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## ESSAYS

### GRAND THEFT AUTO: CALIBRATING LABORATORY CONDITIONS TO THE NEW NORMAL IN UNION ELECTIONS

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INTRODUCTION.....	100
I. ORGANIZING THE SOUTH: A CRASH COURSE IN PROGRESS .....	103
A. <i>Volkswagen Chattanooga</i> .....	106
B. <i>Nissan Canton</i> .....	111
II. BYPASSING SECTION 8(A)(1) THROUGH THIRD-PARTY INTERFERENCE.....	114
A. <i>The “Laboratory Conditions” Doctrine</i> .....	114
B. <i>The Board’s Treatment of Third-Party Interference</i> .....	117
1. The Board’s Original Approach Under the Wagner Act (1935–47).....	117
2. The Fine-Tuning of Laboratory Conditions to Measure Community Pressure (1948–Present) .....	118
III. TAKING THE EXPERIMENT SERIOUSLY: ADAPTING THE LABORATORY CONDITIONS DOCTRINE TO CURB ANTI-UNION COMMUNITY PRESSURE.....	122
A. <i>Applying Extant Case Law to the UAW’s Roadblocks</i> .....	124
B. <i>Confronting “Both Sides”-ism and its Absurdities</i> .....	128
C. <i>The Utility of the Doctrine in the Information Age</i> .....	130
CONCLUSION.....	131

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## INTRODUCTION

Imagine you are an automotive worker in the Deep South of the United States. The automobile factory you work at employs thousands of workers, as is common in the region. The plant is owned by a foreign manufacturer, which is par for the course as well. You work eight to ten hours a day and make good wages compared to most people in your state, although that depends on whether you are a full-time employee or still employed by the temp agency that contracts with the manufacturer.

At some point during your career, a union drive starts among the workforce. As it builds in influence, attention is drawn to hazardous working conditions and broken promises by management. Eventually, the unionizing effort becomes strong enough to petition for an election to earn certification as the collective bargaining representative of you and your co-workers. If you have not already pledged support for the union, its organizers work fervently to win your vote.

At this point, plant management takes on a different tone regarding the union. Whereas your supervisors may have once been standoffish or at most annoyed, now they are outwardly hostile at the idea of unionization. You and dozens of other workers are pulled aside for weekly presentations that frame your vote as a show of loyalty. Rumors abound that your cherished benefits will be lost if a union comes into the workplace, and some even worry that the plant will close its doors and flee town for cheaper labor.

The bitterness of this battle taking place on your employer's doorstep—emulating the final weeks of a presidential campaign in the closest of swing states—may not be surprising to you, given that the company is defending its territory. But you soon discover that management's message does not stop at the end of your shift. Television commercials urge you to "Vote No" on unionization. Local business leaders in the state take to the airwaves to warn of labor's lies and inefficiencies. Pro-company signs line the streets and adorn the windows of most of your town's small businesses. Pamphlets arrive daily from vaguely named organizations like "Americans for Prosperity," rife with statistics that decry the economic devastation that unions have wrought in northern cities. Most jarring of all are the press releases from state politicians in the days before the election that promise new assembly lines in return for the union's defeat

or threaten job losses in the event of a victory. By the time you are finally ready to fill out a ballot, it is as if the entire community is demanding that you maintain the status quo and send the union packing.

These are the conditions described by Robert Hathorn, a service technician at the Nissan plant in Canton, Mississippi who voted “yes” for the United Auto Workers (UAW) but saw the union rejected by almost two-thirds of his co-workers in August of 2017. Hathorn described the election environment as “overwhelming” and the anti-union message as “telepathic”:

I would go to work and get in that shift meeting; a message comes on the [in-plant] TV about voting no to the UAW. Then the manager says something, then I go to the break room and there are slides slandering the UAW. Then you get ready to leave and they hand out literature about voting against the union. I leave work and up and down the highway you see Vote No signs. You see billboards talking about “our team, our future,” you get home and you get brochures in the mail, you turn on the television and there it was again. Every time you turn on social media it’s there. It was overwhelming. That had to get to people.<sup>1</sup>

Much of what Hathorn describes is legal within the confines of American labor law. Employers may require employees to attend anti-union presentations (innocuously dubbed “captive audience meetings”) during working hours without affording the union the same access and opportunity.<sup>2</sup> Employers have wide latitude to express their views

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<sup>1</sup> Chris Brooks, *Why Did Nissan Workers Vote No?*, LABOR NOTES (August 11, 2017), <http://www.labornotes.org/2017/08/why-did-nissan-workers-vote-no> [hereinafter Brooks].

<sup>2</sup> *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406 (1953) (restoring the “no-equal-opportunity” rule regarding in-plant captive audience meetings). Employers are granted near-dictatorial authority in this setting:

The employer is entitled to discipline employees who leave the captive audience meeting or who insist on participating by asking questions or manifesting disagreement with the views being force-fed to them. Further, the employer may prevent pro-union employees from attending such meetings, deliberately isolating employees from co-workers who might be able to rebut the employer’s claims. It is not unprecedented for an employer to lock all the exits at the workplace during a captive audience meeting and physically restrain those attempting to leave.

regardless of the medium through which they communicate them, only contravening the National Labor Relations Act (NLRA) if these expressions contain either a threat of reprisal or force, or a promise of benefit.<sup>3</sup> Generally, the National Labor Relations Board (NLRB), the agency statutorily charged with enforcing the Act, largely refrains from policing the veracity of employers' campaign literature.<sup>4</sup> The Board will only set an election aside on these grounds if the literature amounts to "forged documents" that "render the voters unable to recognize propaganda for what it is."<sup>5</sup> Perhaps sensing the soft underbelly of this system, employers have expanded their utilization of sophisticated union-avoidance tactics in recent decades to increasingly effective results.<sup>6</sup>

However, actions undertaken by external forces in organizing drives lie on shakier ground. Third parties unrelated to the conflict do not possess the explicit speech rights under the NLRA that employers and workers enjoy.<sup>7</sup> Nonetheless, groups ranging from local citizens to advocacy groups to sitting politicians choose to offer their views in elections, deemed important to the given region, routinely engaging in impassioned rhetoric and prediction-making as to the effects of unionization.<sup>8</sup> In a pair of recent elections that garnered national attention, these intrusions have surpassed

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Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65, 68 (2010) (footnotes omitted).

<sup>3</sup> Labor Management Relations (Taft-Hartley) Act § 8(c), 29 U.S.C. § 158(c) (2012).

<sup>4</sup> *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, 133 (1982) ("[W]e will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements.").

<sup>5</sup> *Id.* Perversely, the *Midland* standard arguably incentivizes union-resistant employers to position their campaigns as flagrantly coercive as possible so as to avoid portraying their arguments in a deceptive fashion. *See id.* ("[W]e will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is.").

<sup>6</sup> *See, e.g.*, Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, E.P.I. BRIEFING PAPER NO. 235 (2009) [hereinafter Bronfenbrenner]. Bronfenbrenner conducted her study from a random sample of 1,004 NLRB certifications and from an in-depth survey of 562 campaigns conducted within that sample between the years 1999 and 2003. *Id.* at 1. She found, among other things, that employers utilized captive-audience meetings in 89 percent of elections, hired "management consultants" in 75 percent of elections, and distributed anti-union literature in upwards of 70 percent of elections. *Id.* at 10, tbl. 3. These tactics greatly reduced the union's chances of winning certification. *Id.*

<sup>7</sup> *See infra* notes 77—98 and accompanying text.

<sup>8</sup> *See infra* notes 99—121 and accompanying text.

the point of conjecture and bordered on threats.<sup>9</sup> However, because these entities technically operate independently from the warring factions, their behavior has escaped legal scrutiny despite its potential coerciveness on workers' freedom of choice.

This article will argue that unions face little hope of prevailing in these sort of large-scale campaigns until the Board rules that aggressive, anti-union community pressure violates federal labor law. Part I examines recent major organizing drives initiated by the United Auto Workers in which such community pressure has come to bear upon representation elections, detailing the extent of the meddling and the unique threats the perpetrators are capable of. Part II introduces case law regarding the "laboratory conditions" of Board-officiated elections and analyzes existing protections against third-party interference. Part III argues that these barriers are wholly inadequate in the modern context of regional anti-union blitzkriegs, and it proposes that the laboratory conditions doctrine be interpreted to encompass the type of tactics deployed in the UAW's recent defeats if unions are to have any chance at success in large-scale organizing campaigns going forward. Part IV concludes the Article by evaluating this suggestion against the backdrop of more drastic proposals to reform American labor law, concluding that the laboratory conditions doctrine needs immediate revisal regardless of other approaches.

#### I. ORGANIZING THE SOUTH: A CRASH COURSE IN PROGRESS

Organized labor in the United States is in an extended state of crisis. While unions once represented more than a third of American workers, they now represent barely a tenth of the labor market (and less than seven percent of the private sector).<sup>10</sup> A combination of global market economics,<sup>11</sup> increased employer resistance to unionizing efforts,<sup>12</sup> and

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<sup>9</sup> See *infra* notes 30—76 and accompanying text.

<sup>10</sup> Megan Dunn & James Walker, *Union Membership In The United States*, U.S. DEP'T LABOR, (Sept. 2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf>.

<sup>11</sup> See Robert E. Scott, *Heading South: U.S.-Mexico Trade and Job Displacement After NAFTA*, E.P.I. BRIEFING PAPER NO. 308 1 (2011) (finding that U.S. trade deficits with Mexico had displaced 682,900 U.S. jobs. as of 2010); see also Stephen Eidle, *Rust Belt Cities and Their Burden of Legacy Costs*, MANHATTAN INST. (Oct. 2017), <https://www.manhattan-institute.org/sites/default/files/R-SE-1017.pdf> (tabulating the loss of manufacturing jobs in Rust Belt cities) [hereinafter Eidle].

hostile, anti-union government policy<sup>13</sup> have decimated membership rolls and driven down wages and benefits for union and nonunion workers alike.<sup>14</sup> Pro-union reforms to the NLRA have died in conference or at the hand of Senate filibusters,<sup>15</sup> leaving federal labor law largely unchanged for over half-a-century.<sup>16</sup> Employers have exploited this stagnation through the increased utilization of automation, subcontractors, and “temporary” workers, effectively turning technological innovation against those seeking stable jobs and benefits.<sup>17</sup>

To survive in the twenty-first century, unions must organize new members to replace those they have lost to aforementioned factors. However, vast swaths of the country are essentially walled off from sustained organizing efforts. Twenty-seven states<sup>18</sup> are currently operating under so-called “Right to Work” laws, which prohibit union security-clause

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<sup>12</sup> See Bronfenbrenner, *supra* note 6. For an example of an effective corporate assault upon a union’s bargaining power, see Michael H. Cimini, *Caterpillar’s Prolonged Dispute Ends*, U.S. DEP’T OF LABOR: COMPENSATION AND WORKING CONDITIONS (Fall 1998), available at <https://www.bls.gov/opub/mlr/cwc/caterpillars-prolonged-dispute-ends.pdf> (chronicling Caterpillar’s resounding win at the bargaining table amidst a series of labor disputes with the UAW between 1991 and 1998); James Surowiecki, *Caterpillar’s Crawl to Control*, Slate (Mar. 13, 1998, 3:30 AM), [http://www.slate.com/articles/arts/the\\_motley\\_fool/1998/03/caterpillars\\_crawl\\_to\\_control.html](http://www.slate.com/articles/arts/the_motley_fool/1998/03/caterpillars_crawl_to_control.html). In the spirit of transparency, my grandfather was a longtime member of UAW Local 974 in Peoria, Illinois, the largest local involved in the dispute.

<sup>13</sup> See, e.g., Gordon Lafer, *Attacks on Public-Sector Workers Hurt Working People and Benefit the Wealthy*, ECON. POLICY INST. (Apr. 19, 2017), <http://www.epi.org/publication/attacks-on-public-sector-workers-hurt-working-people-and-benefit-the-wealthy/> (highlighting the recent evisceration of collective bargaining rights for public-sector workers in Iowa and Wisconsin).

<sup>14</sup> See Josh Bivens et al., *How Today’s Unions Help Working People: Giving Workers the Power to Improve Their Jobs and Unrig the Economy*, ECON. POLICY INST. 7-11 (2017).

<sup>15</sup> See Rand Wilson, *The Labor Law Reform We Need*, LABOR NOTES (July 11, 2012), <http://www.labornotes.org/2012/07/labor-law-reform-we-need>.

<sup>16</sup> See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

<sup>17</sup> Catherine Rampell, *The Rise of Part-Time Work*, N.Y. TIMES: ECONOMIX (Mar. 8, 2013, 10:51 AM), <https://economix.blogs.nytimes.com/2013/03/08/the-rise-of-part-time-work/>; Noam Scheiber, *Plugging Into the Gig Economy, From Home With a Headset*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/business/economy/call-center-gig-workers.html>.

<sup>18</sup> Missouri’s voters overturned their state’s Right to Work law in a state-wide ballot referendum in August of 2018 after turning in triple the amount of signatures necessary to enact the constitutional blocking mechanism. Noam Schreiber, *Missouri Voters Reject Anti-Union Law in a Victory for Labor*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/business/economy/missouri-labor-right-to-work.html>. Missouri was set to otherwise become the twenty-eighth Right-to-Work state in the union.

provisions that enable unions to collect “fair share fees” to cover the costs of services and representation. These laws, made possible through one of the Taft-Hartley Act’s amendments,<sup>19</sup> create an incentive for workers to decline paying union dues and become “free riders” of services tied to representation. Unions are required by law to represent all employees in the bargaining unit equally,<sup>20</sup> thus potentially wasting resources on workers who do not pay the organization a cent in return.

But this assumes a union is even extant. The southern states, which almost uniformly passed Right-to-Work laws in the first decade of their legality, are home to most of the lowest union-density rates in the country.<sup>21</sup> A concomitance of (often circular) economic and social factors lead to employer hegemony in the Deep South, including fiscal austerity, underinvestment in education, and conservative social policies.<sup>22</sup> In light of the post-war labor movement’s devastating failure to organize multi-racial unions amidst a cacophony of race- and red-baiting business tactics, some have dubbed the South’s implacable opposition to labor and minority rights “the Southern cage.”<sup>23</sup>

As such, it may seem counter-intuitive that today’s unions would waste a substantial amount of resources attempting to organize southern workplaces. However, if unions are to increase membership and regain leverage in collective bargaining, there simply is no avoiding the fastest growing region in the country.<sup>24</sup> Perpetuating the “race to the bottom”

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<sup>19</sup> Labor Management Relations (Taft-Hartley) Act § 14(b), 29 U.S.C. § 164(b) (2012).

<sup>20</sup> National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (2012); *accord Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

<sup>21</sup> Bureau of Labor Statistics, *Union Affiliation of Employed Wage and Salary Workers by State*, U.S. DEP’T LABOR (displaying union-density rates as 2015-16 annual averages) [hereinafter Union Density].

<sup>22</sup> See Colin Gordon, *The Legacy of Taft-Hartley*, JACOBIN (Dec. 19, 2017), <https://jacobinmag.com/2017/12/taft-hartley-unions-right-to-work>; Ross Eisenbrey, *Right-To-Work Laws: Designed to Hurt Unions and Lower Wages*, E.P.I. (Mar. 2, 2015, 3:45 PM), <http://www.epi.org/blog/right-to-work-laws-designed-to-hurt-unions-and-lower-wages/>.

<sup>23</sup> See Rich Yeselson, *Fortress Unionism*, DEMOCRACY JOURNAL (Summer 2013), <https://democracyjournal.org/magazine/29/fortress-unionism/> [hereinafter Yeselson]; see also Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 1 (2005), available at [http://havenscenter.org/files/southern\\_imposition.pdf](http://havenscenter.org/files/southern_imposition.pdf).

<sup>24</sup> U.S. Census Bureau, *Population Clock*, U.S. DEP’T OF COMMERCE, available at [https://www.census.gov/popclock/data\\_tables.php?component=growth](https://www.census.gov/popclock/data_tables.php?component=growth) (last visited Nov. 14, 2017).

socio-economic phenomenon, both domestic and foreign employers have increasingly located their manufacturing operations in the low-wage, regulatory lax South rather than compete with the higher wage and more union-populous northern state economies.<sup>25</sup>

Capital is fleeing from unions, and unions have no choice but to pursue it—even if the path is treacherous and the chance of success is slim. Furthermore, organized labor cannot afford to bide time and fortify its position in its northern and Midwestern bases, as even former strongholds like Michigan and Wisconsin have passed Right-to-Work legislation under recent Republican insurgencies.<sup>26</sup> Thus, it is hardly surprising that the UAW—one of the unions hardest hit by the global recession and its effect upon heavily-organized industries such as auto-manufacturing<sup>27</sup>—has made it a top priority to unionize foreign automakers in the South.<sup>28</sup>

#### A. *Volkswagen Chattanooga*

The UAW's first major target in its southward push was the 1,400-acre, 3,000-plus employee Volkswagen plant in Chattanooga, Tennessee.<sup>29</sup> The plant, which started production in 2011 and represents a one-billion-dollar investment by the German automaker,<sup>30</sup> was always “the most

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<sup>25</sup> See generally NORMAN CAULFIELD, *NAFTA AND LABOR IN NORTH AMERICA* (2011); see also Chris Brooks, *Money for Nothing*, JACOBIN (Sept. 16, 2016), <https://www.jacobinmag.com/2016/09/vw-subsidies-chattanooga-tn-uaw-autoworkers>. Of course, the phenomenon of “capital flight” has existed before modern labor law even came to be. See Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 969-70 (1993).

<sup>26</sup> Monica Davey, *Unions Suffer Latest Defeat in Midwest With Signing of Wisconsin Measure*, N.Y. TIMES (Mar. 9, 2015), <https://www.nytimes.com/2015/03/10/us/gov-scott-walker-of-wisconsin-signs-right-to-work-bill.html>. Moreover, manufacturing jobs continue to disappear in private-sector unions' remaining bastions of strength. See Eidle, *supra* note 11.

<sup>27</sup> *U.A.W. and the Auto Industry*, N.Y. TIMES (Oct. 8, 2015), [https://www.nytimes.com/interactive/2015/10/08/business/uaw-auto-union-timeline.html#time386\\_11115](https://www.nytimes.com/interactive/2015/10/08/business/uaw-auto-union-timeline.html#time386_11115) (stating that in 2008 UAW membership dropped below 500,000 members for the first time since 1941, down from a peak of 1.5 million members in 1979).

<sup>28</sup> See Nick Bunkley, *U.A.W. to Renew Organizing Efforts at Foreign-Owned Plants*, N.Y. TIMES (Jan. 12, 2011), <http://www.nytimes.com/2011/01/13/business/global/13uaw.html> (noting the UAW's plan to portray resisting companies as “human rights violators”).

<sup>29</sup> *Chattanooga*, VOLKSWAGEN: GROUP OF AMERICA, <http://www.volkswagengroup.america.com/facts.html> (last visited Nov. 15, 2017).

<sup>30</sup> *Id.*

promising prospect” from the union’s perspective.<sup>31</sup> Volkswagen was known for its uniquely collaborative relationship with Germany’s largest trade union, IG Metall, manifested in the form of industry-wide bargaining and subsidiary works councils.<sup>32</sup> These councils are elected bodies of employee representatives that supplement an employer’s union but also function independently from the adversarial model of collective bargaining.<sup>33</sup> The German principle of “codetermination” stipulates that employers must obtain approval from employees before making certain decisions for the business,<sup>34</sup> whereby works councils may exercise consenting authority over anything from bonuses to working hours to vacation days.<sup>35</sup> Such a social partnership is unprecedented in the United States, and IG Metall provided substantial advice and support to the UAW throughout the organizing process.<sup>36</sup> Meanwhile, Volkswagen management expressed interest in importing German-styled works councils to Chattanooga by way of unionization.<sup>37</sup>

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<sup>31</sup> Stephen J. Silvia, *The United Auto Workers’ Attempts to Unionize Volkswagen Chattanooga*, I.L.R. REVIEW 4 (2017) [hereinafter Silvia].

<sup>32</sup> *Id.* at 4-5.

<sup>33</sup> *Id.* at 5.

<sup>34</sup> Allison Drutchas, *An American Works Council: Why It’s Time to Repeal NLRA Section 8(a)(2)*, 93 U. DET. MERCY L. REV. 29, 39 (2016).

<sup>35</sup> *Id.* at 42 (citations omitted). Further, German works councils have notification rights to the company’s financial affairs and its decision to terminate a worker’s employment, as well as consultation rights to the implementation of new technology in the workplace. *Id.* at 43.

<sup>36</sup> Silvia, *supra* note 31, at 5-6. As Silvia notes, “IG Metall leaders had become increasingly concerned that German automakers were diverting production to the United States to take advantage of the lower labor costs,” and eventually launched a transnational partnership to attempt to reduce the wage disparity. *Id.* at 5; *see also* Ryan Breene, *UAW partners with Germany’s IG Metall to push for better U.S. wages, union representation*, AUTOMOTIVE NEWS (Nov. 19, 2015, 3:10 PM), <http://www.autonews.com/article/20151119/OEM01/151119780/uaw-partners-with-germanys-ig-metall-to-push-for-better-u.s.-wages>.

<sup>37</sup> Silvia, *supra* note 31, at 7. The only way to install a works council-type system under American labor law is through a unionized workplace. *Id.* at 6-7. In *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), the Board invalidated a set of Japanese-inspired employee “Action Committees” at a non-union plant because they were unlawfully “dealing with” the employer over items like wages and working conditions and depended on the company for financial support in violation of § 8(a)(2) of the NLRA, which declares it “an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” However, the Board’s opinion suggested that these “quality circle” employee-participation groups are permissible if ratified through collective agreement:

Suffice it to say, the UAW was confident in its efforts. The union claimed in August of 2013 that a majority of employees in the plant had signed authorization cards.<sup>38</sup> In January of 2014, UAW officials announced it had reached an agreement with management to hold a Board-supervised election for recognition from February 12 to 14, and the two sides signed an official neutrality agreement just weeks before the vote.<sup>39</sup> The agreement was described as a “dream world” for the union.<sup>40</sup> Volkswagen agreed to refrain from engaging in the sort of anti-union campaigning now custom for American companies, and it provided UAW organizers with a list of names and home addresses of its employees.<sup>41</sup> Additionally, Volkswagen granted the UAW access to its plant for voluntary gatherings and presentations before the election while endorsing the German model of works councils and employee codetermination rights as the plant’s desired model of labor relations.<sup>42</sup> In return, the UAW promised that, if elected, initial collective bargaining negotiations with Volkswagen would revolve around “maintaining the highest standards of quality and productivity” and “maintaining and where possible enhancing the cost advantages and other competitive advantages that [Volkswagen] enjoys relative to its competitors . . . .”<sup>43</sup>

The neutrality agreement produced an incredible wave of backlash among anti-union forces in the area, which were already loudly outspoken against the UAW’s organizing efforts at the Chattanooga plant and had

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Where there is a labor union on the scene, these employee-management cooperative programs may act as a complement to the union. They can not, however, lawfully usurp the traditional role of the Union in representing the employees in collective bargaining about grievances, wages, hours, and terms and conditions of work.

*Electromotion*, 309 N.L.R.B. at 1004 (Oviatt, Member, concurring); see also Dennis M. Devaney, *Electromotion and Du Pont: The Next Generation*, 4 CORNELL J. L. & PUB. POL’Y 3, 11-12 (1994). Thus, it is little wonder that Volkswagen and the UAW conditioned the implementation of works councils in the plant on the election of the UAW as the employees’ collective bargaining representative. See *infra* note 41.

<sup>38</sup> Silvia, *supra* note 31, at 9.

<sup>39</sup> *Id.* at 10.

<sup>40</sup> Brent Snavelly, *VW, UAW cooperate before election begins*, USA TODAY (Feb. 11, 2014, 7:19 PM), <https://www.usatoday.com/story/money/cars/2014/02/11/volkswagen-uaw-cooperation-vote/5404223/>.

<sup>41</sup> Silvia, *supra* note 31, at 11. However, the union agreed to forego from making any house calls. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 12.

persuaded Volkswagen to resist the union's request for voluntary recognition.<sup>44</sup> Grover Norquist's lobbying organization, Americans for Tax Reform, rented a dozen billboards in Chattanooga that visually linked the UAW to President Barack Obama and abandoned factories in Detroit.<sup>45</sup> Local papers quoted sources that speculated unionization would prevent the plant from obtaining new products for its assembly lines.<sup>46</sup> Two prominent Tennessee State Republicans, Speaker Pro Tempore Bo Watson and House Majority Leader Gerald McCormick, threatened to withhold future state subsidies from Volkswagen if its workers voted to unionize.<sup>47</sup> A spokesman for Republican Governor Bill Haslam stated on the eve of the election that it would "become more difficult for Tennessee to recruit new manufacturers to the state if the Volkswagen workers are represented by the UAW,"<sup>48</sup> and urged the workers to vote no on behalf of the governor's office.

Most alarming were the actions of United States Senator Bob Corker, the former Mayor of Chattanooga. On the first day of voting, Corker released the following statement at his local office: "I've had conversations today and based on those am assured that should the workers vote against the UAW, Volkswagen will announce in the coming weeks that it will manufacture its new mid-size SUV here in Chattanooga."<sup>49</sup> Volkswagen management immediately denied any connection between the

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<sup>44</sup> *Id.* at 9; Gabe Nelson, *4 Key VW Decisions Shaped Vote's Course*, AUTOMOTIVE NEWS (Feb. 22, 2014, 12:01 AM), <http://www.autonews.com/article/20140222/OEM01/302249972/4-key-vw-decisions-shaped-votes-course> (stating that Volkswagen management refused card-check recognition because it was "concerned about antagonizing Republican politicians in Tennessee"). Around this time in 2013, the National Right to Work Legal Defense Foundation had begun offering free legal assistance to Volkswagen employees "who felt intimidated by UAW organizers", and right-wing lobbying organizations—including the Competitive Enterprise Institute and Grover Norquist's Americans for Tax Reform—were carpeting the city with anti-union media. Silvia, *supra* note 31, at 8.

<sup>45</sup> Silvia, *supra* note 31, at 13.

<sup>46</sup> *Id.* Don Jackson, the recently-retired president of manufacturing at the Chattanooga plant, stated that he didn't "know that for a fact, but it's just economics" that the union "will not be good" for attracting a new sports utility vehicle line. Mike Pare, *Pro-, anti-UAW activity gears up ahead of VW election*, TIMES FREE PRESS (Feb. 8, 2014), <http://www.timesfreepress.com/news/local/story/2014/feb/09/pro-anti-uaw-activity-gears-up-ahead-of-vw/131300/>.

<sup>47</sup> Silvia, *supra* note 31, at 14.

<sup>48</sup> Brent Snavelly, *Tenn. Lawmakers Issue Incentive Threat in VW Union Move*, USA TODAY (Feb. 11, 2014, 8:50 AM), <https://www.usatoday.com/story/money/business/2014/02/11/tennessee-volkswagen-uaw-incentives-threat/5388341/>.

<sup>49</sup> Silvia, *supra* note 31, at 14.

outcome of the election and production-related decisions, but Corker reiterated his claim about future investment the following day: “After all these years and my involvement with Volkswagen, I would not have made the statement I made yesterday without being confident it was true and factual.”<sup>50</sup> Corker’s statements immediately received widespread coverage,<sup>51</sup> and even prompted a response from Obama before voting had officially concluded.<sup>52</sup>

On the evening of February 14, 2014, the results of the election were announced. With eighty-nine percent of employees participating, 712 voted against union representation and 626 voted in favor. The UAW had garnered forty-seven percent of the vote—shy of the fiftypercent-plus-one necessary to constitute a majority. “I’m thrilled for the employees and thrilled for our community,” Corker told the *Wall Street Journal* that night. “I’m sincerely overwhelmed.”<sup>53</sup>

On February 21, 2014, the UAW filed objections with the Board, alleging coercive third-party interference with the election and urging the Board to set aside the results and conduct another secret-ballot election.<sup>54</sup> The union claimed that Tennessee politicians and private groups repeatedly

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<sup>50</sup> *Id.* at 14-15.

<sup>51</sup> See, e.g., Bernie Woodall, *U.S. Senator Drops Bombshell During VW Plant Union Vote*, REUTERS (Feb. 12, 2014, 9:28 PM), <https://www.reuters.com/article/us-volkswagen-corker/u-s-senator-drops-bombshell-during-vw-plant-union-vote-idUSBREA1C04H20140213>.

<sup>52</sup> Ed O’Keefe, *Obama Knocks GOP for Fighting Unionization of Tenn. VW Employees*, WASH. POST (Feb. 14, 2014), [https://www.washingtonpost.com/news/post-politics/wp/2014/02/14/obama-knocks-gop-for-fighting-unionization-of-tenn-vw-employees/?utm\\_term=.2b4b12740049](https://www.washingtonpost.com/news/post-politics/wp/2014/02/14/obama-knocks-gop-for-fighting-unionization-of-tenn-vw-employees/?utm_term=.2b4b12740049). Corker had a confrontational history with organized labor in the state prior to his involvement with the UAW’s campaign at Volkswagen, having been accused of opposing the Obama’s administration’s American auto-industry bailout on the basis that he wanted to break the union’s grip on General Motors in Tennessee and elsewhere. See Peter Whoriskey, *Anger Grips Auto Workers*, WASH. POST (Dec. 13, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/12/AR2008121204128.html>; Zaid Jilani, *Corker Booed By Workers At GM Plant Ceremony, Takes Credit For Saving Industry That He Opposed Saving*, THINKPROGRESS (Sept. 20, 2010, 2:57 PM), <https://thinkprogress.org/corker-booed-by-workers-at-gm-plant-ceremony-takes-credit-for-saving-industry-that-he-opposed-saving-2efc89229b9a/>.

<sup>53</sup> Neal E. Boudette, *Union Suffers Big Loss at Tennessee VW Plant*, WALL ST. J. (Feb. 15, 2014, 11:49 AM), <https://www.wsj.com/articles/union-vote-at-volkswagen-tennessee-plant-heading-to-close-1392379887>.

<sup>54</sup> See *Volkswagen Grp. of Am. Inc. and UAW*, N.L.R.B., No. 10-RM-121704, *UAW objections filed Feb. 21, 2014*, available at <http://op.bna.com.s3.amazonaws.com/dlrcases.nsf/r%3FOpen%3dbpen%9git8l> [hereinafter UAW Objections].

threatened the “diminishment of job security if the workers vote for the union” until their message “was known to every potential voter in this extremely high visibility campaign.”<sup>55</sup> But two months later, the UAW abruptly announced that it had dropped the charges.<sup>56</sup> Most assumed that, given the union’s narrow loss, it wished to hold another representation as soon as possible rather than bog the plant down in appeals,<sup>57</sup> but it was later revealed that Volkswagen and the UAW had reached a deal behind the scenes. The union agreed to forego any elections in Chattanooga for the next two years, while Volkswagen would recognize the UAW on a voluntary “members union” basis.<sup>58</sup> However, management later reneged on this agreement after the UAW successfully organized a smaller unit of 164 skilled employees in the plant against Volkswagen’s wishes.<sup>59</sup>

*B. Nissan Canton*

The UAW next set its sights on the sprawling, mile-long Nissan plant in Canton, Mississippi that housed over 3,500 hourly workers.<sup>60</sup> While still smarting from its loss at Volkswagen, Nissan presented the UAW with an opportunity to revise its southern organizing strategy. One of the major criticisms that emerged from the Chattanooga campaign was that the union

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<sup>55</sup> *Id.* at 11.

<sup>56</sup> Steven Greenhouse, *U.A.W. Drops Appeal of VW Vote in Tennessee*, N.Y. TIMES (Apr. 21, 2014), <https://www.nytimes.com/2014/04/22/business/auto-workers-union-drops-appeal-in-vw-vote.html>.

<sup>57</sup> *See id.* (“[I]f a labor board process included federal court appeals, it could have taken two years for an N.L.R.B. decision ordering a new election to take effect.”). Under the NLRA, losing unions must wait twelve months to conduct another election. National Labor Relations Act § 9(e)(2), 29 U.S.C. § 159(e)(2) (2012).

<sup>58</sup> *UAW Says Volkswagen Reneged on Deal to Recognize Union*, TIMES FREE PRESS (June 21, 2016), <http://www.timesfreepress.com/news/business/aroundregion/story/2016/jun/21/uaw-says-volkswagen-reneged-deal-recognize-union/372126/>.

<sup>59</sup> *See id.*; *see also* Silvia, *supra* note 31, at 16-23. The UAW finally petitioned for another NLRB election at Volkswagen’s Chattanooga plant in April 2019, narrowly losing 833-776. Chris Brooks, *Why the UAW Lost Again in Chattanooga*, LABOR NOTES (June 14, 2019), <https://labornotes.org/2019/06/why-uaw-lost-again-chattanooga>. While many elements of coercive community pressure were present in this sequel election, such as Tennessee Governor Bill Lee’s decisive anti-union efforts, Volkswagen management was this time actively opposed to the UAW’s organizing efforts and campaigned stridently against unionization of the plant. *Id.* Any legal analysis of the 2019 campaign thus falls outside the scope of this Article.

<sup>60</sup> Noam Scheiber, *Racially Charged Nissan Vote Is a Test for U.A.W. in the South*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/business/economy/nissan-united-auto-workers-mississippi.html> [hereinafter Scheiber].

failed to engage with the local community and mobilize “civil rights, church-based, or other civil society groups” until days before the election.<sup>61</sup> In Canton, the UAW made sure to cultivate support from the region’s faith leaders and NAACP officials well before the vote while directing its messaging campaign—“Worker Rights are Civil Rights”—at Nissan’s majority African-American workforce.<sup>62</sup>

Unlike the situation at Volkswagen, Nissan management vociferously opposed unionization. Whereas Volkswagen negotiated away its right to campaign against the union leading up to the representation election, Nissan took full advantage of the bevy of anti-union strategies afforded it under federal labor law.<sup>63</sup> In addition to the usual tactics, rumors swirled that the company would take away its leased-car benefits that allowed workers to drive Nissan vehicles at below-market rates with no credit application.<sup>64</sup> And in a pair of unfair labor practice charges filed with the Board, the UAW accused Nissan officials of telling workers that the plant would shut down if they voted in favor of unionization,<sup>65</sup> as well as surveilling its employees by rating them in degrees of pro-union sentiment.<sup>66</sup>

But management was only one prong of what labor writer Chris Brooks has deemed the South’s “anti-union trifecta,” which includes the company itself, business advocacy groups, and the local political establishment.<sup>67</sup> “Vote No” signs appeared in the windows and on the lawns of most of Canton’s businesses.<sup>68</sup> The Mississippi Chamber of Commerce and the National Association of Manufacturers saturated television channels

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<sup>61</sup> Silvia, *supra* note 31, at 16.

<sup>62</sup> See Scheiber, *supra* note 61; Brooks, *supra* note 1.

<sup>63</sup> See *supra* notes 3-7 and accompanying text; Brooks, *supra* note 1.

<sup>64</sup> Brooks, *supra* note 1.

<sup>65</sup> *Id.*

<sup>66</sup> Josh Eidelson, *Union Says Nissan Surveils Workers at Mississippi Plant*, BLOOMBERG (Sept. 29, 2017, 3:05 PM), <https://www.bloomberg.com/news/articles/2017-09-29/uaw-alleges-nissan-surveils-workers-at-plant-where-union-failed>.

<sup>67</sup> See Brooks, *supra* note 1; *Labor’s Southern Strategy: A Conversation Between Chris Brooks and Gene Bruskin*, DOLLARS & SENSE (September/October 2017), <http://dollarsandsense.org/archives/2017/0917brooks-bruskin.html> [hereinafter Brooks & Bruskin].

<sup>68</sup> See Dave Jamieson, *United Auto Workers Lose Crucial Union Battle at Mississippi Nissan Plant*, HUFFINGTON POST (Aug. 5, 2017, 12:42 AM), [https://www.huffingtonpost.com/entry/uaw-nissan-vote-uaw-rejected\\_us](https://www.huffingtonpost.com/entry/uaw-nissan-vote-uaw-rejected_us) [hereinafter Jamieson]; see also Mike Elk (@MikeElk), TWITTER (Aug. 2, 2017, 8:29 PM), <https://twitter.com/MikeElk/status/892905275631562753>.

with anti-union ads.<sup>69</sup> Americans for Prosperity—a conservative 501(c)(4) organization funded by Charles and David H. Koch—stuffed mailboxes with 25,000 pamphlets that promised economic ruin should the UAW prevail in the election.<sup>70</sup> Republican Governor Phil Bryant was even more explicit, posting a picture on his official Facebook account depicting crumbling urban buildings accompanied with the following message: “I hope the employees at Nissan Canton understand what the UAW will do to your factory and town. Just ask Detroit. Vote no on the union.”<sup>71</sup> Most appallingly, a local radio station aired an interview with an unidentified man who proclaimed that Nissan workers would return to “hauling corn and picking cotton and ploughing fields or digging ditches” should the UAW force the Japanese automaker out of Mississippi.<sup>72</sup>

When the dust settled, the UAW had suffered another major loss in a Board-officiated election, this one more lopsided than at Volkswagen: 2,244 votes against unionization to 1,307 in favor. The union filed unfair labor practice charges with the Board against Nissan in protest of its more flagrant labor violations,<sup>73</sup> but the trifecta’s overall campaign strategy remains undefeated in large-scale, media-intensive elections.<sup>74</sup> Moreover, the tumultuous atmosphere of a hotly-contested organizing campaign has

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<sup>69</sup> Brooks, *supra* note 1.

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

<sup>71</sup> Jamieson, *supra* note 69.

<sup>72</sup> Lucy Pasha-Robinson, *Nissan: Mississippi Radio Warns Workers They’ll Go Back to ‘Picking Cotton’ If They Unionise as Plant Rejects UAW in Vote*, INDEPENDENT (Aug. 5, 2017, 5:19 PM), <http://www.independent.co.uk/news/business/news/nissan-mississippi-radio-workers-picking-cotton-unionise-uaw-reject-vote-a7878236.html>.

<sup>73</sup> See *infra* notes 65-66 and accompanying text.

<sup>74</sup> In the other major southern organizing effort conducted in recent years, the International Association of Machinists union suffered a blowout election loss at Boeing’s Charleston, South Carolina plant under conditions strikingly similar to what the UAW faced against Nissan. See Chris Brooks, *It’s Not Over*, JACOBIN (Feb. 17, 2017), <https://www.jacobinmag.com/2017/02/boeing-south-carolina-union-machinists-labor-organize-uaw-chatanooga-volkswagen> (“Boeing and a statewide business advocacy group saturated local television, radio, newspapers, and social media with hundreds of anti-union ads.”) [hereinafter *It’s Not Over*]; see also Josh Eidelson, *Boeing’s Best Union Buster Is South Carolina’s Governor Nikki Haley*, BLOOMBERG (Apr. 17, 2015, 10:45 AM), <https://www.bloomberg.com/news/articles/2015-04-17/nikki-haley-proud-union-buster-at-boeing-south-carolina-i8lpjuao> (drawing parallels between Haley’s anti-union efforts on behalf of Boeing and those of Corker against the UAW). For an extreme example of the anti-union culture in South Carolina, see Steven Greenhouse, *How Do You Drive Out a Union? South Carolina Factory Provides a Textbook Case*, N.Y. TIMES (Dec. 14, 2014), <http://www.nytimes.com/2004/12/14/us/how-do-you-drive-out-a-union-south-carolina-factory-provides-a-textbook.html?mtrref=www.google.com>.

the added effect of driving exhausted workers to vote for a sense of normalcy. As Nissan worker and UAW supporter Robert Hathorn stated in an interview shortly after the election:

“I heard people say ‘I’ll be glad when this is over.’ You know, they’re tired with it. . . . If I was in [a neutral voter’s] shoes, I probably would’ve said the same thing. . . . because it was every single day. . . . It’s like a song you can’t get out of your head.”<sup>75</sup>

## II. BYPASSING SECTION 8(A)(1) THROUGH THIRD-PARTY INTERFERENCE

### A. *The “Laboratory Conditions” Doctrine*

It is well understood in industry relations that threats to workers’ job security—even veiled ones—may substantially impair employees’ autonomy in the workplace. Judge Learned Hand once articulated this concept in eloquent fashion:

Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used of which the relation between the speaker and the hearer is perhaps the most important part. *What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.*<sup>76</sup>

Labor law contemplates this dilemma. Section 8(a)(1) of the NLRA deems it an unfair labor practice for an employer “to interfere with, restrain or coerce employees in the exercise of their rights” to engage in concerted activities for mutual aid or protection.<sup>77</sup> Policing an employer’s curtailment of his or her employees’ rights to union organizing remains a constant imperative of the Board, but it views the build-up to a representation election as an especially vulnerable time. This added layer of protection first

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<sup>75</sup> Payday Report, *Q&A Robert Hathorn: Nissan workers’ regrets and the fight back*, YOUTUBE (Aug. 10, 2017), [https://www.youtube.com/watch?v=\\_jWqmsyFPGk](https://www.youtube.com/watch?v=_jWqmsyFPGk).

<sup>76</sup> *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (emphasis added).

<sup>77</sup> National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (2012).

took form in the landmark case of *General Shoe Corp.*,<sup>78</sup> where the Board held that it possessed the power to set aside the results of an election and order a new one even in cases where an unfair labor practice was not committed. The majority grounded its decision in enforcing employees' freedom of choice pursuant to the Board's authority under Section 9 of the Act:

Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative.

...

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.<sup>79</sup>

Thus, if the conditions of the experiment are upset by conduct that is "calculated to prevent a free and untrammelled choice by the employees" to the point where they may no longer freely express their desires to vote for or against unionization, the Board must nullify the results of the election and conduct another one.<sup>80</sup>

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<sup>78</sup> *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

<sup>79</sup> *Id.* at 126-27.

<sup>80</sup> *Id.* at 126. The Board acknowledged that elections did "not occur in a laboratory where controlled or artificial conditions may be established," and that, accordingly, the Board's goal was "to establish ideal conditions insofar as possible," and to assess "the actual facts in the light of realistic standards of human conduct." *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, 130 (1982) (quoting *The Liberal Market, Inc.*, 108 N.L.R.B. 1481, 1482 (1954)).

The Board thereafter set aside elections where employer conduct “impaired the free and informed atmosphere requisite to an untrammelled expression of choice by its employees,”<sup>81</sup> which included deceptive campaign propaganda in the form of fraud or forgery,<sup>82</sup> indirect threats of the loss of jobs or benefits,<sup>83</sup> threats of physical violence and retaliation,<sup>84</sup> and inflammatory racial appeals.<sup>85</sup>

As an ancillary matter, it is worth mentioning that at least some scholarship has taken issue with the laboratory conditions doctrine’s tension with Section 8(c) of the NLRA.<sup>86</sup> That section—included in the Taft-Hartley amendments as a response to the New Deal-era Board’s perceived transgression of employers’ inherent speech rights<sup>87</sup>—instructs that an employer’s expression or dissemination of his or her “views, arguments, or opinion” does not constitute an unfair labor practice so long as it “contains no threat of reprisal or force or promise of benefit.”<sup>88</sup> The *General Shoe*

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<sup>81</sup> The Timken-Detroit Axle Company, 98 N.L.R.B. 790, 792 (1952).

<sup>82</sup> See, e.g., *id.*; United Aircraft Corporation, 103 N.L.R.B. 102 (1953). *But see supra* notes 5-6 and accompanying text.

<sup>83</sup> See, e.g., Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 (1962) (overruling cases upholding “implied threats couched in the guise of statements of legal position” as privileged under § 8(c)).

<sup>84</sup> RJR Archer, Inc., 274 N.L.R.B. 335 (1985).

<sup>85</sup> Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).

<sup>86</sup> See Shawn J. Larsen-Bright, Note, *Free Speech and the NLRB’s Laboratory Conditions Doctrine*, 77 N.Y.U. L. REV. 204 (2002) [hereinafter Larsen-Bright]; James W. Wimberly, Jr. & Martin H. Steckel, *NLRB Campaign Laboratory Conditions Doctrine and Free Speech Revisited*, 32 MERC. L. REV. 535 (1981). While much has been written about the balancing of labor-related speech rights in the workplace, these appear to be the only academic pieces that examine the laboratory conditions doctrine at article-length. *Cf.* Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 45 (1964) (criticizing the doctrine as vague and intangible); Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 793-97 (1994) (criticizing the doctrine’s reliance on the “marketplace of ideas” justification and proposing its replacement with an “ideal of egalitarian deliberation” that “neutralize[s] the effect of relations of power and subordination on deliberative procedure and outcomes”); Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 323-28 (2012) (echoing much of Barenberg’s critique). However, Craig Becker—then-law professor and now-General Counsel of the AFL-CIO—tackled the doctrine in his intellectual *tour de force* on employer participation in union representation elections and noted the same tension from labor’s perspective. Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 548-61, 569-70 (1993) [hereinafter Becker].

<sup>87</sup> See Larsen-Bright, *supra* note 86, at 215 nn. 55-59; Becker, *supra* note 86, at 535-47.

<sup>88</sup> Labor Management Relations (Taft-Hartley) Act § 8(c), 29 U.S.C. § 158(c) (2012).

case, which empowers the Board to regulate employers' speech even without a finding of an unfair labor practice under Section 8, arguably circumvents the Taft-Harley Congress's intent to shield employers from the Board's expansive reading of employee protections in the context of a representation election. However, the doctrine to this point has not been seriously questioned by reviewing judges or subsequent Board personnel,<sup>89</sup> and the matter of employer activity falls outside the scope of this Article.

*B. The Board's Treatment of Third-Party Interference*

More interesting for our purposes is the laboratory conditions doctrine's application to interference by third parties—that is, persons or organizations not directly affiliated with the statutory parties to the election. The Board's standard for reviewing third-party misconduct has changed with revisions to federal labor law and adapted to unique fact patterns, but the Board has generally sought to corral flagrantly anti-union behavior since its inception.

**1. *The Board's Original Approach Under the Wagner Act (1935–47)***

Not long after its formation, the Board addressed head-on the issue of “community pressure” against union organizing.<sup>90</sup> In the original NLRA, known colloquially as the Wagner Act for its lead proponent, New York Senator Robert F. Wagner, Section 2(2) stated that an “employer” was “any person acting in the interest of the employer, directly or indirectly . . .”<sup>91</sup> The original Roosevelt-appointed Board members adopted a broad interpretation of “employer.” Where it was found that members of the community consciously instigated adverse public feeling toward the union and its organizing efforts, the employer was held responsible for violating

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<sup>89</sup> See Larsen-Bright, *supra* note 86, at 217-22. The *General Shoe* case was briefly controversial in partisan politics, earning immediate criticism and condemnation from the Taft-Hartley Congress. JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY* 35-36, 50 (1995). However, legislative attempts to overturn the policy or persuade the Board to abandon it have never come to fruition.

<sup>90</sup> See Thomas Wade Phillips, Note, *An Analysis of Third Party Community Pressures and Their Effect upon Union Organizational Activities*, 22 VAND. L. REV. 322, 323-28 (1969) [hereinafter Phillips].

<sup>91</sup> *Id.* at 323.

Section 8(1) of the Act,<sup>92</sup> even if such action was only the creating or fostering of a sentiment that the employer's plant would be moved if it were unionized.<sup>93</sup>

In reaction to this expansive reading of Section 2(2), as well as to broader concerns about the Board's disregard of employers' speech rights,<sup>94</sup> Congress amended the section in 1947 to state: "The term 'employer' includes any person acting as an *agent* of an employer, directly or indirectly . . . ."<sup>95</sup> Thus, the Board could no longer find unfair labor practices against employers for anti-union community pressure without some proof that the group's actions were either authorized or ratified by the employer, thus vacating the *respondeat superior*-esque justification the Board had promulgated to that point. "The obvious effect" of this piece of the Taft-Hartley Act, as one commentator noted in reflection of the legislative history, "was to make it much more difficult for the Board to control anti-union community pressures,"<sup>96</sup> especially pivotal at the time of major southern organizing efforts.<sup>97</sup>

## 2. *The Fine-Tuning of Laboratory Conditions to Measure Community Pressure (1948–Present)*

However, employers' victory on this specific doctrinal front was ultimately short-lived. In *General Shoe*, decided one year after the passage of Taft-Hartley, the Board determined that it had the power to set aside election results even in cases where neither party committed an unfair labor practice.<sup>98</sup> The majority's opinion made no mention of limiting the enforcement of its laboratory conditions doctrine to the employer or union

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<sup>92</sup> See, e.g., *Remington Rand, Inc.*, 2 N.L.R.B. 626 (1937) (holding that employer interfered with employees' organizing rights by instigating and organizing antiunion hostility, which included warning citizens and public officials of perceived communal consequences of unionization); see also Phillips, *supra* note 90, at 325 n.9.

<sup>93</sup> See, e.g., *Merit Clothing Co.* 30 N.L.R.B. 1201 (1941) (finding that the anti-union activities of the town mayor and other private citizens were directly traceable to the fear of community citizens that the employer would close his plant if union activity continued); see also Phillips, *supra* note 90, at 325 n.14.

<sup>94</sup> See *supra* note 87.

<sup>95</sup> Labor Management Relations (Taft-Hartley) Act § 2(2), 29 U.S.C. § 152(2) (2012) (emphasis added); see also Phillips, *supra* note 90, at 328.

<sup>96</sup> Phillips, *supra* note 90, at 328-29.

<sup>97</sup> See Yeselson, *supra* note 23; Michael Goldfield, *The Failure of Operation Dixie: A Critical Turning Point in American Political Development?*, in GARY M. FINK & EARL E. REED, *RACE, CLASS, AND COMMUNITY IN SOUTHERN LABOR HISTORY* (1994).

<sup>98</sup> See *supra* notes 78-85.

(or agents of either party). As such, *any* misconduct that sufficiently interfered with employees' freedom of choice could taint the experiment and require its repetition.

While the Board still held employers liable for violations of Section 8(a)(1) where it was found that anti-union third-parties were acting as "agents" of an employer, and thus satisfied the stricter standard of the revised Section 2(2),<sup>99</sup> the Board applied the laboratory conditions doctrine in cases where there was no agency relationship at all between the transgressor and the company at issue.<sup>100</sup> In *James Lees & Sons Co.*,<sup>101</sup> for example, the Board set aside an election where substantial anti-union activity from the community created an "atmosphere of fear" at the plant where workers were considering unionization,<sup>102</sup> which, among other things, included local banks refusing to make loans to known union supporters. Importantly, the Board stated that it was immaterial whether the employer was "responsible for the generation of the fear which interfered with the free choice of ballot."<sup>103</sup> This atmosphere of fear concept was thereafter frequently invoked in cases analyzing the extent of interference arising from third-party activists.<sup>104</sup>

Around this time, the Board set aside elections where community pressure upset laboratory conditions in the form of anti-union industrial advisory committees,<sup>105</sup> full-page newspaper advertisements warning of economic harm,<sup>106</sup> and letters and editorials that predicted plants would leave town in the event of unionization.<sup>107</sup> This also held true for public officials that crusaded against union organizing efforts. In *Utica-Herbrand Tool Division of Kelsey-Hayes Co.*,<sup>108</sup> the Board invalidated an election where officials and influential citizens of the community, through a "barrage of propaganda" that included letters, visits to employees' homes,

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<sup>99</sup> See Phillips, *supra* note 90, at 330-38.

<sup>100</sup> *Id.* at 341-44.

<sup>101</sup> 130 N.L.R.B. 290 (1961).

<sup>102</sup> *Id.* at 291.

<sup>103</sup> *Id.* at 299.

<sup>104</sup> See *Benson Veneer Co.*, 156 N.L.R.B. 781 (1966); *Myrna Mills, Inc.*, 133 N.L.R.B. 767 (1961); *Lake Catherine Footwear, Inc.*, 133 N.L.R.B. 443 (1961).

<sup>105</sup> See *Benson Veneer Co.*, 156 N.L.R.B. at 793-94; *Proctor-Silex Corp.*, 159 N.L.R.B. 598 (1966); *Lifetime Door Co.*, 158 N.L.R.B. 13 (1966).

<sup>106</sup> See *Monarch Rubber Co.*, 121 N.L.R.B. 81 (1958).

<sup>107</sup> See *Automotive Controls Corp.*, 165 N.L.R.B. No. 43 (1967).

<sup>108</sup> 145 N.L.R.B. 1717 (1964).

radio broadcasts, and newspaper editorials and advertisements, insisted that unionization would force the employer to move its plant and bring economic ruin upon the area.<sup>109</sup> This aggressive campaigning from external forces contributed to an “atmosphere of fear of reprisal and loss of job opportunity if the employees selected the [union] as their bargaining agent”, effectively destroying the “laboratory atmosphere which the Board seeks for its elections.”<sup>110</sup>

The Board’s scrutiny of public officials eventually expanded in stature, progressing from city councilmen and local business owners to statewide officials and congressional figures. Notably, these individuals often spoke *in favor* of unions. In *Columbia Tanning Corp.*,<sup>111</sup> the Board set aside an election where the Massachusetts state labor commissioner wrote a letter in Greek to Greece-native employees one day before the election, praising the union that was campaigning for certification and ultimately endorsing its petition.<sup>112</sup> The Board held that workers had been deprived of a free choice in the election because many of the immigrant employees who received the letter likely did not know the difference between the state and federal labor boards, thus creating a perception that the “government” was endorsing the union on the eve of the vote.<sup>113</sup> This inquiry was relaxed for more generic statements of solidarity. In *Chipman Union, Inc.*,<sup>114</sup> the Board denied an employer’s request to overturn an election in which a United States Congresswoman wrote a one-page letter to employees voicing her support for their “struggle for fairness and justice in the workplace.”<sup>115</sup> Here, the Congresswoman’s statements could not be reasonably confused as an official government endorsement *a la Columbia Tanning*, and “it was clear that [she] was speaking only for herself and that her message contained no threat or coercive statement whatsoever.”<sup>116</sup> Similarly, in *Saint-Gobain Abrasives, Inc.*,<sup>117</sup> the majority held that a pro-union

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<sup>109</sup> *Id.* at 1726.

<sup>110</sup> *Id.* at 1719, 1722.

<sup>111</sup> 238 N.L.R.B. 899 (1978).

<sup>112</sup> *Id.* at 900.

<sup>113</sup> *Id.* Cf. *Ursery Companies, Inc.*, 311 N.L.R.B. 399 (1993) (determining that employees would not confuse a pro-union statement from a state representative distributed on official union stationery as a government endorsement of the union).

<sup>114</sup> 316 N.L.R.B. 107 (1995).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 107-108.

<sup>117</sup> 337 N.L.R.B. 82 (2001).

Congressman's relatively benign statement about workers' disadvantages in the context of federal labor law (contra employer's advantages under the NLRA) did not upset the laboratory conditions of the election to the point that it necessitated setting aside the union's victory.<sup>118</sup>

If one were to construct a standard emanating from this line of cases, it appears that the Board is wary of assigning too much influence to public officials' statements unless there is a significant possibility that the intended audience may confuse the speaker's opinion for an official government endorsement of one party to the election.<sup>119</sup> Historically, however, the Board is not hesitant to police those statements that are packaged as economic threats, and it considers the cumulative effect of individual incidents of third-party misconduct in evaluating the fairness of an election.<sup>120</sup> Each coercive action can potentially magnify the other,

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<sup>118</sup> *Id.* The Congressman's words appeared in full in Chairman Hurtgen's dissenting opinion:

The Company has also refused to debate this important issue, claiming that federal labor laws do not allow a fair debate because the laws restrict what an employer can say. As a United States Congressman with a strong interest in labor law, I can assure you that the law does indeed allow for a fair debate. If the company *chooses* not to debate, that is their right, but they should not hide behind misstatements about federal regulations. In fact, the laws are structured in such a way as to make it extremely difficult for workers to organize—not the other way around.

*Id.* (emphasis in original) (Hurtgen, Chairman, dissenting). Astoundingly, Chairman Hurtgen would have held the Congressman's statement *per se* coercive because of the level of his office: "My view is simply that a Congressman should also stay away from that issue in the context of pro-party comments in an ongoing organizational campaign." *Id.* at 83. The Chairman supplied no explanation for his contention that identical statements from the workers' employer would not be similarly coercive besides insisting that "[a]s to matters of law, employees are likely to view the response of a Federal official as more reliable than that of a private party to the election." *Id.*

<sup>119</sup> For additional examples, see *Affiliated Computer Servs.*, 355 N.L.R.B. 899, 900-901 (2010) (during which State Senator's expressed concern that employer's proposed compensation plan "may result in layoffs in our state and in the borough that I represent" could not reasonably be construed as coercive upon employees or as a "veiled threat" to employer); *Trump Plaza Hotel & Casino*, 352 N.L.R.B. 628, 629 (2008) (determining that statements from three state and federal elected officials asserting that they had examined signed authorization cards and concluded a majority of the employees in the bargaining unit had authorized the union to represent them was not coercive and would be interpreted as a mere expressions of opinion).

<sup>120</sup> See *Picoma Industries, Inc.*, 296 N.L.R.B. 498, 498 (1989) (stressing the need to "consider the cumulative credited evidence in determining the effect of third-party preelection misconduct" on election results); see also *Universal Mfg. Corp.*, 156 N.L.R.B. 1459 (1966) (finding that coordinated anti-union actions by members of the community violated laboratory conditions of the election).

snowballing the stress and tension of the campaign until they create the atmosphere of fear that settles upon workers' cities, neighborhoods, and homes—hence *community* pressure.

### III. TAKING THE EXPERIMENT SERIOUSLY: ADAPTING THE LABORATORY CONDITIONS DOCTRINE TO CURB ANTI-UNION COMMUNITY PRESSURE

Those cognizant of this extra layer of prophylactic enforcement invoked it following the UAW's loss in Chattanooga. In the days between the election and the union filing charges with the Board, labor law scholar Kenneth Dau-Schmidt argued that “[i]f in fact [Senator Corker] made fraudulent statements with the intent of intimidating workers, that would be a violation of laboratory conditions.”<sup>121</sup> The falsity of Corker's claims—that Volkswagen would expand production at Chattanooga only if its workforce voted against unionization—is almost a certainty. The company immediately disavowed the Senator's comments,<sup>122</sup> and while the Chattanooga plant was eventually awarded the SUV production line Corker spoke of, the announcement came several months after the fallout of the election results,<sup>123</sup> whereas Corker promised such an announcement would come within weeks of the union's loss. Moreover, documents obtained by Tennessee journalists after the election revealed that the offices of Corker and Governor Haslam coordinated anti-UAW messaging with various state Republicans and anti-union organizations leading up to the vote, unveiling a far more collaborative mobilization against the union effort than any individual had suggested transpired.<sup>124</sup> Most damning was Haslam's

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<sup>121</sup> Moshe Z. Marvit, *What Are the UAW's Legal Options After the Volkswagen Defeat?*, IN THESE TIMES (Feb. 18, 2014, 12:14 PM), [http://inthesetimes.com/working/entry/16306/uaw\\_legal\\_options\\_volkswagen\\_defeat](http://inthesetimes.com/working/entry/16306/uaw_legal_options_volkswagen_defeat).

<sup>122</sup> Silvia, *supra* note 31, at 14 (“[Volkswagen] CEO [Frank] Fischer released a response, asserting that there was ‘no connection between our Chattanooga employees’ decision about whether to be represented by a union and the decision about where to build a new product for the US market’”).

<sup>123</sup> See Aaron M. Kessler, *Volkswagen to Add S.U.V. Line to Chattanooga Plant*, N.Y. TIMES (July 14, 2014), <https://www.nytimes.com/2014/07/15/business/vw-to-add-suv-production-to-chattanooga-plant.html?mtrref=www.google.com>. The company announced in April 2017 that it was adding yet another SUV line to its Chattanooga plant. David Shepardson, *Volkswagen to Build New SUV in Tennessee Plant*, REUTERS (Apr. 12, 2017, 9:59 AM), <https://www.reuters.com/article/us-autoshow-new-york-vw/volkswagen-to-build-new-suv-in-tennessee-plant-idUSKBN17E1UB>.

<sup>124</sup> See Mike Elk, *Emails Show Sen. Corker's Chief of Staff Coordinated with Network of Anti-UAW Union Busters*, IN THESE TIMES (Apr. 1, 2014, 11:05 PM), [http://inthesetimes.com/working/entry/16505/emails\\_show\\_bob\\_corkers\\_chief\\_of\\_staff\\_co](http://inthesetimes.com/working/entry/16505/emails_show_bob_corkers_chief_of_staff_co)

retraction of a \$300 million offer in economic incentives to Volkswagen that was contingent on the company actively opposing the UAW's organizing efforts.<sup>125</sup>

True to Dau-Schmidt's prediction, the UAW filed objections to the election results on the basis of third-party misconduct.<sup>126</sup> The union's objection asserted that threats were "made by powerful political leaders who, in fact and in the reasonable perception of the employees, were quite capable of putting their threat into effect."<sup>127</sup> These politicians—aided by private interest groups—repeatedly threatened the "diminishment of job security if the workers vote for the union" until their message "was known to every potential voter in this extremely high visibility campaign."<sup>128</sup>

While the UAW eventually withdrew its charges to facilitate other organizing attempts at the Chattanooga plant,<sup>129</sup> thus relinquishing its right to litigate the issue before a favorable, Obama-stocked Board,<sup>130</sup> the theory raised in the objections is ripe for review by future Boards. As recent events in Mississippi demonstrated, the community pressure encountered at Volkswagen was not unique; both pro- and anti-union forces alike recognize that each foreign automaker plant in the region may represent a strategic stronghold for the future solvency of organized labor. As a simple

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ordinated\_with\_anti\_uaw\_groups; John Logan, *Evidence of GOP Interference in VW Election Is Now Overwhelming*, TRUTHOUT (Apr. 11, 2014), <http://www.truthout.org/opinion/item/23007-evidence-of-gop-interference-in-vw-election-is-now-overwhelming>.

<sup>125</sup> Phil Williams, *Haslam Offers No Apologies For \$300M Volkswagen Offer*, NEWS CHANNEL 5, <http://www.newschannel5.com/story/25135576/haslam-offers-no-apologies-for-300m-volkswagen-offer>. The incentives—comprised of taxpayer money—were "subject to works council discussions . . . being concluded to the satisfaction of the State of Tennessee." *Id.*; see also Michael Ballaban, *Tennessee Governor Leveled A \$300 Million Threat At VW Over UAW Vote*, JALOPNIK (Apr. 1, 2014, 1:20 PM), <https://jalopnik.com/tennessee-governor-leveled-a-300-million-threat-at-vw-1556229931>; Alexander Stoklosa, *Documents Back Up UAW Claim of "Political Interference" in VW Chattanooga Vote*, CAR AND DRIVER (Apr. 2, 2014, 3:05 PM), <https://blog.caranddriver.com/documents-back-up-uaw-claim-of-political-interference-in-vw-chattanooga-vote/>.

<sup>126</sup> UAW Objections, *supra* note 54, at 10-12.

<sup>127</sup> *Id.* at 11.

<sup>128</sup> *Id.* at 9, 11.

<sup>129</sup> See *supra* notes 54-59 and accompanying text.

<sup>130</sup> Assuming that the Board would have rendered a final decision in the Volkswagen case within 41 months of the UAW's initial filing, any expansion of the laboratory conditions doctrine would have been in place by the time the UAW petitioned for a representation election at Nissan's Mississippi plant in July 2017.

matter of logistics, unions must organize the American South to both expand membership and protect contractual gains made in more labor-friendly states.<sup>131</sup> Large-scale organizing campaigns in traditionally anti-union areas of the country will continue to occur in the coming years, and it is imperative that the administrative agency responsible for enforcing the NLRA's twin protections of industrial peace and employees' freedom of choice<sup>132</sup> adapt its machinery to shield elections from coercive third-party conduct. Interference by anti-union politicians, business groups, and private interests are only incentivized by further dormancy.

A. *Applying Extant Case Law to the UAW's Roadblocks*

Appropriately, the crux of the UAW's legal argument relied upon *Westwood Horizons Hotel*,<sup>133</sup> the Board's current standard for determining whether third-party misconduct created "a general atmosphere of fear and reprisal rendering a free election impossible."<sup>134</sup> Here, the Board would apply a five-factor test to the various statements made during the elections at Nissan or Volkswagen by considering:

- (1) the nature of the threat itself;
- (2) whether it encompassed the entire [bargaining] unit;
- (3) the extent of dissemination;

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<sup>131</sup> The case of the Machinists union and Boeing is demonstrative. *See supra* note 75. Boeing built its newest plant in South Carolina, home of the lowest union density in the country, *see* Union Density, *supra* note 22, explicitly in reaction to the frequent labor disputes the company experienced at its plant in Seattle. Andrew Strom, *Boeing and the NLRB—A Sixty-Four Year-Old Time Bomb Explodes*, 68 NAT'L LAW. GUILD REV. 109 (2011). The company has since laid off thousands of workers in the state of Washington. Dominic Gates, *Boeing plans hundreds of layoff notices for engineers this week*, SEATTLE TIMES (Apr. 17, 2017, 11:47 AM), <https://www.seattletimes.com/business/boeing-aerospace/boeing-plans-hundreds-of-layoffs-for-engineers-this-week/> ("Boeing cut almost 7,400 jobs in the state" in 2016 alone). By any reasonable estimation, the Machinists union must organize Boeing's only non-union plant to prevent the further siphoning of jobs and production assignments from its union shops. *See It's Not Over*, *supra* note 74 ("[L]ike the [UAW] at [Chrysler, Ford, and General Motors], the Machinists union has only one option for protecting its gains and winning back what it has lost: it must organize in the South.").

<sup>132</sup> National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (2012). For an example of the Supreme Court's invocation of these principles, *see* Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27, 38 (1987).

<sup>133</sup> 270 N.L.R.B. 802 (1984); *see also* UAW Objections, *supra* note 54, at 11.

<sup>134</sup> Westwood Horizons, 270 N.L.R.B. 802, 803 (1984).

- (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and
- (5) whether the threat was made or revived at or near the time of the election.<sup>135</sup>

The community pressure directed at the UAW in both campaigns undoubtedly clears *Westwood Horizon*'s hurdles. First, most threats were predicated on the potential loss of jobs for the employees at Nissan and Volkswagen, often explicitly referencing the layoffs and economic recession suffered in the union's headquarters of Detroit. Corker's coercion hit from the opposite end, promising additional jobs and a plant expansion if Volkswagen's workers voted against the UAW. Combined, such warnings and assurances—which are automatic unfair labor practices if mentioned by an employer—invoke Justice John Marshall Harlan II's famous quip that “[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove.”<sup>136</sup>

Second, these anti-union statements were exclusively directed at the entire rank-and-file workforces of both plants. Whether threatening job losses or promising job security, both tactics were designed to appeal to as many employees as possible so as to harm the union's position on the shop floor and in the community. This factor is typically applied in cases where threats are made to an individual or a small number of employees within larger bargaining units,<sup>137</sup> but here there was no such specificity.

Third, the statements were widely disseminated through extensive media coverage. The UAW's objections documented the flood of media attention paid specifically to Corker's assurances,<sup>138</sup> and noted that “the ‘No2UAW’ Facebook page, a center of debate on the campaign, placed beyond doubt how the Corker threats were to be read by the [Volkswagen] workforce” by frequently linking to media reports of his statements.<sup>139</sup> Nissan workers such as Robert Hathorn described a general feeling of

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<sup>135</sup> Lamar Advertising of Janesville, 340 N.L.R.B. 979, 980 (2003) (citing *Westwood Horizons*, 270 N.L.R.B. at 803).

<sup>136</sup> NLRB v. Exchange Parts Co., 375 U.S. 405, 410 (1964).

<sup>137</sup> See, e.g., MasTec Direct TV, 356 N.L.R.B. 809, 811-12 (2011) (finding pro-union employee's physical threat to four co-workers did not create a general atmosphere of fear and reprisal in part because employee's threats did not encompass the entire unit).

<sup>138</sup> UAW Objections, *supra* note 54, at 14-58.

<sup>139</sup> See *id.* at 12, 57-58.

exhaustion and inundation from the anti-union organizations' messaging in Mississippi.<sup>140</sup>

The fourth factor requires the most speculation without Board-conducted hearings and employee testimony, but it seems self-evident that Volkswagen employees would consider the combined forces of the state's legislature, governor, and a United States senator to be capable of making good on their threats of withholding tax subsidies or promises of added production.<sup>141</sup> Nissan employees in Mississippi, while only subjected to Facebook posts and general anti-union sentiments from their governor,<sup>142</sup> were nonetheless tasked with weighing the words of a unified local business scene that constantly warned of the perils of unionization. It cannot be said for certain whether a critical mass of employees based their vote on this community pressure, but the purpose of powerful people's issuing strong statements is assumedly to exert influence in achieving their desired result.

Finally, the timing of these statements in both elections was clearly intended to maximize their impact. Governor Bryant vocalized his Detroit-themed warning the day before the vote at Nissan, while Corker held a press conference on the first day of voting. Other anti-union statements, posts, and materials were increasingly disseminated in the days leading up to the election,<sup>143</sup> mirroring the usual campaign behavior of Board-officiated

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<sup>140</sup> See *supra* notes 1, 75 and accompany text.

<sup>141</sup> Corker, after all, has often claimed responsibility for recruiting Volkswagen to Chattanooga as the city's former mayor. See Lydia DePillis, *Sen. Bob Corker Can't Stand the United Auto Workers: An Annotated Interview*, WASH. POST (Feb. 12, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/02/12/sen-bob-corker-cant-stand-the-united-auto-workers-an-annotated-interview/?utm\\_term=.d33059686873](https://www.washingtonpost.com/news/wonk/wp/2014/02/12/sen-bob-corker-cant-stand-the-united-auto-workers-an-annotated-interview/?utm_term=.d33059686873) ("I'm a former mayor of Chattanooga. I recruited [Volkswagen] to our state. I was the first person to call their number, and two of the three meetings with them took place in my home in Chattanooga. I know [VW Chairman Martin] Winterkorn really really [sic] well. We're in constant contact with Volkswagen at every level. Seriously, I don't know a public official that's been more involved with Volkswagen, nor, candidly, more involved with the UAW.").

<sup>142</sup> See *supra* note 71 and accompanying text; Emily Wagster Pettus, *Mississippi Governor: Nissan Workers Should Reject Union*, U.S. NEWS (July 27, 2017, 5:01 PM), <https://www.usnews.com/news/best-states/mississippi/articles/2017-07-27/governor-house-speaker-stumping-at-neshoba-county-fair>.

<sup>143</sup> See Silvia, *supra* note 31, at 12-15; Dave Jamieson, *Nissan Launches Anti-Union Blitz Ahead of Pivotal UAW Election*, HUFFINGTON POST (July 30, 2017, 5:53 PM), [https://www.huffingtonpost.com/entry/nissan-launches-anti-union-blitz-ahead-of-pivotal-election-in-the-south\\_us\\_597e11d0e4b02a8434b7019d](https://www.huffingtonpost.com/entry/nissan-launches-anti-union-blitz-ahead-of-pivotal-election-in-the-south_us_597e11d0e4b02a8434b7019d).

elections in which employers are actively contesting the petitioning union.<sup>144</sup>

In sum, it appears likely that a labor-sympathetic Board would consider massive, politically-coordinated third-party misconduct as creating a general atmosphere of fear and reprisal that made a free election impossible for the workers at Nissan and Volkswagen, especially where past Board decisions involving community pressure frequently invalidated elections on the basis of anti-union newspaper editorials, advertisements, and actions of local businessmen or city officials.<sup>145</sup> The events that recently transpired in Mississippi and Tennessee certainly seem *as* coercive as those that took place in the middle of the twentieth century between unions and hostile, small-town communities, if not more so.

One potential counterargument arises from these cases with regard to Volkswagen. In the first decades of the laboratory conditions doctrine's formulation, the Board would often refuse to set aside representation elections in borderline cases of community pressure where it was found that the employer publicly and privately disavowed rumors of plant closings or other forms of job losses.<sup>146</sup> Thus, Volkswagen could have defended the results of the election on the basis that it disputed Corker's statements and urged other third parties not to involve itself in the campaign.<sup>147</sup>

However, the specific facts of the election at Volkswagen demonstrate the logical futility of grafting such a defense onto the actions of Corker and other anti-union actors. While Volkswagen officials denied that any plant expansion was contingent on the outcome of the election, it is not the company that was to be feared. Republican leaders of the Tennessee legislature had already publicly threatened to withhold tax subsidies from the company if its workers voted to unionize. Indeed, the very reason why Volkswagen resisted the UAW's call for card-check recognition as early as the summer of 2013 was because management feared upsetting Republican politicians in Tennessee.<sup>148</sup> And if nothing else, Nissan's aggressive campaign against the union in Mississippi—in addition to the alleged anti-

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<sup>144</sup> Bronfenbrenner, *supra* note 6, at 20-24.

<sup>145</sup> See *supra* Part II.B.ii.

<sup>146</sup> See Phillips, *supra* note 91, at 344-45.

<sup>147</sup> Silvia, *supra* note 31, at 14.

<sup>148</sup> Silvia, *supra* note 31, at 9 (“[Volkswagen] management refused the request because they were ‘concerned about antagonizing Republican politicians in Tennessee.’”).

union behavior of other automakers across the country<sup>149</sup>—dampers any expectation that Volkswagen’s neutrality agreement with the UAW may become an industry norm.

*B. Confronting “Both Sides”-ism and its Absurdities*

Bolstering the laboratory conditions doctrine to combat anti-union community pressure invites an obvious criticism. In cases such as *Chipman* and *Saint-Gobain*, the Board declined to set aside elections in which members of Congress expressed support for employees’ organizing efforts;<sup>150</sup> despite the fact that the politicians addressed the employees directly in writing and assured them of their right to join a union. If the Board were to find misconduct in the actions of politicians, business groups, and private interests that aggressively oppose unionization, those same parties may argue that pro-union statements by politicians should also be considered sufficiently disruptive of laboratory conditions. As attorneys of the National Right to Work Legal Defense Foundation have argued, “Even Obama weighed in with support for unionization at Volkswagen”<sup>151</sup>, and Senator Bernie Sanders fervently campaigned for the UAW in Mississippi.<sup>152</sup>

That logic relies on a longstanding flaw in American labor law that has existed since the passage of the Taft-Hartley Act: that persuasion from a union is the same as persuasion from an employer. This yin-and-yang view of industrial relations defies basic understandings of human psychology and behavioral economics. As psychologists Daniel Kahneman and Amos Tversky have demonstrated since the 1980s, people tend to prefer avoiding

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<sup>149</sup> See, e.g., David Welch, *UAW Files Claim That Tesla Fired Workers Who Supported Union*, BLOOMBERG (Oct. 26, 2017, 11:08 AM), <https://www.bloomberg.com/news/articles/2017-10-26/uaw-files-claim-that-tesla-fired-workers-who-supported-union>.

<sup>150</sup> See *supra* notes 114-18.

<sup>151</sup> Ben Penn, *UAW Files Objections Over VW Election With NLRB, Allqweeges Third-Party Coercion*, B.N.A. (Feb. 24, 2014), <https://www.bna.com/uaw-files-objections-n17179882349/>.

<sup>152</sup> Right to Work (@RightToWork), TWITTER (Nov. 17, 2017, 3:03 PM), <https://twitter.com/RightToWork/status/931613794106781696>; see also John Nichols, *Bernie Sanders Is Going to Mississippi to March With Workers This Weekend*, NATION (Mar. 3, 2017), <https://www.thenation.com/article/bernie-sanders-is-going-to-mississippi-to-march-with-workers-this-weekend/>; Bernie Sanders, *Nissan dispute could go down as most vicious anti-union crusade in decades*, GUARDIAN (Aug. 3, 2017, 6:00 PM), <https://www.theguardian.com/us-news/2017/aug/03/nissan-workers-union-bernie-sanders>.

losses to acquiring equivalent gains.<sup>153</sup> This phenomenon, generally referred to as “loss aversion,” bears out strikingly well across all sorts of decisional avenues,<sup>154</sup> but it features most prominently in monetary considerations. Some studies estimate that individuals tend to give economic losses approximately two-fold the weight that they assign gains.<sup>155</sup>

Union representation elections fit neatly into this theory: the decision to vote for or against unionization produces a similar (if implicit) economic analysis among employees in the bargaining unit. Unionizing alters the status quo of the workplace,<sup>156</sup> and its advertised advantages will inevitably be blunted by vocalized opposition from the entities who control workers’ benefits, paychecks, and schedules. This resistance increasingly takes the form of subtle threats or warnings from management and company supervisors, spreading concern that a union victory may result in the loss of existing wages and benefits, jobs, or even the closing of the plant entirely should the union win certification.<sup>157</sup> The best anti-union campaigns make the two concepts synonymous.

The union is the carrot; a threat to job security is the stick. In a world where workers may be twice as afraid of the beating as they are hungry for the treat, it is a work of legal fiction to police both pro-union and anti-union forces alike as if their words carry the same weight when uttered.<sup>158</sup> With recent events in mind, future Board members should hold anti-union community pressure to greater scrutiny than pro-union actions—

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<sup>153</sup> See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 334-41 (2011); DANIEL KAHNEMAN & AMOS TVERSKY, CHOICES, VALUES, AND FRAMES 341-50 (1984).

<sup>154</sup> See Sang Lee et al., *The Commonality of Loss Aversion across Procedures and Stimuli*, PLOS ONE (Sept. 22, 2015), available at <http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0135216&type=printable>.

<sup>155</sup> *Id.* at 1.

<sup>156</sup> Daniel Kahneman and others have observed the loss aversion theory’s utility in the context of status quo bias. Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. OF ECON. PERSPECTIVES 193, 197-203 (1991). See also Becker, *supra* note 86, at 567-68.

<sup>157</sup> See generally Bronfenbrenner, *supra* note 6.

<sup>158</sup> More to this point, non-union employers enjoy the equivalent of despotic power over their workforces. See generally ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT) (2017). Meanwhile, unions have not possessed the authority to compel the discharge of employees for purposes other than their failure to pay the equivalent of membership dues and initiation fees since 1947. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963) (Taft-Hartley modifications to Section 8(a)(3) effectively banned the closed shop and whittled down union-shop membership to “financial core” status).

and it should do so until the latter proves itself to be the former's equal in disrupting the laboratory conditions of Board-officiated elections. Anything less will contribute to the widening disparity of economic power between capital and labor that defines our twenty-first century reality of corporate mobility, neoliberal governance, and increasingly feeble labor laws.

C. *The Utility of the Doctrine in the Information Age*

There is something to say about the appropriateness of re-enforcing a legal maxim that is nearing its seventieth birthday in coverage of rapidly changing industries. Multiple criticisms can be made against its extension from even a pro-union standpoint. First, the need for "laboratory conditions" rests upon an analogy that champions neutrality where government impartiality may ultimately mean extinction for organized labor.<sup>159</sup> Second, the doctrine favors NLRB election machinery in an era that has proven that anything but card-check recognition inherently favors management and supposes that the election process itself is a system of industrial governance worth saving.<sup>160</sup> Third, and perhaps most operational, a doctrine predicated on censoring opinions and withholding information from voters is futile in an era where opinions and information are increasingly accessible.<sup>161</sup>

While infringements such as Corker's assurances seem eminently punishable, more subtle statements of labor-management viewpoints may be impossible to police but remain just as effective. Furthermore, organizing communications increasingly take place online and not in traditional media, incentivizing the swift flow of information at critical points in the campaign. The remedy for a violation of laboratory conditions—a redo of the election—seemingly dooms unions to a cycle of fighting foes it cannot stop with weapons it cannot match.

These are valid assessments, and they suggest that Board law needs a serious overhaul in more ways than one. But this analysis does not purport to be anything more than a fine-tuning of an existing doctrine to produce

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<sup>159</sup> See *supra* Part III.B.

<sup>160</sup> See generally Becker, *supra* note 86 (arguing that management has no legitimate interest in workers' decision to unionize); Ezra Klein, *How Bad is Card Check?*, THE AMERICAN PROSPECT (Oct. 20, 2006), <http://prospect.org/article/how-bad-card-check>.

<sup>161</sup> See generally Joseph P. Mastro Simone, *Limiting Information in the Information Age: The NLRB's Misguided Attempt to Squelch Employer Speech*, 52 WASHBURN L.J. 473 (2013).

more equitable outcomes from the resources that are already available. While unions should be actively searching for ways to alter a playing field that has refused to fight fair for decades, labor must fire its loaded guns.

#### CONCLUSION

Although this article has been sympathetic to the UAW's plight (as well as that of other labor organizations braving the Southern Cage), it does not mean to minimize the union's campaign missteps. There is much to be said about the self-immolating nature of the UAW's cherished neutrality agreement with Volkswagen, which left at least some workers wondering what they were fighting for by draining the union of its adversarial element,<sup>162</sup> and its campaign at Nissan was rife with criticism of basic strategic blunders.<sup>163</sup> Certainly at least some blame must be placed upon the leadership of today's largest manufacturing-based unions, who—in the face of globalization and an increasingly hostile political climate—have pushed collaboration with corporations and accepted concessions on contracts.<sup>164</sup> However, it is not clear that the UAW's tactical shortcomings robbed it of sure victories at Nissan or Volkswagen, and it does not follow that more militant unionism would have won the day at either plant.

The problem for unions remains the same regardless of their posture: labor wishes to extract more value from the goods and services it produces, and capital will oppose additional labor costs to maintain its share of profits. Given this diametric conflict in economic order, perhaps it is pointless to advocate for tweaks to doctrines of small subsets of American labor law; it may be futile to make any doctrinal changes at all to the laws as they currently exist. If so, it is better to wait for major legislative reforms that fundamentally alter the ways in which unions organize or collectively

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<sup>162</sup> See Silvia, *supra* note 31, at 16; Mike Elk, *How Sweetheart Deals Hurt Labor*, COMMON DREAMS (Feb. 18, 2014), <https://www.commondreams.org/views/2014/02/18/how-sweetheart-deals-hurt-labor>; Wayne Cliett, *Why Do Auto Workers Union Drives Keep Failing? A Rank-and-File View*, LABOR NOTES (Jan. 10, 2018), <http://labornotes.org/blogs/2018/01/why-do-auto-workers-union-drives-keep-failing-rank-and-file-view?language=es>.

<sup>163</sup> The major targets of criticism were the UAW's rank-and-file organizing committee, which was allegedly understaffed and unrepresentative of the plant as a whole, and the union's decision to call for a vote while lacking the desired supermajority of authorization cards from members in the bargaining unit. See Brooks & Bruskin, *supra* note 67.

<sup>164</sup> See Sam Gindin, *Lessons from Chattanooga*, JACOBIN (Feb. 24, 2014), <https://www.jacobinmag.com/2014/02/lessons-from-chattanooga/>; Dianne Feeley, *Against the New Normal*, JACOBIN (Feb. 8, 2016), <https://www.jacobinmag.com/2016/02/uaw-autoworkers-contracts-ford-chrysler-gm-fiat-marchionne/>.

bargain with employers. Unions would thus be better served waiting for national card-check legislation,<sup>165</sup> industry-wide bargaining rights,<sup>166</sup> or perhaps even a comprehensive successor to the National Labor Relations Act.<sup>167</sup>

But this argument puts the cart before the horse. It assumes that a critical mass of legislators will eventually decide to spend time, resources, and political capital reforming labor law and championing unions, even though the post-Reagan labor movement is bereft of major organizing victories that could serve as a symbol of resurgence.<sup>168</sup> People who are not in unions need a reason to care about unions, and it is difficult to communicate the benefits of collective bargaining rights when seemingly the only times unions appear in national media is through coverage of major defeats in organizing drives<sup>169</sup> or through passage of state Right-to-Work laws.

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<sup>165</sup> Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009); accord Brent Garren & Zachary Henige, *The Employee Free Choice Act (“EFCA”): Salvaging Sec. 7 Rights*, A.B.A., available at <https://apps.americanbar.org/labor/annualconference/2007/materials/data/papers/v2/019.pdf>.

<sup>166</sup> Kate Andrias, *The New Labor Law*, 126 YALE L. J. 2 (2016); accord Dylan Matthews, *Europe could have the secret to saving America’s unions*, VOX (Apr. 17, 2017, 9:30 AM), <https://www.vox.com/policy-and-politics/2017/4/17/15290674/union-labor-movement-europe-bargaining-fight-15-ghent>.

<sup>167</sup> Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Congress (2019); accord Alexia Fernández Campbell, *Democrats Have an Ambitious Plan to Save American Labor Unions*, VOX (May 14, 2019), <https://www.vox.com/policy-and-politics/2019/5/14/18536789/right-to-work-unions-protecting-the-right-to-organize-act-bill>.

<sup>168</sup> This is perhaps a symptom of the national media and political establishment’s overrepresentation of the manufacturing industry as the face of “blue-collar” work. See Ben Casselman, *Americans Don’t Miss Manufacturing—They Miss Unions*, FIVETHIRTYEIGHT (May 13, 2016, 7:00 AM), <https://fivethirtyeight.com/features/americans-dont-miss-manufacturing-they-miss-unions/>. This portrayal effectively minimizes the achievements of females and African-Americans, who are the fastest growing demographic in unionization. Anna Louie Sussman, *Are Women the New Face of Organized Labor?*, WALL ST. J. (Sept. 7, 2015, 8:08 AM), <https://blogs.wsj.com/economics/2015/09/07/are-women-the-new-face-of-organized-labor/>; Bureau of Labor Statistics, *Union Members—2016*, U.S. DEP’T LABOR, available at <https://www.bls.gov/news.release/pdf/union2.pdf> (showing that “Black workers were more likely to be union members [in 2016] than were White, Asian, or Hispanic workers”).

<sup>169</sup> National media have a penchant for describing most union elections they bother covering as “historic.” See, e.g., Lydia DePillis, *Auto union loses historic election at Volkswagen plant in Tennessee*, WASH. POST (Feb. 14, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/02/14/united-auto-workers-lose-historic-election-at-chattanooga-volkswagen-plant/?utm\\_term=.b17642fbc422](https://www.washingtonpost.com/news/wonk/wp/2014/02/14/united-auto-workers-lose-historic-election-at-chattanooga-volkswagen-plant/?utm_term=.b17642fbc422). It is hard to

As its ranks continue to dwindle, the labor movement needs a spark, a rallying point, a triumph. It must organize a world-famous employer, and it must do so in the South. This article demonstrated that it is unlikely unions will be able to claim such a victory until the National Labor Relations Board rules that aggressive, anti-union community pressure is a violation of the laboratory conditions doctrine espoused over seventy years ago in *General Shoe*. The tactics deployed by anti-union politicians, business groups, and private interests in the elections at Nissan's and Volkswagen's plants undeniably created an atmosphere that rendered free choice impossible for the employees involved, and such parties are encouraged to utilize the same strategy at the next major battles for foreign manufacturers' workplaces until labor law holds them accountable.

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see what made this election more historic than, say, the same union's organizing effort at Nissan's Smyrna, Tennessee plant in the late 1980s.