Free Speech & Election Law

Why Vote in Secret? Balancing Autonomy and Accountability in Absentee, Card Check, and Corporate Voting Contexts

*By Allison R. Hayward**

The way a group, jurisdiction, or nation votes, and makes decisions binding on their members and citizens, is fundamental and deceptively prosaic. Why do some groups (e.g., faculties, Congress, caucuses, HOAs) take public votes in most contexts, accompanied by debate, sometimes heated? Why do others (e.g., electorates, labor unions) take private votes (often by ballot cast in a secure setting where "heated debate" is not allowed) in most contexts?[1]

Moreover, what should we make of the exceptions to these general forms? This article contends that the hybrid mode of voting—non-public yet non-secret voting such as in contemporary absentee balloting, in union organizing petitions (so called "card check" campaigns) as well as among corporate shareholders—carries with it the weaknesses of each alternative without the strengths. Accordingly, where possible the situations that use this hybrid should be reformed to adopt the open or secret modes.

I. Why Different Contexts Require Different Modes of Voting

Voting systems must manage two separate characteristics. The first is the character of the decision being made. Certain decisions are better-made in deliberative assemblies rather than by balloting. Debate can bring the question into focus and can allow a body to make a prompt decision. An aspect of deliberation is also the flexibility to modify the issue before the vote. Motions can be amended; ballots cannot. It is easier for a meeting to accommodate a series of votes on amendments that would require separate elections by ballot and avoid the problem of "cycling preferences" where the electorate ends up with a suboptimal choice.[2]

The second characteristic is voter independence, power, or vulnerability. In the context where the vote is cast, is it important at that moment for the voter to be insulated from pressure, so as to express his preference privately, sincerely, anonymously, and secretly? Secret voting is important in situations where we want voters to register their preference secure in the knowledge that no one will know how they voted. Historically, secret balloting has been instituted in response to fraud, but it can stand on its own in situations where elections need to register the sentiment of a relatively large group about a contested issue of general interest.

Condorcet's widely discussed insights suggested that individual voters are more likely to be correct about the choice that is best for them and for the polity overall. Sincere expression of majority will is likely to result in the best alternative.[3] The "best" is a desirable outcome, not only because it may better serve the welfare of the group, but because dissenters, understanding this, will more willingly acquiesce to the majority's choice (at least in the short run). We especially care about dissenters' feelings of legitimacy when the "group" under discussion is a political subdivision.[4] "Love it or Leave it" (or "exit" in Albert Hirschmann's influential description) is rarely a realistic choice in a polity. Moreover, withdrawal is undesirable if those dissenters' honest perspectives as voters will be necessary for future good decisions on other questions.[5] Also, when dissenters feel cheated, their attempt to rectify the direction of government can take antisocial forms.

Thus, a well-run election in a large body where exit is unrealistic, like a political jurisdiction, should restrict as much as possible any opportunities for threats, bribes, or monitoring at the moment of voting. Other voting contexts however, present competing concerns and should be administered differently. Thus, when the voter is also a representative, votes should be cast openly and each voter's vote identified with him. Only then can colleagues and the constituency observe how the representative is performing in office. Even here, it is customary to allow a secret ballot in certain sensitive situations.[6]

II. Balloting Through History

Before the 1880s, most American jurisdictions voted by ballot, but American ballots were not "secret" ballots. Voters brought their own ballots to a central polling place. Parties would print out the slate of candidates for all offices, and voters would choose a ticket, then deposit it at the polls.[7] Generally, voters would make their way through a crowd to their voting window with their ticket, hand it inside to an election official, who would then deposit it in a ballot box out of reach of the public.[8]

While the American private ballot system was more closed than that afforded in open-voice voting, voters could (and did) exercise more discretion over their vote than it might at first appear. Simply because a voter took and cast a Republican ballot did not limit the voter to every candidate on the Republican slate. Voters could alter their party ballots, by writing in a preferred choice or pasting in the name of another candidate provided by that campaign.[9] Or voters could tear off the names of disfavored candidates and vote the rest.[10] But the private ballot system also allowed malefactors to distribute misleading or fraudulent ballots. Local parties could print up their own slates to oppose the regular party nominees (or demand money to distribute the "correct" ballot). Opposing parties could circulate "bogus" rival ballots.[11]

Between 1888 and 1900, the secret, state-printed "Australian ballot" swept the United States.[12] Standardization was not without costs. "What had been a relatively fluid and informal electoral process, dominated by the local party

* *Assistant Professor of Law, George Mason University School of Law, Board member, Center for Competitive Politics, and Board member of the Office of Congressional Ethics.*

organizations, now became a more formal proceeding, still dominated by the major parties but with vastly more authority vested in the party elite."[13]

The secret ballot posed new challenges. Is the ballot designed so that voters can easily choose their preferences? For instance, the "Massachusetts ballot," now the modern standard, organized candidates by office; the "Indiana ballot" listed columns of candidates by party.[14] The Massachusetts ballot was more conducive to independent voting and split tickets; the Indiana ballot encouraged straight-ticket voting but took less time to vote, reduced "roll off," and (by incorporating symbols for the parties) was easier for uneducated or illiterate voters to use.[15] Among some, the motives for adopting the state-printed Australian ballot was to disenfranchise illiterate voters.[16] Pre-election voter education, such as distributing sample ballots in advance, reduced voter confusion but added to the expense of the election.[17]

Even when the instructions are clear, voters make mistakes. How will nonconforming ballots be counted, if at all? Can election administrators number ballots, so that in a recount or contest a voter can identify his ballot and can clarify his intent? State courts confronted with such systems split on whether such numbering was inconsistent with a guarantee of a secret ballot.[18]

Once the state prepared the ballots, state law determined who could appear on them, with nontrivial consequences for voters' choices. Evidence suggests that ballot access restrictions in a handful of Southern states saved the presidency for Harry Truman in 1948, and New York's denial of Eugene McCarthy's ballot access suit in 1976 helped elect Jimmy Carter.[19]

The Australian ballot has become another public budget item, subject to those constraints and incentives. As populations increased, election administrators have been faced with growing expenses in guaranteeing the secret ballot, in locating and staffing polling places, printing ballots and other materials, and tabulating returns. Yet citizen outcry for greater election administration budgets is seldom heard.

III. Important Exceptions

Today, we vote by non-secret ballot in situations where public accountability and deliberation are also nonexistent. These situations might be labeled "demi-publicity." An ever-increasing number of ballots are cast by mail, away from the compelled confidentiality of the polling place. Whereas twenty-five years ago only about five percent of the total votes cast were cast away from the traditional election-day polling place, in 2000 that percentage had risen to fourteen percent, and in 2004 to approximately twenty-two percent.[20] In 2008, it appears that an unprecedented number—about thirty percent—of voters cast their ballots before Election Day, either at early polling locations or by voting absentee away from a polling place.[21]

The "demi-publicity" problem is not confined to public elections. In "card check" labor organizing campaigns, voters are asked to cast a vote in favor of union representation in frequently coercive situations. Moreover, voting by corporate shareholders is not anonymous and also can be susceptible of influence and coercion. Why is confidentiality not protected in these contexts? Should it be?

A. Absentee Voting

Vermont first extended an "absentee" vote to civilians in 1896.[22] Its law, however, required that the absent voter cast a vote on election day at a polling place in the state. By 1928 all but three states had provided at some point for absent voting. The vast majority of these laws allowed the voter to vote before election day, either by appearing in the registrar's office or before an officer qualified to administer an oath. Commentators observed that so long as these laws ensured that ballots "would be voted under some public auspices and transmitted to the proper precincts protected from dishonesty and without violating the voters' confidence" that absent voting was little threat to the integrity of elections.[23] Such protections make voting less convenient, and few took advantage of absentee voting. In 1922, out of an electorate numbering 2,300,000 in New York City, 329 absentee votes were cast.[24]

More recently, legislators have broadened the availability of absentee voting in many states by adopting "no excuses" absentee balloting. That is, a voter can apply for and vote an absentee ballot even if able to reach the polls on election day.[25] Not surprisingly, absentee voting increased in these states—California's absentee turnout went from about five percent at the time its "no excuses" law was enacted, to over thirty percent in 2004.[26] California also adopted permanent absentee status in 2002, under which the state will send the voter an absentee ballot each election without the voter requesting a ballot each time. In 2005 twenty-one percent of all registered California voters had permanent absentee status.[27]

Innovations like "no excuses" absentee voting and permanent absentee status, by increasing voting outside the protection of the polls, could logically increase the availability of absentee ballots for fraud. But even in jurisdictions where these innovations have not been adopted, a culture of absentee fraud can flourish. With the cooperation of a willing notary, for example, even the affidavit provisions of these stricter laws provide no guarantee against fraud by entrenched interests.[28] In a 1982 Oklahoma prosecution of absentee voter fraud, the judge justified accepting a no-contest plea because "it's been kind of difficult to put someone in the pokey for this since it has been going on for so long."[29] To the extent absentee voting is seen as needing reform, most of the attention is on the error rates of absentee voting, and activists counsel that easier standards will result in fewer spoiled or rejected absentee votes.[30]

Finally, even in the best circumstances voters make mistakes. Because absentee voters tend to be better-educated and older than election day voters, one might expect that their ballots would exhibit fewer problems.[31] However, the evidence shows that the problem of the miscast or "residual" absentee ballot is real and substantial. Residual vote rates for absentee voters tend to be higher than for early voting or election day voting at the polls.[32] In some jurisdictions the differences are striking. In California, for instance, the residual rate in the 2004 election was 1.0% for polling place voting, and 1.3% for absentee voting (out of 4,108,088 absentee ballots counted); in Virginia 0.7% for polling place voting versus 1.1% for absentee voting (of 221,890 absentee ballots counted), and in North Carolina 2.2% versus 4.6% (of 122,984 absentee ballots counted).[33]

Although absentee voters as a group would appear better prepared to vote (given demographics), absentee ballots exhibit more mistakes. Something about voting away from the polls affects a voter's ability to cast a ballot. That "something" may be as simple as having a checking device at the polling place to reject overvotes and ballots with illegible marks. This is a persistent deficiency in absentee voting not readily capable of remedy.

B. Voting and Card Check Campaigns

A union can become the recognized agent for collective bargaining in one of three ways. It may be selected by a majority of the unit's employees in an NLRB-conducted election.[34] Or the employer may agree to recognize the union once a majority of its workers have signed authorization cards.[35] Finally, the NLRB may order a union be recognized if a majority of workers have signed authorization cards and the employer has engaged in practices that make a fair election unlikely.[36] Accordingly, in situations where there is a "question of representation"—typically because a union claims to be the designated representative of a set of employees and the employer disputes that claim—the National Labor Relations Act requires the Board to direct an election by secret ballot.[37]

Labor organizations complain that this system is unduly burdensome, in that employers presented with authorization cards from a majority of the relevant unit's employees should, they contend, recognize that union as the collective bargaining representative for all employees in that unit. As the law stands now, however, even if the union collects authorization cards from a supermajority of employees, the employer may still insist upon an election.[38] During the period before the election, unions complain that employers inundate their employees with anti-union information, intimidate employees, and otherwise coerce the employees' judgment, reducing if not eliminating the chances the election will favor the union.[39]

Voting at a Certification-Election Day resembles voting at public polls in many respects. Employees present themselves to monitors, who, once satisfied with the voter's bona fides, provide a ballot and direct the voter to a booth.[40] After the voter marks the ballot, a worker under the scrutiny of an NLRB agent deposits the ballot into a ballot box. Authorization "card check" campaigns, by contrast, resemble absentee balloting in some respects. Individuals supporting the union solicit signatures from employees one-on-one, often at home and away from observation by others.[41]

The encounters can be unpleasant. "In the context of a union organizing drive, peer pressure from fellow workers and from the union to sign union membership cards may make it difficult for an employee to express genuine feelings about the union."[42] Similarly, supervisors may call organizers aside and counsel them against engaging in this protected activity, unlawfully threaten them with dire consequences, or promise advantages if the employee stops organizing.[43]

At present, the closest analogy in politics to a card check effort is a petition drive. In both, sufficient signatures merely trigger an election by secret ballot on a question. But under proposed revisions titled the "Employee Free Choice Act" (EFCA), a card check effort that obtained a bare (absolute) majority of the unit's worker signatures would bring all relevant workers, whether or not they like it, under the collective bargaining representation of the union with no separate election.[44] Currently, the employer, although not capable logistically to argue against the union's efforts during the card check drive, has the opportunity to reach workers with its perspective during the campaign before the election. Under EFCA, this opportunity disappears. A card check authorization effort would become analogous to a one-sided petition drive with the power, alone, to amend existing law. To be sure, this change in the law would prevent supervisors and employers' agents from threatening, coercing, or bribing employees not to support the union, but critics assert that the appropriate remedy for such unfair labor practices is not to cut the employer's perspective out of the campaign altogether.[45]

Under EFCA, we encounter a more extreme example of non-secret but non-private voting than in the absentee balloting context. While absentee balloting occurs within the requisite time limits and deadlines of a particular campaign, a union authorization card can be deemed "current" for a year or more after being signed and cannot be revoked by the worker.[46] Workers are approached by one party to the contest and either vote for union representation or face the unpleasant consequences of refusing. Unlike absentee balloting, where a self-confident voter might be able to avoid a campaign worker's prying eyes, there is no hypothetical case where the voter can exercise his choice confidentially.[47] The organizer either walks away with a signed card or does not.

Furthermore, because card check efforts need not be publicized, nor the identities of supporters released, there is no way for a worker whose name has been fraudulently added to the union's list to detect the fraud, whereas the voter whose absentee ballot is intercepted by a third party may notice it missing or find out on election day that a vote has already been cast in his name. Unlike voting a secret ballot under the supervision of some neutral overseer, the worker is vulnerable to coercion and/or fraud. Unlike a public meeting to vote for representation, he cannot hear competing arguments, ask questions, or observe the attitude of his colleagues. Finally, the card check process is only available under EFCA when a workplace is being organized. It is not available when employees want to change their representative or rescind recognition.[48] If card check is a suitable way to express workplace democracy in the organizing context, it should be equally appropriate for changes in representation.

If card check organizing is rejected, then which is better, secret ballot or open meetings? History teaches us that union organizing and representation elections are potentially unpleasant. The purpose behind the NLRA, after all, was to increase industrial peace in an often hostile context. The rise of the neutrality agreement/card check model via private contract between unions and employers provides a useful, already-existing alternative for those situations where each side can work with the other.[49] Those campaigns that remain subject to NLRA are the tense and contested ones. Therefore, it is unlikely that a "public meeting" open voting alternative would work in those workplace campaigns that now proceed under the NLRA.

Thus, there is good reason to preserve employee access to the secret ballot in the labor organizing context. Secret ballot elections are admittedly no guarantee of smooth sailing—experience has shown that they too can be used as a tool of fear and manipulation, as the unhappy histories of certain trade unions will attest.[50] Those matters reach beyond the task of this Article, which has been to explain the importance of the secret ballot in certain settings, especially those where voters have reason to fear retribution. Fewer contexts present a clearer example of this than the contested union organizing election.

C. Shareholder Voting

Under Delaware's corporate code, shareholders vote to elect directors, typically by plurality vote. Shareholders also vote on bylaw amendments, resolutions, mergers, and amendments to the Certificate of Incorporation.[51] These votes are cast on "ballots," away from any protective polling location, and the identity of the voter is on the ballot. The corporation can see who has voted and how they voted. Is this voting process legitimate, given the concerns raised throughout this article about non-public, non-confidential balloting?

Corporate voting, especially in large, publicly-traded companies, has characteristics not shared by the other forms of voting discussed above. Unlike voters, who register and vote based mostly on domicile, or workers, who are part of a collective bargaining unit determined by their job, the shareholder franchise is based on possession, perhaps fleeting, often indirect, of an intangible asset. Simply because someone possesses shares as of a certain date may say little about their stake in the operation of the company or their knowledge of its operations.[52]

Moreover, investors may loan their securities to others, and with them, the votes. Those borrowers would be able to vote without having anything meaningful at stake.[53] "Empty voting" by investors who have hedged their positions is controversial, and it is hard to think of an analogous situation in politics where large voting blocks would cast their votes "insincerely"—perhaps in an effort to make things worse off.[54]

Unlike a voter or worker, the identity of the beneficial shareholder may not be known if, as is frequently the case, the owner of record is not the individual investor but a broker or other nominee. If investors have elected to be treated as an objecting beneficial owner (OBO), the corporation will never know their individual identities but can only convey voting materials to intermediaries.[55] This makes for an inefficient "campaign" but also means that the corporation at this stage is unable to lobby the shareholder. That insulation is fleeting—once the vote is cast, management could see who voted against management and contact those shareholders or the transmitting intermediaries.

Moreover, beneficial shareholders may not control their votes. If the investor never receives the materials, the custodian may vote the "uninstructed" shares as it sees fit.[56] Even after an investor casts a vote or instructs the custodian of the shares how to vote, he may reverse that vote—until the end of voting, a shareholder may cast multiple votes, and only the proxy cast last in time determines the votes of the shares.[57] Shareholders can enter into "voting trusts" that bind them contractually to vote a certain way, and can "buy" votes.[58] In short, many shared traits in other voting contexts—an identifiable and relatively stable electorate with a real stake, to whom a campaign can be directed, who cast votes directly, on ballots where there is some means for imposing ballot integrity, are not present in corporate voting.

In the context of this study, corporate voting would seem to share some traits with absentee and card check voting. A shareholder casts a vote outside a setting shielded from influence or coercion. In fact, similar to the card check setting, a shareholder can be approached again and again during a voting period to "re-vote." Corporate voting would thus be classified as a form of non-secret but non-public voting that our analysis suggests is illegitimate.

Yet differences in shareholder voting mean that the shareholder voting context is not susceptible to the same analysis. In a large, publicly-traded corporation, small shareholders, unlike voters or workers, would likely find that "exit" from the corporation, to a competitor or financial substitute, is easier (even preferable) than researching and voicing an opinion through voting.[59] So whatever influence or pressure they may suffer when casting their vote can be avoided easily, if they so choose.

Furthermore, not all corporations are large, publicly-traded companies. How does open voting fare in closely-held corporations, when shares may be relatively illiquid and exit is thus difficult? Here, the other characteristics of mass voting are also not present. Voting in closely-held corporations is more like voting on a committee, faculty, or HOA, face-to-face, where votes are usually cast openly after motions and debate. This context lacks the logistical impediments to open voting with debate that exist in mass elections.

To assert that there is no political gamesmanship or coercion in these contexts would be naive, but given the number and diversity of such bodies, it is hard to imagine how mandated secret voting would be implemented. Moreover, open voting with debate, discussion, and the potential for reconsideration, as observed at the outset, is the most flexible and accommodating form for taking votes. On balance, corporate voting may not present a situation where the secret ballot is needed for ascertaining the true will of participants.

Larger institutional shareholders of publicly-traded corporations fall at the opposite end of the spectrum from the small shareholder. These investors are more analogous to representatives (of their beneficiaries, perhaps, or of other shareholders) and, like members of Congress or Parliament, in our model should appropriately cast a public vote. Where it makes little sense for the individual shareholder to have to register a public opinion on the board of directors or a merger, a large shareholder such as a union pension fund, TIAA-CREF, or Calpers has the resources to bring questions before the shareholders and advocate for change.[60] Activist hedge funds make it their business to agitate for corporate change.[61] These shareholders should engage openly, sharing research, views, and arguments, and responding to the corporation's defenses and counterproposals. It is good for the corporation, other investors, and the economy if that engagement, and the votes cast, are public. Larger investors are also more likely to be the

shareholders that engage in insincere "empty voting." If a vote on a corporate matter is to have legitimacy with all shareholders, these large shareholders should be monitored.[62]

Other commentators, notably corporate law scholar Lucian Bebchuk, have called for the secret ballot in all voting on directors. He contends that the lack of confidentiality distorts the voting of institutional investors in favor of incumbents. These investors, banks, funds, and other players in the financial world will have business interests better served by remaining on good terms with corporate insiders than by voting for challengers who are better for overall shareholder value.[63] Yet this problem doesn't disappear with a "secret ballot" cast in circumstances akin to an absentee ballot. Just as with absentee voting, if the shareholder wants to show corporate incumbents how its shares voted, it can. The problem is that no one else can see, and no one else can monitor that shareholder-incumbent deal.

Substantial differences between "corporate democracy" on the one hand, and workplace or public democracy on the other hand, mean that the model developed at the outset applies differently. The exchange between these representative institutional shareholders and the corporation is more analogous to a legislative debate, or oversight of administrators, than an election requiring the protection of the secret ballot.

Conclusion

Forms of voting that offer "demi-publicity" are in most contexts defective and difficult to justify. There are reasonable alternatives. For absentee voting in elections, jurisdictions should provide early voting in controlled locations where the protection against coercion and fraud are possible. In the labor organizing context, the analysis argues against the choice of a bare majority through card check to determine whether the workplace is organized. Instead, the card check process could provide the first step to an organizing election (as a petition places an issue on the ballot). Legitimate grievances about the fairness of union organizing elections, and whether employers are engaging in unfair labor practices, offer no justification for discarding the protection from fraud and coercion secured through a secret ballot. Voting by shareholders can also be non-debated and non-secret, but the diverse characteristics of large and small shareholders counsel for transparency, not secrecy, when large institutional investors are engaged in contested corporate voting.

Endnotes

1 This article is a condensed version of a larger study, Allison Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote,* available at http://works.bepress.com/allison_hayward/7.

2 *See* Saul Levmore, *Parliamentary Law, Majority Decisionmaking and the Voting Paradox*, 75 Va. L. Rev. 970, 988 (1989).

3 *See* H.P. Young, *Condorcet's Theory of Voting*, 82 Am. Pol. Sci. Rev. 1231 (1988).

4 Albert O. Hirschman, Exit, Voice and Loyalty 15-20 (1970).

5 *Id*. at 98-105.

6 Robert's Rules of Order Newly Revised 38, lines 22-27.

7 Richard F. Bensel, The American Ballot Box in the Mid-Nineteenth Century 14-15 (2004).

8 *Id*. at 11-14.

9 John Reynolds and Richard McCormick, *Outlawing "Treachery": Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910*, 72 J. Am. Hist. 835, 845 (1986).

10 *See* Robert C. Brooks, Political Parties and Electoral Problems 425 (1933) (describing large numbers of "bob-tailed" Democrat ballots omitting Horace Greeley's name in the 1872 Presidential contest).

11 Reynolds and McCormick, *supra* note 9, at 846-47.

12 Joseph P. Harris, Election Administration in the United States 154-55 (1934); John C. Fortier, Absentee and Early Voting 9 (2006).

13 Reynolds and McCormick, *supra* note 9, at 858.

14 Harris, *supra* note 12, at 155.

15 *Id*. at 155-61.

16 Alexander Keyssar, The Right to Vote 142-43 (2000).

17 Harris, *supra* note 12, at 189-90.

18 Ritchie v. Richards, 47 P. 670, 673 (Utah 1896) (holding that ballot numbering was not unconstitutional under a state secret-ballot requirement); *Ex Parte* Owens, 42 So. 676 (1906).

19 Judith L. Elder, *Access to the Ballot by Political Candidates*, 83 Dick. L. Rev. 387, 388-89 (1978).

20 Fortier, *supra* note 12, at 19.

21 Michael McDonald, *The Return of the Voter: Voter Turnout in the 2008 Presidential Election*, 6 Forum, Article 4, at 4 (2008). Some jurisdictions have seen absentee voting rates soar; in 2008 in Colorado, almost 79% of the total vote was cast early, with 80% of that early vote cast by mail-in absentee ballot. Michael McDonald, *(Nearly) Final 2008 Early Voting Statistics*, updated Jan. 11, 2009, http://election.gmu.edu. In Florida, early voting made up almost 52% of the total vote, and mailed-in absentees comprised 40% of that early vote. *Id*.

22 Helen M. Rocca, A Brief Digest of the Laws Relating to Absentee Voting and Registration 5 (1928); Brooks, *supra* note 10, at 452-53.

23 Victor J. West, *1921 Laws Respecting Elections*, 16 Am. Pol. Sci. Rev. 460, 464 (1922).

24 Edward M. Sait, American Parties and Elections 554 (1927).

25 Fortier, *supra* note 12, at 13.

26 *Id*. at 14.

27 *Id*.

28 *Voter Fraud Charge Names New Yorkers*, N.Y. Times, Oct. 28, 1929, at 19.

29 *Oklahoma Speaker Tried in Vote Fraud Case*, N.Y. Times, Aug. 14, 1982, at 23.

30 Bob von Sternberg, *Minn Race Spotlights National Problem; Difficulties With* Absentee Voting "Are the New Hanging Chad," Expert Says, Wash. Post, Dec. 21, 2008, at A3.

31 David C. Kimball, Advanced Voting and Residual Votes 8 (2008), *available at* http://www.allacademic.com/meta/p279962_index.html.

32 *Id*. at 15.

33 *Id*. at 35.

34 Elections can also be conducted, by consent of the employer and the union, by another third party, such as an arbitrator. Gerald Mayer, Congressional Research Service, Labor Union Certification Procedures: Use of Secret Ballots and Card Checks 9 (April 16, 2009).

35 Again, the union and the employer can negotiate their own card check agreement, which may require a supermajority of employees to sign cards. Mayer, *supra* note 34, at 12; Adrienne E. Eaton & Jill Kriesky, *NLRB Elections versus Card Check Campaigns: Results of a Worker Survey*, 62 Indus. & Lab. Rel. Rev. 157, 158 (2009).

36 Mayer, *supra* note 34, at 8.

37 29 U.S.C. §159 (c).

38 *Id.*

39 *See* Kate Bronfenbrenner, Economic Policy Institute, No Holds Barred: The Intensification of Employer Opposition to Organizing, Briefing Paper #235, at 4-5 (May 20, 2009); NLRB v. St. Francis Healthcare, 212 F.3d 945 (6th Cir. 2000) (discussing standard for determining if employer has "threatened" employees); Eaton & Kriesky, *supra* note 34, at 158 (summarizing studies).

40 *See* Newport News Shipbuilding & Dry Dock Co., 243 N.L.R.B. 99, 101-02 (1979) (describing voting procedures).

41 *See Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education & Labor*, 110th Cong. 5 -7 (2007).

42 Susan Johnson, *Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success*, 112 Econ. J. 344, 350 (2002) (noting that mandatory voting systems reduce recognition rates by about 9 percent).

43 *See, e.g.,* Impressive Textiles, 317 N.L.R.B. 8 (1995) (discussing threats of termination for advocating vote for union recognition).

44 H.R. 1409, 111th Cong. (1st Sess. 2009).

45 Eaton & Kriesky's survey indicates that workers experience less coercion in card check organizing campaigns than secret ballot elections. *See supra* note 35. Under existing law that would be expected, since presently card check campaigns are conducted under a private neutrality agreement, typically supervised by an arbitrator. *See* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 Ind. L.J. 1589, 1589-90 (2008); *see also* Prof'l Janitorial Serv. of Houston, 353 N.L.R.B. No. 65 (Dec. 17, 2008) (card check under neutrality agreement conducted by American Arbitration Association); Dana Corp., 351 N.L.R.B. No. 28, 2007 WL 2891099 (Sept. 29, 2007) (same).

46 Richard Epstein, *The Case Against the Employee Free Choice Act* 43 (Working Paper No. 452, 2009).

47 *See* Excelsior Underwear, 156 N.L.R.B. 1236 (1966) (holding that an employee cannot claim a privacy right to keep his union sentiments secret from the union).

48 *See, e.g.,* James B. Jacobs, Mobsters, Unions, and Feds 92 (2006) (challenger candidate murdered); Robert Fitch, Solidarity for Sale 169-71 (2006); *Democracy in AFSCME DC37 in NYC*, Union Democracy Review #168 (May-June 2007) (noting that an inconvenient polling location allowed local president to remain in office). One could argue that true employee free choice would necessarily include extending card check recognition to changes in affiliation or rescission of representation.

49 Cooper, *supra* note 45, at 1593-94.

50 *See Mob Influence at Its Worst: The Case of Local 560*, 7 Trends Organized Crime 40, 44-50 (Winter 2001) (summarizing abuse of union elections by Anthony Provenzano).

51 Del. Gen. Corp. L. §§109, 216, 242, 251, 271; *see also* Jonathan R. Macey, Promises Kept, Promises Broken 201 (2008).

52 *See* Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 Cardozo L. Rev. 445, 453 (2008).

53 *Id*. at 485-86.

54 Macey, *supra* note 51, at 215 (discussing Compaq shareholders alleging empty voting in merger with HP).

55 Marcel Kahan & Edward B. Rock, *The Hanging Chads of Corporate Voting*, 96 Geo. L.J. 1227, 1237-45 (2008)

56 *Id*. at 1233.

57 *See* Yair Listokin, *Management Always Wins the Close Ones*, 10 Am. L. & Econ. Rev. 159, 161-62 (2008).

58 Hayden & Bodie, *supra* note 52, at 484; Del. Gen. Corp. L. 218(a), (c).

59 *See* Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 Vand. L. Rev. 129, 138 (2009).

60 J.W. Verret, *Pandora's Ballot Box, or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Reexamined*, 62 Bus. Law. 1007, 1030-31 (2007).

61 *Id*. at 1031-32.

62 Macey, *supra* note 51, at 215-16; Thompson & Edelman, *supra* note 59, at 156.

63 Lucian Bebchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675, 704-05 (2007). Confidential voting was a prominent issue for activist shareholders (especially the United Shareholders Association) in the early 1990s but waned after 1994. *See* Roberta Romano, *Does Confidential Proxy Voting Matter?* 32 J. Legal Stud. 465, 476-77 (2003).