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Adding Joy Silk to Labor's Reform Agenda

Brian J. Petruska

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ADDING *JOY SILK* TO LABOR’S REFORM AGENDA

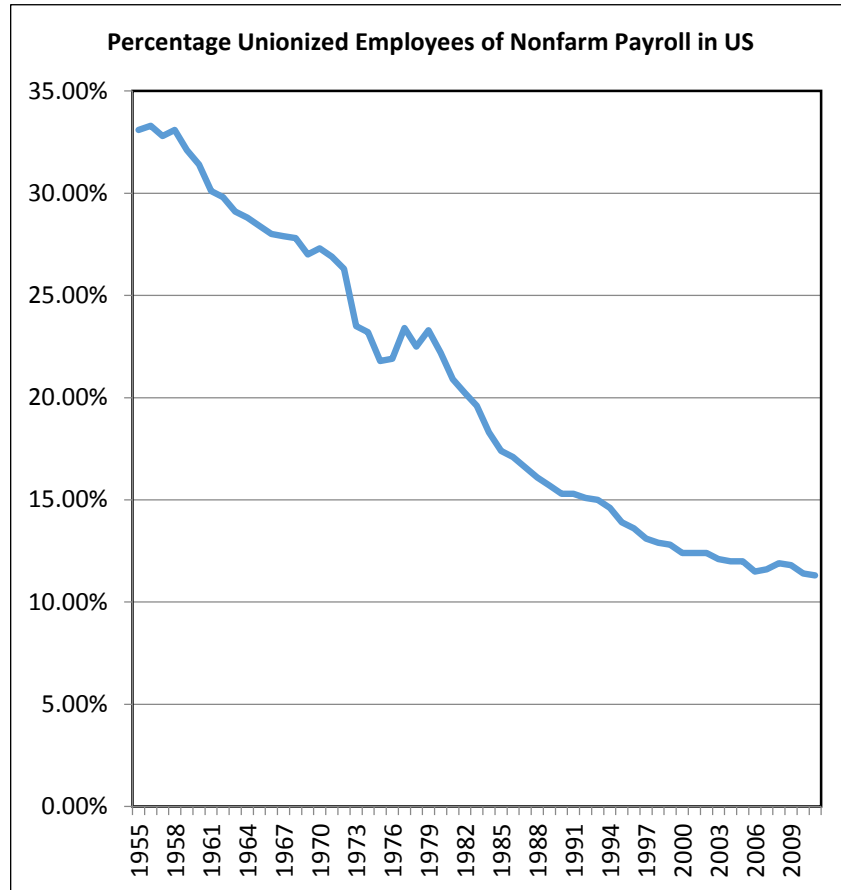
Brian J. Petruska*

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INTRODUCTION

FIGURE 1¹

In 2009, the year that Barack Obama began his administration as President, union density—which measures the percentage of employees in the United States workforce who are unionized—was 12.3%. As of

1. Nonfarm payroll data taken from the Database on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts (ICTWSS Database). Information on union density from 1955–2004 taken from Gerald Mayer, *Union Membership Trends in the United States*, Congressional Research Service (2004), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace. Union density from 2005 to 2011 taken from ICTWSS database. J. Visser, ICTWSS Data base, version 5.1. Amsterdam: Amsterdam Institute for Advanced Labour Studies (AIAS), University of Amsterdam. September 2016. Open access database at: uva-aias.net/en/ictwss

2015, seven years into his presidency, union density stood at 11.1%.² These numbers should trouble the U.S. Labor movement. The numbers also should raise a question anew—what can be done to restore the U.S. Labor Movement? As the above Figure 1 shows, Labor’s decline has continued for more than a generation. It was not stopped by the collective efforts of the presidential administrations of Carter, Clinton, or Obama, even though all of these presidents enjoyed the support of Democratic Congressional Majorities for at least a portion of their terms.

It has not been for lack of effort. Labor has attempted to address the reform of U.S. labor laws through major legislation when the opportunity has arisen. In 1977, it supported the Labor Law Reform Act of 1977.³ In 2007 and 2009, it supported the Employee Free Choice Act.⁴ The current vehicle for Labor’s reform effort is the Workplace Action for a Growing Economy, or “WAGE” Act.⁵

Problematically, however, the prospects for passing major legislative reforms are not strong. Most political observers do not believe that Labor’s allies in the Democratic Party can regain control of the U.S. Congress in the foreseeable future.⁶ Labor’s best chance for reform, therefore, is at the administrative level with the way the National Labor Relations Board (“NLRB,” or the “Board”) interprets and enforces the National Labor Relations Act (“NLRA,” or the “Act”).⁷

This Article argues that significant, large-impact reform by the NLRB is possible. A 1949 doctrine arising from *Joy Silk Mills, Inc.* held that a union could obtain a bargaining order from the NLRB if it: (1) obtained authorization cards from a majority of an employer’s employees, and (2) requested recognition from the employer, only to have the employer refuse recognition and then proceed to commit unfair labor practices.⁸ Persuading the NLRB to resurrect the *Joy Silk* doctrine would achieve potentially game-changing reform of U.S. labor law. Moreover, such a change is legally viable and likely to be

2. See U.S. Dep’t of Labor, Bureau of Labor Statistics, Union Members -2015, USDL-16-0158 (Jan. 28, 2016); U.S. Dep’t of Labor, Bureau of Labor Statistics, Union Members - 2009, USDL-10-0069 (Jan. 22, 2010).

3. H.R. 8410, 95th Cong., (1st Sess. 1977).

4. See H.R. 800, 110th Cong., (1st Sess. 2007), <http://www.govtrack.us/congress/bills/110/hr800>; H.R. 1409, 111th Cong., (1st Sess. 2009).

5. S. 2042, 114th Cong., (1st Sess. 2015).

6. Nate Cohn, *Why Democrats Can’t Win the House*, N.Y. TIMES, Sept. 6, 2014, at SR1.

7. 29 U.S.C. §§ 151 *et seq.*

8. See *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1264 (1949), *modified and enforced*, *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950).

sustained by federal appellate courts.

After presenting this argument to supporters of the Labor Movement, it is clear from the responses that there is work to do in making the case that this strategy would be viable and would achieve meaningful improvements. The purpose of this Article, therefore, is to make those cases.

In Part I, the Article briefly reviews the background of the *Joy Silk* doctrine and how it came to be replaced by the doctrine of *Gissel Packing Co.*⁹ and abandoned by the NLRB.¹⁰

In Part II, the Article argues that the NLRB can, as a matter of administrative discretion, re-adopt the *Joy Silk* doctrine as part of its interpretation and enforcement of the NLRA. The peculiar circumstances under which the NLRB abandoned the *Joy Silk* doctrine involved an arguably rogue government attorney, whose performance at oral argument before the U.S. Supreme Court appears to be responsible for the loss of the doctrine. From this, the Article argues that the abandonment of *Joy Silk* likely was not intentional and was not supported by a compelling legal rationale, and that a return to the doctrine has not been foreclosed by the Supreme Court.

In Part III, the Article presents the analytical and empirical case for re-adopting the *Joy Silk* doctrine. This Part will include a discussion of why *Gissel*, the doctrine that substituted for *Joy Silk*, did not provide the same deterrence against unfair labor practices (ULPs) during union organizing drives. Due to its doctrinal indeterminacy and its status as an extraordinary remedy, *Gissel* actually provides substantial incentives to employers to commit ULPs during union organizing efforts. The Article also presents an extended argument based upon empirical evidence that the abandonment of *Joy Silk* triggered a massive increase in the commission of ULPs during union organizing campaigns, and that the re-adoption of *Joy Silk* will lead to a reduction of ULPs during organizing campaign of a similar magnitude.

In Part IV, the Article recommends adjustments to the *Joy Silk* doctrine to accommodate legal developments in the rights of employees under Section 7 of the Act to refrain from union activity that arose following *Joy Silk's* abandonment. These rights can be safeguarded by modifying the application of the NLRB's contract bar rule in cases where a collective bargaining agreement results from a bargaining order. The NLRB's contract bar rule provides that no representation election will be held during the first three years of a

9. NLRB v. Gissel Packing Co., 395 U.S. 575, 599 n.13 (1969).

10. See *infra* Part I.

collective bargaining agreement.¹¹ When the NLRB issues a bargaining order, however, I recommend that the contract bar be withheld until the union obtains certification through an election. This modest change will safeguard employees' access to a secret-ballot election, but do so within a framework that maximally neutralizes the employer's incentive to violate the Act with the purpose of dissipating the union's support.

In Part V, the Article argues that restoring *Joy Silk* to U.S. labor law will have a game-changing impact on U.S. labor relations. To support this claim, the Article attempts to demonstrate that the abandonment of *Joy Silk* was a pivotal development in U.S. labor law that heavily contributed to the subsequent decline of the American Labor Movement. The abandonment of *Joy Silk* and its replacement by *Gissel* created a new landscape that proved inhospitable to union organizing and has led to dramatic decreases in NLRB elections. From this, the Article argues that a restoration of the *Joy Silk* doctrine should be expected to dramatically improve the ability of unions to organize and grow, which is to say, restoring *Joy Silk* would constitute meaningful labor law reform.

I. THE REPLACEMENT OF *JOY SILK* WITH *GISSEL*

Since the earliest days of the NLRA, the NLRB has enforced the law with respect to violations of § 8(a)(5)¹² even where the union has not been voluntarily recognized or certified by winning an election. The original Wagner Act provided:

Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify . . . the name or names of the representatives that have been designated or selected. In any such investigation, the Board . . . may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.¹³

Between 1935 and 1947, the NLRB relied upon this provision to certify unions without holding elections.¹⁴

In 1947, the Taft-Hartley Act repealed the provision that permitted the Board to certify a union by a means other than an election. After

11. See generally *General Cable Corp.*, 139 NLRB 1123 (1962).

12. Section 8(a)(5) of the NLRA prohibits an employer from failing to bargain collectively with a representative of its employees, as defined in Section 9(a) of the Act. 29 U.S.C. 158(a)(5). Section 8(d) of the NLRA defines bargaining collectively to require negotiation "in good faith." 29 U.S.C. § 158(d).

13. See *Gissel*, *supra* note 9; See also 49 Stat. 449 § 9(c) (July 5, 1935).

14. See *Gissel*, *supra* note 9, at 596.

Taft-Hartley, an election was the only means through which the Board could certify a union as an exclusive representative within the meaning of Section 9(a) of the Act. Despite this change, however, the Board continued to find violations of Section 8(a)(5) when an employer violated its duty to collectively bargain in good faith with a union that had been “designated” as an exclusive representative by a majority of employees, but had not been certified through an election. The Board first announced that it would continue to enforce Section 8(a)(5) in this context in *Joy Silk Mills, Inc.*¹⁵ In *Joy Silk*, the NLRB announced a policy that an employer will be ordered to recognize and bargain with a union if the general counsel establishes the following: (1) that the union represented a majority of workers in an appropriate bargaining unit, (2) the union requested recognition, (3) the employer denied the request for recognition while lacking a good faith doubt as to the union’s majority status, and (4) the employer took action calculated to dissipate the union’s majority status.¹⁶

The elimination of the *Joy Silk* doctrine is a matter of public record. *Joy Silk* disappeared as valid labor law on the morning of June 16, 1969, when the Supreme Court of the United States announced its opinion in the case of *NLRB v. Gissel Packing Co.*¹⁷ Based on this incident, one might guess that the U.S. Supreme Court ended the *Joy Silk* doctrine. Yet the Supreme Court explicitly denied playing any role in *Joy Silk*’s rejection.¹⁸ Rather, the Supreme Court stated that the NLRB “abandoned” it.¹⁹ Nevertheless, the Supreme Court proceeded in *Gissel* to adopt a new doctrine under which the Board would order an employer to bargain with an uncertified and unrecognized union if the NLRB’s General Counsel proved that the employer committed ULPs that have made the conduct of a fair election unlikely or impossible, even if the NLRB attempted to use its traditional remedies to fix the situation.²⁰

Did the NLRB “abandon” *Joy Silk* as the Supreme Court suggests? Here, the record is murky. To begin, the Supreme Court’s description of how the Board “abandoned” *Joy Silk* is highly unusual. The Court’s opinion explains that, “although the Board’s brief before this Court generally followed the approach as set out in *Aaron Brothers* . . . the Board announced at oral argument that it had virtually

15. *Joy Silk*, *supra* note 8, at 741.

16. *Id.*; see also *Aaron Bros. Co.*, 158 N.L.R.B. 1077, 1079 (1966).

17. See *Gissel*, *supra* note 9, at 590.

18. See *id.* at 594 (stating that the Board made the decision to abandon the *Joy Silk* doctrine following the submission of its brief to the Court).

19. *Id.*

20. See *id.*

abandoned the *Joy Silk* doctrine altogether.”²¹ Thus, according to the Supreme Court, the NLRB changed its position sometime between filing its brief with the Court and appearing for oral argument in March of 1969. The problem is that, if the NLRB did change its policy on *Joy Silk* during this period, it created no public record of the change. The official record, therefore, creates a mystery. A best guess of what really happened is discussed in Part II, *infra*.

Meanwhile, in 1971, the Board severed all remaining ties to *Joy Silk* in *Linden Lumber Division, Summer & Co.*²² In this case, the Board made clear that an employer has no obligation to file a petition for an election even where it refused to recognize and bargain with a union who presented unequivocal evidence of majority support.²³ In establishing this rule, the NLRB made clear that it no longer would conduct any inquiry whatsoever into the employer’s good faith, or lack thereof, for refusing to recognize a union who offered it evidence of majority support.²⁴ In the Supreme Court’s review of the Board’s new policy, a 5-4 decision narrowly affirmed that the policy was not an abuse of the Board’s discretion.²⁵

In announcing its decision in *Linden Lumber*, the NLRB offered a rationale for abandoning *Joy Silk* for the first time:

How are we to evaluate whether [the employer] “knows” or whether it “doubts” majority status? And if we are to let our decisions turn on an employer’s “willingness” to have majority status determined by an election, how are we to judge “willingness” if the record is silent, as in *Wilder*, or doubtful, as here, as to just how “willing” the Respondent is in fact? We decline, in summary, to reenter the “good-faith” thicket of *Joy Silk*, which we announced to the Supreme Court in *Gissel* we had “virtually abandoned . . . altogether.”²⁶

II. THE BOARD RETAINS DISCRETION TO RE-ADOPT JOY SILK.

A. *The Board Has Discretion to Reverse Its Prior Positions.*

The U.S. Supreme Court has made clear that, in developing labor relations policy for the nation, the Board is entitled to substantial deference. The prevailing standard provides that:

21. *Id.*

22. *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 719, 720-21 (1971) (citations omitted).

23. *See id.*

24. *See id.*

25. *See Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309-10 (1974).

26. *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 719, 720-21 (1971) (citations omitted).

[s]o long as the Board's construction . . . is at least permissible under [the Act], and insofar as the Board's application of that meaning engages in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review.'²⁷

The Board's entitlement to substantial deference arises from its recognition by the Supreme Court as "expert in federal national labor relations policy . . . [with] vested responsibility for developing that policy . . ."²⁸ In fact:

[i]t is the province of the Board, not the courts, to determine whether or not the 'need' exists in light of changing industrial practices and *the Board's cumulative experience in dealing with labor-management relations*. For the Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life, and its special competence in this field is the justification for the deference accorded its determination.'²⁹

The deference due to the Board even applies where the Board is reversing itself from prior positions.³⁰ As the Supreme Court has held, "[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes."³¹ Under this guidance, courts generally have deferred to the Board with respect to significant changes in Board policy.³²

27. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–67 (1975); *see also* *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786–87 (1990) ("We will uphold a Board rule as long as it is rational and consistent with the Act," (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37 (1987))), even if we would have formulated a different rule had we sat on the Board," (citing *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 413, 418 (1982))).

28. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500–01 (1978).

29. *Weingarten*, 420 U.S. at 266–67 (emphasis added); *Beth Israel Hosp.*, 437 U.S. at 501 (stating that as the nation's appointed labor relations expert, "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review").

30. *NLRB v. Int'l Ass'n of Bridge*, 434 U.S. 335, 351 (1978); *see also* *Weingarten*, 420 U.S. at 265–66.

31. *Int'l Ass'n of Bridge*, 434 U.S. at 351; *see also* *Weingarten*, 420 U.S. at 265–66 ("To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking.").

32. *See, e.g.*, *NLRB v. Rhone-Poulenc, Inc.*, 789 F.2d 188, 191 (3d Cir. 1986); *Int'l All. Of Theatrical Stage Emps. & Moving Picture Mach. Operators v. NLRB*, 779 F.2d 552, 555 (9th Cir. 1985); *Consol. Papers, Inc. v. NLRB*, 670 F.2d 754, 757 (7th Cir. 1982); *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 176 (3d Cir. 1980).

Two examples suffice to demonstrate the Board's recognized ability to change its mind on longstanding policy. The first is the Board's decision in *John Deklewa & Sons*.³³ In *Deklewa*, the Board overruled a sixteen-year precedent governing pre-hire collective bargaining agreements in the construction industry that are authorized by Section 8(f) of the NLRA.³⁴ A pre-hire agreement in the construction industry is one that can be signed even when the union does not enjoy majority support.³⁵ Under the prior rule of *R.J. Smith Construction Co.*,³⁶ a pre-hire agreement was subject to unilateral repudiation by an employer unless the union converted the agreement from a Section 8(f) non-majority agreement to a Section 9(a) majority agreement during the agreement's term.³⁷ In *Deklewa*, the Board abandoned that approach and instead ruled, *inter alia*, that Section 8(f) pre-hire agreements were enforceable and not subject to repudiation until they expired, and also that a Section 8(f) agreement could not convert to a majority agreement without obtaining an express recognition of the union's majority status from the employer.³⁸

The change in policy in *Deklewa* was substantial, and *R.J. Smith* was a longstanding precedent at the time it was overruled. Moreover, the Supreme Court had approved of the Board's *R.J. Smith* policy on two occasions.³⁹ Despite these considerations, courts nevertheless almost unanimously approved the Board's entitlement to change its policy because they recognized that Section 8(f) was silent on the issues of repudiation by the employer and conversion to a Section 9(a) agreement, which therefore necessitated deference to the NLRB's interpretation.⁴⁰

33. 282 N.L.R.B. 1375 (1987), *enforced sub nom.*, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988).

34. *Id.* at 1377.

35. *See* 29 U.S.C. § 158(f).

36. 191 N.L.R.B. No. 135 693, 695 (1971), *enf. denied sub nom.*, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186 (1973).

37. 282 N.L.R.B. No. 135 at 1378-79.

38. *Id.* at 1377-78.

39. *See* *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); *NLRB v. Int'l Ass'n of Bridge*, 434 U.S. 335, 351 (1978).

40. *See, e.g.*, *NLRB v. Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1393-95 (10th Cir. 1992); *C.E.K. Indus. Mech. Contrs. v. NLRB*, 921 F.2d 350, 357 (1st Cir. 1990); *NLRB v. Bufco Corp.*, 899 F.2d 608, 609, 611 (7th Cir. 1990) DOC 13; *NLRB v. W.L. Miller Co.*, 871 F.2d 745, 748 (8th Cir. 1989); *Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1129-35 (9th Cir. 1988); *Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770, 776-79 (3d Cir. 1988). The Second Circuit has not explicitly ruled on the validity of *Deklewa*, but has cited to it without questioning its validity. *See* *Empire State Carpenters Welfare Annuity & Apprenticeship Training Funds v. Conway Constr. of Ithaca, Inc.*, No. 07-CV-2259 (DRH) (ETB) 2012 WL 894407 (E.D.N.Y. Mar. 15, 2012) (*unpublished opinion*) *7 n.2 (citing

Similarly, the Board changed its position four times in a twenty-year period on how it would treat misrepresentations made during an election. In 1962, the Board articulated its initial policy in *Hollywood Ceramics*, stating that a substantial and material misrepresentation would provide grounds for setting aside an election.⁴¹ In 1977, the Board reversed that position in *Shopping Kart Food Market* and ruled that most misrepresentations made during an election would not provide grounds to set aside an election.⁴² The following year, in *General Knit*, the Board returned to the *Hollywood Ceramics* position.⁴³ In 1982, in *Midland National Life Insurance Co.*, the Board reversed yet again and re-adopted the rule of *Shopping Kart*.⁴⁴ Although circuit courts were quite critical of the Board's vacillations, those courts nevertheless deferred to the Board's entitlement to set labor policy on this issue.⁴⁵

To sustain a change in policy to restore the doctrine of *Joy Silk*, the Board will be required to show that the policy "is rational and consistent with the Act."⁴⁶ As part of making this showing, the Board

Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, 288 F.3d 491, 496 (2d Cir. 2002), vacated on other grounds, 538 U.S. 918 (2003); *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 315 n. 3 (2d Cir. 1990)). The DC Circuit disapproved of the Board's original position in *R.J. Smith*. See *Int'l Union of Operating Eng'rs*, 480 F.2d at 1191. Only two circuits failed to enforce the Board's change of policy, and both did so not due to the merits of the Board's position, but out of procedural concerns posed by the prior-panel opinion rule, under which three-judge panels of a circuit must follow prior-panel opinions unless the panel opinions are overruled either by the Supreme Court or the *en banc* circuit court. See *Indus. Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997); *Local Union 48 Sheet Metal Workers v. S.L. Pappas & Co.*, 106 F.3d 970, 975 (11th Cir. 1997). Interestingly, the Fourth Circuit opinion partially relies upon the Ninth Circuit's *Mesa Verde* opinion in support of its own application of the prior panel rule to NLRB policy changes. See *Indus. Turnaround Corp.*, 115 F.3d at 254–55. The *en banc* Ninth Circuit, however, rejected the view that the prior-panel rule was applicable in cases where the Board has changed its interpretation of the Act. See *Mesa Verde*, 861 F.2d at 1134–35 ("We hold, therefore, that if prior decisions of this court constitute only deferential review of NLRB interpretations of labor law, and do not decide that a particular interpretation of statute is the only reasonable interpretation, subsequent panels of this court are free to adopt new and reasonable NLRB decisions without the requirement of *en banc* review.") (citations omitted).

41. 140 N.L.R.B. No. 36 221, 224 (1962).

42. 228 N.L.R.B. No. 190 1311, 1313-14 (1977).

43. 239 N.L.R.B. No. 101 619, 620 (1978).

44. 263 N.L.R.B. No. 24 127, 129 (1982).

45. *NLRB v. Best Products Co., Inc.*, 765 F.2d 903, 911 (9th Cir. 1985) (accepting *Midland*); *NLRB v. Chi. Marine Containers, Inc.*, 745 F.2d 493, 498–500 (7th Cir. 1984) (accepting *Midland*); *Hickman Harbor Serv., Div. of Flowers Transp. Co. v. NLRB*, 739 F.2d 214, 218 (6th Cir. 1984) (accepting *Midland*); *NLRB v. Mich. Rubber Products, Inc.*, 738 F.2d 111, 116 (6th Cir. 1984) (accepting *Midland*); *NLRB v. Monark Boat Co.*, 713 F.2d 355, 360–61 (8th Cir. 1983) (accepting *Midland*); *NLRB v. Rolligon Corp.*, 702 F.2d 589, 592 (5th Cir. 1983) (accepting *Midland*).

46. *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990).

may be required to demonstrate that the change in policy is a reasonable effort to strike the balance among conflicting legitimate interests, based upon the Board's cumulative experience and in light of changing industrial circumstances.⁴⁷ This is a case that the Board surely can make with respect to restoring to *Joy Silk* as valid law.

B. The History of How the Board Came to Abandon Joy Silk Strongly Suggests That It Was Abandoned by Mistake.

The history of how the Board came to abandon the *Joy Silk* doctrine supports the conclusion that the Board can (and should) re-adopt the doctrine. The history strongly suggests that the Board abandoned *Joy Silk* through a mistake by, and possibly the improper conduct of, one of its attorneys.⁴⁸

According to the most thorough examination of the history behind the case, *Joy Silk* was not initially abandoned by the Supreme Court or the NLRB, but rather by the NLRB's Associate General Counsel, Dominick L. Manoli.⁴⁹ After conducting an exhaustive review of the case files,⁵⁰ Professors of Law Laura J. Cooper and Dennis R. Nolan concluded that during oral argument Associate General Counsel Manoli unilaterally changed positions for the Board during oral argument before the Supreme Court. Put more bluntly, they conclude that Manoli misrepresented to the Court the actual state of affairs with respect to Board policy.⁵¹ The professors based this conclusion both on analysis of the oral argument transcript, but also by interviewing the surviving lawyers who participated in the argument.⁵² On the question of whether Manoli's change of position was a mistake or a deliberate misstatement, the professors conclude that more likely Manoli deliberately misstated the NLRB's position.⁵³

Why would a dedicated career agency attorney like Manoli do such a thing? Professors Cooper and Nolan propose that Manoli adulterated Board doctrine as a way of evading a knotty question in the Board's case law under the *Joy Silk* doctrine.⁵⁴ The problem with which Manoli struggled was that under *Joy Silk*, as amended by *Aaron*

47. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 267 (1975).

48. Laura J. Cooper & Dennis R. Nolan, *The Story of NLRB v. Gissel Packing: The Practical Limits of Paternalism*, in LABOR LAW STORIES 219-21 (Catherine Fisk & Laura J. Cooper eds., 2005).

49. *Id.*

50. The key lawyer and witness, Associate General Counsel Manoli, died in 1980 and therefore could not provide his version of events. Cooper & Nolan, *supra* note 48, at 219.

51. Cooper & Nolan, *supra* note 48, at 220-21.

52. *Id.*

53. Cooper & Nolan, *supra* note 48, at 219-221.

54. *Id.* at 221.

Brothers,⁵⁵ an employer had the right to refuse to recognize a union claiming majority support from the workers only if the employer had a good faith doubt that the majority truly supported the union.⁵⁶ The difficult question that arose was what the NLRB did when an employer had no doubts about his employees' support for the union, but simply preferred an election process.⁵⁷ Under the Board's way of looking at things, a preference for election did not necessarily constitute a good faith doubt about majority status, though it might.⁵⁸ If the employer preferred an election to confirm the employees' true wishes, that was permissible. But if the employer had no true doubt as to the employees' support for the union—as might arise if the employer were independently aware of the employees' support—then that employer nevertheless might violate the Act by declining recognition and requesting an election.

The Board's supposedly meticulous parsing of the employer's motives for refusing recognition gave rise to accusations that the Board was imposing a "magic words" requirement upon employers, requiring them to articulate their preference for an election with just the right nuance to avoid being found guilty of an unlawful refusal to bargain with the union in good faith.⁵⁹ This, it was argued, violated the employer's right to free speech.⁶⁰

The situation was further complicated by the distinct, but at that time unresolved, question of whether an employer who was ostensibly insisting upon an election was required to file its own petition for an election in order to prove its good faith.⁶¹ The lack of resolution of this question added to the sense at the time that employers who were presented with a showing of authorization cards from a union were in a legally treacherous position, in jeopardy of violating the NLRA with a wrong word or a single wrong step.⁶²

Professors Cooper and Nolan contend that while arguing before the Supreme Court, *Manoli* chose to avoid being ensnared by this

55. See 158 NLRB 1077, 1079 (1966). In *Aaron Bros. Co.*, the NLRB amended the *Joy Silk* doctrine by specifying that the NLRB's General Counsel held the burden of proof and persuasion to show an employer's lack of good faith in refusing to recognize and bargain with a union claiming support from a majority of employees. *Id.*

56. See *id.* at 220-21.

57. Cooper & Nolan, *supra* note 48, at 220-21.

58. *Id.*

59. *Id.*

60. Transcript of Oral Argument at 15, 51, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (No. 573).

61. See *Gissel*, *supra* note 9, at 594-95 (stating that the Court would not address the issue).

62. Cooper & Nolan, *supra* note 48, at 221.

thicket with a simple denial that the thicket existed.⁶³ Manoli suggested that commission of unfair labor practices was the *sine qua non* of the doctrine.⁶⁴ Otherwise, no bad faith failure to bargain would be found, no matter the employer's motive.⁶⁵ Asked by one Justice whether this had always been the Board's position, Manoli answered, "No, Your Honor, I think the Board has changed that."⁶⁶ But, Professors Cooper and Nolan conclude, it was Manoli who changed the Board's position.⁶⁷

Professors Cooper and Nolan suggest that Manoli's conduct may have crossed the line of what is appropriate and ethical for a government attorney by asserting as a fact that the agency no longer follows a precedent that it had not formally abandoned.⁶⁸ Whatever can be said of the propriety of Manoli's advocacy, it was poor agency process. Such a unilateral decision means that the NLRB members did not participate in Manoli's decision. As a result, the expertise and experience of the agency's principal members were not brought to bear on the wisdom or utility of the policy change. The labor and management communities also did not have an opportunity to submit their views in advance of the change.

The Board, in its *Linden Lumber* decision, ultimately did issue an opinion abandoning *Joy Silk*—two years after the Supreme Court's opinion in *Gissel*.⁶⁹ Ironically, in rejecting *Joy Silk*, the *Linden Lumber* Board nevertheless acknowledged the accidental and erroneous nature of the original abandonment of the doctrine, noting that "[t]here was some question" as to whether the Supreme Court's description of Board practice in the *Gissel* opinion was "entirely accurate."⁷⁰

This history of *Joy Silk*'s inadvertent abandonment cannot inspire confidence that it was the right decision. To the contrary, in light of the need for additional deterrence in the present operation of the Act, discussed in Part III, *infra*, the abandonment of *Joy Silk* is a mistake that should be corrected.

III. THE CASE FOR RE-ADOPTING THE *JOY SILK* DOCTRINE

A. *Joy Silk Is An Analytically Stronger Doctrine for Deterring the*

63. *Id.*

64. Transcript of Oral Argument at 9, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (No. 573).

65. *Id.*

66. *Id.*

67. Cooper & Nolan, *supra* note 48, at 220–21.

68. See Cooper & Nolan, *supra* note 48, at 220 n.60.

69. *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 719, 720 (1971).

70. *Id.*

Commission of ULPs During Union Organizing Campaigns Than Is Gissel, the Doctrine That Replaced It.

The primary reason for the Board to re-adopt the *Joy Silk* doctrine is because the Board's forty-year experiment in administering the Act without *Joy Silk* demonstrates that the Act lacks the capacity to sufficiently deter the commission of ULPs without it.

First, an analytical review of the *Joy Silk* doctrine demonstrates that it is the single most effective tool for deterring the commission of unfair labor practices during representational elections. The doctrine directly negates an employer's incentive to violate the law. Employers who commit ULPs usually do so to avoid collectively bargaining with a union.⁷¹ Under *Joy Silk*, the Board would order an employer to recognize and bargain with a union upon showing that: (1) the union represented a majority of workers in an appropriate unit, (2) the union requested recognition, (3) the employer denied the request for recognition while lacking a good faith doubt as to the union's majority status, and (4) the employer took action calculated to dissipate the union's majority status.⁷² By making a bargaining order the unavoidable consequence of a ULP, this policy makes ULPs counterproductive even for the most stubbornly anti-union of employers. By directly negating the incentive to commit ULPs, this policy does more to ensure elections that are free of ULPs than any other policy the NLRB could adopt.

In the absence of enforcing Section 8(a)(5) with respect to uncertified, unrecognized unions, the NLRA lacks any alternative remedy to achieve effective deterrence to the commission of ULPs during organizing drives. The Board's only other remedies under the Act consist of cease and desist orders, reinstatement, backpay, or other affirmative relief, which usually takes the form of a notice.⁷³ A cease and desist order, however, obviously lacks any measure of deterrence; it is the very definition of one free bite at the apple. An award of reinstatement and backpay is make-whole relief; any deterrent effect it has is purely incidental. Similarly, the issuance, posting, or reading of a notice has little value as a deterrent; as the saying goes, talk is cheap. Without the *Joy Silk* doctrine, therefore, the NLRA simply lacks any meaningful deterrent to the commission of ULPs. This is a gaping hole in the statutory regime that radically undermines the real ability of

71. See, e.g., Gordon Lafer, Ph.D., American Rights At Work, *Neither Free Nor Fair*, 2 (July 2007), <http://www.jwj.org/wp-content/uploads/2014/04/Neither-Free-Nor-Fair-FINAL.pdf> (describing employer's use of ULPs to defeat union organizing drives).

72. *Joy Silk*, *supra* note 8.

73. See 29 U.S.C. § 160(c).

employees to organize.

So what about the *Gissel* doctrine that replaced *Joy Silk*? Why does this doctrine fail to provide necessary deterrence? The *Gissel* doctrine's greatest weakness is that it is highly indeterminate. As a result, it exerts highly indeterminate deterrence against the commission of ULPs.

Gissel asks whether an employer's ULPs have made the conduct of a fair election unlikely or impossible, even after the application of traditional remedies. Because this inquiry asks a question about future events, courts have struggled with the speculative nature of the doctrine, demanding increasingly strict proof from NLRB's General Counsel before affirming bargaining orders.⁷⁴

For instance, in the first years after *Gissel* was announced, circuit courts demanded "specific findings" and "detailed analysis" with respect to the following four factors before enforcing a *Gissel* bargaining order: 1.) the immediate and residual impact of the unfair labor practices on the election process; 2.) the possibility of holding a fair election in terms of any continuing effect of misconduct; 3.) the likelihood of recurring misconduct; and, 4.) the potential effectiveness of ordinary remedies.⁷⁵ By the late 1990s, those factors had doubled in number, and agency guidance highlighted no fewer than eight factors that must be addressed to support a *Gissel* bargaining order, including hard-to-address categories such as the likelihood of future recurrence of ULPs and the impact of events that occurred *following* the administrative hearing from which the bargaining order first issued.⁷⁶ Several circuit courts require the Board to address two additional considerations as well, such as explaining why traditional remedies are not adequate and showing an explicit causal connection between the ULPs and the inability to hold an election.⁷⁷

Gissel's indeterminacy is inherent to the doctrine. It arises from the fact that the doctrine is not clearly based in any specific text of the Act. Rather, *Gissel* is founded in the NLRB's power under Section

74. See *infra* Notes 78-79.

75. See, e.g., *Peerless of Am., Inc. v. NLRB*, 484 F.2d 1108, 1118 (7th Cir. 1973) ("[T]he Board must make 'specific findings' as to the immediate and residual impact of the unfair labor practices on the election process and that the Board must make 'a detailed analysis' assessing the possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of ordinary remedies."); *New Alaska Dev. Corp. v. NLRB*, 441 F.2d 491, 494-95 (7th Cir. 1971) (holding that the NLRB did not "meet the 'precise analysis' required by *Gissel*"); *NLRB v. Kostel Corp.*, 440 F.2d 347, 353 (7th Cir. 1971).

76. See Gen. Couns. Mem. 99-8, *Guideline Memorandum Concerning Gissel*, 4-5 (Nov. 10, 1999).

77. *Id.* at 5.

10(c) of the Act to issue “affirmative relief” that includes a bargaining order under certain difficult-to-specify conditions.⁷⁸ The inquiry at the heart of the *Gissel* doctrine is whether the employer has committed ULPs that make the conduct of a fair election unlikely. Other than by defining ULPs in general, the statutory text provides no clues for how this inquiry should be answered.⁷⁹ *Gissel* doctrine distinguishes between Category I cases, which involve outrageous and pervasive ULPs, and Category II cases, which involve less serious ULPs.⁸⁰ This distinction is found nowhere in the Act, and no *objective* basis exists to distinguish between Category I and Category II cases.

Gissel doctrine utilizes a further classification of “hallmark” ULPs.⁸¹ Again, no statutory basis for this category exists, and confusion persists regarding what qualifies as a “hallmark” violation. For instance, some courts have an ongoing disagreement with the NLRB over whether a promise of benefits is a “hallmark” infraction.⁸² The Memorandum on *Gissel* orders published by the General Counsel of the NLRB also notes that circuit courts have questioned the viability of *Gissel* orders when the case only involves violations of Section 8(a)(1).⁸³ Members of the NLRB have admitted that “there can be few ‘per se’ rules” for determining when a bargaining order under *Gissel* is warranted, and that the decision has been perplexing and confounding for the NLRB almost since the inception of *Gissel*.⁸⁴ This confusion is also attributable to the *Gissel* doctrine’s lack of an express foundation in the text of the Act. As a result of this lack of clear connection to the statutory text, it should come as no surprise that *Gissel* is both indeterminate and faces resistance by circuit courts.

78. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969); *General Stencils, Inc.*, 195 N.L.R.B. 1109, 1112 (1972) (Chairman Miller, dissenting) *enforcement denied* 472 F.2d 170 (2d Cir. 1972) (Board members have admitted that there can be “few per se rules” for determining when a bargaining order under *Gissel*, noting that presence of “infinitely various circumstances” that should influence the analysis).

79. The provision of the NLRA defining employer ULPs is 29 U.S.C. § 158(a)(1)-(5). The provision establishing the election process is 29 U.S.C. § 159(c)(1)(B), which says only that the election shall be by “secret ballot” but otherwise contains no standards for whether an election is fair or not.

80. See *Guideline Memorandum Concerning Gissel*, *supra* note 76, at 4–5.

81. As explained by the Board, “hallmark” violations are “highly coercive violations that include plant closure or threat of plant closure, conferral of benefits, discharge, or threat of discharge, and the use of force in an attempt to discourage union activity.” *Cogburn Healthcare Ctr., Inc.*, 335 NLRB 1397, 1403 n.14 (2001). In *Cogburn Healthcare*, the Board appeared to credit the Second Circuit Court of Appeals with defining the term “hallmark violation” in *NLRB v. Jamaica Towing*, 632 F.2d 208, 216 (2d Cir. 1980). See *id.*

82. See *id.* at 5.

83. For a definition of a § 8(a)(1) violation, see *Guideline Memorandum Concerning Gissel*, *supra* note 76.

84. *General Stencils, Inc.*, 195 N.L.R.B. at 1111.

For those who would assert that the flaws of *Gissel* somehow are not inherent to the doctrine itself, they must contend with the fact that circuit courts identified all the difficulties in the *Gissel* proof model in the first years of the doctrine's existence. Within two years of *Gissel*'s introduction, circuit courts from the Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeals issued decisions criticizing the NLRB's failure to take seriously the difficult evidentiary showing necessitated by the *Gissel* proof model.⁸⁵ These cases highlighted all of the problems that have dogged the *Gissel* doctrine throughout its existence.⁸⁶ Circuit courts identified these fundamental objections to *Gissel* almost immediately after the doctrine was created.⁸⁷ Yet as the doctrine became more familiar to circuit courts, it did not become more accepted. Over twenty years later, in 1999, the General Counsel of the NLRB admitted that rather than becoming more accepting of *Gissel* with time, circuit courts had only become more stubborn in their reluctance to enforce bargaining orders under *Gissel*.⁸⁸

85. *Clark's Gamble Corp. v. NLRB*, 422 F.2d 845, 847 (6th Cir. 1970); *NLRB v. Gen. Stencils, Inc.*, 438 F.2d 894, 905 (2d Cir. 1971) (Friendly, J.) (enforcement of bargaining order denied); *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446, 449 (5th Cir. 1970) (same); *Fremont Newspapers, Inc. v. NLRB*, 436 F.2d 665, 673 (8th Cir. 1970) (enforcement of bargaining order denied); *New Alaska Dev. Corp. v. NLRB*, 441 F.2d 491, 494-95 (7th Cir. 1971) (holding that the NLRB did not "meet the 'precise analysis' required by *Gissel*"); *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 421 (8th Cir. 1971) (enforcement of bargaining order denied); *Gen. Steel Products, Inc. v. NLRB*, 445 F.2d 1350, 1356-57 (4th Cir. 1971) (enforcement of bargaining order denied); *NLRB v. Miller Trucking Serv., Inc.*, 445 F.2d 927, 932 (10th Cir. 1971) (enforcement of bargaining order denied); *NLRB v. Sayers Printing Co.*, 453 F.2d 810, 818 (8th Cir. 1971) (enforcement of bargaining order denied); *NLRB v. World Carpets of N.Y., Inc.*, 463 F.2d 57, 62 (2d Cir. 1972).

86. For instance, a major point of contention in these cases was the Board's inability to prove convincingly that a fair election is impossible, which is the basic speculative proof problem at the heart of the *Gissel* doctrine. See *World Carpets of N.Y.*, 463 F.2d at 62; *New Alaska Dev. Corp.*, 441 F.2d at 494-95; *Hart Beverage Co.*, 445 F.2d at 421; *Miller Trucking Serv.*, 445 F.2d at 932. A second problem was the Board's inability to distinguish objectively the types of ULPs that make a bargaining order necessary from those that do not. See *Gen. Stencils, Inc.*, 438 F.2d at 905; *Sayers Printing Co.*, 453 F.2d at 818. Perhaps the most intransigent problem arose from the circuit court's discomfort with enforcing a bargaining order based upon a factual determination made several years in the past that a fair election was not possible, without any analysis of whether an election would be impossible in the present. See *Clark's Gamble Corp.*, 422 F.2d at 847; *Am. Cable Sys., Inc.*, 427 F.2d at 449; *Gen. Steel Products, Inc.*, 445 F.2d at 1356.

87. Indeed, the Fourth Circuit's opinion in *General Steel Products, Inc.*, arose from a case that was before the Supreme Court with the *Gissel* case. On remand from the Supreme Court, the NLRB re-issued a bargaining order under the new *Gissel* doctrine only to have the Fourth Circuit refuse enforcement based largely the Board's failure to consider changes in circumstances that occurred over the many years while the case was under judicial review. See *Gen. Steel Products, Inc.*, 445 F.2d at 1356.

88. See *Guideline Memorandum Concerning Gissel*, *supra* note 76, at 1 (noting that "[o]ver the years, some of the circuit courts of appeal considering whether to enforce Board *Gissel* orders have differed with the Board's approach"). Specific examples of the

Another significant problem with *Gissel* is that the Second, Third, Fourth, Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits regard a *Gissel* bargaining order as an “extraordinary remedy.”⁸⁹ An extraordinary remedy, by definition, is one that is rarely entered; for that reason, *Gissel* cannot be expected to offer significant deterrence. To the contrary, because the *Gissel* doctrine is granted only in extraordinary cases, *Gissel* actually provides *incentives* to employers to commit ULPs during Board-supervised elections, because it sends the message that, except in extraordinary circumstances, the employer’s illegal conduct will accomplish its intended aim.

differences include the fact that the NLRB typically refuses employer requests to reopen the record to offer evidence of changes in circumstances following the violations that precipitated the *Gissel* bargaining order, despite the fact that “[t]he courts are almost unanimous in requiring that the Board consider the relevance of changed circumstances.” *Id.* at 13 n.48 (citing *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1170–72 (1998)). Another point of contention identified was the fact that “several of the courts of appeals have not accepted the Board’s view of these [8(a)(1)] violations as “hallmark” and declined to enforce the Board’s decisions.” *Id.* at 14.

89. *NLRB v. Goya Foods*, 525 F.3d 1117, 1129 (11th Cir. 2008); *NLRB v. U.S.A. Polymer Corp.*, 272 F.3d 289, 297 (5th Cir. 2001); *Exch. Bank v. NLRB*, 732 F.2d 60, 63 (6th Cir. 1984); *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838, 841 n.5 (4th Cir. 1982); *NLRB v. Century Moving & Storage, Inc.*, 683 F.2d 1087, 1093 (7th Cir. 1982); *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 470 (3d Cir. 1981); *Grandee Beer Distribs., Inc. v. NLRB*, 630 F.2d 928, 934 (2d Cir. 1980); *NLRB v. Ship Shape Maint. Co.*, 474 F.2d 434, 442–43 (1972).

B. Empirical Evidence Shows that Without the Joy Silk Doctrine, the NLRA Lacks Sufficient Deterrence Against the Commission of ULPs during Representation Elections.

The foregoing section made the analytical case that *Joy Silk* more effectively deterred the commission of ULPs during representation elections than *Gissel*. This section will show that the empirical record also resoundingly supports that conclusion. Figure 2, *infra*, broadly illustrates the consequences of the NLRB's abandonment of the *Joy Silk* doctrine.

Figure 2⁹⁰

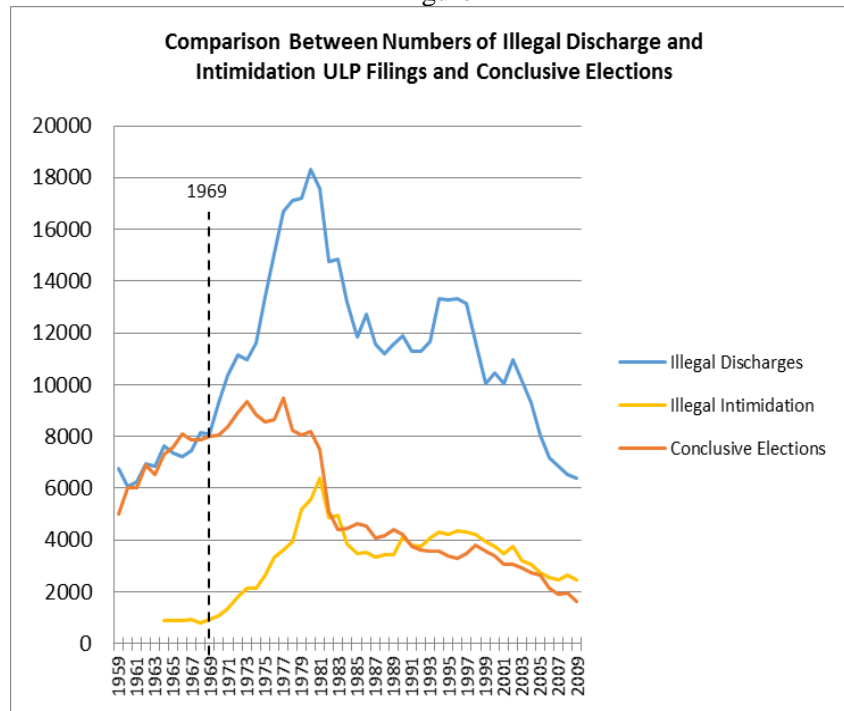


Figure 2 illustrates the increase in the number of illegal discharge and intimidation ULP charges filed following the abandonment of the *Joy Silk* doctrine.

90. Data for Illegal Intimidation ULPs, Illegal Discharge ULPs taken from Table 2 of the NLRB's Annual Reports from 1959 to 2009. See 24 NLRB ANN. REP. 163 (1959) through 74 NLRB Ann. Rep. 95 (2009). Data on conclusive representational and collective bargaining elections from Chart 11 and Table 13 of the Annual Report of the NLRB volume 26 (1961); from Chart 12 and Table 13 from volumes 27 through 29 (1962-1964); from the unnumbered Chart on page 15 and Table 11A from volumes 35 and 36 (1970-1971); and Table 11A and Chart 12 of the Annual Reports of the NLRB volumes 30 through 34 (1965-1969) and 37 through 74 (1972-2009). See 29 NLRB ANN. REP. 20 (1964) to 74 NLRB Ann. Rep. 13 (2009).

Figure 2 displays the incidence of three types of filings with the NLRB from 1959 to 2009. The blue line shows the number of ULP charges alleging violations of Section 8(a)(3) of the Act, which are referred to generally herein as “Illegal Discharges.”⁹¹ The purple line shows the number of ULP charges alleging violations of Section 8(a)(1), which are referred to generally here as “Illegal Intimidation” charges.⁹² The red line shows the number of conclusive elections conducted each year by the Board.⁹³

As Figure 2 shows, the broad consequences of the NLRB's abandonment of *Joy Silk* are that Illegal Discharge ULPs increased by 125% from 8,122 to 18,313, and Illegal Intimidation charges increased by over 525%, rising from 947 in 1969 to 6,493 in 1981. By contrast, after rising steadily through the 1960s, the number of conclusive elections flattened to virtually no growth following the abandonment of *Joy Silk*. In the 1980s, the number of elections fell precipitously during the opening years of the decade and have trended steadily downward since. In sum, Figure 2 lays an empirical foundation for arguing that, in abandoning the *Joy Silk* doctrine, the NLRB relinquished its capacity to effectively deter the commission of ULPs during union organizing campaigns.

One might ask whether employers did not actually increase their

91. Violations under Section 8(a)(3) mostly consist of allegations of the illegal discharge of union supporters and are referred to throughout as “Illegal Discharges.” These charges are uncommon between incumbent unions and unionized employers because disputes between these parties over a discharged employee will mostly likely be addressed through the collective bargaining agreement's grievance mechanisms. Consequently, illegal discharge allegations are likely to arise between unions and unorganized companies and thus will be heavily centered on organizing campaigns.

92. The label “Illegal Intimidation” used throughout this article refers to pure 8(a)(1) ULP charges. Such charges are pure in the sense that they are not dependent on any other section of the Act to describe the violation; they allege violations § 8(a)(1) but do not allege a violation of any other section of the Act. Such 8(a)(1)s usually consist of threats, employer surveillance of employee activity, or interrogations. This category may also include allegations of discrimination that are not violations of Section 8(a)(3) because the employer is retaliating against the exercise of Section 7 rights but without a motive related to an employee's association with a union.

93. The NLRB recorded percentages of union victories in a Chart 12 in its Annual Reports since the 1960s. In the 1975, however, the Board altered the way it presented this statistic. See 40 NLRB ANN. REP. 15 (1975). Prior to 1975, the Board measured union victories as a percentage of “collective bargaining elections” in which unions were selected as the exclusive representative. See, e.g. 39 NLRB ANN. REP. 15 (1974). In 1975, the Board changed the statistic to measure the percentage of “representation elections” in which unions were selected. See 40 NLRB ANN. REP. 15. “Collective bargaining elections” consist of elections held pursuant to RC and RM petitions. See 22 NLRB ANN. REP. 172 (1957) “Representation elections” consist of RC, RM, and RD petitions, that is, petitions filed by unions, by an employer, and for decertification, respectively. See 40 NLRB ANN. REP. at 197.

commission of ULPs at all, but rather that unions merely increased their incidence of filing ULPs. However, this explanation is fatally flawed. To begin, both *Joy Silk* and *Gissel* provide relatively equal incentives to unions to file ULPs against employers during organizing drives. Unions increase their chances of obtaining relief under either *Gissel* or *Joy Silk* by filing charges against employers.⁹⁴ The change in rules, therefore, would not explain why unions began filing ULPs more frequently after 1969.

Even more fatal to the theory is that the NLRB's recorded merit factor for ULPs did not appreciably change from 1970 to 1980, when the incidence of ULPs exploded upward.⁹⁵ The merit factor was 34.2 in 1970, 35.7 in 1980, 40.7 in 1990, and 39.9 in 2000.⁹⁶ The consistency in the merit factor tells us that, while the frequency of filing ULP charges increased over this period, that increase was proportionate to the increase in the *commission* of ULPs; that is to say, unions filed ULPs at the same rate relative to the commission of ULPs after the adoption of the *Gissel* rule as they before it. The relative rate at which unions filed ULPs did not change, and as a result we can be confident that the increase in the commission of employer ULPs was real.

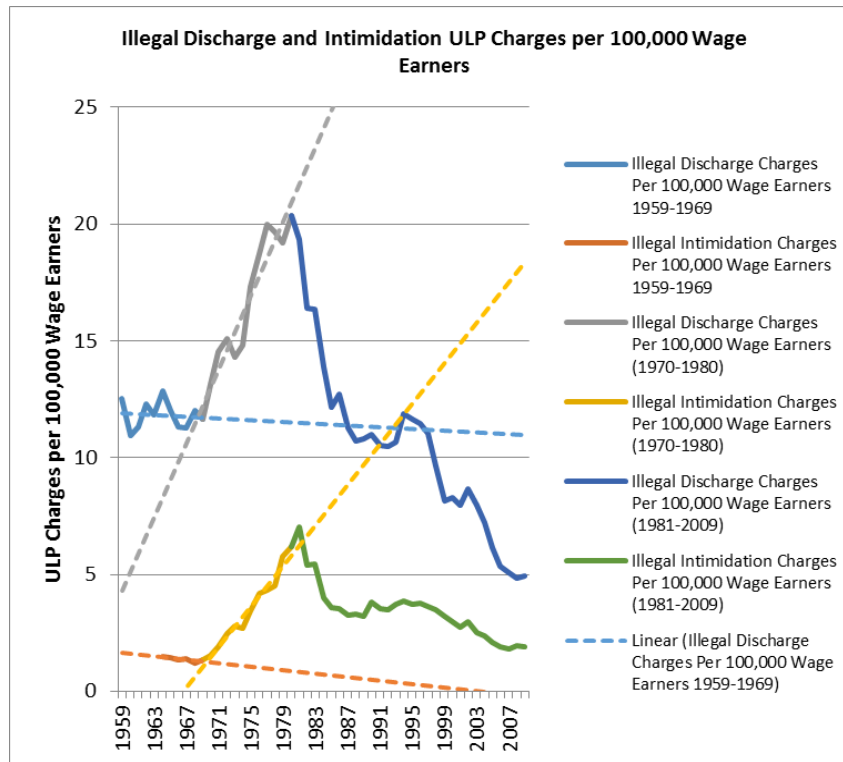
It also might be questioned whether the increases can be explained by increases in the size of the workforce. However, as Figure 3, *infra*, demonstrates, from 1959 to 1969 the rate of increase in the filing of Illegal Discharge and Intimidation ULPs was slower than the rate of growth of the work force. For this reason, the incidence of ULP filings per 100,000 wage earners actually decreases through the time period, and the trend line projected from the data during this time period is downward sloping. By contrast, from 1970 to 1980, the rate of increase in the filing of Illegal Intimidation and Discharge ULP charges proceeds considerably faster than the rate of growth of the work force, resulting in a dramatic upward slope in the data and projected trend lines derived from that data. As shown in Figure 3, the rate of Illegal Intimidation charges increased from 1.4 per 100,000 wage earners in 1969, to seven per 100,000 in 1981. Similarly, the rate of Illegal

94. See *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1264 (1949) (citing the employer's unlawful conduct as a factor showing an employer's bad faith); *Aaron Bros. Co.*, 158 N.L.R.B. 1077, 1079 (1966) (citing substantial ULPs as signifying an employer's bad faith); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969) (citing the "extensiveness of an employer's unfair practices" as a relevant factor for issuing a bargaining order).

95. The NLRB's merit factor is the percentage of cases in which the NLRB finds merit to the ULPs charge either by issuing complaints or by working out settlements prior to issuing complaints. See 45 NLRB ANN. REP. 10 (1980).

96. See 45 NLRB ANN. REP. 10 (1980); 55 NLRB ANN. REP. 10 (1990); 65 NLRB ANN. REP. 9 (2000).

Discharge ULPs increased from 11.7 per 100,000 wage earners in 1969, to 20.1 in 1980. The data demonstrates that the rate of increase in these ULPs that occurred following the abandonment of *Joy Silk* was independent of, and much faster than, concurrent increases in the size of the workforce.

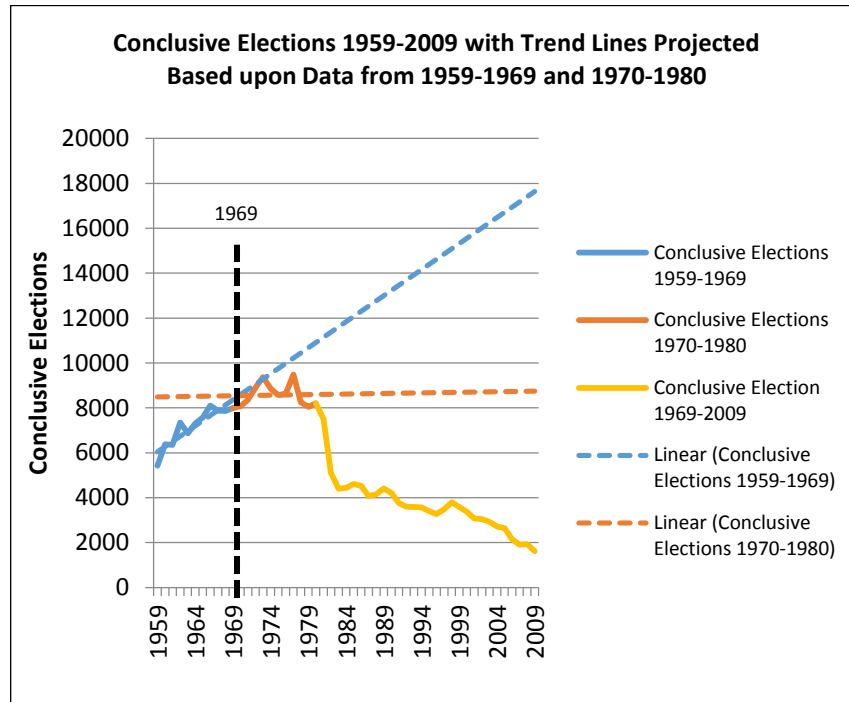
FIGURE 3⁹⁷

Another question pertains to what happened within the data following the peaks of 1980 and 1981 when the incidence of ULPs began to fall. Did something happen to allow the Board to re-assert control over the commission of ULPs in the 1980s?

The answer, unfortunately, is no. Instead, as shown in Figure 4

97. Data for Illegal Intimidation ULPs, Illegal Discharge ULPs taken from Table 2 of the NLRB's Annual Reports from 1959 to 2009. See 24 NLRB ANN. REP. 163 (1959) through 74 NLRB ANN. REP. 95 (2009). Data on conclusive representational and collective bargaining elections from Chart 11 and Table 13 of the Annual Report of the NLRB volume 26 (1961); from Chart 12 and Table 13 from volumes 27 through 29 (1962-1964); from the unnumbered Chart on page 15 and Table 11A from volumes 35 and 36 (1970-1971); and Table 11A and Chart 12 of the Annual Reports of the NLRB volumes 30 through 34 (1965-1969) and 37 through 74 (1972-2009). See 29 NLRB Ann. Rep. 20 (1964) to 74 NLRB ANN. REP. 13 (2009). Worker population data from the Bureau of Labor Statistics, Department of Labor, on Nonfarm Wage Earners.

below, the primary driver of ULPs—NLRB elections—began rapidly falling after 1981. Figure 4 shows the data for the number of conclusive collective bargaining and representation elections conducted by the NLRB from 1959 to 2009. Using a linear regression based upon the data from the *Joy Silk* era, Figure 4 displays the trend line projected into the years following the Board's abandonment of *Joy Silk* in 1969.

FIGURE 4⁹⁸

As can be seen, the number of elections rose steadily through the 1960s. In the 1970s, as ULPs dramatically increased, the trend flattened to virtually no growth. In the 1980s, the number of elections fell precipitously during the opening years of the decade and have

98. Data for Illegal Intimidation ULPs, Illegal Discharge ULPs taken from Table 2 of the NLRB's Annual Reports from 1959 to 2009. See 24 NLRB ANN. REP. 163 (1959) through 74 NLRB ANN. REP. 95 (2009). Data on conclusive representational and collective bargaining elections from Chart 11 and Table 13 of the Annual Report of the NLRB volume 26 (1961); from Chart 12 and Table 13 from volumes 27 through 29 (1962-1964); from the unnumbered Chart on page 15 and Table 11A from volumes 35 and 36 (1970-1971); and Table 11A and Chart 12 of the Annual Reports of the NLRB volumes 30 through 34 (1965-1969) and 37 through 74 (1972-2009). See 29 NLRB ANN. REP. 20 (1964) to 74 NLRB ANN. REP. 13 (2009).

trended steadily downward since. As with ULPs, this Figure 4 shows that something occurred after 1969 to alter the trajectory of the trend with respect to representation elections that caused the number of elections to stop growing and then decrease steadily. Furthermore, the drop off in the number of elections matches precisely with the drop off in the number of ULPs. This tandem movement is clearly visible in Figure 1, *supra*. In addition, as is discussed *infra*, the tandem movement can be demonstrated statistically.

The other way we know that the NLRB did not re-acquire control over the commission of ULPs in the early 1980s is that the rate of ULPs per election did not decrease at all in the 1980s. Rather, even though the absolute number of ULPs decreased during this time, the number of ULPs per election continued to increase. This trend can be seen, in Figure 5, *infra*.

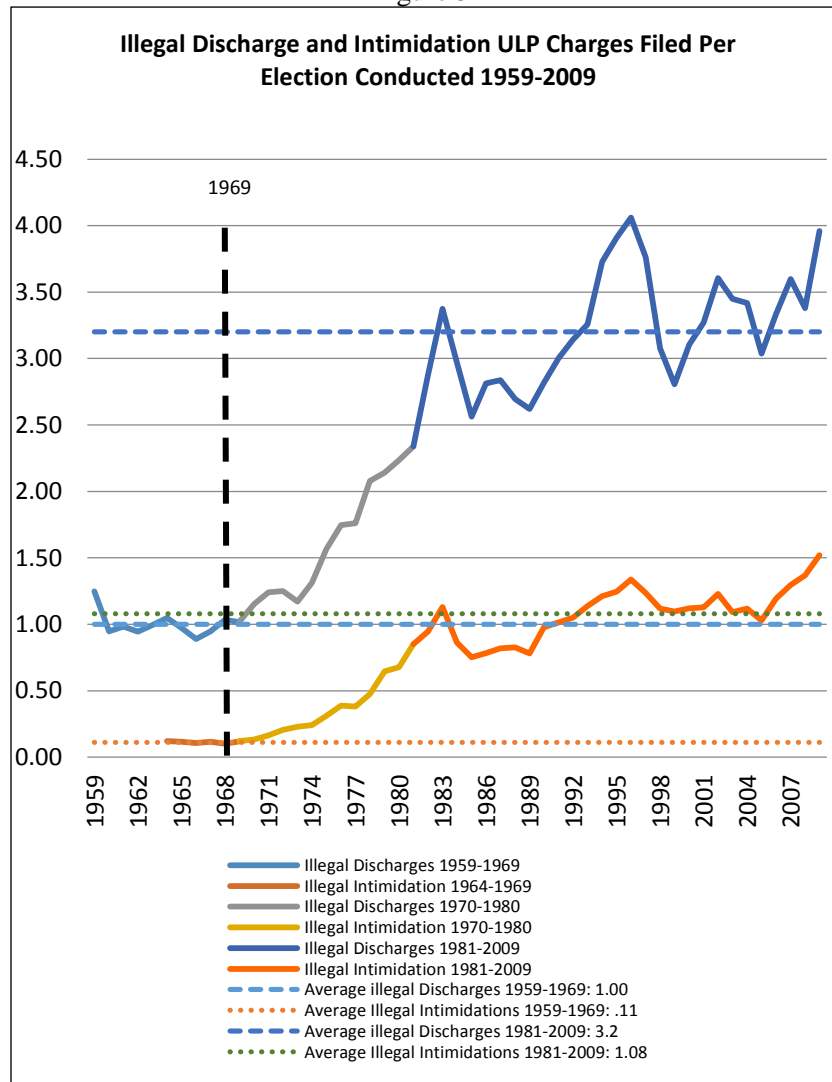
Figure 5⁹⁹

Figure 5 shows that the number of Illegal Intimidation and

99. Data for Illegal Intimidation ULPs, Illegal Discharge ULPs taken from Table 2 of the NLRB's Annual Reports from 1959 to 2009. See 24 NLRB ANN. REP. 163 (1959) through 74 NLRB ANN. REP. 95 (2009). Data on conclusive representational and collective bargaining elections from Chart 11 and Table 13 of the Annual Report of the NLRB volume 26 (1961); from Chart 12 and Table 13 from volumes 27 through 29 (1962-1964); from the unnumbered Chart on page 15 and Table 11A from volumes 35 and 36 (1970-1971); and Table 11A and Chart 12 of the Annual Reports of the NLRB volumes 30 through 34 (1965-1969) and 37 through 74 (1972-2009). See 29 NLRB ANN. REP. 20 (1964) to 74 NLRB ANN. REP. 13 (2009).

Discharge ULPs filed per conclusive election did not consistently decrease in the 1980s. Instead, after peaking in the early 1980s, both rates settled into a new equilibrium at a much higher level than existed prior to 1969. After *Joy Silk* was abandoned, the average number of Illegal Intimidation charges per election increased by a factor of nearly ten, from 0.11 in the period from 1964 to 1969, to 1.08 in the period following 1980. The average number of Illegal Discharge ULPs increased by a factor of three, from 1.00 per election in the period from 1959 to 1969, to 3.2 per election during the period from 1981 to 2009.

The relationship between the number of elections and the incidence of Illegal Discharge and Intimidation ULPs is consistent throughout the period from 1959 to 2009. As seen in Figure 1, *supra*, ULPs and elections moved in tandem prior to 1969 and from 1979 onward. The only period during which the trends in the numbers of elections and ULPs diverge is the ten-year period immediately following the abandonment of *Joy Silk*, when ULPs increased explosively upward while elections stagnated.¹⁰⁰

The relationship between elections and ULPs can be shown statistically by calculating the correlation coefficient between the incidence of ULPs and the incidence of elections. A coefficient of 1 is a perfect correlation, while -1 is a perfectly inverted correlation. A coefficient of 0 means no correlation, while 0.5 or below is considered a weak correlation.

As Table 1 shows, ULPs are closely correlated to the number of elections, and the degree of correlation is very strong. The correlation coefficient between Illegal Discharge ULPs and elections is 0.90 from 1979 to 2009, and 0.89 from 1955 to 1969. From 1970 to 1979, the correlation is inconsistent with the relationship during other time periods because Illegal Discharges rose dramatically while the number of elections stagnated. This turmoil in the data produced a slightly negative correlation, as opposed to the strongly positive correlation that exists during the other periods observed.

100. See, *supra*, Figure 1.

TABLE 1¹⁰¹
TABLE OF CORRELATION COEFFICIENTS

Correlation between Illegal Discharges and Conclusive Elections	
Period	Correlation Coefficient
1955-1969	0.89
1970-1979	-0.04
1979-2009	0.90
Correlation between Illegal Intimidation and Conclusive Elections	
Period	Correlation Coefficient
1964-1969	0.15
1970-1979	-0.12
1979-2009	0.84

The same pattern is exhibited with Illegal Intimidation charges. The correlation coefficient between Illegal Intimidation charges and elections is 0.84 during the period 1979 to 2009. There is almost no correlation between Illegal Intimidation charges and elections from 1964 to 1969. This discrepancy may be due to the very small sample size—only six years—or it is possible that no correlation existed between these sets of events prior to the abandonment of *Joy Silk*. As with Illegal Discharges, the correlation turns slightly negative during the 1970s. Ten years after the adoption of *Gissel*, however, the correlation between the two types of events is strong, with a correlation coefficient of 0.84. It is also worth noting that the incidence of Illegal Discharges and Illegal Intimidation are closely correlated. From 1979 to 2009, the correlation coefficient between them is 0.94.

The correlations presented in Table 1 support two insights. First, the ULPs themselves are connected to elections. This connection is critical because *Joy Silk* and *Gissel* both are rules that govern in the context of union organizing.¹⁰² If the ULPs themselves were not

101. Data for Illegal Intimidation ULPs, Illegal Discharge ULPs taken from Table 2 of the NLRB's Annual Reports from 1959 to 2009. See 24 NLRB ANN. REP. 163 (1959) through 74 NLRB ANN. REP. 95 (2009). Data on conclusive representational and collective bargaining elections from Chart 11 and Table 13 of the Annual Report of the NLRB volume 26 (1961); from Chart 12 and Table 13 from volumes 27 through 29 (1962-1964); from the unnumbered Chart on page 15 and Table 11A from volumes 35 and 36 (1970-1971); and Table 11A and Chart 12 of the Annual Reports of the NLRB volumes 30 through 34 (1965-1969) and 37 through 74 (1972-2009). See 29 NLRB ANN. REP. 20 (1964) to 74 NLRB ANN. REP. 13 (2009).

102. See *Gissel Packing Co.*, 395 U.S. at 580-90 (describing the factual setting of the four consolidated cases arising from union organizing campaigns); *Joy Silk Mills, Inc.*, 85 N.L.R.B. at 1264 (case arose from a union organizing campaign).

clearly connected to organizing, then the abandonment of *Joy Silk* and its proposed re-adoption would be unlikely to affect them. These ULPs, however, are obviously tied to elections and union organizing.

Second, the most plausible account of the correlation is that the elections *are causing* the ULPs. Causation cannot run the other way. Consider how elections happen. An NLRB election requires a question concerning representation,¹⁰³ which in turn requires the presence of a party, almost always a labor organization, wishing to serve as an exclusive representative. While unorganized employees have the right to file ULP charges against their employer without a union's involvement,¹⁰⁴ the act of filing charges will not cause the formation of a labor organization, and therefore does not induce elections for representation. Could a third factor exist that simultaneously causes both union organizing drives and separately causes ULPs in a way where the two are not related? The existence of such a factor is highly doubtful—there is no evidence to date suggesting such a factor. The evidence supports the explanation that union organizing drives induce NLRB representative elections and concurrently incite Illegal Discharge and Intimidation ULPs.

Beyond the statistical evidence presented here, the link between Illegal Discharge and Intimidation ULPs is further supported by a host of survey studies and other empirical inquiries that have been conducted since the 1980s. Many surveys conducted since the explosion of ULPs in the 1970s confirm that, in fact, the NLRB election process for the past thirty years has been suffused with the commission of ULPs.

A 2009 comprehensive report on the commission of ULPs during representation elections found that from January 1, 1999, through December 31, 2003:

[E]mployers threatened to close the plant in 57% of elections, discharged workers in 34%, and threatened to cut wages and benefits in 47% of elections. Workers were forced to attend anti-union one-on-one sessions with a supervisor at least weekly in two-thirds of elections. In 63% of elections employers used supervisor one-on-one meetings to interrogate workers about who they or other workers supported, and in 54% used such sessions to threaten workers.¹⁰⁵

103. See 29 U.S.C. § 159(c).

104. See 29 C.F.R. § 101.2 (providing that any person may file a ULP charge).

105. Kate Bronfenbrenner, Economic Policy Institute, *No Holds Barred: The Intensification of Employer Opposition to Organization*, Economic Policy Institute briefing paper #235, 2 (May 20, 2009), http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf.

In sum, this report concludes that coercive conduct occurs in the majority of Board-supervised elections.

Similar results are reported by Dr. Gordon Lafer, who, reviewing data from 2004, concluded “that one out of every 17 eligible voters was fired or otherwise financially penalized for supporting unions.”¹⁰⁶ Dr. Lafer’s conclusion matches the findings of Harvard Law Professor Paul Weiler in the 1980s, who reported that “for every twenty recorded votes for unions in elections in 1980, and for every ten votes in 1985, there was one case of an illegally discharged worker obtaining reinstatement through the office of the NLRB.”¹⁰⁷ In sum, the evidence shows a consistent track record where very high levels of employer coercion permeate the Board election process.

This record provides a strong rationale for re-adopting *Joy Silk* as a rational step to address the clearly insufficient deterrence in the extant statutory regime. The history of the Act prior to the abandonment of *Joy Silk* demonstrates that it is possible for the Board to conduct large numbers of elections with significantly lower numbers of ULPs.¹⁰⁸ Indeed, in light of its experience prior to 1969, the Board should set a target of reducing ULP filings to no more than one Illegal Discharge per election and no more than one Illegal Intimidation per every ten elections. To reduce ULPs sufficiently to meet these targets, however, the Board must administer and interpret the Act in a way that exerts greater deterrence. Re-adopting *Joy Silk* would be a logical means to achieve these goals.

Re-adopting *Joy Silk* is the best means to increase deterrence for several reasons. First, the rate of commission of ULPs was lower under the Act while *Joy Silk* was in place. It therefore is logical to conclude that the *Joy Silk* doctrine could be important to achieve these levels again. Second, in *Linden Lumber*, the Board justified the abandonment of *Joy Silk* as a matter of discretionary policy to reflect the Board’s preference for having representational questions resolved through elections.¹⁰⁹ To advance that preference, the *Linden Lumber* Board chose to stop enforcing Section 8(a)(5) in cases where the representative had been designated but not certified or voluntarily recognized.¹¹⁰ Given the higher ULP commission rates and therefore

106. Gordon Lafer, Ph.D., American Rights At Work, *Neither Free Nor Fair*, 32 (July 2007), <http://www.jwj.org/wp-content/uploads/2014/04/Neither-Free-Nor-Fair-FINAL.pdf>.

107. Paul C. Weiler, GOVERNING THE WORKPLACE: THE FURTHER OF LABOR AND EMPLOYMENT LAW 112 (1990).

108. See Figure 1 and Figure 5, *supra*.

109. *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 718, 721 (1971).

110. See *id.*

insufficient deterrence now,¹¹¹ this policy choice is no longer justified. Simply stated, the need for additional deterrence militates in favor of Board enforcement of Section 8(a)(5) in all circumstances when it is violated—even when it is violated with respect to representatives who are designated by a majority of employees, but not certified by the Board or voluntarily recognized by an employer. History has rendered its verdict that the decision to simply not enforce the Act in these circumstances is a luxury the Board cannot afford. The Board should therefore return to enforcing Section 8(a)(5) when employers violate the subsection with respect to designated but uncertified and unrecognized representatives; that is, it should re-adopt the doctrine of *Joy Silk*.

C. Strong Evidence Supports the Conclusion that the Abandonment of Joy Silk Caused the Massive Increase in ULPs Following 1969.

The prior argument is not necessarily predicated upon the conclusion that the abandonment of *Joy Silk* caused the increase in ULPs that occurred after 1969. Rather, it rests simply upon the observation that the significant increase in commission of ULPs following 1969 points to a lack of sufficient deterrence in the Act. In light of the need for additional deterrence, it would be a rational and logical step for the Board to enforce Section 8(a)(5) when employers violate it with respect to designated, but uncertified and unrecognized, representatives, and instead to re-adopt *Joy Silk* as a means of attempting to exert more deterrence against the commission of ULPs.

An even more powerful rationale for re-adopting *Joy Silk* is possible, however. Powerful evidence exists to support the conclusion that the abandonment of *Joy Silk* caused the increase in the commission of ULPs that followed. The proof of this conclusion will be made as follows. First, the trends the filing of ULPs before and after the abandonment of *Joy Silk* are compared in order to demonstrate that the trends changed definitively after 1969. Second, the timing of increases in the ULPs is examined. Third, alternative explanations for the increase will be considered.

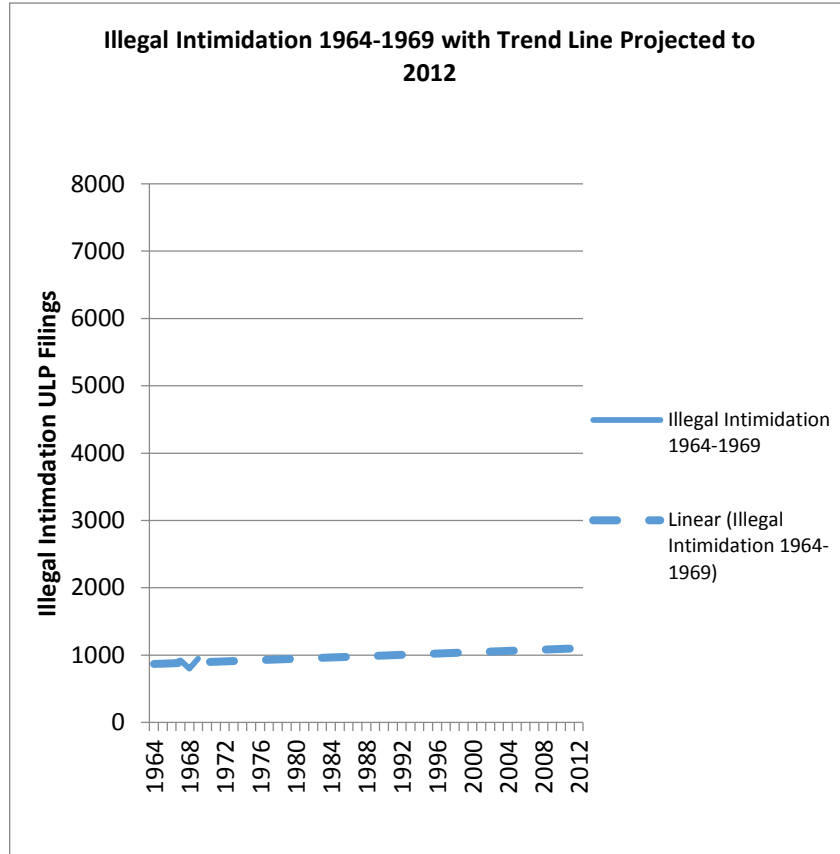
Proof that *Joy Silk* caused the increase in the commission of ULPs begins by comparing trend lines both before and after the abandonment of *Joy Silk*. Figure 5, *infra*, displays the total number of charges alleging Illegal Intimidation from 1964 to 1969. Unfortunately, no data for Illegal Intimidation charges is available in the years preceding 1964.¹¹² Using a linear regression based upon the data from the *Joy*

111. See Figure 1 and Figure 5, *supra*.

112. Statistics for the filing of pure 8(a)(1) charges are not available from 1951 to 1964,

Silk era, Figure 6, *infra*, displays the trend line projected into the years following the Board's abandonment of *Joy Silk* in 1969.

FIGURE 6¹¹³



As can be seen, the trend line based upon the data from 1964 to 1969 predicts that, in the ten years following 1969, Illegal Intimidation charges will not exceed 1000. Moreover, if the trend continued

the first year that the NLRB began tracking this category of ULP. The NLRB did record pure 8(a)(1) charges in 1949 and 1950, however, when 350 and 352 charges were filed. See 14 N.L.R.B. 159 (1949); 15 N.L.R.B. 222 (1950). The inclusion of these data points barely alters the plot of the projected trend line extracted from the *Joy Silk* era and does not materially alter the conclusions offered here that the commission of Illegal Intimidation charges increased in an unprecedented and dramatic manner following the abandonment of *Joy Silk*.

113. Data for Illegal Intimidation ULPs taken from Table 2 of the NLRB's Annual Reports from 1959 to 2009. See 24 NLRB ANN. REP. 163 (1959) through 74 NLRB ANN. REP. 95 (2009). The line labeled "Linear" is a projection of a trend line derived from the data from 1959 to 1969 only.

without deviation through 2009, the Illegal Intimidation charges would not have exceeded 1,500 during the entire period.

In reality, however, the trends from 1964 to 1969 did not continue following the Board's abandonment of *Joy Silk*. As Figure 7, *infra*, shows, Illegal Intimidation ULP charges increased dramatically following 1969.

Figure 7¹¹⁴

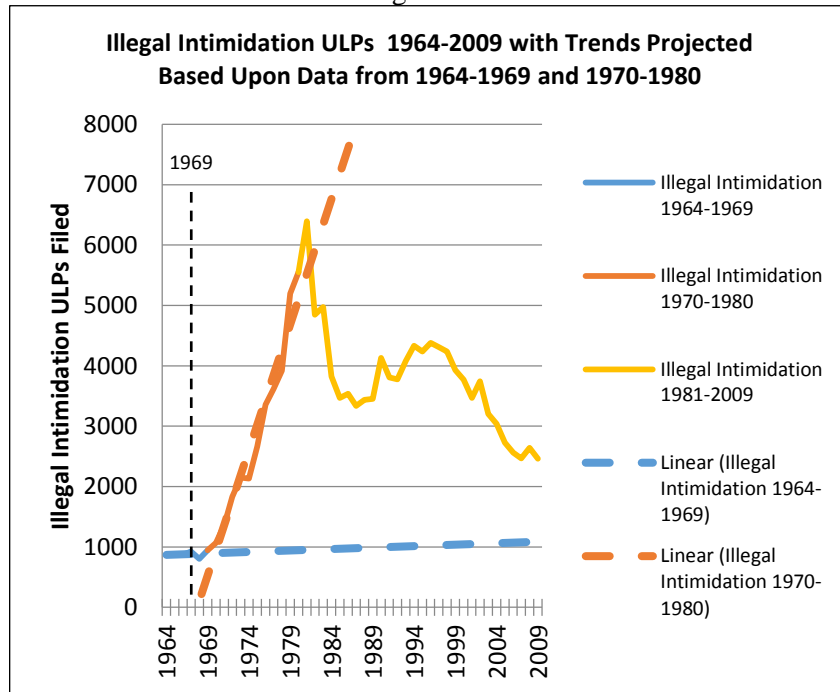


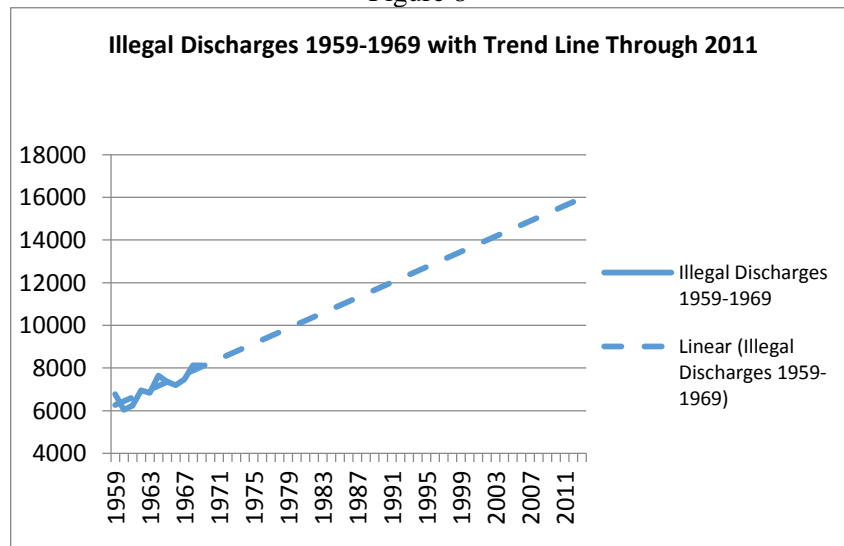
Figure 7 shows the record of actual Illegal Intimidation ULP charges filed from 1964 to 2009. It also shows the trend line from the data from 1964 to 1969 previously shown in Figure 6 above, along with the trend line derived from the data from 1970 to 1980. Following the Board's abandonment of *Joy Silk*, Illegal Intimidation charges rose with unprecedented speed. Rather than requiring thirty years to reach 1,500 charges, as predicted by the trend line based upon the data from the *Joy Silk* era, Illegal Intimidation charges exceeded 1,500 just two years after 1969. By 1981, these ULP charges would peak at 6,493 in

114. Data for Illegal Intimidation ULPs taken from Table 2 of the NLRB's Annual Reports from 1959 to 2009. See 24 NLRB ANN. REP. 163 (1959) through 74 NLRB ANN. REP. 95 (2009). The two lines labeled "Linear" compare trend lines derived from data from 1959-1969 and data from 1970-1980.

1981, an increase of 575% since 1969. The path followed by the data on Illegal Intimidation charges following 1969 simply could not have been predicted by the trend in the data prior to that year. Rather, the dramatic upward jolt in the data from one trend line to another— a change of approximately sixty-five degrees— depicts a conspicuous disjuncture strongly suggestive that something occurred in 1969 to sharply increase ULPs.

A similar trend occurred with “Illegal Discharge” ULPs. Figure 8, *infra*, displays the total number of charges filed with the NLRB from 1959 to 1969 alleging “Illegal Discharge.” Figure 8 also includes a linear regression based upon data from 1959 to 1969 to project a trend line into the years from 1970 forward.

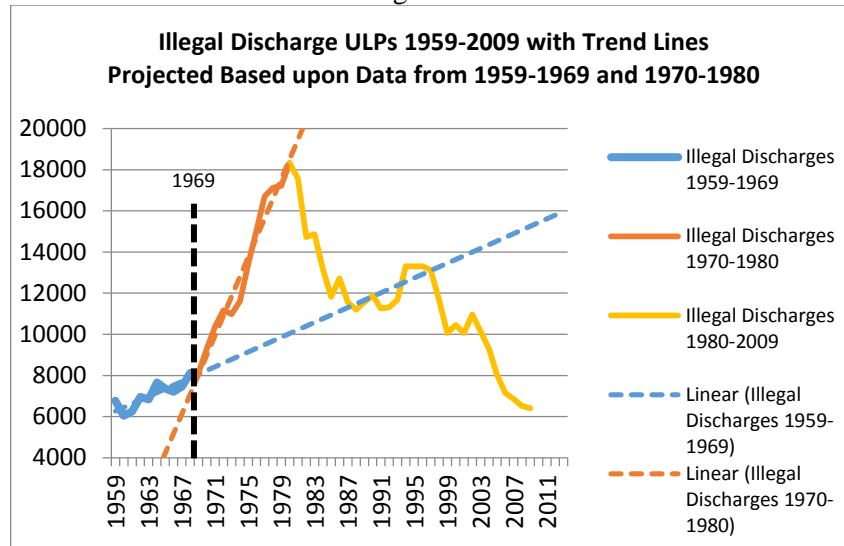
Figure 8¹¹⁵



As seen in Figure 8, the trend line based upon the data from 1959 to 1969 predicts that, in the ten years following 1969, Illegal Discharge ULPs would not exceed 12,000. Furthermore, if the trend from 1959 to 1969 continued without deviation through 2009, Illegal Discharges would not have exceeded 16,000 even after forty years.

In reality, however, the trend line did deviate quite dramatically following the NLRB’s abandonment of *Joy Silk*.

115. Data for Illegal Discharge ULPs taken from Table 2 of the NLRB’s Annual Reports from 1959 to 2009. See 24 NLRB ANN. REP. 163 (1959) through 74 NLRB ANN. REP. 95 (2009). The line labeled “Linear” is a projection of a trend line derived from data from 1959 to 1969 only.

Figure 9¹¹⁶

As can be seen in Figure 9, rather than needing forty years to double, Illegal Discharge ULPs doubled in eight years. This constitutes an acceleration in the rate of increase of Illegal Discharge ULPs of approximately five times faster following the abandonment of *Joy Silk* than when the doctrine was in place.

The increase in Illegal Intimidation and Discharge ULPs following the abandonment of *Joy Silk* are both dramatic and unprecedented. The sheer magnitude of the change in trends strongly indicates that 1969 was a pivotal year for ULPs. Moreover, the upward trends in ULPs start immediately with the abandonment of *Joy Silk*. This is a point of chronology, but chronology is fundamental to showing causation. *Joy Silk* was abandoned, and the increase in ULPs immediately followed. Moreover, the timing is not close or approximate; it is exact. The trends began as soon as the NLRB stopped applying *Joy Silk*.

Furthermore, the increase in ULPs stabilized and then declined as soon as union elections began declining.¹¹⁷ This trend in the declines of ULPs and elections suggests that the ULPs are being committed in the context of elections—something about the NLRB's election process changed in a way that led to the increased ULPs. One plausible

116. Data for Illegal Discharge ULPs taken from Table 2 of the NLRB's Annual Reports from 1959 to 2009. See 24 NLRB ANN. REP. 163 (1959) through 74 NLRB ANN. REP. 95 (2009). The lines labeled "Linear" compare the trend lines derived from the data from 1959-1969 and 1970-1980.

117. See Figures 1, 7 and 9, *supra*.

explanation to account for dramatic increase in ULPs, therefore, is a change in the legal regime that either decreased deterrence or increased incentives for employers to commit ULPs. The only significant change in the NLRB's election process that occurred in 1969 was the adoption of *Gissel* and the abandonment of *Joy Silk*.¹¹⁸ This change, therefore, is the only candidate within the legal regime that can account both for the timing and the subsequent contours of the increase in ULPs.

Is there an alternative explanation that can account for this development better than the abandonment of *Joy Silk*?

One possibility is that something changed in the culture of employers to make them more antagonistic against unions and therefore more prone to commit ULPs. This explanation is a traditional one offered by such labor scholars as Richard B. Freeman.¹¹⁹ However, this so-called alternative is not really independent of the explanation based upon the abandonment of *Joy Silk*. Even if management became culturally more hostile to unions, it seems unlikely that employers would significantly increase the commission of ULPs unless they perceived little deterrence in the legal regime. Second, the trend lines are far too abrupt for what would be expected for a purely cultural change. Rather, the nearly instantaneous increase in the commission of ULPs after 1969 is better explained by a management culture already hostile to unions, with a sudden change in the legal regime that reduced deterrence. Therefore, there is a strong case that the abandonment of *Joy Silk* caused the increase.

The above demonstration provides evidence for the conclusion that the abandonment of *Joy Silk* caused—or at least contributed to—the increase in ULPs that followed 1969. Even regarding the proof as indefinite, however, the Board is not held to the standard of scientific precision and may take reasonable steps to address concerns. The Board's construction must be "at least permissible under [the Act]," while reconciling "conflicting interests of labor and management."¹²⁰ The Board's decision to change policy must be made "in light of changing industrial practices and the Board's cumulative experience in

118. See 34 NLRB ANN. REP. 113-15 (1969).

119. See Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, (Nat'l Bureau of Economic Research, Working Paper No. 2805, 1988).

120. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266-67 (1975); see also NLRB v. Curtin Matheson Sci., Inc., 494 U.S. 775, 787 (1990) ("We will uphold a Board rule as long as it is rational and consistent with the Act) (citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38 (1987)), even if we would have formulated a different rule had we sat on the Board," (citing Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 413, 418 (1982))).

dealing with labor-management relations.”¹²¹ The evidence presented above demonstrates that the Board's cumulative experience provides ample justification for readopting *Joy Silk*.

D. The Re-Adoption of Joy Silk is Supported by the Text and Purposes of the Act and Supreme Court Precedents.

1. Joy Silk Has a Firm Foundation in the Text of the Act.

The Board's interpretation of the Act will be accepted so long as it constitutes a reasonable construction of the Act's text.¹²² Here, the *Joy Silk* doctrine establishes a proof model and remedy that is directly tied to the Act's statutory text. First, *Joy Silk*'s premise is that an employer violates the Act by refusing without good faith to recognize and negotiate with a designated collective bargaining representative.¹²³ This premise is rooted in the plain terms of § 8(a)(5), as defined by Section 8(d) of the NLRA.¹²⁴ Section 8(a)(5) of the Act proscribes an employer's "refus[al] to bargain collectively with the representative of his employees, subject to the provisions of section 159(a),"¹²⁵ and Section 8(d) defines the term "bargain collectively" used in Section 8(a)(5) to be an obligation to meet and confer "in good faith."¹²⁶

The second element of the *Joy Silk* doctrine is its signal feature, i.e., the interpretation of § 9(a) that representatives may be chosen by employees by means other than a Board-supervised election.¹²⁷ The interpretation is based upon the text of Section 9(a), which defines a collective representative as one "*designated or selected*"— but not certified— "for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes."¹²⁸ If Section 9(a) required that a collective representative be "certified" as the majority representative, that would leave no option but an election for choosing the representative because elections are the only method under which the NLRB can certify a representative.¹²⁹ Section 9(a)

121. *Weingarten*, 420 U.S. at 266 (emphasis added); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) (stating that as the nation's appointed labor relations expert, "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review").

122. See Notes 120-21, *supra*.

123. *Joy Silk*, *supra* note 8.

124. 29 U.S.C. § 158(d).

125. 29 U.S.C. § 158(a)(5).

126. 29 U.S.C. § 160(d).

127. See *Joy Silk Mills, Inc.*, 85 NLRB at 1265.

128. 29 U.S.C. § 159(a).

129. See 29 U.S.C. § 159(c)(1)(B).

does not use the term “certify,” however, and this is taken to mean that the representative may be chosen by means other than elections, such as through authorization cards.¹³⁰ This reading of the Act is sound and received the full unanimous endorsement of the U.S. Supreme Court in the *Gissel* opinion.¹³¹ Indeed, if this were not the case, an employer’s decision to voluntarily recognize a majority-supported union could not bestow Section 9(a) status. But voluntary recognition has been recognized and enforced for virtually the entire history of the Act.¹³²

Joy Silk has a third element that also is solidly based within the statutory text, i.e. that a refusal to bargain that lacks good faith is most strongly evidenced by the commission of ULPs. This is a sound premise because most ULPs require anti-union animus, or the rejection of the collective bargaining principle and the right to engage in concerted activity.¹³³ Violating Sections 8(a)(1) or (8)(a)(3), which are the most relevant employer ULPs, requires that the employer interfered with, coerced, or discriminated against an employee based upon the employee’s exercise of their rights under Section 7, such as the right to act collectively for mutual aid and protection.¹³⁴

Finally, *Joy Silk*’s remedy arises from the text of the Act. Because the ULP in a *Joy Silk* case is a violation of Section 8(a)(5) for failing to bargain in good faith with a designated Section 9(a) representative, the basic remedy is a cease and desist order to stop refusing to bargain in good faith.¹³⁵ The issuance of a bargaining order under *Joy Silk*, therefore, is nothing more than an order to stop engaging in the violation.¹³⁶

In sum, *Joy Silk* establishes a violation of Section 8(a)(5) of the Act when an employer, without good faith, refuses to bargain with a union designated by a majority of employees through the execution of authorization cards. The doctrine then prescribes the traditional remedy for a Section 8(a)(5) violation, i.e., a bargaining order, to remedy the violation.

130. *Id.*

131. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597 (1969).

132. *Lamons Gasket Co.*, 357 N.L.R.B. No. 739 (2011).

133. See Note 138, *infra*.

134. See 29 U.S.C. §§ 158(a)(1)–(5); see also *Wright Line*, 251 N.L.R.B. 1083 (1980) (requiring the NLRB’s General Counsel to prove animus to establish § 8(a)(1) and 8(a)(3) charges), *enfd.*, 662 F.2d 899 (1st Cir. 1981); *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983) (affirming the NLRB’s *Wright Line* doctrine).

135. See *Joy Silk Mills, Inc.*, 85 NLRB at 1266.

136. See *Caterair International*, 322 N.L.R.B. 64, 68 (1996) (“An affirmative bargaining order is ‘the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.’”).

2. *Joy Silk Is Fully Supported by the Supreme Court's Opinion in Gissel.*

It seems strange to observe that the Supreme Court's opinion in *Gissel* fully supports the *Joy Silk* doctrine because the argument in *Gissel* provided the setting for the abandonment of *Joy Silk*. Yet it remains that *Gissel* is wholly supportive of *Joy Silk*. As the Supreme Court's opinion in *Gissel* makes clear, it was not the Supreme Court who abandoned *Joy Silk* during oral argument before the Court.¹³⁷

Indeed, in the absence of Manoli's abandonment of *Joy Silk*, the *Gissel* opinion otherwise reads largely as an endorsement of the abandoned *Joy Silk* approach.¹³⁸ Most critically, in *Gissel*, the Supreme Court provided definitive authority for the principle that a union may be designated as an exclusive representative under Section 9(a) through authorization cards and without an election.¹³⁹

Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the ULP provision of Section 8(a)(5)—for instance, by showing convincing support, by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.¹⁴⁰ This interpretation of the Wagner Act and the present Act is well-settled, particularly as to the use of authorization cards.¹⁴¹

Furthermore, the Supreme Court repeatedly cited with favor the NLRB's decision in *Aaron Brothers*,¹⁴² which was the Board's leading case under the *Joy Silk* doctrine at that time.¹⁴³

137. See *Gissel Packing Co.*, 395 U.S. at 594 (“Although the Board’s brief before this Court generally followed the approach as set out in *Aaron Bros.*, the Board announced at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether.”).

138. *Gissel Packing Co.*, 395 U.S. at 597–98.

139. *Id.*

140. *Gissel Packing Co.*, 395 U.S. at 597–99 (1969) (footnotes and citations omitted).

141. *Id.*

142. *Aaron Bros.*, 158 N.L.R.B. 1077 (1966).

143. The most significant passage of the Supreme Court’s opinion in *Gissel* regarding *Aaron Bros.* is as follows:

As we have pointed out, however, an employer is not obligated to accept a card check as proof of majority status, under the Board’s current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status. See *Aaron Bros.*, 158 N.L.R.B. 1077, 1078. If he does make an investigation, the Board’s recent cases indicate that reasonable polling in this regard will not always be termed violative of § 8(a)(1) if conducted in accordance with the requirements set out in *Struksnes Construction Co.*, 165 N.L.R.B. No. 102 (1967). And even if an employer’s limited interrogation is found violative of the Act, it might not be serious enough to call for a bargaining order. See *Aaron*

Although the union involved in the *Gissel* case argued that the Board's policy was incorrect because the employer should be required either to recognize the union or file a petition for an election, the Court declined to address this argument, noting only that the Board's new position made it unnecessary.¹⁴⁴ In short, the Supreme Court's opinion in *Gissel* does not so much as hint at the presence of a fatal defect in the *Joy Silk* doctrine.

The Supreme Court's opinion in *Linden Lumber*¹⁴⁵ also does not undermine the vitality of *Joy Silk*. In *Linden Lumber*, the Supreme Court simply affirmed that, in light of the Board's policy of preferring elections, the Board did not abuse its discretion by refusing to find a violation of Section 8(a)(5) on the grounds that an employer refused to bargain with a union without the conduct of an election— despite clear evidence presented to the employer that the union was supported by a majority of employees.¹⁴⁶ While the Supreme Court ruled that the Board's interpretation was permissible, the Justices found this to be a close issue because the outcome appeared irreconcilable with the plain text of Section 8(a)(5).¹⁴⁷ Indeed, four dissenting Justices argued that the Board was obligated to find a violation of Section 8(a)(5) under the language of the Act, and that the Board was precluded from citing policy reasons for failing to do so.¹⁴⁸ The Supreme Court's opinion in *Linden Lumber*, therefore, is fully supportive of the Board's authority under the Act to find a violation of Section 8(a)(5) for an employer's failure to recognize and bargain in good faith with a union designated as the collective bargaining representative through authorization cards.

Bros.; *Hammond & Irving, Inc.*, 154 N.L.R.B. 1071 (1965).

As noted above, the Board has emphasized that not 'any employer conduct found violative of Section 8(a)(1) of the Act, regardless of its nature or gravity, will necessarily support a refusal-to-bargain finding,' *Aaron Bros.*, at 1079; *Gissel Packing Co.*, 395 U.S. at 609-10. *Aaron Bros.* amended the *Joy Silk* doctrine by specifying that it was General Counsel's obligation to establish that the employer's failure to bargain lacked good faith, rather than an employer being obligated to affirmatively demonstrate good faith.

144. *Gissel Packing Co.*, 395 U.S. at 595.

145. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309-10 (1974).

146. *Id.* ("In light of the statutory scheme and the practical administrative procedural questions involved, we cannot say that the Board's decision that the union should go forward and ask for an election on the employer's refusal to recognize the authorization cards was arbitrary and capricious or an abuse of discretion.").

147. *Id.*

148. *Id.* at 317 (Stewart, J., dissenting) ("The language and history of the Act clearly indicate that Congress intended to impose upon an employer the duty to bargain with a union that has presented convincing evidence of majority support, even though the union has not petitioned for and won a Board-supervised election. 'It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy'" (quoting *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 363 (1949))).

The *Linden Lumber* Board's identification of a "good faith thicket" as a reason for rejecting *Joy Silk* is an exceedingly thin rationale.¹⁴⁹ The obligation to determine the good faith conduct of employers and unions arises from a clear statutory command of the Act, regardless of whether the Board finds it to be a "thicket."¹⁵⁰ Furthermore, the Board remains obligated to engage the thicket in order to enforce Section 8(a)(5) in all contexts other than *Joy Silk*.¹⁵¹

Whatever evidentiary difficulties attend the good faith "thicket" of the *Joy Silk* doctrine pale in comparison to the affirmative harm wrought by its absence in the forty years since its abandonment, whether measured from the massive increase in violations of the Act that ensued or the substantial reduction in representation elections.

3. *Joy Silk Was Accepted by Most Circuit Courts.*

In addition, the *Joy Silk* doctrine was accepted in principle by every Circuit in the nation prior to its abandonment by the NLRB in 1969.¹⁵² This is significant because most Circuits follow, in cases of intra-Circuit conflicts, the rule that the earliest panel decision on the point governs unless and until that opinion is overruled by the court sitting *en banc* or the Supreme Court.¹⁵³ This rule provides reason to believe that many of the Circuits remain bound by authority holding that *Joy Silk* is a permissible interpretation of the Act.

149. *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 719, 720–21 (1971).

150. See 29 U.S.C. § 160(d).

151. A context where "good faith thickets" unavoidably remain arises from cases involving an employer's basic duty to negotiate with an exclusive representative in good faith. See, e.g., *A-L King Size Sandwiches, Inc.*, 265 NLRB 850, 858 (1982) ("[R]esolution of surface bargaining allegations, as has often been stated, never presents an easy issue. The problems are complex, 'no two cases are alike,' and 'none can be determinative precedent for another, as good faith bargaining 'can have meaning only in its application to the particular facts of a particular case'" (quoting *Borg-Warner Controls, a Division of Borg-Warner Corporation*, 198 NLRB 726, 729-730 (1972), *enfd.* 732 F.2d 872 (11th Cir. 1984)).

152. *NLRB v. Ken Rose Motors, Inc.*, 193 F.2d 769 (1st Cir. 1952); *NLRB v. Pyne Molding Corp.*, 226 F.2d 818 (2d Cir. 1955); *NLRB v. Epstein*, 203 F.2d 482 (3d Cir. 1953); *NLRB v. Inter-City Advert. Co.*, 190 F.2d 420 (4th Cir. 1951); *NLRB v. Southland Paint Co.*, 394 F.2d 717, 724 (5th Cir. 1968); *NLRB v. Armco Drainage & Metal Products*, 220 F.2d 573 (6th Cir. 1955); *NLRB v. Taitel*, 261 F.2d 1 (7th Cir. 1958); *NLRB v. Wheeling Pipe Line Inc.*, 229 F.2d 391 (8th Cir. 1956); *NLRB v. Trimfit of Cal. Inc.*, 211 F.2d 206 (9th Cir. 1954); *NLRB v. Hamilton*, 220 F.2d 492 (10th Cir. 1955). Note, the Eleventh Circuit is bound by the opinions of the former-Fifth Circuit.

153. See, e.g., *United States v. Abboud*, 438 F.3d 554, 567 (6th Cir. 2006); *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (*en banc*); *Morrison v. Amway Corp.*, 323 F.3d 920, 929 (11th Cir. 2003); *Southard v. Tex. Bd. of Crim. Justice*, 114 F.3d 539, 549 (5th Cir. 1997); *Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1228 n.8 (8th Cir. 1995); *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

4. *Joy Silk Is Supported by a Logical Rationale.*

Joy Silk is based upon a more convincing rationale than *Gissel*. The key premise of the *Joy Silk* doctrine is that an employer who responds to a union's demand for recognition by committing ULPs does not have good faith doubts about its employees' support for the union and also does not accept its employees' right to unionize and the collective-bargaining principle.¹⁵⁴ This premise is readily believable. After all, an employer who truly believed that a union lacked support from a majority of employees would not need to resort to illegal tactics, such as intimidation or electoral bribery. Rather, these tactics betoken the employer's apparent judgment that the employees truly do support the union, which is why the coercive tactics become necessary. The coercion also adequately demonstrates the employer's culpable belief that the employees' uninhibited wishes are not worthy of respect. The proof model under *Joy Silk*, therefore, is altogether canny.

5. *Joy Silk Will Advance the Purposes of the Act by Increasing the Number of Elections, Reducing ULPs, and Ensuring Fairer Elections.*

The restoration of *Joy Silk* will advance the goals and purposes of the NLRA by increasing the number of elections overall, reducing ULPs committed during elections, and securing fairer elections consistent with the standard of laboratory conditions. To begin, the restoration of *Joy Silk* is likely to lead to a dramatic increase in the number of representation elections conducted by the Board.

Critics say that the purpose of restoring *Joy Silk* is to reduce the number of Board-supervised representational elections. This criticism seriously misjudges the likely effects of *Joy Silk*. Rather than reduce elections, the *Joy Silk* doctrine's most likely and immediate effect will be to seriously reduce the incidence of ULPs. Under *Joy Silk*, an employer who wishes to resist unionization faces two options: 1) to commit ULPs and bring upon itself years of litigation that ultimately lead to a bargaining order, and, after that, months of tough bargaining to avoid an agreement; or 2) engage in a lawful campaign of persuasion with employees prior to an election, and, if that is unsuccessful, months of tough bargaining to avoid an agreement. Between these two options, the first option is far more costly and has the added drawback of leading to the same destination as the less costly second option. Rational employers will see this logic and follow the latter option—that is, they will insist upon elections and avoid ULPs. This choice will

154. *Joy Silk Mills, Inc.*, 85 NLRB at 1265.

result in elections occurring at higher rates, but with far fewer ULPs.

Indeed, those who would suggest that *Joy Silk* will reduce the number of secret ballot elections have it exactly backwards: It was the abandonment of *Joy Silk* and the adoption of *Gissel* that has massively reduced secret-ballot collective bargaining elections in this country.¹⁵⁵ From 1970 to 2009, the number of elections held by the NLRB per year dropped from 8,074 to 1,704.¹⁵⁶ The number of elections in 2009 was the lowest number of elections in NLRB history since 1940.¹⁵⁷ But comparing 2009 to 1940 is inapt. In 1940, the Board only conducted 1,192 collective bargaining elections, but those elections involved 590,000 eligible workers.¹⁵⁸ Only 96,030 workers were involved in the 1,704 elections that the Board conducted in 2009.¹⁵⁹ Thus, it may fairly be said that we are witnessing the lowest levels of election activity since the enactment of the Act.

In contrast, the average number of elections from 1949 to 1969 was 6,431 as compared to 3,147 elections on average from 1989 to 2009.¹⁶⁰ As shown in Figure 10, *infra*, the number of elections fell from over ten per 100,000 employees to fewer than two elections per 100,000 employees since the abandonment of *Joy Silk*.

155. See Figure 1, *infra*, and accompanying text.

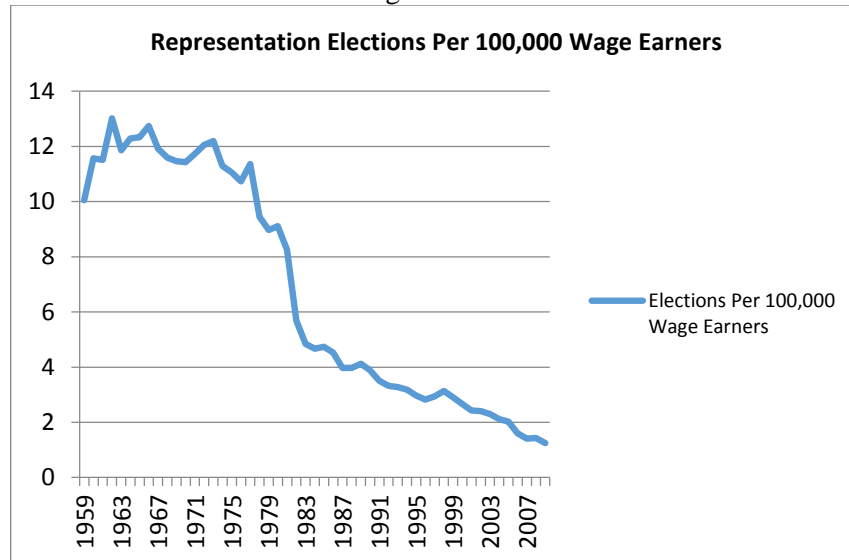
156. Compare 42 NLRB ANN. REP. 18 (1977), with 74 NLRB ANN. REP. 13 (2009).

157. Compare 74 NLRB ANN. REP. 13 (2009), with 5 NLRB ANN. REP. 18 (1940).

158. See 5 NLRB ANN. REP. 18 (1940).

159. 74 NLRB ANN. REP. 11, 13 (2009).

160. See *supra* note 9; see also, e.g., John T. Dunlop, *Fact Finding Report: Commission on the Future of Worker-Management Relations*, 66-67, 81 (U.S. Dep't of Labor & U.S. Dep't of Commerce 1994) (noting that during the 1950s, the height of the *Joy Silk* regime, the Board conducted nearly 6,000 elections, involving over 700,000 workers).

Figure 10¹⁶¹

Given the average of approximately twelve elections per 100,000 employees in the nonfarm workforce under the *Joy Silk* regime, and a current nonfarm workforce of more than 130 million, the historical rates would project approximately 15,000 elections per year if the Board restores *Joy Silk* as valid labor law.¹⁶² The Board's experience with *Joy Silk*, therefore, shows that *Joy Silk* had no effect of limiting elections. To the contrary, *Joy Silk* is necessary to provide a sufficient level of protection to make more numerous elections feasible.

Moreover, the elections that the Board conducts are far more likely to meet the Board requirement of "laboratory conditions" than the elections held by the Board under the *Gissel* rule following the abandonment of *Joy Silk*.¹⁶³ In *General Shoe*, the Board set the goal that elections "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."¹⁶⁴ Contrary to the goals of *General Shoe*, the *Gissel* doctrine actually has the effect of routinizing

161. Nonfarm payroll data taken from the Database on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts (ICTWSS Database). See Note 1, *supra*.

162. A nonfarm payroll of 136,860,000 taken from the ICTWSS Database. See Note 1, *supra*. The Board's historic experience suggests that it may take ten to twelve years for elections to rise to the ratios of ten per 100,000 employees seen prior to the abandonment of *Joy Silk*.

163. *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

164. *Id.*

a baseline level of ULPs that will be deemed ordinary, or at least not extraordinary, in the administration of the Act. Because this “ordinary” level of ULPs is not sufficient to warrant a bargaining remedy, it is the precise level of ULPs that an anti-union employer will seek to commit. Having an “ordinary” level of ULPs is incompatible with *General Shoe*’s policy of laboratory conditions. *Joy Silk*, therefore, is the proper policy for an agency that wants to attain the goal of *General Shoe*.

In fulfillment of *General Shoe*’s promise of “laboratory conditions,” the restoration of *Joy Silk* should radically reduce the incidence of the commission of ULPs during union organizing campaigns. As discussed in Part I, *supra*, the historic evidence shows that, under the *Joy Silk* regime, employers committed on average approximately one Illegal Discharge and 0.11 Illegal Intimidation ULPs per election. After the abandonment of *Joy Silk*, these averages increased to 3.2 Illegal Discharge and 1.08 Illegal Intimidation ULPs per election.¹⁶⁵ These comparative averages suggest a drop of 66% for Illegal Discharge ULPs per election and of 90% for Illegal Intimidation ULPs. Using 2009 numbers and presuming that the number of elections remains constant, we would expect to see the number of Illegal Discharge ULPs to drop from 6,411 to 2,180 and Illegal Intimidation ULPs to drop from 2,461 to 246. A decrease in the violations of the Act on this scale certainly provides a sound reason for the NLRB to return to this policy.¹⁶⁶

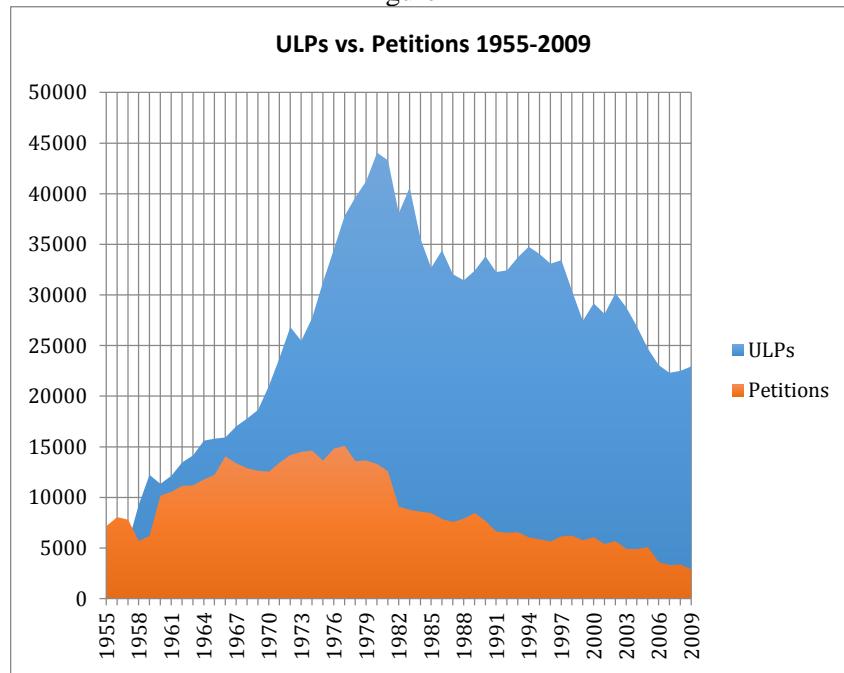
The abandonment of *Joy Silk* fundamentally undermined the central purpose of the NLRA by massively reducing the NLRB’s activity with regard to collective bargaining. The NLRB is now, and for decades has been, an agency that predominately processes and adjudicates ULPs, with a much smaller function involving resolving questions concerning collective representation. As Figure 11, *infra*, demonstrates, ULP filings have dwarfed petitions by a rate of nearly four to one since at least the late 1970s. This leads to the result depicted in Chart 15 from the Annual Report of the NLRB for Fiscal Year 2009, which shows that nearly 90% of the agency’s docket

165. See *supra* Figure 5.

166. The actual number of ULPs may not drop in the manner described, however, because the number of ULPs likely will remain tied to the number of elections. While the number of ULPs per election should decrease significantly, the number of elections is likely to increase significantly. This dynamic makes a projection of the effect on the absolute number of ULP filings difficult to predict. Furthermore, it took ten to twelve years for the abandonment of *Joy Silk* to have its ultimate impact on the rate at which both election and ULPs were filed. See *supra* Figures 1 and 5. It is reasonable to expect a similar time period for a re-implementation of *Joy Silk* to drive down the ULPs to the ratios per election seen prior to the abandonment of *Joy Silk*.

consists of ULPs, with only about 10% consisting representation matters.¹⁶⁷ ULPs have comprised at least 80% of the NLRB's activities since the early 1980s.¹⁶⁸

Figure 11¹⁶⁹



Based on the Findings and Policy statement that introduces the NLRA, this state of affairs constitutes a profound perversion of the purposes of the Act. In the statement, Congress announces the following as the purposes of the Act:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise

167. 74 NLRB ANN. REP. 17 (2009).

168. *Id.*

169. Data for ULPs taken from Table 2 of the NLRB's Annual Reports from 1959 to 2009. See 24 NLRB ANN. REP. 163 (1959) through 74 NLRB Ann. Rep. 95 (2009). Data on election petitions taken from Chart 11 and Table 13 of the Annual Report of the NLRB volume 26 (1961); from Chart 12 and Table 13 from volumes 27 through 29 (1962-1964); from the unnumbered Chart on page 15 and Table 11A from volumes 35 and 36 (1970-1971); and Table 11A and Chart 12 of the Annual Reports of the NLRB volumes 30 through 34 (1965-1969) and 37 through 74 (1972-2009). See 29 NLRB ANN. REP. 20 (1964) to 74 NLRB Ann. Rep. 13 (2009).

by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.¹⁷⁰

As this statement makes clear, the key purpose of the Act is to “encourage the practice and procedure of collective bargaining.”¹⁷¹ The Act, therefore, does not “protect the exercise by workers of full freedom of association [and] self-organization” as an end in itself, but rather provides these protections “for the purpose of negotiating the terms and conditions of their employment and other mutual aid or protection.”¹⁷² For the current Board, however, ends and means have become inverted. The processing of ULPs has become its primary purpose. The Board does not enforce against ULPs for the purpose of “encouraging the practice and procedure of collective bargaining,”¹⁷³ because collective bargaining is increasingly not occurring.

If nothing else, Figure 11, *supra*, demonstrates that the NLRB's current interpretation and administration of the Act has gone drastically off course. If the NLRB cannot deter ULPs sufficiently that collective bargaining is actually encouraged and practiced, then the agency is failing. This agency is and has been failing in its purpose ever since the Board abandoned *Joy Silk*. It is possible that *Joy Silk* will not work as successfully in 2016 as it did in 1955, but one can hardly imagine that it will work less well than the current situation under *Gissel*.

IV. IN RE-ADOPTING *JOY SILK*, THE BOARD SHOULD AMEND THE DOCTRINE TO ACCOMMODATE CHANGES IN THE LAW SINCE ITS ABANDONMENT.

Joy Silk has been absent from the legal landscape of the United States for over forty years, and the country has not stood still during its absence. It is only natural that the doctrine, if re-adopted today, should be modified to reflect changing circumstances and developments in the law. Two such adaptations are recommended here.

170. 29 U.S.C. § 151.

171. *Id.*

172. *Id.*

173. *Id.*

A. Application of Joy Silk should be Limited to Evidence that the Employer Rejects the Collective Bargaining Principle, Desires to Thwart Employee Free Choice, or Wishes to Gain Time to Undermine the Union.

The first modification to the resurrected *Joy Silk* doctrine should address the knotty conceptual problems that led NLRB Associate General Counsel Manoli to unilaterally abandon *Joy Silk* in the first place. That problem was: if a bargaining order is based on a finding that an employer refused to recognize and bargain with a union without good faith, what should the Board do when the employer refused recognition out of a simple preference for a secret ballot election?¹⁷⁴ This is not an insurmountable conceptual problem, and the Board was well on its way toward resolving it in 1969 before Manoli triggered the shift away from the doctrine.

Under the *Joy Silk* doctrine, the Board identified four methods that the General Counsel could use to show that an employer's refusal to recognize a majority-supported union was in bad faith. General Counsel could show:

[1] employer conduct displaying a rejection of the collective-bargaining principle, [2] a purpose to thwart or interfere with the employees' free choice of their bargaining representative, [3] a desire to gain time within which to undermine the union or dissipate the majority, or [4] by independent knowledge of the employer that the union has a majority.¹⁷⁵

Of these four methods of proof, the fourth— independent knowledge of the employer that the union has a majority— should be eliminated from any re-adoption of the *Joy Silk* doctrine. This method of proof is problematic because an employer with independent knowledge that the union has majority support from its employees still may have lawful reasons to want an election. Even if an employer is certain that the majority of employees have voluntarily supported a union, the employer could, nevertheless, believe in good faith that it might persuade them to vote against the union in an election through a non-coercive appeal to reason. An employer acting under this belief would not appear to violate the NLRA under any obvious theory. After all, the NLRA does give employees the right to refrain from associating with a union.¹⁷⁶ Furthermore, Section 8(c) of the Act specifies that the expression of an employer's views, if not coercive or threatening,

174. Cooper & Nolan, *supra* Note 48, at 218-21.

175. Aaron Bros. Co., 158 N.L.R.B. 1077 (1966) (Member Jenkins, concurring).

176. See 29 U.S.C. § 157.

cannot be deemed evidence of an unfair labor practice.¹⁷⁷ If the employer merely wishes to express his or her views to employees prior to an election, the employer would seem to be within his rights to do so. Merely showing an employer's independent knowledge that the union has majority support, therefore, is insufficient to prove a violation. Accordingly, this method of establishing a violation of Section 8(a)(5) should not be included in the re-adoption of *Joy Silk*.

B. Employees' Right To Refrain from Union Affiliation Can Be Accommodated Through Adjustments to the Contract Bar.

There can be little doubt that judicial concern for the Section 7 rights of employees to refrain from union activity is higher now than it was when *Joy Silk* was in effect. This concern is especially evident in many Circuits' emphasis that *Gissel* bargaining orders be used as a last resort and only when other options have been rejected.¹⁷⁸ It is also seen in the D.C. Circuit's insistence that all bargaining orders issued by the Board, not just those issued under the *Gissel* doctrine, specifically analyze whether issuing the bargaining order properly strikes the balance between the employees' Section 7 rights to choose whether or not to affiliate with a union.¹⁷⁹

The changed legal landscape necessitates a greater accommodation to the employees' right to exercise an uninhibited vote through a secret ballot election than was afforded by the *Joy Silk* doctrine. At the same time, there is a great need for better deterrence against ULPs. The proper balance between these two objectives is not found by limiting the issuance of bargaining orders. Rather, the best approach is to withhold application of the contract bar to collective bargaining agreements that result from bargaining orders. The contract bar is an NLRB administrative rule under which a petition for a representation election or for decertification of a union will be dismissed if the bargaining unit is subject to a current collective bargaining agreement.¹⁸⁰ The contract bar should be withheld until such time as the union attains certification through an election. This policy is recommended by the following considerations.

First, the most significant abridgement of an employee's access to a secret-ballot election arises not from the recognition bar following a bargaining order, but from the contract bar following the adoption of a

177. 29 U.S.C. § 158(c).

178. See, *supra* Note 93 and cases cited therein.

179. See, e.g., *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727 (2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1461-62 (1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1247-48 (1994).

180. See *General Cable Corp.*, 139 N.L.R.B. 1123 (1962).

collective bargaining agreement.¹⁸¹ The NLRB will apply the bar for a reasonable period, which is generally deemed to be three years.¹⁸² When courts express concern that a bargaining order could lead to employees being unionized without an opportunity to hold a secret-ballot vote on the issue, they generally are reacting to the fact that the contract bar may preclude access to NLRB elections. This is why withholding application of the contract bar will do the most to mollify the Circuit courts' concerns.

Although a bargaining order will trigger a recognition bar,¹⁸³ which will preclude petitions for an election for a reasonable period of about a year, the employees' Section 7 interests are slight during this period because the union cannot affect terms and conditions of employment or subject employees to a union security clause until a collective bargaining agreement is attained.¹⁸⁴ At most, employees suffer under a protraction of the status quo with respect to terms and condition of employment while negotiations are underway.¹⁸⁵ However, this is hardly unfair—the employee initially agreed to those terms and conditions voluntarily in accepting and retaining employment with that employer.

Furthermore, the recognition period, which bars petitions for a reasonable period following the issuance of a bargaining order, is indispensable to ensuring that the bargaining order provides a meaningful remedy. As articulated by the U.S. Supreme Court, “a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.”¹⁸⁶ The balance of interests under the NLRA, therefore, weighs strongly in favor of retaining the recognition bar following the entry of a bargaining order.

Once a collective bargaining agreement is attained, however, the union begins to influence the employees' employment relationship directly. At the commencement of a collective bargaining agreement,

181. The recognition bar spans a period of a year during which the union holds an irrebuttable presumption of majority status. See *Keller Plastics Eastern*, 157 N.L.R.B. 583 (1966); *Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954).

182. *General Cable Corp.*, 139 N.L.R.B. at 1128-29.

183. The entry of bargaining order will trigger a recognition bar. See *Frank Bros. Co. v. NLRB*, 321 U.S. 702, 705-06 (1944). The purpose of this period is to enable the bargaining relationship to become productive. *Id.*

184. “[T]he duty to bargain under the Act to require the employer to maintain the status quo in mandatory subjects of bargaining prior to negotiations or reaching agreement with the union and to offer the union an opportunity to bargain over proposed changes in mandatory subjects before changes are implemented. *Indiana & Michigan Elec. Co.*, 284 NLRB 53, 58 (1987).

185. *Id.*

186. *Id.*

an unwilling employee can credibly claim to be involuntarily subjected to having a union exercise influence over his or her employment relationship without having been afforded the opportunity to cast a vote in a secret-ballot election. At this point, therefore, the employees' Section 7 interests in the freedom to refrain from union affiliation should take precedence, and employees should be permitted to seek an election to reject the union if they are dissatisfied with the terms of the collective bargaining agreement, object to unions in principle, or for any other reason.

By withholding the contract bar from a contract resulting from a bargaining order, the Board will ensure employees access to the secret-ballot election. Withholding the contract bar also provides an incentive to the union to file a petition itself in order to obtain the benefit of a contract bar. After all, the most propitious time to conduct an election is following the entrance into a collective bargaining agreement. By this point, the employer has arrived at an accommodation with the union, and therefore should be expected to harbor less anti-union animus following a successful collective bargaining process. Also, the merits and detractions of unionization will be concrete at that point, rather than speculative. This means both the employer and the employees will be able to weigh the benefits of unionization based upon real considerations. The contract also often will afford the union access to grievance machinery and access to the job site, which will ensure more equal footing in the event that the employer chooses to engage in illegal conduct. Moreover, once a contract is in place, employer ULPs have less capacity to harm the union. Not only does the contract provide remedies, but the commission of employer ULPs will delay any election until the charges are resolved. This is known as the Blocking Charge Rule.¹⁸⁷ If employer ULPs are deemed to erode employee support, the union can take advantage of this rule to delay the election until those ULPs are remedied. Alternatively, if the parties proceed to election and the union loses, the commission of ULPs may cause the election to be deemed invalid.¹⁸⁸ Either way, the union contract will remain in place until the process reaches a conclusive result.

Lastly, if the union chooses not to file a petition to seek certification through an election, the employees suffer no injury. They will remain free to file their own petition.¹⁸⁹ And if negotiations fail to

187. See NLRB CASE HANDLING MANUAL, PART 1, UNFAIR LABOR PRACTICE PROCEEDINGS ¶ 11730 (Feb. 2016); *Am. Metal Products*, 139 N.L.R.B. 601 (1962).

188. *Am. Red Cross Missouri-Illinois Blood Servs. Region & Local Union No. 682, Int'l Bhd. of Teamsters.*, 347 NLRB 347, 355 (2006).

189. See 29 C.F.R. § 102.60 (providing that an employee or group of employees may

produce a collective bargaining agreement, then unionization has failed and the objections of employees who oppose unionization are mooted.

Withholding the application of the contract bar from collective bargaining agreements that result from a bargaining order, therefore, provides additional concrete assurance that restoration of the *Joy Silk* doctrine will not increase the denial of access to a secret-ballot election as employees unionize.¹⁹⁰ Instead, it will simply help ensure that the elections conducted are more orderly, fair, and valid. As a result, it will simultaneously strengthen employees' right to engage or refrain from engaging, without inhibition, in union activity. Accordingly, it would constitute a substantial improvement in the administration of the Act and advance the realization of the Act's legislative goals.

So amended, the *Joy Silk* doctrine will satisfy the concerns raised by Circuit courts, including the D.C. Circuit, about ensuring that employees' Section 7 rights are not overridden without good cause. When an employer is presented with a demand for recognition and evidence of majority support, and when that employer responds by attempting to dissipate the union's support through coercion and unlawful tactics, due regard for the employees' Section 7 rights favors the entry of the bargaining order in order to vindicate the aspirations reflected in the employees' initial choice. This would effectuate compliance with Section 8(a)(5) and deter the commission of ULPs in response to initial organizing by employees. The bargaining order will not override the employees' Section 7 rights, which are accommodated by withholding the contract bar from any collective bargaining agreement that results from the bargaining order. Lastly, if a bad faith refusal to bargain is proved, alternative remedies to a bargaining order usually will not adequately address the violation, since even the most basic remedy—*i.e.*, a cease and desist order from refusing to bargain—

file a petition for an election).

190. On the other hand, no change to the contract bar should be made in the case of voluntary recognitions by an employer for three reasons. First, the central purpose of the Act is to encourage collective bargaining. Fulfilling that purpose requires encouraging the stability of collective bargaining relationships especially in cases where they are voluntarily established. Second, the law ordinarily permits the employer to establish the background terms and conditions of employment. It would seem to violate the Board's duty to maintain neutrality if voluntary recognition, supported by a non-coerced majority of authorization cards, was the one instance where an employer is denied the ability to establish background conditions of employment. Third, employees retain the option of quitting, and there is nothing inequitable about relying on exit as the primary option for employees who are out-of-step with both the employer and the majority of their co-workers regarding collective representation. After all, when the employer and the majority of employees do not want a union, exit is the only option that the legal regime affords the union supporter. There is nothing unfair, therefore, about leaving this as the primary option for the union opponent as well.

unavoidably requires bargaining.

V. IS THIS MEANINGFUL REFORM?: THE CASE THAT *JOY SILK* WOULD BE A GAME-CHANGER

To determine whether a restoration of the *Joy Silk* doctrine will have a meaningful impact on the decline of the Labor Movement, an appropriate starting point is to ascertain the causes of Labor's decline. The academic literature generally identifies three major hypotheses to explain the dramatic decline in the Labor Movement that occurred from 1970 to present. For convenience, these hypotheses are referred to as: (1) the structural explanation, (2) the ideological explanation, and (3) the legal regime explanation. The merits and shortcomings of each of these theories will be addressed in turn.

The structural explanation is probably the most widely known, largely because it is the most intuitive.¹⁹¹ Supporters of this hypothesis contend that the major cause of the decline of unions was increased global competition and the decline of heavily unionized industries in the United States.¹⁹² The decline of unionized industries, and with it the implication that unions caused or contributed to the decline, has been cited as a reason for why workers are reluctant to join unions.¹⁹³ This decline is simple enough to demonstrate. For instance, in 1950, 33.7% of all employees were employed in manufacturing in the United States.¹⁹⁴ By 1997, only 15.2% were.¹⁹⁵ At the same time, the share of employment in the service sector rose from 11.9% to 29.4%.¹⁹⁶

One reason this explanation is widely believed is that it is, to some extent, almost certainly true. Many of the domestic U.S. industries most dramatically and detrimentally affected by the acceleration in globalization beginning in the 1980s were industries that were heavily unionized. To return to the comparison between manufacturing and services, in 1953 42.4% of employees working in manufacturing were union members, while just 9.5% of employees working in services were.¹⁹⁷ The decline in manufacturing naturally would negatively affect union membership in U.S. merely because these industries employed millions of union members.

191. Seymour Martin Lipset & Ivan Katchanovski, *The Future of Private Sector Unions in the U.S.*, in *THE FUTURE OF PRIVATE SECTOR UNIONISM IN THE UNITED STATES*, 10–13 (James T. Bennett and Bruce E. Kaufman, eds., 2002).

192. *Id.*

193. *Id.*

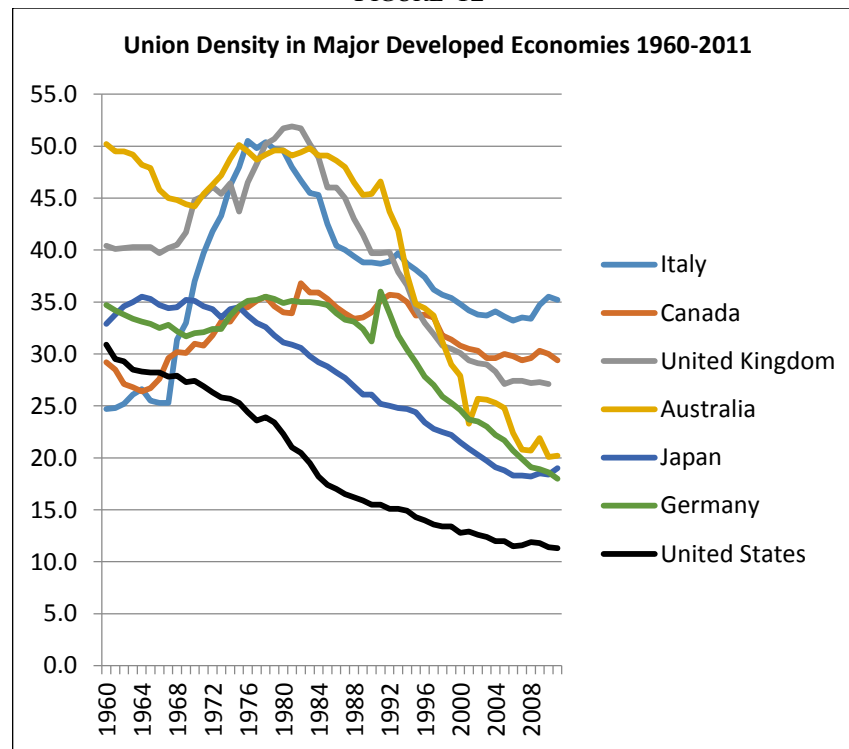
194. *Id.* at 11.

195. *Id.*

196. *Id.*

197. *Id.* at 12.

However, this explanation falls short because the outsized losses in union density experienced in the United States are unique.¹⁹⁸ As shown in Figure 12, *infra*, among major developed countries no other country experienced the especially steep decline in labor density as seen in the U.S.

FIGURE 12¹⁹⁹

The anomalous nature of the decrease in union density in the U.S. is damaging to the structural hypothesis because most developed economies were subjected to the same challenges in the global economy as the U.S., but the labor movements of other nations were

198. Lipset & Katchanovski, *supra* note 191, at 13 (noting that comparable structural changes took place in most developed countries and rejecting the view that structural changes in the U.S. economy can explain the drop it experienced in union density).

199. Data from. Visser, ICTWSS Data base. version 5.0. Amsterdam: Amsterdam Institute for Advanced Labour Studies AIAS. October 2015. Open access database at: www.uva-aias.net/nl/data/ictwss. The nations presented on Figure 2 were drawn as an illustrative sample of developed nations and was not intended to be comprehensive. For other sources comparing the union density of various nations, see Lipset & Katchanovski, *supra* note 191, at 16; Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LAB. REV. 38, 45-46 (Jan. 2006); Clara Chang & Constance Sorrentino, *Union Membership Statistics in 12 Countries*, MONTHLY LAB. REV. 46, 50 (Dec. 1991).

not similarly affected.²⁰⁰ As can be seen, by the mid-1970s, the union density in the U.S. was approximately ten percentage points lower than the other nations represented. The experience of Canada is particularly relevant because it differs so dramatically from that of the U.S. In the face of the same global economic conditions as the U.S., labor density in Canada actually increased, rather than decreased.²⁰¹ As of 2011, labor density in Canada was approximately 30%.²⁰² The variability in the union density of each of these developed economies during this period, especially the dramatic divergence in experience between Canada and the U.S., suggests that factors specific to each country exerted a more important influence over each nation's union density than did the global economy in general.

The second hypothesis for the decline of the Labor Movement can be categorized as the ideological cause. The attribution of the decline of labor due to changes in ideology has two variants. The first argues that a change in management ideology to one of increased opposition to unions caused the decline.²⁰³ The second variant hypothesizes that unions lost support among the U.S. workforce due to a decline in social-democratic sentiments that arose during the Great Depression and a revival of libertarian ideologies.²⁰⁴ Since these hypotheses focus on the opinions of individuals, they are initially verifiable primarily through survey data. Survey results have yielded a lack of statistically significant differences in the attitudes of managers in the United States and Canada, which undermines the explanation based upon an ideological shift among management personnel.²⁰⁵ The second

200. Of all other nations, the experience of France has the most surface similarity to that of the U.S. As in the U.S., union density in France fell from approximately 20% to a bit less than 10% from 1960 to 2011. See ICTWSS database, *supra* Note 1; see also Lipset & Katchanovski, *supra* note 191, at 16. Upon close inspection, however, it becomes clear that the two nations are not analogous. Despite low union membership levels, 95% of employees in France are covered by collective bargaining agreements. See Visser, *supra* note 199, at 46. By contrast, in the U.S., the percentage of employees who are union members does not appreciably differ from the percentage covered by a collective bargaining agreement. *Id.*, at 46. This dramatic difference in union membership versus coverage by collective bargaining agreements in France and the U.S. makes comparisons between the two regimes difficult, and renders a comparison between each nation's level of membership misleading. See ICTWSS database, *supra* Note 1.

201. See ICTWSS database, *supra* Note 1.

202. *Id.*

203. Lipset & Katchanovski, *supra* note 191, at 23.

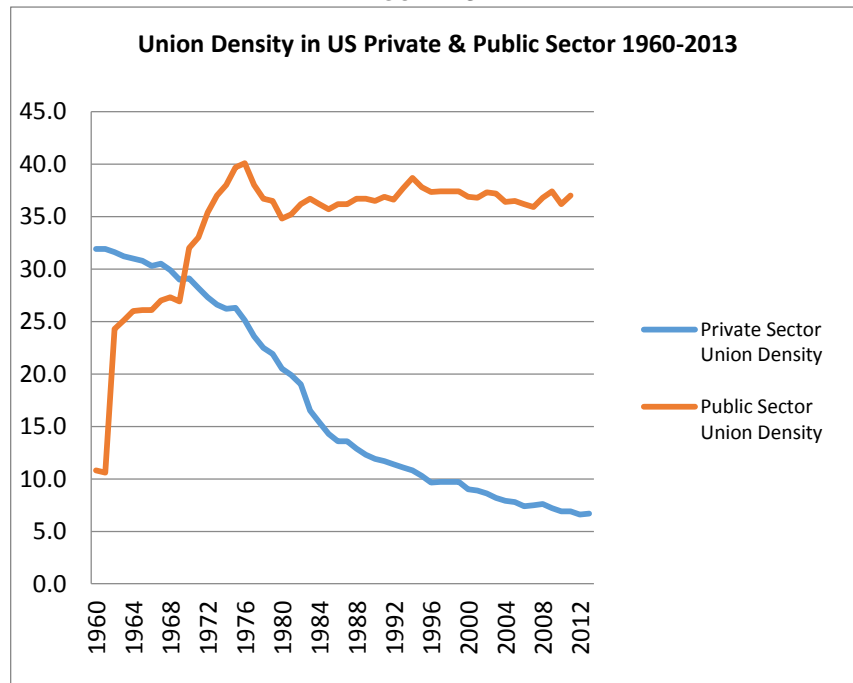
204. Lipset & Katchanovski, *supra* note 191, at 23. See also William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983) DOC 11; Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives* (Nat'l Bureau of Economic Research, Working Paper No. 2805, 1988).

205. Lipset & Katchanovski, *supra* note 191, at 16.

hypothesis, based upon a shift in the ideologies held by employees, does enjoy statistical support from survey results.²⁰⁶ This survey data by itself, however, does not demonstrate that this hypothesis is true. Rather, it only means that the hypothesis has cleared an initial hurdle of demonstrating that an ideological change actually occurred, and that the hypothesis is viable. The survey data does not show, however, that this shift in ideology actually exerted an impact on union density in the U.S.

Other evidence strongly undermines the contention that an ideological shift can explain the unusual decrease in union membership in the U.S. First, union density in public employment *rose* during the exact period when private sector density was falling. As seen in Figure 13, *infra*, public sector unionism grew steadily and sustained itself from the period of 1960 through 2000.

206. *Id.* at 22-23.

FIGURE 13²⁰⁷

This fact would seem to completely rebut the hypothesis that shifts toward libertarian ideologies were responsible for the decrease in union density. After all, a cultural shift in the ideology of the population should be expected to affect the entire population. Unless supporters of this theory can demonstrate why individuals employed in the public sector would be immune to the change, the evidence suggests that the proposed cultural shift did not have a pivotal impact.

In addition, the decline in union density was relatively uniform across the country. Whether measured from 1964 to 2013 or 1990 to 2013, every state in the nation has experienced dramatic losses in union density.²⁰⁸ During the time period 2000 to 2013, forty-five states and the District of Columbia experienced declines in union membership with only five states experiencing increases.²⁰⁹ The states with increases, however, do not follow any pattern related to ideological

207. Data from Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 INDUS. & LAB. REL. REV. 349–54 (2003); data available at www.unionstats.com.

208. See Barry T. Hirsch, David A. Macpherson, & Wayne G. Vroman, *Estimates of Union Density by State*, MONTHLY LAB. REV. 51–55 (July 2001). Data available at <http://unionstats.gsu.edu/MonthlyLaborReviewArticle.htm>.

209. *Id.*

orientation. They were Alabama, Alaska, California, Oklahoma, Vermont, and Washington. Of these, California experienced the smallest increase in union density.²¹⁰ Due to the broad regional disparities in political opinion in the U.S., the uniformity of the decline in union density across states appears inconsistent with a theory that ideological orientation is responsible for the decline.

Lastly, polling data on approval of unions does not support the occurrence of a substantial shift in public opinion regarding unions during the period of decline in union density. Long-term assessment of popular sentiment toward unions fail to provide any support for the contention that popular sentiment shifted against unions in the 1970s. Gallup, for instance, recorded public approval toward unions of nearly 60% through the 1970s and 1980s.²¹¹ Admittedly, this polling data on the approval of unions does not address precisely the same shift from a social-democratic to libertarian ideology proposed by Lipset and Katchanovski. But it is reasonable to expect the two opinions to correlate, especially if the shift to libertarianism is offered as an explanation for the national decrease in union density. The shift to libertarian ideology, however, if it occurred, appears to have failed to affect public opinion on unions.

This brings the discussion to the third hypothesis for the decline in private sector union density in the U.S., namely, the legal regime explanation. This view holds that the decline in private sector union density in the U.S. is attributable to an element of the legal regime that governs private sector labor relations.²¹² The discussion thus far already has encountered two critical data points in support of this view. The first is the international comparison of union density in other developed countries.²¹³ That the union density of other nations is significantly higher than in the U.S. suggests that the legal regime played a role. Additionally, the drastic divergence between union density in the private and public sectors, shown in Figure 13, *supra*, provides more support for the legal regime view. After all, a relevant difference between nations is that they are governed by separate legal regimes. Likewise, a relevant difference between the U.S. private and

210. *Id.*

211. See Jeffrey M. Jones, Approval of Labor Unions Holds Near Its Low, at 52%, Gallup, Inc., <http://www.gallup.com/poll/149279/approval-labor-unions-holds-near-low.aspx> (last visited Oct. 8, 2016); see also, HISTORICAL STATISTICAL ABSTRACT OF THE UNITED STATES (Millennial Ed. Online) Table Ba-4995-4998 (showing that from 1936 to 1999 the lowest level of support for labor union in the U.S. was 55 percent in 1979 with an average over the period of 64% approval).

212. See Lipset & Katchanovski, *supra* note 191, at 9-19 (summarizing the views of those who attribute the decline in unionism to the legal environment in the United States).

213. See, *supra*, Figure 12.

public sectors is that, in the realm of labor relations, they are governed by different legal regimes; the NLRA does not apply to public employees.²¹⁴

Another piece of evidence in support of the legal regime hypothesis is the fact that the sector with the second highest union density (after public administration) is transportation.²¹⁵ Unions usually are estimated to enjoy density of approximately 20% in the transportation sector.²¹⁶ This is notable because common carriers, which constitute a major portion of the transportation sector, are governed by the Railway Labor Act, and not the NLRA.²¹⁷ The airline industry, for example, is highly unionized.²¹⁸ With respect to pilots, only a single airline was non-union in 2014.²¹⁹ This disparity between the fortunes of unions under the NLRA and the RLA provides further support that the legal regime is playing a critical factor for determining the labor density.

All of the above provides strong support for the view that the legal regime is responsible for the especially low union density in the U.S. private sector. The common thread that ties union density in foreign countries, the U.S. public sector, and the U.S. transportation sector is the fact that these jurisdictions lie beyond the scope of the NLRA. Despite this evidence, some have rejected the legal regime hypothesis on the grounds that other countries with higher levels of union density have less regulation over labor relations.²²⁰ This objection ignores the stark differences in the background rules governing employment in the United States and these other nations. Almost no other country follows the U.S. rule of employment at will, which allows an employer to fire workers for any reason or no reason at all.²²¹ Rather, most other nations in Europe and the United Kingdom have more robust

214. See 29 U.S.C. § 152(2) (2012) (excluding “the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof,” from the definition of an “Employer” under the Act).

215. *Union Membership Annual News Release*, BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, Jan. 24, 2014, (noting that in 2013, transportation and warehousing have a union density of 19.6%, which is the second highest in the private sector act utilities), http://www.bls.gov/news.release/archives/union2_01242014.htm (last visited on Oct. 8, 2016).

216. *Id.*

217. See 45 U.S.C. § 151 (defining rail, commuter rail, and air carriers as common carriers subject to the Act); 29 U.S.C. § 152(2) (2012) (excluding employers covered by the Railway Labor Act from coverage under the NLRA);

218. See Jack Nicas, *Jet Blue Pilots Vote to Unionize*, WALL ST. J., Apr. 22, 2014, <http://www.wsj.com/articles/SB10001424052702304049904579517911131169286>.

219. *Id.*

220. Lipset & Katchanovski, *supra* note 191, at 19.

221. Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 347 (2014).

protections of employee tenure, including just cause requirements and notice and severance obligations.²²² This is significant because much of the regulation imposed by the NLRA merely extends the kinds of protection to employees that the employment at will rule fails to provide. Due to the general absence of protections for employees against discharge, changes to the U.S. legal regime that increase these protections will make the U.S. system more like nations with higher union density, while those that decrease protections will make the U.S. system less like those nations.

Critics also dismiss the legal regime hypothesis because workers in different countries perceive little difference between their legal regimes.²²³ Surveys of employee attitudes suggest a basic similarity in the perceptions of Canadians and Americans regarding the level of legal protection for workers forming unions or the level of animus by managers.²²⁴ A survey result on people's perceptions of a legal regime, however, does not necessarily prove anything about how the legal regime operates in practice. The survey evidence, therefore, does not actually prove very much.

One major shortcoming of the legal regime hypothesis has been in identifying precisely what element of the legal regime was responsible for driving union density down. Rich Yeselson has argued that the Labor-Management Relations Act of 1947, also called the Taft-Hartley Act, was the change in the law that stanching the Movement's growth and led to its current nadir.²²⁵ One problem with this theory, however, is timing. Union density in the U.S. grew for several years following the implementation of the Taft-Hartley Act.²²⁶ Moreover, private sector union membership continued to grow—albeit not as fast as the labor force—for nearly thirty years following the passage of Taft-Hartley.²²⁷ Why would it take so long for the Taft-Hartley Act to have a detrimental impact? Indeed, the fuzziness in chronology points to an even greater defect in this thesis: Yeselson fails to articulate a causal mechanism between the elements of the Taft-Hartley Act and their negative effect on union density. Yeselson identifies five elements of

222. See *Id.* at 358–59, 370–71, 387–89, 395–98, 434–36 (noting the additional protections to employment absent from the employment at-will doctrine that are provided by law in Australia, Canada, France, Germany, and Britain).

223. Lipset & Katchanovski, *supra* note 191, at 19.

224. *Id.*

225. Rich Yeselson, *Fortress Unionism*, DEMOCRACY J., 29 (Summer 2013), <http://democracyjournal.org/magazine/29/fortress-unionism/>; see also, Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763 (1998).

226. *Id.*

227. See Seymour Martin Lipset & Ivan Katchanovski, *The Future of Private Sector Unions in the U.S.*, J. LABOR RES. 229, 230 (Spring 2001).

the Taft-Hartley Act that he says “had the most far-reaching impact.”²²⁸ They are: (1) the authority for states to enact right-to-work laws, (2) the recognition of employer free speech rights, (3) the prohibition on secondary boycotts, (4) the removal of supervisors from the definition of employees under the Act, and (5) the non-communist affidavit.²²⁹ Nevertheless, he provides no connection between these elements and the consequent drop in union density.²³⁰ Rather, he leaves the reader to infer that such a causal mechanism exists. In light of the years of growth in both union density and union membership that occurred following 1947,²³¹ the more natural inference is that these elements had little direct effect on union density.

Others attribute Labor's decline to the ability of employers to permanently replace striking workers.²³² Those who hold this view point specifically refer to President Ronald Reagan's replacement of striking air traffic controllers as a watershed moment because it signaled that union busting had become respectable.²³³ Here too, timing is a problem. While President Reagan's firing of over 11,000 Professional Air Traffic Controllers Organization strikers constituted an dismal point in U.S. labor history,²³⁴ an employer's right to permanently replace strikers dates back to 1938.²³⁵ Given that the majority of labor's dramatic increase in union density occurred in the presence of this point of law, it is difficult to understand how this element of the law could be responsible for the inability of the Labor Movement to grow.

The most common variant of the legal regime hypothesis focuses on the NLRA's lack of punitive measures to deter against the commission of unfair labor practices.²³⁶ This was the hypothesis that

228. *Id.*

229. Yeselson, *supra* note 225.

230. *Id.*

231. Lipset & Katchanovski, *supra* note 191.

232. See Joseph A. McCartin, *The Strike That Busted Unions*, N.Y. TIMES, Aug. 3, 2011, at A25; JOSEPH A. MCCARTIN, COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA 359-61 (2011).

233. *Id.*

234. *Id.*

235. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

236. See, e.g., Nancy Schiffer, *Rights Without Remedies: The Failure of the National Labor Relations Act*, ABA SECTION OF LABOR & EMPLOYMENT LAW, 2nd Annual CLE Conference, 4-11 (Sept. 10-13, 2008), <http://apps.americanbar.org/labor/lel-annualcle/08/materials/data/papers/153.pdf>;

Richard B. Freeman, *What Can We Learn from NLRA to Create Labor Law for the 21st Century?*, GEORGE WASHINGTON LAW SCHOOL SYMPOSIUM: THE NATIONAL LABOR RELATIONS ACT AT 75: ITS LEGACY AND ITS FUTURE (Oct. 28, 2010), <http://www.law.harvard.edu/programs/lwp/people/staffPapers/freeman/2010%20Freeman%20NLRB.pdf>; John T. Dunlop, *Fact Finding Report: Commission on the Future of Worker-*

drove Labor to push for the Labor Law Reform Act of 1977,²³⁷ and has been the focus by far of the most commentary on the shortcomings of the NLRA.²³⁸ The missing piece to this theory has been an explanation for the lack of strong penalties being problematic in the 1980s, but not in the 1950s and 1960s. Instead, proponents of this theory have generally espoused that employer opposition to unions spontaneously increased in the 1970s.²³⁹ The following passage from an empirical study by Richard B. Freeman and Morris M. Kleiner typifies the reliance on this assumption:

In the 1960s management at most large firms recognized unions as a permanent labor market institution and viewed collective bargaining as an acceptable mode for determining wages and working conditions . . . In the 1970s and 1980s management's attitude and behavior changed dramatically. The goal of a union-free environment, once espoused by fringes of the management community, spread until by 1983 45% of the relatively progressive firms in the BNA's Personnel Practices Forum declared that being nonunion was their major labor relations goal. Unfair labor practices committed by management skyrocketed despite a decline in NLRB representation elections, and approximately one-third of the firms whose workers voted to unionize remained nonunion by failing to sign a collective contract, effectively reversing the result of the election.²⁴⁰

The view expressed seems to be the NLRA always lacked effective deterrence, but the lack of deterrence only became a problem in the 1970s when employer sentiment turned resolutely anti-union. What this narrative fails to contemplate is that, rather than employer sentiment changing, it might have been the legal regime that changed, and that this change in the law may have led employers to act more freely on their previously-held anti-union preferences.²⁴¹

In this article, I have supplied what has been missing from the legal regime hypothesis: namely, a discrete change in the legal regime whose introduction corresponds with Labor's decline. Under this explanation, returning to Joy Silk will be meaningful labor law reform

Management Relations, 69 U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE (1994).

237. H.R. 8410, 95th Cong. (1st Sess.1977).

238. See *supra* note 43.

239. Freeman & Kleiner, *supra* note 119, at 1; Bronfenbrenner, *supra* Note 105, at 4 (describing an increase in employer opposition in the 1970s).

240. Freeman & Kleiner, *supra* note 119, at 1.

241. The view that anti-union sentiment suddenly increased in the 1970s conflicts with the common sense understanding that that employers have always been anti-union. See Thomas Kochan, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS*, 182-83 (1980) ("[T]he dominant policy of U.S. employers has historically and currently been to strongly oppose efforts to unionize a heretofore unorganized company or work force.").

indeed. A return to Joy Silk should be expected to significantly revive labor's fortunes in the United States by neutralizing the most significant impediment to worker organizing: illegal employer opposition.

CONCLUSION

The central argument of this article is that the NLRA can be fixed, and the repair does not require the intervention of Congress. The problem of too many ULPs during NLRB elections did not always exist. It arose when it did for a reason. As I have endeavored in this article to demonstrate, the abandonment of *Joy Silk* likely caused the problem and returning to *Joy Silk* likely will fix it.

But if the solution is as simple and readily available as I contend, then why has it not been implemented already? Why is it not currently on Labor's agenda for reforming U.S. Labor law? Why has the Labor Movement instead expended all of its political capital *twice* on enacting a legislative fix?

The best answer I can provide is that Labor initially perceived *Gissel* as a victory.²⁴² Indeed, no cause existed in 1969 to view it as a loss. *Joy Silk* was abandoned in such an irregular fashion that it was difficult to interpret its meaning. Moreover, once *Gissel* was the law, Labor adopted the legal objective of making the doctrine as favorable as possible, while management counsel immediately set out to expose the doctrine's inherent weaknesses and limitations. For Labor to at any point acknowledge those weaknesses meant surrendering to management's view.

So instead of surrendering the prize it thought it had won, the Labor Movement dug in on the goal of making *Gissel* as effective as possible by urging aggressive enforcement and regular resort to injunctive relief under Section 10(j) of the Act.²⁴³ To the extent that this strategy was resisted by courts, Labor attributed this obstruction to the biases of a right-wing judiciary. Labor was mistaken, however. The limitations of *Gissel* are inherent to the doctrine.

In any event, *Gissel* can remain good law alongside *Joy Silk*. It

242. See, e.g., Linda Hirshman, *After 45 Years of Conservative Rulings, Here's What a Liberal Supreme Court Would Do*, WASH. POST., Feb. 19, 2016, https://www.washingtonpost.com/opinions/after-45-years-of-conservative-rulings-heres-what-a-liberal-supreme-court-would-do/2016/02/19/efa63ad4-d589-11e5-b195-2e29a4e13425_story.html?utm_term=.66c93be11b71 (describing *Gissel* as "a new extraordinary remedy for labor . . .").

243. See, Gen. Couns. Mem. 14-03, *Affirmation of the 10(j) Program*, 1 (Apr. 30, 2014), http://www.managementmemo.com/files/2014/05/GC-14_03-Affirmation-of-10_j-Program.pdf.pdf; see also *Guideline Memorandum Concerning Gissel*, *supra* note 76, at 1, <https://www.nlr.gov/reports-guidance/general-counsel-memos>.

may serve as an option for cases where a union does not request recognition from an employer prior to the commission of a rash of disabling ULPs or where a union obtains a majority as substantial ULPs are being committed. But without *Joy Silk*, *Gissel* was a pyrrhic victory only, one that continues to set the stage for Labor's inevitable and ultimate defeat.

Returning to *Joy Silk* is not currently on the reform agenda of the Labor Movement. If this Article is successful, it will be. Restoring *Joy Silk* to U.S. labor law is both possible and necessary. Forty-five years is long enough to wait. The Labor Movement cannot afford to wait much more.