Back to the Bargaining Table: The *Joy Silk* Doctrine's Potential To Revive Union Organization*

The modern American labor movement is facing a prolonged stagnation characterized by four decades of declining union membership. Emboldened by the apparent weakness of federal labor law, modern employers are committing an ever-increasing number of unfair labor practices aimed at union avoidance. These chronic abuses beg the question of what can be done to repair employee-management relations and bolster good-faith bargaining. This Comment contends that the revival of Joy Silk *bargaining orders may provide the National Labor Relations Act with the necessary enforcement power to bring resistant employers back to the bargaining table.*

INTRODUCTION

In early September 2021, the *New York Times* ("*Times*") was embroiled in a grueling union election battle against the company's organizing tech workers.[1] During the union election campaign, *Times* employees voted on whether to certify the prospective union as their exclusive bargaining representative.[2] If certified, the *Times* would be obligated to both recognize and bargain with the union.[3] In response, management-side lawyers quickly mobilized to provide the company with a "confidential strategy briefing" detailing how to defeat the prospective union, or at least, reduce its bargaining power in the event it gained recognition.[4] However, one wrinkle held the potential to unravel management's entire antiunion campaign: one of the *Times*' lawyers accidentally forwarded this confidential briefing to a staff member of the opposing union.[5]

Generally, such a blunder would not be a fatal blow to the employer.[6] Although union officials may bring charges of unlawful surveillance or polling, they would by no means escape the requirement of a formal National Labor Relations Board ("NLRB") election.[7] During this obligatory—and arguably performative—election period, an employer opposed to collective bargaining can attempt to undermine unionization efforts.[8] However, the *Times*' briefing included a chart with detailed estimates of employee voting, in a way that undoubtedly demonstrated that the employer had explicit knowledge of the union's majority status.[9]

1. *See* Brandon Magner, *The New York Times Makes the NLRB's Case for Reviving the* Joy Silk *Doctrine*, LABORLAB, https://www.laborlab.us/joy_silk_doctrine [https://perma.cc/VC93-RH8D (dark archive)] [hereinafter Magner, *Reviving the* Joy Silk *Doctrine*].

2. *See Conduct Elections*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections [https://perma.cc/2ADJ-5RR2].

3. *Id.* ("[A] union that receives a majority of the votes cast is certified as the employees' bargaining representative and is entitled to be recognized by the employer as the exclusive bargaining agent for the employees in the unit. Failure to bargain with the union at this point is an unfair labor practice.").

4. *See* Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.* An employer can violate Section 8(a)(1) of the National Labor Relations Act through practices such as spying on employees' union activity, photographing or videotaping employees engaged in peaceful union activity, or polling employees to determine the extent of their union support without implementing the proper safeguards. *See Interfering with Employee Rights (Section 7 & 8(a)(1))*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1 [https://perma.cc/D78G-CQK3]. For more information about the mechanics of a formal secret ballot NLRB election, *see infra* Section I.A.

8. *Id.* ("Under current law, the *Times*' management is allowed to barrel ahead to an election regardless of the fact that they know the union enjoys majority support among the petitioning workers, even if management's intent is solely to stall and attempt to undermine the union.").

9. Sam Knight, *NLRB Is Reviewing a Rule Change That Has Helped Bosses Bust Unions for Decades*, TRUTHOUT (Sept. 6, 2021), https://truthout.org/articles/nlrb-is-reviewing-a-rule-change-that-has-helped-bosses-bust-unions-for-decades/ [https://perma.cc/XB2F-BUM6].

Enter the *Joy Silk* doctrine. Hours before *Times* management's erroneous email, newly-appointed NLRB General Counsel Jennifer Abruzzo issued her first memorandum laying out an ambitious pro-union agenda.[10] Near the top of her docket was a plan to reinstate the long-dormant *Joy Silk* doctrine.[11] Under the *Joy Silk* doctrine, an employer is compelled to recognize and bargain with a union absent a good-faith belief that the union lacks majority support.[12] Thus, the *Times* could not force an election if management conclusively knew the union already had the majority vote.

The *Times*' case perfectly illustrates the utility of *Joy Silk*'s good faith reasonable doubt test. Emboldened by the apparent weakness of the National Labor Relations Act ("NLRA"), modern employers are committing an ever-increasing number of unfair labor practices, including refusing to bargain in good faith with union representatives.[13] Currently, the mandatory formal election process is exploited as an "unlawful stall tactic to erode union support and undermine employee choice."[14] These chronic abuses beg the question of what can be done, if anything, to bolster the stagnant American labor movement. The revival of the *Joy Silk* doctrine may provide the NLRA with the enforcement power necessary to end needless filibusters and force recalcitrant employers back to the bargaining table.

This Comment contends that *Joy Silk* should be reintroduced under the NLRB's new reform agenda, so long as it is updated to reflect changes in the

10. *See* Memorandum GC 21-04 from Jennifer A. Abruzzo, NLRB Gen. Couns., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers (Aug. 12, 2021), https://apps.nlrb.gov/link/document.aspx/09031d4583506e0c [https://perma.cc/Q6TQ-6NXV (staff-uploaded archive)].

11. David G. Weldon, *Ready, Set, Go! NLRB New General Counsel Outlines Ambitious Pro-Union Agenda*, NAT'L L. REV. (Aug. 17, 2021), https://www.natlawreview.com/article/ready-set-go-nlrb-s-new-general-counsel-outlines-ambitious-pro-union-agenda [https://perma.cc/JJD6-RDS6]; *see also* Brandon Magner, *Why Labor Law Needs* "Joy Silk" *Bargaining Orders*, LAB. L. LITE (Nov 29, 2020), https://brandonmagner.substack.com/p/why-labor-law-needs-joy-silk-bargaining [https://perma.cc/8T4A-AP66] [hereinafter Magner, *Why Labor Law Needs* Joy Silk] (explaining how *Joy Silk* fell out of favor at the NLRB).

12. *See Refusal-To-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387, 397–99 (1966) [hereinafter *Refusal-To-Recognize*]; *see also* Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1 ("Under *Joy Silk*, management's lack of good-faith doubt about the union's majority status means that it is required to bargain with the union, regardless of whether there has been an election to certify that majority.").

13. Ross Eisenbrey, *Employers Can Stall First Union Contract for Years*, ECON. POL'Y INST. (May 20, 2009), https://www.epi.org/publication/snapshot_20090520/ [https://perma.cc/L4LB-U8ZF] (contending that workers' failure to gain adequate union representation can be attributed to "the absence of damage remedies such as cash penalties against employers who bargain in bad faith and the fact that employers have the legal right to *permanently replace striking workers*—effectively firing them if they go on strike").

14. Robert Iafolla, *NLRB Legal Chief Plans Back-to-Future Strategy on Board Powers*, BLOOMBERG L. (Aug. 24, 2021, 11:35 AM), https://news.bloomberglaw.com/daily-labor-report/nlrb-legal-chief-plans-back-to-future-strategy-on-board-powers [https://perma.cc/8U8W-H23W] [hereinafter Iafolla, *NLRB Legal Chief*].

modern American workforce.[15] The argument proceeds in four parts. Part I explores the background of *Joy Silk* and contends that its "disappearance explains much of the chronic under-enforcement of federal labor law over the past half-century."[16] Part II examines whether the revival of *Joy Silk* creates more problems than it solves for the modern workforce. Finally, Part III suggests possible modifications to the *Joy Silk* doctrine to address the concerns raised in Part II.

I. *JOY SILK*'S DISAPPEARANCE

The *Joy Silk* doctrine's creation, reign, and subsequent abandonment has sparked controversy between labor scholars over the past century.[17] The following sections provide background first on the mechanics of federal labor law generally and then on the *Joy Silk* doctrine specifically.

A. *Background of the NLRA and the Mechanics of Unionization*

The right to unionize lies at the heart of American labor law and is responsible for securing many foundational protections, such as the minimum wage and the forty-hour work week.[18] The right to unionize is specifically protected under the NLRA.[19] In 1935, Congress enacted the NLRA to safeguard employees' rights to unionize and to "prevent unfair labor practices committed by private sector employers and unions."[20] The NLRA plays an essential role in protecting workplace democracy by safeguarding private-sector employees' rights to collectively bargain, which often takes the form of unionization, in pursuit of better working conditions.[21]

15. *See* Magner, *Why Labor Law Needs* Joy Silk, *supra* note 11.

16. *Id.*; *see* Brian J. Petruska, *Adding* Joy Silk *to Labor's Reform Agenda*, 57 SANTA CLARA L. REV. 97, 127 (2017).

17. *See* Brandon Magner, The Good-Faith Doubt Test and the Revival of *Joy Silk* Bargaining Orders 44 (Oct. 13, 2021) (unpublished manuscript) (on file with the North Carolina Law Review) [hereinafter Magner, The Good-Faith Doubt Test] ("[B]y the late 1960s the good-faith doubt test was under fire by an impressive armada of labor law experts in academia, government, and private practice.").

18. Laura Miller, *Read President Obama's Open Letter to America's Hardworking Men and Women*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Sept. 4, 2016, 8:00 PM), https://obamawhitehouse.archives.gov/blog/2016/09/04/president-obama-letter-americas-hardworking-men-and-women [https://perma.cc/2V3D-G69E] (contending that many "cornerstones of the greatest middle class," such as the forty-hour work week, the minimum wage, and retirement plans, all bear the union label).

19. National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (1984)).

20. *What We Do*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do [https://perma.cc/DYK3-MBR9].

21. *National Labor Relations Act*, NLRB, https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act [https://perma.cc/ALA2-27XR (staff-uploaded archive)].

The unionization mechanisms of the NLRA are simple. Section 8(a)(5) and Section 9(a) of the NLRA require employers to bargain with representatives who were "designated or selected" by a majority of employees in a particular bargaining unit.[22] So long as at least thirty percent of employees demonstrate written interest in being represented by a collective bargaining agent, the NLRB will conduct a secret ballot election to allow employees the opportunity to formally unionize.[23] If the majority votes to unionize, then the employer is obligated to recognize and bargain in good faith with the union.[24] Generally, absent voluntary employer recognition, unions are required to conform with the formal mechanics of the secret ballot election to gain recognition.[25] However, there is also a second, more controversial avenue to recognition—a mandatory bargaining order.[26]

A mandatory bargaining order allows the NLRB to force employers to recognize and bargain with a union, even absent a formal secret ballot election. The use of bargaining orders has not always been contentious.[27] The Supreme Court recognized the validity of bargaining orders under the Wagner Act,[28] beginning with *Franks Bros. Co. v. NLRB*[29] in 1944.[30] While later federal laws

22. National Labor Relations Act, § 9(a) (codified as amended at 29 U.S.C. § 159(a) (1984)); Brandon Magner, *The Scandalous Story of How "*Joy Silk*" Disappeared from Labor Law*, LAB. L. LITE (Aug. 16, 2021), https://brandonmagner.substack.com/p/the-scandalous-story-of-how-joy-silk [https://perma.cc/WN6Y-5DN6 (dark archive)] [hereinafter Magner, *Scandalous Story of* Joy Silk]. *See generally Bargaining in Good Faith With Employees' Union Representative (Section 8(d) and Section 8(a)(5))*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative [https://perma.cc/3HAT-WLM8] [hereinafter *Bargaining in Good Faith*] (explaining the requirements of employers while bargaining with unions). A bargaining unit is "a group of two or more employees who share a common interest and may reasonably be grouped together" for the purpose of collective bargaining with a particular employer. The determination of appropriate bargaining units is left to the discretion of the NLRB. *See* NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf [https://perma.cc/YKF4-LRXF].

23. *See generally Conduct Elections*, *supra* note 2 (explaining how union elections are conducted).

24. *Id.* ("[A] union that receives a majority of the votes cast is certified as the employees' bargaining representative and is entitled to be recognized by the employer as the exclusive bargaining agent for the employees in the unit.").

25. *See id.*; *see also* Knight, *supra* note 9.

26. *See Conduct Elections*, *supra* note 2 (contending the NLRB can use bargaining orders to "order bosses to bargain with the union, effectively forcing recognition").

27. Magner, *Scandalous Story of* Joy Silk, *supra* note 22; *see also* Bernard J. Berkowitz & Richard A. Kroll, *Labor Law—Bargaining Orders—*National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575 (1969)*, 4 SUFFOLK U. L. REV. 160, 160–62 (1969).

28. National Labor Relations Act, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (1984)).

29. 321 U.S. 702 (1944).

30. *See generally id.* (finding that the NLRB had authority to order employers to bargain with a union despite the fact that the union lost majority status through the replacement of employees in the normal course of business during the interval between the filing of charges and the issuance of the complaint); *see also* Magner, *Scandalous Story of* Joy Silk, *supra* note 22.

conditioned NLRB certification on a formal election process,[31] Congress declined to change the language of Section 8(a)(5) or Section 9(a).[32] Evidently, the Act did not foreclose the possibility of granting exclusive representation status to unions absent a formal NLRB election.[33]

B. *The Creation, and Subsequent Abandonment, of the* Joy Silk *Doctrine*

The Taft-Hartley Act,[34] introduced in 1947, repealed the section of the NLRA that permitted the NLRB to certify a union absent a formal secret ballot election.[35] Even so, the Board continued to take disciplinary action against employers who failed to bargain in good faith with a union that had a clear majority, even if they had not formally been elected.[36] Following the ambiguity created by the Taft-Hartley Act, it was imperative for the NLRB to create a consistent policy that clarified when employers were compelled to recognize and bargain with a union short of a formal election.[37]

In *Joy Silk Mills, Inc. v. NLRB*,[38] Truman's NLRB created a second avenue to union recognition through Section 8(a)(5) of the Act,[39] which states that an employer who refuses to bargain collectively with the representatives of his employees has committed an unfair labor practice.[40] This ruling came to be known as the *Joy Silk* doctrine.[41] In *Joy Silk*'s heyday during the 1950–60s, this provision was interpreted to mean that an employer is compelled to recognize and bargain with a union if they lack a good faith doubt as to whether the union

31. Taft-Hartley Act, ch. 120, sec. 101(9), § 9, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 159 (1951)).

32. *See* Petruska, *supra* note 16, at 102–03.

33. Magner, *Scandalous Story of* Joy Silk, *supra* note 22 ("The statute thus clearly continued to contemplate the possibility of exclusive representation status for unions which had not won a secret-ballot election, including those that were voluntarily recognized by an employer or were recipients of bargaining orders by way of ULP litigation."); *see* Steven R. Wall, Note, *Representative Bargaining Orders: A Time for Change*, 67 CORNELL L. REV. 950, 951–52 (1982).

34. *See* Taft-Hartley Act, ch. 120, 61 Stat. 136 (codified as amended in scattered sections of 2 and 29 and 50 U.S.C.).

35. *Id.* § 9(c); *see* Petruska, *supra* note 16, at 102–03 ("After 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.").

36. Petruska, *supra* note 16, at 103.

37. Magner, *Scandalous Story of* Joy Silk, *supra* note 22.

38. 185 F.2d 732 (D.C. Cir. 1950).

39. *Id.* at 741–42.

40. *See* Taft-Hartley Act, ch. 120, sec. 101(8)(a)(5), § 8(a)(5), 61 Stat. 136, 141 (1947) (codified as amended at 29 U.S.C. § 158(a)(5) (1951)); *Joy Silk Mills*, 185 F.2d at 741–42.

41. *See generally* Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1 (discussing the impact of *Joy Silk* on labor law enforcement).

has majority support.[42] Thus, if an employer knew that a majority of employees supported unionization, they would be compelled to bargain immediately.

The *Joy Silk* doctrine allows a union to obtain a bargaining order from the NLRB if it both: (1) obtains authorization cards from the majority of an employer's employees, and (2) requests recognition from the employer, only to have the employer refuse recognition and then proceed to commit an unfair labor practice ("ULP")[43]—any action taken by an employer or union that violates the NLRA.[44] ULPs can take many forms, such as unlawful retaliation against or surveillance of employees engaged in protected activity.[45] Protected activity includes any effort to unionize, but it also extends to nonunion conduct such as discussing wages or the right to strike.[46]

Under *Joy Silk*, any employer who denies a union's request for recognition must demonstrate its good faith doubt as to union majority status.[47] Importantly, the employer would automatically lose the right to oppose recognition if it committed any ULP after the union's initial request for recognition.[48] Indeed, any misstep on behalf of the employer is considered per se evidence of their bad-faith doubt and underlying motive to unduly stall union support.[49]

During *Joy Silk*'s reign in the mid-twentieth century, labor law was at its zenith.[50] The doctrine made massive strides to place workers on equal footing with their employers and provided the NLRA with the enforcement teeth it so

42. *See* Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1 ("[I]f an employer . . . *did not possess a good-faith doubt* as to the union's majority status when it refused to recognize the union, an employer was to have violated . . . the NLRA.").

43. *See* Petruska, *supra* note 16, at 103.

44. *What Is an Unfair Labor Practice by Management?*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/managementunfairlaborpractice.aspx [https://perma.cc/V5Y9-858Q (staff-uploaded, dark archive)].

45. *See id.* ("The National Labor Relations Board (NLRB) has created an extensive listing of employer actions that it considers would unduly interfere with an individual employee's labor rights."); *see also Coercion of Employees (Section 8(b)(1)(a))*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/coercion-of-employees-section-8b1a [https://perma.cc/A9GW-ED4A] (explaining common examples of employer ULPS, including threatening employees with adverse consequences should they support a union or photographing and videotaping employees engaged in protected activity).

46. *See Your Rights*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights [https://perma.cc/7KBY-SR2H].

47. *See* Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1.

48. *Id.* (contending any unfair labor practice committed by the employer is evidence of a *bad faith* doubt in the union majority status and unlawful stall tactics).

49. *See id.*

50. *See* Jim Martin, *Opinion: Unions Are Making a Comeback*, DAILY CAMERA (Mar. 16, 2021, 11:28 AM), https://www.dailycamera.com/2021/03/16/opinion-unions-are-making-a-comeback/ [https://perma.cc/J2YL-BU9Q (dark archive)]; *see also* Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1 (explaining the period in which *Joy Silk* was most prominent).

desperately needed.[51] With one third of the U.S. workforce unionized, the labor movement appeared to be a permanent fixture of American society.[52] Eventually, *Joy Silk* was adopted by every federal circuit in the country, solidifying its protections against undue employer interference in the collective bargaining process.[53] However, the doctrine's control abruptly ended in 1969.[54]

C. Joy Silk*'s Replacement with* Gissel *Bargaining Orders*

Although *Joy Silk* proved effective at deterring employer misconduct, critics contended the "good faith reasonable doubt" standard was at once too strict and overbroad.[55] In *NLRB v. Gissel Packing Co., Inc.*,[56] the Supreme Court replaced *Joy Silk* with a new legal framework.[57] Overnight, the NLRB abandoned the requirement that employers prove their "good faith doubt" as to union majority status, contending that the existence of doubt was "largely irrelevant."[58] Under the new *Gissel* standard, there were no employer ULPs that would automatically trigger a bargaining order.[59] Rather, workers covered by the NLRA could obtain bargaining orders only if they met the difficult standard of demonstrating that management's behavior rendered it essentially impossible to hold a fair union representation election.[60] Labor scholars contend the *Gissel* standard is highly subjective, leading to confusion and patchwork application.[61] Specifically, the post-*Gissel* NLRB failed to clarify which employer ULPs reach this threshold.[62] Rather, the NLRB made broad conclusions without analyzing the facts of particular cases, failing to provide guidance for future decisions.[63]

51. *See generally* Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1 (discussing the role of *Joy Silk*'s strict good-faith reasonable doubt requirement in bolstering labor law enforcement).

52. Martin, *supra* note 50.

53. Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1.

54. *Id.*

55. Petruska, *supra* note 16, at 102–04.

56. 395 U.S. 575 (1969).

57. Petruska, *supra* note 16, at 103 ("*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.*"); *see also* Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1.

58. *See* Mark S. Rapaport, *Bargaining Orders Since* Gissel Packing*: Time To Blow the Whistle on* Gissel, 1972 WIS. L. REV. 1170, 1172.

59. *See* Daniel M. Carson, *The* Gissel *Doctrine: When a Bargaining Order Will Issue*, 41 FORDHAM L. REV. 85, 93 (1972) ("The difficulty in applying the Gissel test, however, is in determining the fine line between the 'less extraordinary cases' in the Court's second category and the 'minor or less extensive unfair labor practices' of the third category.").

60. Knight, *supra* note 9.

61. *See* Terry A. Bethel & Catherine Melfi, *The Failure of* Gissel *Bargaining Orders*, 14 HOFSTRA LAB. L.J. 423, 426–27 (1997) ("Most labor law scholarship discussing *Gissel* bargaining orders have dealt with the Board's difficulty in defining when this criterion is satisfied.").

62. *See* Bertrand B. Pogrebin, *NLRB Bargaining Orders Since* Gissel*: Wandering from a Landmark* 46 ST. JOHN'S L. REV. 193, 203 (1971) ("The failure to articulate its grounds for decisions in [*Gissel*] cases has resulted in apparently inconsistent determinations.").

63. *See id.*

The deregulation of bargaining orders after *Gissel* permitted many employers to stall, obstruct, or even completely derail the union certification process.[64] As illustrated by the *Times*, employers are emboldened by the lack of consequences for interfering with the union election and certification process.[65] Indeed, post-*Gissel*, charges of "illegal firings per representation election increased by more than threefold from 1969–1983."[66] Furthermore, the NLRB itself was resistant to issuing *Gissel* bargaining orders.[67] Today, *Gissel* orders are rarely issued, which may be partially attributed to the Court's difficulty in discerning when an employer violation has actually taken place under the ambiguous standard.[68]

The failure of *Gissel* bargaining orders to deter employer-side ULPs may be a foreseeable outcome.[69] The *Gissel* doctrine substantially weakens union bargaining power, and if a union's strength is directly tied to its ability to negotiate in good faith with employers, it is hardly shocking that *Gissel* has weakened unions.[70] Absent the hard-ball approach adopted under *Joy Silk*, the NLRB's ULP deterrence mechanisms lack the necessary bite to curb this type of employer abuse.[71]

With current unionization rates of wage and salary workers hovering at 10.8%,[72] union activism has been effectively hamstrung since its peak in the 1960s.[73] This tremendous decrease in organization can be partially attributed to the apparent inability of administrative agencies, like the NLRB, to curb rampant ULPs.[74] However, the recent change in administration may harken an era of renewed optimism and much-needed change for labor advocates.[75] Many

64. *See* Iafolla, *NLRB Legal Chief*, *supra* note 14; NLRB v. Gissel Packing Co., 395 U.S. 575, 576–78 (1969) (holding that an employer's "good faith doubt" as to a union's majority status was no longer sufficient for union recognition and limiting situations in which bargaining orders could be issued).

65. Bethel & Melfi, *supra* note 61.

66. Knight, *supra* note 9.

67. Bethel & Melfi, *supra* note 61, at 437 ("In our four year study period, the Board imposed a *Gissel* order in only 176 cases, or an average of 44 times a year. This is a minute number when one considers that, during the same period, the Board decided 4502 unfair labor practice cases.").

68. *See id.* at 426.

69. *See id.* at 429 ("[C]ontrary to NLRB assumptions, that the *Gissel* bargaining order does not lead to productive collective bargaining relationships that protect the rights of employees who were subject to serious unfair labor practices.").

70. *Id.* at 452.

71. Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1.

72. *Union Membership (Annual) News Release*, U.S. BUREAU LAB. STATS. (Jan. 22, 2021), https://www.bls.gov/news.release/archives/union2_01222021.htm [https://perma.cc/9GYY-658T].

73. *See* Emily Bazelon, *Why Are Workers Struggling? Because Labor Law Is Broken*, N.Y. TIMES (Feb. 19, 2020), https://nytimes.com/interactive/2020/02/19/magazine/labor-law-unions.html [https://perma.cc/58Lv-D7ZV (staff-uploaded, dark archive)].

74. Petruska, *supra* note 16, at 131–32.

75. *See* Steven Greenhouse, *Biden Stakes Claim to Being America's Most Pro-Union President Ever*, GUARDIAN (May 2, 2021, 2:00 EDT), https://www.theguardian.com/us-news/2021/may/02/joe-biden-unions [https://perma.cc/8ZTD-Z25F].

employees hope that the election of Joe Biden, who may prove to be the most pro-union U.S. president of this century,[76] signals a zeitgeist for the modern labor movement.[77]

D. *Revival of* Joy Silk *Bargaining Orders by Abruzzo and the Biden Administration*

General Counsel Abruzzo, among other labor advocates, asserts in her recent memo that a return to *Joy Silk* is a return to enforcing labor law as written.[78] In support of her mission to revive the doctrine, Abruzzo emphasized that the NLRB "possesses broad discretionary authority to fashion remedies to fit the circumstances of each case that comes before it."[79] It is important, however, to acknowledge that the general counsel's ambitious memo is not binding legal authority; thus, absent formal NLRB approval, Abruzzo's intention to revive *Joy Silk* lacks teeth.[80] Further, the NLRB's preliminary decision to upend decades worth of *Gissel* precedent faces substantial employer pushback.[81] Although *Joy Silk* makes leaps and bounds to curb employer-side

76. *See* Ahiza Garcia-Hodges, *Biden's Vow To Be 'Most Pro-Union President' Tested in First Year*, NBC NEWS (2020), https://www.nbcnews.com/business/economy/bidens-vow-union-president-tested-first-year-rcna12791 [https://perma.cc/Z348-PT7N].

77. *See* Cara J. Chang & Meimei Xu, *'Our Success or Failure Is Tied Together': Grad Student Union Activism Picks Up in Biden Era*, HARV. CRIMSON (Apr. 12, 2021), https://www.thecrimson.com/article/2021/4/12/grad-union-solidarity/ [https://perma.cc/D2MW-XGK4] ("Joe Biden's ascension to the White House has precipitated a flurry of activity by . . . [individuals] whom had avoided certain organizing efforts during the Trump administration."); *see also* Greenhouse, *supra* note 75.

78. *See* Magner, *Scandalous Story of* Joy Silk, *supra* note 22.

79. *See* Off. of Pub. Affs., *NLRB General Counsel Jennifer Abruzzo Issues Memo on Seeking All Available Remedies to Fully Address Unlawful Conduct*, NLRB (Sept. 8, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-seeking-all-available [https://perma.cc/L3BR-UH44]; *see also* Memorandum FC 21-06 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, NLRB (Sept. 8, 2021), https://apps.nlrb.gov/link/document/aspx/09031d458353f6b9 [https://perma.cc/RGJ4-VJM7].

80. *See* Ryan T. Smith & Michael J. Frantz, *Timeout! NLRB General Counsel Says Student-Athletes Are Employees Who Can Unionize*, LAB. & EMP. L. NAVIGATOR (Oct. 4, 2021), https://www.laboremploymentlawnavigator.com/2021/10/timeout-nlrb-general-counsel-says-student-athletes-are-employees-who-can-unionize/ [https://perma.cc/A5Z4-QRCW] ("In order for student-athletes to achieve the protections she seeks, GC Abruzzo's position will need to be considered and adopted by the Board itself.").

81. *See, e.g.*, Robert C. Nagle, *NLRB General Counsel Signals Stronger Enforcement Actions Against Employers, Part Two: 'Seeking Full Remedies*,*'* FOX ROTHSCHILD (Oct. 13, 2021), https://www.foxrothschild.com/publications/nlrb-general-counsel-signals-stronger-enforcement-actions-against-employers-part-two-seeking-full-remedies [https://perma.cc/3G23-B4KW]. *See generally* Ian Ward, *The Lie That Helped Kill the Labor Movement*, POLITICO (June 7, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/06/07/the-lie-that-helped-kill-the-labor-movement-00037459 [https://perma.cc/GY79-DfQN] (describing how the *Joy Silk* doctrine was created by the NLRB in 1949, modified by the NLRB in 1966, and ultimately destroyed by the Supreme Court in

unfair labor practices, critics argue it leaves *union*-side abuses virtually unfettered.[82] Before the NLRB takes any further action to formally readopt the *Joy Silk* doctrine, it should determine whether such a contentious reversal of precedent creates more problems than it solves.

II. DOES *JOY SILK*'S REVIVAL CREATE MORE PROBLEMS THAN IT SOLVES?

Over the course of the past century, labor scholars have conducted extensive research on the benefits and risks of reviving the *Joy Silk* doctrine.[83] Many contend that a shift away from mandatory formal NLRB elections toward informal authorization card checks would mitigate the risk of undue employer coercion.[84] Employees may sign a union authorization card to signify their interest in being represented by a collective bargaining agent.[85] A shift to reliance on authorization cards may produce fairer labor outcomes on a grand scale by allowing employees to more freely express their opinions on unionization absent fear of employer surveillance or retaliation.[86]

However, there is compelling evidence that *Joy Silk* may not be the cure-all that labor advocates assert it is.[87] The potential dangers associated with reviving the divisive *Joy Silk* doctrine are discussed in the following subsections. Section A discusses whether *Joy Silk*'s "good faith reasonable doubt" standard would clear the confusion and ambiguity created by *Gissel*. Section B weighs the benefits and risks associated with allowing union recognition through card checks rather than formal election procedures. Finally, Section C assesses the impact of renouncing *Gissel*'s precedent and promulgating new labor policy through case-by-case adjudication.

Gissel). It is important to acknowledge that the existence of *Joy Silk* and *Gissel* need not be mutually exclusive: both could remain good law to be used under different circumstances. *See* Petruska, *supra* note 16, at 159–60.

82. *See* Nagle, *supra* note 81.

83. *See generally* Petruska, *supra* note 16 (reviewing *Joy Silk* and arguing for its readoption with adjustments to address criticism).

84. *See id.* at 138.

85. *See* Jennifer Orechwa, *What Is a Union Authorization Card?*, PROJECTIONS (June 19, 2018), https://projectionsinc.com/unionproof/what-is-a-union-authorization-card/ [https://perma.cc/6S9T-BAQJ].

86. *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. RELS. REV. 42, 57 (2001) [hereinafter Eaton & Kriesky, *Union Organizing*]. Card check agreements "reduced the use of illegal tactics such as discharges and promises of benefits, as well as the supervisory one-on-one campaigns that are destructive of relationships and emotionally traumatizing." *Id.*

87. *See generally* Robert Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434, 439–41 (1965) (contending that *Joy Silk*'s reliance on dual-purpose authorization cards creates "unrealistic, unworkable, and unfair" results—cards signed for one purpose, authorizing a union election, may be used instead to circumvent an election and directly authorize the union as the employees' bargaining agent).

A. *Does* Joy Silk*'s "Good Faith Reasonable Doubt" Standard Truly Provide Clarity?*

The traditional *Joy Silk* doctrine is sharply criticized for the enormous weight it places on the employer's state of mind at the time it refuses to bargain.[88] The doctrine inquires directly into the underlying thoughts and intentions of the employer: Did it truly believe the union lacked majority status, or was the employer merely stalling?[89] Although this distinction is important, any inquiry into the motivations or beliefs of a particular party is highly subjective. Moreover, rather than deterring employer abuse, this test may unintentionally encourage employers to strategically frame their arguments against unionization.[90] Consider the example of the *Times*. Faced with a majority of authorization cards, management could choose the path of candor and admit they want more time to speak with employees about the potential pitfalls of unionization. However, in doing so they open themselves up to a ULP triggering automatic recognition because they nonetheless lack a good faith reasonable doubt as to the union's majority support. Alternatively, they could pretextually state that they reasonably doubt the validity of the authorization cards, escaping a bargaining order and achieving ostensibly the same result: a delay in union recognition. Accordingly, many contend that the good-faith reasonable doubt standard does little other than encourage a prefabricated employer response centered on reasonable doubt whenever presented with authorization cards.[91]

Additionally, many critics contend that the doctrine may be too exacting to be truly effective.[92] The black-and-white mechanisms of *Joy Silk* leave little room for nuance: any employer ULP committed during a union election drive, regardless of whether it was intended to dissipate union majority, will

88. Pogrebin, *supra* note 62, at 194 ("The main objection to the *Joy Silk* test was that it made the employer's state of mind at the time of his refusal to recognize determinative of the employees' right to vote on the issue of representation in a secret ballot election.").

89. *Id.* at 194–95.

90. *See id.* at 195–96.

91. *See id.*; *see also* Howard Lesnick, *Establishment of Bargaining Rights Without an NLRB Election* 65 MICH. L. REV. 851, 853–54 (1967) ("In effect, then, an employer presently has the right to insist on an election, but only if he does so on the ground that he disbelieves the union's card showing and his assertion of disbelief is not itself belied by his other acts or statements. The need to resolve any latent inconsistency between the acknowledgment of a privilege to rely on a generalized 'distrust of cards' and the denial of an opportunity to see if the employees 'might change their minds' has not yet been given recognition in NLRB opinions.").

92. *See* Pogrebin, *supra* note 62, at 194–95; *see also* Lewis, *supra* note 87, at 435 (contending that further examination of the validity of the *Joy Silk* doctrine is necessary in light of "the severity of the consequences of this doctrine on both employer and employee").

automatically trigger a bargaining order.[93] This formulaic approach leaves little to "no room for weighing the degree of the unfair labor practices committed."[94] Even so, many of *Joy Silk*'s defenders contend that a weaker approach would not be sufficient to deter employer-side abuses and blatant union-busting.[95]

Joy Silk's "good faith reasonable doubt" standard is as powerful as it is contentious. Although criticisms of its subjective and exacting nature are not without foundation, there is opportunity to retrofit the doctrine to fit the needs of the modern American labor movement. Potential limitations and solutions to the aforementioned problems are discussed at length in Part III.

B. *Will* Joy Silk *Card Checks Tangibly Improve Labor Relations?*

1. The Effect of Card Checks on Employee Coercion

The most significant labor development under the *Joy Silk* doctrine is the ability of unions to secure employer recognition solely through the procurement of sufficient authorization cards.[96] By signing a union authorization card, individual employees in a potential bargaining unit signal their interest in being represented by a collective bargaining agent.[97] Under current law, authorization cards can only carry unions so far. Regardless of how many employees sign on, the union must still win a majority vote through a formal NLRB election to gain recognition.[98] Under *Joy Silk*, authorization cards alone could propel unions all the way across the finish line.[99] If a union validly collected authorization cards from over fifty percent of the potential bargaining unit, they could forgo the formal election process entirely and jump straight to recognition.[100]

Proponents of the card check process contend that it "substantially diminishes the employer's opportunity for coercive campaigning."[101] Before the formal NLRB election process, employers are granted virtually unfettered free

93. *See* Pogrebin, *supra* note 62, at 194–95. Consider a scenario where management forbids two employees from discussing their wages with one another in a conversation entirely separate from an ongoing union drive. Although, on its face, this ULP is unrelated to unionization efforts, it could nonetheless be used to trigger a mandatory bargaining order under *Joy Silk*.

94. *Id.* at 195.

95. *See id.*

96. *See, e.g.*, Lewis, *supra* note 87, at 435–36; *see also Refusal-To-Recognize*, *supra* note 12, at 398.

97. *See* Orechwa, *supra* note 85.

98. *Id.*

99. *See id.*

100. *Id.*; Michael F. Rosenblum, Comment, *The Authorization Card Dilemma*, 13 VILL. L. REV. 564, 564–65 (1968).

101. Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. RELS. REV. 157, 158 (2009) [hereinafter Eaton & Kriesky, *NLRB Elections*] ("The NLRB election process . . . enab[les] management to wage lengthy and bitter anti-union campaigns, during which workers can expect harassment, intimidation, threats, and firings. By avoiding these inherently coercive and anti-democratic anti-union campaigns, majority-rule card-check procedures help employees make freer choices under less duress.").

speech against the union.[102] This includes aggressive one-on-one meetings with employees extolling the "dire consequences" of unionization, which often effectively reduces union success rates.[103] Moreover, pro-union employees have no protected right to voice their opinions at "captive audience meetings."[104] To the contrary, employers can legally fire employees on the spot should they interfere with or speak out against the official antiunion campaign.[105] Shifting to union authorization via card checks may successfully curb these intentionally coercive procedures. The vast majority of card checks can be conducted absent employer knowledge, thus eliminating opportunities for management to conduct a subversive campaign and unduly limit employee free speech.[106]

However, card checks alone may not be sufficient to end the unfair labor practices committed during union election battles; rather, they merely open the door to union-side abuse.[107] Compared to the tried-and-true formal election procedures, the card check process has two main shortcomings.[108] First, informal card checks lack the degree of anonymity associated with the secret ballot election process.[109] Opponents of card checks emphasize that "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."[110] Thus, card checks alone may in fact overstate employee interest in unionization.[111] As compared to the formal NLRB election process, which is supervised and administered by federal employees entirely detached from the

102. *Id.*

103. *Id.*

104. Gordon Lafer & Lola Loustaunau, *Fear at Work: An Inside Account of How Employers Threaten, Intimidate, and Harass Workers To Stop Them from Exercising Their Right to Collective Bargaining*, ECON. POL'Y INST. (July 23, 2020), https://www.epi.org/publication/fear-at-work-how-employers-scare-workers-out-of-unionizing/ [https://perma.cc/4RXG-N8FJ]; *see also* Livingston Shirt Corp., 107 N.L.R.B. 400, 408–09 (1953) (finding that "there is nothing improper in an employer's refusing to grant to the union a right equal to his own in his plant").

105. *See* Lafer & Loustaunau, *supra* note 104. Under current NLRB law, employers are allowed to hold "captive audience" meetings where employees are forced to convene on paid time to hear the potential disadvantages of unionization. *See* Livingston Shirt Corp., 107 N.L.R.B. at 407–09. There are no protections for employees who speak out at these meetings. *See* Hicks Ponder Co., 168 N.L.R.B. 806, 814 (1967) (holding that employers have "no statutory obligations to accord the employees the opportunity to speak" at captive audience meetings).

106. Eaton & Kriesky, *NLRB Elections*, *supra* note 101, at 158–59.

107. *See Refusal-To-Recognize*, *supra* note 12, at 390; *see also* Lafer & Loustaunau, *supra* note 104 ("NLRB elections are fundamentally framed by one-sided control over communication, with no free-speech rights for workers.").

108. *Refusal-To-Recognize*, *supra* note 12, at 390.

109. *Id.*

110. Eaton & Kriesky, *NLRB Elections*, *supra* note 101, at 159.

111. *Id.*

specific workplace, card check processes do not provide for any neutral oversight to guarantee decisions are made free from undue coercion.[112]

Second, the informality of card checks may contribute to rash and uninformed employee decisions.[113] There are numerous reasons why employees sign authorization cards without adequate reflection, including to avoid arguments with pro-union coworkers or to escape conflict with insistent union organizers.[114] Workers who reluctantly sign authorization cards often rely on the formal election process as a stop gap—they believe that the election will give them a second opportunity to express their opposition to unionization before it ever takes place.[115] Moreover, the anonymous procedures of the secret ballot election allows reticent employees to voice their opposition to unionization absent coworker or union pushback.[116] Thus, the formal election procedures may prove more effective at insulating results from *union*-side coercion.

Furthermore, employees who enthusiastically sign authorization cards before the formal election process may be only presented with a partial story.[117] While a formal election generally allows the employer to introduce evidence in opposition to the union, an employer may be wholly unaware a card check is taking place until they are presented with a demand for immediate recognition.[118] At this stage in the certification process, it is far too late for the employer to introduce arguments against the union.[119] Under *Joy Silk*, employers may be compelled to recognize the union as soon as they are presented with sufficient cards, absent any opportunity to warn employees of potential negative effects.[120] Consequently, employees who sign authorization cards may know very little about the possible disadvantages of unionism, such as "initiation fees and special assessments, fines for the violation of union rules, and obligations to walk the picket line in any strike involving the union."[121] The overarching concern surrounding reliance on union card checks is the fear of

112. *Id.* (contending that card checks have no neutral oversight and are "subject to misrepresentation concerning the meaning of the cards and even outright forgery of worker signatures").

113. *Refusal-To-Recognize*, *supra* note 12, at 390; *see also* Lewis, *supra* note 87, at 436 ("[T]he basic problem [of *Joy Silk*] concerns the employee's understanding of what he is signing, and what he was told about the purpose of his signature.").

114. *Refusal-To-Recognize*, *supra* note 12, at 390.

115. *See id.*

116. *See id.*

117. *Id.*; *see also* Eaton & Kriesky, *NLRB Elections*, *supra* note 101, at 160 ("Roughly two-thirds of the employers interviewed about their neutrality or card check agreements reported that, in their view, employees were 'subject to unrebutted, pro-union speeches or materials' . . . or were 'not informed of both sides of the union representation question.'").

118. *Refusal-To-Recognize*, *supra* note 12, at 390.

119. *Id.*

120. *Id.*

121. *Id.*

misrepresentation.[122] Employers are worried they will be strong-armed into union recognition by a majority of authorization cards, even if employees scarcely understand the true nature of what they have signed.[123]

However compelling the policy arguments against card checks may be, they are not statistically supported.[124] In a 2009 study measuring the source of undue employer coercion during the card check process, employees overwhelmingly reported that they did not experience undue coercion at the hands of union representatives.[125] Seventy percent of employee respondents who signed cards before union recognition did so in the presence of the person who provided the card, who was often a coworker or a union representative.[126] Even so, ninety-four percent of respondents reported that the presence of another individual did not make them feel pressured to sign the card.[127]

Moreover, most workers report significantly more pressure from management to oppose the union rather than pressure from union organizers or coworkers to support the union.[128] Regarding formal NLRB elections, almost half of sampled employees reported that management pressured them to oppose the union, and half of those who reported management-side pressure stated that it was severe.[129] By contrast, reports of union-side coercion were much lower in the context of card checks.[130] Only sixteen percent of sampled employees reported pressure from coworkers or union staff members.[131] Additionally, management pressure to oppose the union was cut in half in the context of card checks as opposed to formal elections.[132]

It is the unfortunate and inevitable truth that employees will face undue pressure from both management and union supporters during the fiercest of union certification battles. However, substantial evidence suggests that *Joy Silk* card checks will not materially undermine the certification results; rather, card checks limit the possibility of employer coercion and lead to fairer results on

122. Rosenblum, *supra* note 100, at 565–66.

123. *Id.* at 566 ("Specifically, the problem is whether the employees have been misled into believing that the actual purpose of the cards was to request an election rather than to designate the union as the immediate bargaining agent.").

124. Eaton & Kriesky, *NLRB Elections*, *supra* note 101, at 164–66.

125. *Id.* at 164.

126. *Id.*

127. *Id.*

128. *Id.* at 157 (explaining that multiple surveys "indicate that there was little undue union pressure to support unionization in card check campaigns, and that management pressure on workers to oppose unionization was considerably greater than pressure from co-workers or organizers to support the union in both card checks and elections").

129. *Id.* at 164.

130. *Id.* at 164–65.

131. *Id.* ("[I]n the card check context, much smaller percentages reported being pressured by co-workers (16.8%) or by union staff (14%) to support the union.").

132. *Id.* at 165.

the grand scale.[133] The remaining concerns regarding authorization card checks are avoiding undue union coercion and authorization card misrepresentation or falsification. Potential remedies to these problems are discussed in Part III.

2. The Effect of Card Checks on Labor-Management Relations

Conflict is an inevitable product of social progress, and labor relations are no exception.[134] Despite our general distaste for disagreement, it has the capacity to serve as a crucible, rendering industry more efficient.[135] Indeed, the framers of the NLRA recognized that the interests of labor and management are inherently at odds, making industrial conflict inevitable.[136] Even so, this battle is not limitless—it is contained within "manageable boundaries" by the Act's collective bargaining framework.[137] Unfortunately, current relations between unions and management have grown so adversarial as to effectively stunt cooperation altogether.[138] This culture of deep-seated hostility hampers meaningful progress in the labor movement.[139]

The future, however, is not void of hope for labor-management relations. It is possible for unions and employers to "vigorously represent opposing interests without the deep-seated enmity that characterizes the American labor scene."[140] Although the current situation may seem beyond repair, some industrial relations scholars contend that further reliance on *Joy Silk*-approved card checks rather than defaulting to the formal election process could be the first step in reducing conflict and creating a more cohesive labor environment.[141]

To understand the appeal of *Joy Silk* recognition through card checks, one must first understand the failings of the current system. Today, many workers suffer under the "rampant lawlessness" of NLRB elections.[142] Absent any meaningful economic or commercial penalties, employers bent on union busting face no material consequences for intimidating or retaliating against employees

133. *Id.* at 167.

134. Robert Dubin, *A Theory of Conflict and Power in Union-Management Relations*, 13 INDUS. & LAB. REL. REV. 501, 501 (1960).

135. *See id.* at 501–02 ("We still tend to have attitudes of dismay and distaste for it, even though experience makes it abundantly clear that the ubiquity of conflict has *not* torn the society apart and made it incapable of functioning.").

136. Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021, 2032 (1987).

137. *Id*.

138. *See id.* at 2042.

139. *Id.* ("This culture is as important as the structure of the Act in inhibiting the growth of labor-management cooperation.").

140. *Id.*

141. Eaton & Kriesky, *NLRB Elections*, *supra* note 101, at 158–59.

142. Lafer & Loustaunau, *supra* note 104.

looking to exercise their collective bargaining rights.[143] Indeed, employers face no consequences other than "make whole" remedies for committing ULPs.[144] These negligeable repercussions, such as reinstatement or backpay, fail to sufficiently deter employer misconduct.[145] Faced with a mere slap on the wrist from the NLRB, many employers actively continue to unlawfully interfere with employee organization.

As a result, the United States has seen a sharp uptick in employer interference with NLRB elections.[146] A 2016 study found that employers were charged with violating workers' rights in over forty percent of all formal union elections.[147] Furthermore, employers were charged with illegally firing workers, often in retaliation for union involvement, in at least one-fifth of all formal elections.[148] Evidently, absent any further consequences, ULP charges have not sufficiently deterred employers from interfering in the election process.[149] It comes as no surprise that labor-management relations have disintegrated where the power imbalance has grown so stark as to enable one party to willfully break the law absent any recourse.

Moreover, employer abuse is not limited to outright unlawful tactics, such as illegal firings, threats, and promises of benefits.[150] Under current law, many employers retain a panoply of "lawful but exploitive" strategies aimed at deterring employee organization.[151] These strategies include holding coercive captive audience meetings,[152] peppering the workplace with antiunion propaganda,[153] and instructing management to inform workers that they will likely lose their jobs if the union campaign is successful.[154] Indeed, employer

143. *Id.* ("In NLRB elections, even employers who willfully and repeatedly break the law by threatening employees, bribing employees, destroying union literature, firing union supporters, or lying to federal officials in an effort to cover up these deeds can never be fined a single cent, have any license or other commercial privilege revoked, or serve a day in prison.").

144. *Investigate Charges*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges [https://perma.cc/A746-GV2B] (explaining that "[u]nder its statute, the NLRB cannot assess penalties" but rather may seek "make-whole remedies").

145. *Id*.

146. *See* Lafer & Loustaunau, *supra* note 104.

147. *Id.*

148. *Id.*

149. *See id.*

150. *See id.*

151. *Id.*; *see* Eaton & Kriesky, *Union Organizing*, *supra* note 86, at 48–51.

152. Lafer & Loustaunau, *supra* note 104; *Litton Systems, Inc.*, 173 N.L.R.B 1024, 1030 (1968) (affirming that employees have "no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management's noncoercive antiunion speech designed to influence the outcome of a union election" where the NLRB supported an employer who fired an employee for discreetly leaving a captive audience meeting).

153. Lafer & Loustaunau, *supra* note 104.

154. *Id.*

manipulation of labor law is both endemic and entirely legal.[155] The $340 million industry of "union avoidance" is undeniably big business, where entire sectors of legal consultants have emerged to help employers manipulate feeble federal labor law.[156]

The result is a "lopsided campaign environment" that stunts employee speech and fosters undemocratic union elections.[157] Consider the recent and widely publicized Amazon election case in Alabama.[158] Following substantial allegations of employer foul play, including ULP charges of unlawful surveillance, the prospective union was granted a second bite at the recognition apple.[159] Stuart Appelbaum, president of the Retail, Wholesale and Department Store Union ("RWDSU"), alleges that "Amazon's intimidation and interference prevented workers from having a fair say in whether they wanted a union in their workplace."[160] Specifically, RWDSU alleged that Amazon "created an atmosphere of confusion, coercion and/or fear of reprisals and thus interfered with employees' freedom of choice" to accept or reject a union.[161] Evidently, even lawful employer tactics can be both traumatic and divisive, serving only to widen the rift between labor and management.[162]

Despite its noted benefits, *Joy Silk* does not offer a complete solution to the long-standing animosity between labor and management. Given the complexity of the adversarial relationship, reconciliation will require more than one stand-alone policy change. Even so, *Joy Silk* is a step in the right direction. *Joy Silk* could provide a lasting solution to curb unlawful management campaign tactics, such as employee intimidation or surveillance.[163] In minimizing antiunion campaign efforts, the NLRB decreases both legal and illegal employer stall tactics.[164] As a matter of public policy, this is highly desirable for two

155. *See id.* (explaining common examples of how employers attempt to stop employees from exercising their federally-protected right to collectively bargain).

156. *Id.*; Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer & Lola Loustaunau, *Unlawful: U.S. Employers Are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, ECON. POL'Y INST. (Dec. 11, 2019), https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/ [https://perma.cc/KnG4-TSY3]

157. Lafer & Loustaunau, *supra* note 104.

158. *See Amazon: Union Election To Be Rerun After Claims of Foul Play*, BBC NEWS (Nov. 30, 2021), https://www.bbc.com/news/59470665 [https://perma.cc/YK4B-NMA9 (staff-uploaded archive)].

159. *Id.*

160. *Id.*

161. Press Release, Retail, Wholesale & Dep't Store Union, RWDSY Files NLRB Election Objections (Apr. 7, 2021), https://www.rwdsu.info/rwdsu_files_nlrb_election_objections_2022 [https://perma.cc/L7QP-3VUF].

162. *See* Eaton & Kriesky, *Union Organizing*, *supra* note 86, at 57.

163. *Id.* ("Indeed, comparisons with Canadian data, where the context is most similar, suggest that voluntary card check agreements in the United States produced lower use of union opposition tactics by management than did the Ontario or Quebec regulatory environment.").

164. *Id.* (contending card checks "reduced the use of illegal tactics such as discharges and promises of benefits, as well as the supervisory one-on-one campaigns that are destructive of relationships and emotionally traumatizing").

reasons.[165] First and foremost, it sends a clear message that undue manipulation and avoidance of the NLRA will not be tolerated.[166] Second, it puts an end to coercive employer tactics, such as captive audience meetings and one-on-one supervisory meetings, which often destroy relationships and emotionally traumatize workers.[167]

Despite *Joy Silk*'s potential to reduce undue employer influence in union elections, its revival may result in a slew of unintended consequences related to union-side abuse.[168] If the doctrine was to be restored in its entirety, employers may find themselves walking on eggshells when dealing with union recognition requests because *any* employer-ULP committed during the card check process could demonstrate bad faith and ultimately lead to a bargaining order.[169] This bright-line rule makes no carveouts for employer-ULPs committed unknowingly or for violations unrelated to card checks altogether.[170] As a result, union officials may be incentivized to throw any and all potential ULP charges against an employer at the wall, regardless of whether management is attempting to comply in good faith.[171] One could envision a scenario where an employer unknowingly commits a de minimis labor violation during a card check and is railroaded into automatic recognition by an opportunistic union on the hunt for low-hanging fruit.[172] This constant barrage of unfounded ULP charges would not strengthen labor-management relations but would exacerbate current tensions. Rather than providing a neutral solution, the NLRB runs the risk of overcorrecting in the opposite direction.

Although "opportunistic unions" remain a possibility under current law, they likely represent the exception rather than the rule. Collective bargaining agents who are certain of their ability to garner majority support are likely to *prefer* recognition through the formal election procedures.[173] Formal elections, as compared to voluntary employer recognition or card checks, provide

165. *See id.*

166. *See id.*

167. *See id.*

168. *See generally* Lewis, *supra* note 87 (contending that authorization cards can be manipulated by unions to misrepresent employee interest in collective bargaining).

169. *See* Petruska, *supra* note 16, at 111 (explaining that *Joy Silk* makes a bargaining order an "unavoidable consequence" of any employer ULP).

170. *See* Magner, *Scandalous Story of* Joy Silk, *supra* note 22.

171. *See* Michael D. Carrouth, *FP Manufacturing Snapshot: Resurrection of Long-Extinct Doctrine Brings Threat of De Facto 'Card-Check*,' FISHER & PHILLIPS (Apr. 13, 2022), https://www.fisherphillips.com/news-insights/fp-manufacturing-snapshot-extinct-doctrine-brings-threat.html [https://perma.cc/3SPL-HL5G] (contending that *Joy Silk* allows for opportunistic unions to "manipulate facts to orchestrate a recognition demand that restricts an employer's options to effectively respond, thereby increasing the risk of inadvertently committing unfair labor practices thereafter").

172. *Id.*

173. *See* Steven M. Swirsky, *NLRB Looks To Make It Harder for Employees To Decertify a Union*, EPSTEIN BECKER GREEN (May 12, 2016), https://www.managementmemo.com/2016/05/12/nlrb-looks-to-make-it-harder-for-employees-to-decertify-unions/ [https://perma.cc/TYJ7-HFD2].

increased insulation against union decertification in the future.[174] Under what is known as a "certification bar," a union that gains recognition through a secret ballot election is protected from decertification for a minimum of one year.[175] Given these benefits, recognition through card check alone will likely not be as common as many employers fear; however, the threat of automatic recognition could be enough to keep undue employer interference at bay.[176] This cordiality may reduce lingering labor-management animosity following a union organizing drive.

While recalcitrant employers may cling to the assertion that *Joy Silk* card checks "hamper free choice by silencing one point of view," the doctrine will likely have a net positive impact on labor-management relations.[177] To address concerns of opportunistic unions, Part III provides an in-depth analysis of potential improvements to the *Joy Silk* doctrine.

C. *Does Yet Another Change in Precedent Undermine the NLRB's Authority?*

Over the past century, the NLRB has oscillated on the validity of the *Joy Silk* doctrine, leaving employees and management alike with whiplash.[178] Many workers have stalled unionization efforts through card checks amidst fear of imminent NLRB reversal.[179] The ever-swinging pendulum of precedent largely stems from the agency's reliance on case-by-case adjudication to promulgate its policies.[180]

Similar to other administrative agencies, the NLRB has the authority to promulgate its legislative policies through two distinct avenues.[181] The first option, codified under Section 6 of the National Labor Relations Act,[182] authorizes the NLRB to create such rules and regulations "as may be necessary

174. *See* Eaton & Kriesky, *Union Organizing*, *supra* note 86, at 57.

175. JON O. SHIMABUKURO, CONG. RSCH. SERV., THE NATIONAL LABOR RELATIONS ACT (NLRA): UNION REPRESENTATION PROCEDURES AND DISPUTE RESOLUTION 8–9 (2013), https://crsreports.congress.gov/product/pdf/RL/RL32930 [https://perma.cc/6TJB-LLKP (staff-uploaded archive)].

176. *See* Magner, *Scandalous Story of* Joy Silk, *supra* note 22.

177. *Id.*

178. *See* Petruska, *supra* note 16, at 99–100 (contending that the NLRB has oscillated between *Gissel* and *Joy Silk* during different administrations).

179. *See* Chang & Xu, *supra* note 77 (explaining how graduate student unionization efforts stalled during the Trump administration).

180. Keahn Morris, John Bolesta & James Hays, *Breaking with Tradition, the Current NLRB Is on a Rulemaking Tear: Election Procedures, Recognition Bar, and 9(a) Collective Bargaining Relationships*, SHEPPARD MULLIN LAB. & EMP. L. BLOG (Aug. 13, 2019), https://www.laboremploymentlawblog.com/2019/08/articles/national-labor-relations-act/rulemaking-tear-election-procedures/ [https://perma.cc/8E5D-4GW8] [hereinafter Morris et al., *Breaking with Tradition*].

181. *Id.*

182. National Labor Relations Act, ch. 372, § 6, 49 Stat. 449, 452 (codified as amended at 29 U.S.C. § 156 (1984)).

to carry out the provisions of the Act" in accordance with the Administrative Procedures Act ("APA").[183] This is often referred to as the agency's formal rulemaking powers.[184] Alternatively, the agency has the power to establish its labor policies through case-by-case adjudication under Sections 9 and 10 of the Act[185] and has significant discretion to choose between the two policy-making vehicles.[186] Throughout the NLRB's eighty-six-year history, the NLRB has very rarely relied upon the formal rulemaking process available to government agencies under the APA.[187] Rather, the agency has promulgated its legislative policies through individualized adjudications.[188]

This virtually exclusive reliance on case-by-case adjudication leads to frequent and dramatic policy shifts.[189] As opposed to policies declared through the formal rulemaking process, which carry the force of law, individual adjudications are easily reversed or modified by subsequent cases.[190] In announcing policy solely through case law, the NLRB relies on future members to follow precedent rather than overturning its decision.[191] The well-documented history of continuous NLRB reversal demonstrates that this is not a safe bet.[192]

Although it is tempting to view a federal administrative agency like the NLRB as an unbiased vehicle dedicated to the consistent application of neutral principles, this is far from reality.[193] Similar to other agencies, members of the

183. *Id.*

184. TODD GARVEY, CONG. RSCH. SERV., A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 3 (2017), https://crsreports.congress.gov/product/pdf/R/R41546/13 [https://perma.cc/XVX3-9MPY (staff-uploaded archive)].

185. *See* Morris et al., *Breaking with Tradition*, *supra* note 180 ("Alternatively, the [NLRA]'s Sections 9 and 10 authorize the NLRB to adjudicate representation and unfair labor practice cases and to establish its polices by precedent-setting adjudications."); *see also* GARVEY, *supra* note 184, at 1 ("Federal agencies may promulgate rules through various methods. Although the notice-and-comment rulemaking procedures of § 553 of the APA represent the most commonly followed process for issuing legislative rules, agencies may choose or may be required to use other rulemaking options, including formal, hybrid, direct final, and negotiated rulemaking.").

186. GARVEY, *supra* note 184, at 1; *see also* Elizabeth M. Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1408 (2004).

187. Morris et al., *Breaking with Tradition*, *supra* note 180 ("The Board has rarely engaged in substantive rulemaking, relying instead on the *ad hoc* adjudicative process to fashion and regularly refashion (and re-refashion) its policies and to vary the Act's application from one presidential administration to the next.").

188. *Id.* (contending the Board's "frequent policy oscillations" have contributed to policy uncertainty and have stunted labor organization).

189. *See generally* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 161 (1985) (explaining how the frequent policy oscillations created by the NLRB's reliance on case-by-case adjudication have made a "labor law professor's job a nightmare" and has led to widespread confusion).

190. *See id.* at 161–65.

191. *See id.*

192. *See supra* Part II.

193. *See* Bethel & Melfi, *supra* note 61, at 430.

NLRB are an extension of the executive branch and are appointed by the President.[194] Unsurprisingly, policies implemented by a particular panel "tend to reflect the social and economic philosophy of the incumbent administration."[195] Although there are no rules governing the political leanings of NLRB members, Democratic appointees are generally perceived as partial to unions and individual workers,[196] while Republican appointees commonly promulgate policy more favorable to management's interests.[197]

Predictably, General Counsel Abruzzo, a Biden appointee, tends to align with union interests.[198] Many view her appointment as a harbinger of a more pro-union era for federal labor law.[199] Indeed, she has announced her intent to challenge an amalgam of Trump-era precedents, including the classification of student-athletes as students rather than employees and the permanent replacement of striking workers.[200] A staunch critic of her predecessors, the new Abruzzo contends that the past Labor Board erred in "overruling many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers."[201] Moving forward, she plans to implement policy that is doctrinally different from that of her Republican precursors, signaling a deep strategic shift in the enforcement of federal labor law.[202]

In enacting such sweeping policy change, General Counsel Abruzzo demonstrates how easily the current Democrat-controlled NLRB can reverse what it considers the antiunion policies of the Trump administration.[203] However, such far-reaching change is not without consequence. Many scholars fear that the frequent policy oscillations of the NLRB have left employers, employees, and unions alike suspended in the ether of administrative

194. *See id.*

195. *Id.*

196. *See id.* at 430–31.

197. *See id.*

198. Weldon, *supra* note 11.

199. *Id.*

200. *Id.*; *see also* Josh Eidelson, *Biden's Top Labor Lawyer Will Use Her Whole Enforcement Arsenal*, BLOOMBERG BUSINESSWEEK (Dec. 14, 2021), https://www.bloomberg.com/news/articles/2021-12-14/biden-labor-lawyer-jennifer-abruzzo-to-fully-use-nlrb-power-to-protect-workers [https://perma.cc/XM8K-TD3R]; Steven Porzio & Elizabeth Dailey, *Breaking: General Counsel Abruzzo Announces That College Athletes Are Employees*, PROSKAUER: LAB. RELS. UPDATE (Sept. 29, 2021), https://www.laborrelationsupdate.com/nlrb/breaking-general-counsel-abruzzo-announces-that-college-athletes-are-employees/ [https://perma.cc/48YY-ELEL].

201. James R. Hays, Keahn Morris & John S. Bolesta, *NLRB General Counsel Sets an Agenda To Reverse Trump-Era Board Policy*, NAT'L L. REV. (2021), https://www.natlawreview.com/article/nlrb-general-counsel-sets-agenda-to-reverse-trump-era-board-policy [https://perma.cc/LZP9-SY73] [hereinafter Hays et al., *Agenda To Reverse Trump-Era Board Policy*].

202. *Id.* ("While the advice of General Counsel's Office is not binding upon the five-member Board, it does indicate a significant shift in prosecutorial priorities and guidance under the Biden Administration.").

203. *See* Weldon, *supra* note 11.

uncertainty.[204] Unions are hesitant to invest time and effort into organizing workers out of fear their hard-earned victories will be instantaneously undone with a change in NLRB administration.[205] Employers, unsure how much power individual unions truly hold, grow resistant and uncooperative.[206] The absence of coherent and consistent NLRB standards has stunted the labor movement.[207]

The agency's frequent policy flip-flops muddy the waters of federal labor law, contributing to the public's mistrust of the NLRB's authority.[208] General Counsel Abruzzo's intention to challenge *Gissel*, whose precedent has stood for half a century, may exacerbate the problem.[209] Rather than clarifying the agency's mission, these wide-sweeping reforms may contribute to general confusion and patchwork enforcement. Instead of reversing Trump-era policy out of reflex, many critics call on Abruzzo to follow precedent and work to reform existing policy, such as *Gissel*.

Although preserving precedent is a laudable goal, General Counsel Abruzzo should avoid crushing the agency entirely beneath the weight of *Gissel*'s sunk-cost fallacy.[210] *Gissel* has proven time and time again its ineffectiveness in deterring employers bent on union busting.[211] Without articulating any coherent standards for when a violation has occurred, the *Gissel* doctrine robs employees of redress and stunts collective bargaining efforts entirely.[212]

In contrast, *Joy Silk*'s good faith reasonable doubt standard provides the NLRA with the enforcement teeth it so desperately needs to be an effective deterrent.[213] Indeed, if Abruzzo hopes to restore the public's faith in the Labor Board, then the NLRA should provide prompt and effective redress for

204. *See* Hays et al., *Agenda to Reverse Trump-Era Board Policy*, *supra* note 201.

205. Ian Kullgren & Andrew Hanna, *Dysfunction and Infighting Cripple Labor Agency*, POLITICO (Apr. 18, 2018, 5:02 AM), https://www.politico.com/story/2018/04/18/national-labor-relations-board-infighting-529688 [https://perma.cc/3TJK-K5V7] ("The in-fighting is bad news for workers who seek the NLRB's help to organize unions and increase corporate accountability for labor law violations—and also, paradoxically, bad news for employers who want to fight unionization and limit corporate liability by reversing pro-labor rulings issued under the Obama NLRB.").

206. *See id.*

207. Calvin W. Sharpe, Comment, *Reappraisal of the Bargaining Order: Toward a Consistent Application of* NLRB v. Gissel Packing Co., 69 NW. U. L. REV. 556, 557–58 (1974).

208. *See* Kullgren & Hanna, *supra* note 205.

209. *See* Memorandum GC 21-04 from Jennifer A. Abruzzo, NLRB Gen. Couns., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, *supra* note 10 (announcing General Counsel Abruzzo's intention to reintroduce *Joy Silk* bargaining orders, potentially to the detriment of *Gissel*'s precedent).

210. *See* Iafolla, *NLRB Legal Chief*, *supra* note 14.

211. *See* Bethel & Melfi, *supra* note 61, at 451–52 ("As the Board's most drastic remedial step, then, the *Gissel* order is an abject failure.").

212. *Id.* at 452–53.

213. *See generally* Magner, *Reviving the* Joy Silk *Doctrine*, *supra* note 1 (discussing how *Joy Silk*'s strict good faith reasonable doubt standard deterred employers from "stalling for time to chip away at . . . workers' support").

discriminatory discharges and refusals to bargain in good faith.[214] Despite significant changes with each administration, the overarching policy goals of the NLRB remain consistent: "[E]ncouraging collective bargaining and protecting workers' rights."[215] In order to defend these goals, reviving *Joy Silk* is a necessary first step.

III. RECOMMENDATIONS

The fiercest opponents of *Joy Silk* provide a litany of reasons why the doctrine's revival may create more problems than it solves. Regardless of the current NLRB's political leanings, agency leaders and labor experts recognize these critiques are not unfounded.[216] Despite its shortcomings, the contentious yet powerful doctrine still holds the potential to revive the United States' tepid labor movement, given the proper improvements.[217]

Moving forward, the NLRB should implement a new and improved *Joy Silk* doctrine that has been retrofitted to meet the needs of the twenty-first century workplace. This part provides recommendations for how to mitigate risks and quell controversy surrounding *Joy Silk*'s reintroduction. Section A provides recommendations for curbing the increased opportunity for union-side ULPs. Section B discusses options for further NLRB oversight of card checks to mitigate risk of employee coercion or misinformation. Finally, Section C examines how the NLRB can improve its policy-making procedures moving forward to shield agency decisions from constant reversal.

A. *Finding a Middle Ground: Reasonable Restraints on the Use of ULPs To Trigger Automatic Recognition*

One of the main criticisms of the *Joy Silk* doctrine as it stands today is its capacity to enable union-side abuse.[218] Although the doctrine strongly protects unions from undue employer coercion, the exacting nature of the doctrine may unintentionally overcorrect.[219] Specifically, many employers fear that ill-

214. Andrew J. Biemiller, *A Labor View of NLRA Reform*, 12 GONZ. L. REV. 69, 73 (1976).

215. Robert Iafolla, *Top NLRB Lawyer Rolls Back Slate of Trump-Era Policies*, BLOOMBERG L. (Feb. 1, 2021, 7:50 PM), https://news.bloomberglaw.com/daily-labor-report/top-nlrb-lawyer-rolls-back-broad-slate-of-trump-era-policies [https://perma.cc/N3SN-F65D] [hereinafter Iafolla, *Top NLRB Lawyer*].

216. *See* Ward, *supra* note 81 (acknowledging *Joy Silk*'s opponents' fears that the doctrine will allow union organizers to solicit votes through in-person pressure but contending that this outcome is unlikely).

217. *See id.*

218. *See* Magner, *Why Labor Law Needs* Joy Silk, *supra* note 11 ("[M]anagement representatives regularly attacked the doctrine on several grounds: it placed the burden of proof on employers; it required the NLRB to subjectively interpret the employer's intent based upon a few words of dialogue (or sometimes none at all); and it allowed unions to obtain a bargaining order despite the supposedly inherent unreliability of authorization cards.").

219. *Id.*

intentioned unions could use even the slightest employer misstep to circumvent an election and gain automatic recognition.[220] On the other hand, the confusing and difficult standard of "near impossibility" under *Gissel* has proven powerless to curb employer-side abuse.[221] Although the NLRB may wish to avoid perpetually swinging between the two pendulums of employer versus union-side abuse, there is middle ground. Moving forward, the NLRB can implement simple changes to mitigate the possibility of union-side coercion while still giving the NLRA the enforcement power it so desperately needs.

As the 1960s *Joy Silk* doctrine currently stands, any and all employer-side ULPs committed during a union election drive would serve as per se evidence that an employer acted in bad faith.[222] As such, a de minimis or unintentional violation of the NLRA, even if it did not tend to interfere with the election process, could be used by the union to trigger automatic recognition.[223] Many industrial relations scholars believe this black-and-white approach incentivizes unions to inundate the NLRB with baseless ULP charges in an attempt to circumvent election procedures and gain immediate recognition.[224]

Moving forward under the *Joy Silk* doctrine, the NLRB should look to limit the categories of ULPs that can be used to automatically trigger a bargaining order. Rather than treating any employer ULP as per se evidence of bad faith, board agents should look to the circumstances surrounding a ULP before issuing a bargaining order.[225] In the past, the NLRB has opted to limit the scope of ULPs that could be used as evidence of an employer's lack of good faith doubt.[226] Specifically, only ULPs directly related to election procedures or committed in an attempt to thwart employees' unionization efforts could be used to trigger a bargaining order.[227] Under this standard, an employer's "unlawful activity must be substantial and calculated to dissipate the union's majority" in order for a union to invoke *Joy Silk*.[228]

By limiting the scope of ULPs, which could be used to trigger *Joy Silk* bargaining orders, the NLRB minimizes union-side foul play and declines to punish employers for de minimis violations of the Act.[229] To avoid ambiguity,

220. *Id.*

221. *See supra* Section I.C.

222. *Bargaining in Good Faith*, *supra* note 22.

223. Magner, *Scandalous Story of* Joy Silk, *supra* note 22 ("The burden was affirmatively placed on the employer to prove his good faith, and the doctrine soon ossified as a *per se* rule in which virtually any and all ULPs committed post-recognition request would be determined to retroactively prove bad faith.").

224. *Id.* (contending that *Joy Silk* is a "strict and unforgiving standard" for employers).

225. *See* Rosenblum, *supra* note 100, at 573–74.

226. *Id.*

227. *Id.* at 573–75.

228. *Id.* at 574–75 ("[I]f a bargaining order is to be imposed, the court concludes, it must be because the 8(a)(1) violations are so serious as to make a bargaining order an appropriate remedy.").

229. *Id.* at 573–74.

the agency should group ULPs into two separate categories: (1) those which under any circumstance demonstrate employer bad faith and will always trigger a bargaining order, and (2) nonelection-related or de minimis violations which may merit case-by-case analysis before a bargaining order is issued. This approach walks the line between traditional *Joy Silk* bargaining orders, which force recognition under any circumstance, and *Gissel*, which poses an almost insurmountable barrier to bargaining orders. Indeed, true to *Joy Silk*'s underlying purpose, the doctrine would apply only to employers acting in bad faith. Imposing reasonable restrictions on the scope of *Joy Silk*'s reach will help preserve healthy relationships between labor and management and limit coercive activity on a grand scale.

B. *Increasing NLRB Oversight of Card Checks*

The formal election mechanics of the NLRA remain the "gold standard" of union recognition.[230] The added protections of complete voter anonymity render the results more reliable and less vulnerable to undue employee coercion.[231] Even so, the NLRB has time and time again recognized the validity of authorization card checks, refusing to treat them as inherently suspect.[232] If the agency wishes to broaden the use of *Joy Silk* card checks, there are practical ways to alleviate employer-side concerns of both falsification and misinformation.[233]

Management consistently contends that reliance on authorization cards alone increases the possibility of misrepresentation or misinformation on the cards.[234] In *Gissel*, the NLRB recognized that the lack of clear-cut boundaries between permissible versus impermissible authorization cards creates opportunity for their manipulation and misrepresentation.[235]

There are two different possible categories of authorization card misuse that the NLRB should work to combat. The first, complete misrepresentation, is less of a threat.[236] Where the purpose of the authorization card is completely

230. *See Election Protection Rule*, NLRB (2020), https://www.nlrb.gov/about-nlrb/what-we-do/national-labor-relations-board-rulemaking/election-protection-rule [https://perma.cc/WJ4V-YRJM].

231. *See* Rosenblum, *supra* note 100, at 565–67.

232. *Id.*

233. *Id.*

234. *See* Cath. U. L. Rev., *Union Authorization Cards—Insufficient Protection for Misled Employees*, 17 CATH. U. L. REV. 319, 320–33 (1968) (detailing some of the many methods by which unions manipulate authorization cards to misrepresent their majority status to unknowing employees).

235. NLRB v. Gissel Packing Co., 395 U.S. 575, 604 (1969) ("We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been [card solicitation] abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.").

236. Rosenblum, *supra* note 100, at 566.

misrepresented on its face, the card is held to be invalid.[237] For example, an authorization card would not be held valid for the purpose of a *Joy Silk* bargaining order if it explicitly stated on its face that it could not be used to trigger automatic union recognition.

However, authorization cards that state multiple purposes and use excessively vague language pose more of a problem.[238] Where alternative purposes are stated, one being authorization to act as immediate bargaining agent, the Board has generally permitted the cards to be used.[239] Although it is not inherently wrong for an authorization card to have multiple valid purposes, it increases the likelihood of employee confusion or misrepresentation.[240] More specifically, many employees may sign cards absent-mindedly, believing their card merely signals *interest* in representation rather than signaling their formal support.[241] In reality, under *Joy Silk*, if pro-union employees could produce enough union authorization cards to demonstrate undoubted majority support, the prospective union could jump straight to recognition.[242]

However, the agency can take effective measures to combat this misinformation. Following the lead of Sixth Circuit courts,[243] the NLRB may promulgate a rule that when a "dual purpose card is used, there is a greater obligation on the part of the union to make sure that the employees are fully aware of the significance of their act in signing."[244] Generally, this requires that the purpose of the card must be clearly stated in writing on the card itself before it is disseminated.[245] By clearly signaling that a given authorization card could lead directly toward union recognition, the NLRB reduces the risk of misrepresentation and allows employees to make informed choices about collective bargaining.[246]

In addition to demanding that dual-purpose authorization cards state their whole purposes in writing on the card itself, the NLRB should look to increase penalties for unions found to have committed an ULP related to card

237. *Id.* at 566.

238. *Id.* at 566–67.

239. *Id.* at 566.

240. *Id.* at 566–67 ("The Fifth Circuit has reversed an 8(a)(5) finding where the union majority was based on cards stating a dual purpose.").

241. *See What Steps Should an Employer Take When Presented with Union Authorization Cards?*, SHRM (2021), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/authorizationcardpresentation.aspx [https://perma.cc/7MKM-6H8R (dark archive)] [hereinafter *What Steps*] ("A union authorization card is signed by an employee to indicate the employee's desire to be represented by the union.").

242. Knight, *supra* note 9 (contending the NLRB can use bargaining orders to "order bosses to bargain with the union, effectively forcing recognition").

243. *See* Dayco Corp. v. NLRB, 382 F.2d 577, 583 (6th Cir. 1967).

244. Rosenblum, *supra* note 100, at 567.

245. *Id.* at 566–67.

246. *Id.*

misrepresentation or employee coercion.[247] One extremely swift and effective method of limiting union-side abuse is to threaten the immediate decertification of any union found to have grossly misrepresented the purpose of authorization cards.[248] In this scenario, *Joy Silk* would only be available to unions having acted entirely in good faith.[249]

By increasing the potential consequences of ULPs for employers and unions alike, the *Joy Silk* doctrine could even the playing field between workers and management and lead to a more democratic and coercion-free election environment.[250] As a matter of public policy, the NLRB will never do away with the formal secret ballot election.[251] However, there are ways to improve the reliability of the card check process to render it a viable alternative in particular circumstances.

C. *Promulgating Changes in Board Policy Through the Formal Rulemaking Process*

The NLRB's current reliance on case-by-case adjudication has done little to shield policy from immediate reversal with changing administrations.[252] Indeed, legal professionals, employers, and workers alike are suspended in constant uncertainty waiting for the agency's imminent doctrinal flip-flops.[253] Moving forward, it is imperative that the NLRB work toward one overarching goal: consistency. Promulgating consistent labor policy is a two-pronged endeavor. First, the NLRB should focus on declaring policy that is consistent with the underlying goal of the agency: encouraging collective bargaining by protecting workers' full freedom of association.[254] Second, once that policy is in place, the agency should work toward protecting it from politically motivated reversal—which often has less to do with the inherent quality of the policy and more to do with differing political allegiances.[255] In order to restore the public's faith in the agency's authority and capability, the NLRB must not appear to be a house divided.

247. *Id.*

248. *See What Steps*, *supra* note 241.

249. *See id.*

250. Petruska, *supra* note 16, at 138–39.

251. *See* Eaton & Kriesky, *NLRB Elections*, *supra* note 101, at 158–59.

252. Ronald W. Taylor & Teresa M. Biviano, *The Pro-Labor Shift Has Arrived: NLRB General Counsel's New Agenda Signals Significant Changes Coming to Labor Law*, VENABLE (Sept. 10, 2021), https://www.venable.com/insights/publications/2021/09/the-pro-labor-shift-has-arrived-nlrb-general [https://perma.cc/9JZW-HBU8].

253. *Id.* (contending that employers should be aware that a change in administration signals a rapid change to "a new and different state of labor law").

254. *See* National Labor Relations Act, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69 (1984)); *see also* Petruska, *supra* note 16, at 138.

255. *See* Morris et al., *supra* note 180 (contending that the NLRB's frequent policy oscillations are damaging).

Although moving away from the long-standing *Gissel* precedent may seem like yet another oscillation, it is in fact a necessary step toward promulgating truly consistent policy within the NLRB. This is in large part because *Joy Silk* aligns far better with the NLRB's underlying policy goals than *Gissel*.[256] When Congress passed the NLRA in 1935, they made it clear that the underlying goal of the Act was to encourage collective bargaining by protecting workers' full freedom of association.[257] However, *Gissel* orders are no more than a "pyrrhic victory," providing little in the way of worker protection or employer deterrence even in the most extreme cases of union busting.[258] Without any meaningful enforcement powers, *Gissel* falls woefully short of safeguarding freedom of association.[259]

By contrast, *Joy Silk* serves the NLRB's overarching policy goals of increasing the number of elections overall, reducing ULPs committed during elections, and ensuring fairer elections generally.[260] Moreover, the existence of *Joy Silk* and *Gissel* need not be mutually exclusive. *Gissel* may remain good law even if *Joy Silk* is reintroduced.[261] Specifically, the *Gissel* doctrine may provide a useful alternative in situations 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."[262] Although *Gissel* may not be strong enough to deter employer abuses when standing alone, it nonetheless is a useful tool in the NLRB's arsenal.

The reintroduction of *Joy Silk* would satisfy the first prong of the NLRB's movement toward consistency by increasing elections and reducing ULPs. However, the real barrier to *Joy Silk*'s meaningful introduction lies in the fact that as it stands, it is wholly unprotected from later reversal.[263] Moving forward, the NLRB should focus on codifying its position on the use of *Joy Silk* bargaining orders through the formal administrative rulemaking process. Unlike case-by-case adjudication, which can be easily reversed or modified by subsequent adjudication, policy generated through the formal rulemaking mechanisms are granted force of law.[264] Thus, agencies cannot ignore or reject rules in ensuing adjudications.[265] If a subsequent administration wished to

256. *See* National Labor Relations Act §§ 151–169.

257. *Id.*

258. Petruska, *supra* note 16, at 160.

259. *Id.* at 159–60.

260. *Id.* at 138 ("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.").

261. *See id.* at 160; Ward, *supra* note 81.

262. Petruska, *supra* note 16, at 160.

263. *See id.* at 104–08.

264. *See id.*

265. *See id.*

challenge General Counsel Abruzzo's use of *Joy Silk* bargaining orders, the change would be subject to the formal notice and comment procedures of the APA.[266] To be clear, these additional barriers do not render her policy immune from reversal; but they do insulate Abruzzo's decision from immediate reversal.[267]

Furthermore, the rulemaking procedures, although more labor intensive, generally provide fairer outcomes on the mass scale.[268] Unlike case-by-case adjudication, administrative rulemaking requires that agencies provide the public with a notice and comment period, where any individual or entity can voice their opinions on the proposed change.[269] During this notice and comment period, agencies are required to consider all "relevant matter presented" to them and provide analyses of any relevant information that informed their choice.[270]

In reviving the *Joy Silk* doctrine, the NLRB would be promulgating a rule of general applicability that would influence the labor rights of thousands of individuals.[271] Given the scope of *Joy Silk*'s potential impact, employers and the public alike have a vested interest in commenting on the proposed policy. The formal rulemaking process, as opposed to a mere adjudication, provides individuals with the opportunity to comment on the decision, leading to better informed outcomes.[272]

While the NLRB historically relied on case-by-case adjudication to announce its policy rather than the formal rulemaking procedures of the APA, the agency should codify its decisions through the more permanent policy-making vehicle. By doing so, the agency not only signals its intent to listen to public opinion when creating policy, it also insulates its decisions from political influences.

266. *See id.*

267. *See id.*

268. *See id. But see* William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 103 (1980) (contending that the persistence that rulemaking is fairer than adjudication is unfounded, leading to undue persuasion by the "crocodile tears" of parties not immediately affected by the court's ruling).

269. *Notice and Comment Process for Agency Rulemaking*, JUSTIA (2022), https://www.justia.com/administrative-law/rulemaking-writing-agency-regulations/notice-and-comment/ [https://perma.cc/KF7X-FB67].

270. *Id.*

271. *See* Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. L. REV. 529, 529 (2005).

272. *See* Morris et al., *supra* note 180.

CONCLUSION

The modern American labor movement is characterized by stagnant collective bargaining and rampant unfair labor practices.[273] Absent any meaningful repercussions for interference in union election charges, employers are emboldened to openly interfere with the secret ballot election process.[274] However, the state of current affairs is not beyond repair. The sharp uptick in ULPs committed during union certification correlates to the abandonment of the *Joy Silk* doctrine.[275] A return to *Joy Silk* could revive the struggling American labor movement by neutralizing the most substantial impediment to worker organization: illegal employer opposition.[276] With the introduction of meaningful ULP deterrence mechanisms, the NLRB could launch a new era of labor characterized by transparency, worker power, and democratic elections.

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273. AFL-CIO & ECON. POL'Y INST., THE NLRB ELECTION PROCESS—OR, HOW *NOT* TO FACILITATE A TIMELY, FAIR VOTE 6, https://files.epi.org/uploads/bwp-nlrb-election-process.pdf [https://perma.cc/PZJ3-2M5A] ("[C]urrent law places too many obstacles in the way of workers who are trying to organize, and gives employers too much room to interfere with their workers' choice.").

274. *See* Magner, *Why Labor Law Needs* Joy Silk, *supra* note 11 ("Employer misconduct has skyrocketed since the NLRB abandoned the doctrine over 50 years ago.").

275. *Id.*; *see also supra* Section I.C (discussing the impact of *Joy Silk*'s replacement with *Gissel* bargaining orders).

276. Magner, *Why Labor Law Needs* Joy Silk, *supra* note 11.

** I am endlessly grateful to the many people who helped bring this Comment to life. A special thanks to all the North Carolina Law Review Board and Staff members who worked tirelessly on this piece—particularly my superb primary editor, Leah Ehler. I would also like to thank Professor Jeff Hirsch for his continual guidance and impressive knowledge of labor law. This Comment would not be possible without the research of labor scholars, including Brandon Magner and Brian Petruska. Lastly, I would like to pay a special thanks to my family Les, Mina, Barrett, and Tierin Baledge, and my partner Bharat Vishnubhotla. Your love and unwavering support carried me to the finish line.