Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement†

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A curious thing is happening in American industrial relations. The American Labor Movement not only is alive but appears to be well, disappointing reports of its impending doom. At this juncture, it seems somewhat unproductive to quarrel over all the causes of unions' misfortunes during the past twenty-five years, just as it seems pointless to deny that they are attributable at least in part to inadequacies of the New Deal labor relations regime itself. The failure of modern labor law has not


2. See Henry H. Drummonds, The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace, 62 FORDHAM L. REV. 469, 482 (1993) (summarizing widely varying views explaining organized labors' decline: "structural changes in the labor markets, increased foreign competition, the cultural preferences of employees, the bureaucratization of unions, rogue employer illegality and ineffective NLRB remedies, and hostile judicial and administrative law decisions, especially during the Reagan years.").

been a want of labor law reform proposals but rather an absence of a political consensus for even a modest fix.\(^4\)

By the mid-1990s, the AFL-CIO leadership seemed paralyzed by the lack of any option other than waiting for a change of political climate that might bring on meaningful labor law reform.\(^5\) Then John Sweeney, the newly elected President of the AFL-CIO, began to proclaim a message of hope: the problem of organizing was solvable without waiting for the Congress to act.\(^7\) Soon other union leaders became convinced that the American labor movement needs to cease anguishing about those things over which it has no control and begin concentrating on matters within its control.\(^8\) From this psychological and philosophical reorientation arose an

\(^{4}\) See, e.g., William B. Gould IV, Agenda for Reform: The Future of Employment Relationships and the Law 9 (1993) (stating that the current system needs reform if we are to reverse the erosion of worker dignity and job security and provide for the continuing efficacy of the collective bargaining process.); Rogers, supra note 1, at 97 (noting that the New Deal system of labor law "may have been well-suited to the industrial society of the 1930s-1950s [but it has failed because it] has not adjusted to the 'new economic realities' of the 1990s").


\(^{6}\) After the 1977 labor law reform initiative was blocked by a Senate filibuster, the AFL-CIO leadership’s response to the continuing decline in union membership consisted primarily of waiting for the return of a favorable political climate. See David Bacon, The Global Economy: Labor Explores New Terrain, Dollars & Sense, September 19, 1997, at 20, available in 1997 WL 10358104.

\(^{7}\) Id. (expressing the opinion that “Sweeney’s greatest contribution has been treating the problem of organizing as solvable”).

\(^{8}\) Daily Lab. Rep. (BNA) No. 159, at C-1 (Aug.18, 1999) (quoting SEIU President Andrew Stern as stating that unions need to cease blaming low organizing returns on things beyond labor’s control, such as the labor laws or employer resistance and understand that labor’s “first obligation is to remove the obstacles within our control”).
overhaul of American unions' commitment and approach to organizing—an approach that does not rely on labor law reform since it largely bypasses the National Labor Relations Board (NLRB). The early returns are promising but by no means conclusive. A central component of the unions' transformed organizing strategy is greater reliance on the pre-recognition neutrality agreement negotiated with an employer whose employees a union is attempting to organize.

This article examines these neutrality agreements. Part I locates the neutrality agreement within unions' revitalized approach to organizing. This discussion shows that neutrality agreements can redress four disadvantages unions confront when organizing: employer intimidation, harmful delay, inadequate access to employees, and inability to secure a first contract. These disadvantages, widely understood as contributing significantly to the decline in union membership during the last quarter of the twentieth century, constitute the core of the unions' complaint about the Taft-Hartley Act's representation processes and the NLRB's

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9. See discussion infra notes 16-40 and accompanying text.


In 1998 a trend reversal began. That year, union membership increased by 100,000, to 16.2 million, the first increase in five years. Overall union density decreased, however, from 14.1 percent to 13.9 percent of the labor force because the economy added 2.2 million new jobs. Daily Lab. Rep. (BNA) No. 16, at A-13 (Jan. 26, 1999). The percentage of union-represented workers (members and nonmembers) in 1998 was 15.4 percent. Daily Lab. Rep. (BNA) No. 159, at C-1 (Aug. 18, 1999). 1999 saw even greater gains. Union membership increased by nearly 300,000 members to a total of 16.5 million. The overall density rate stayed even at 13.9 percent. Among private-sector employees, union membership increased by 100,000 but density among private-sector employees slipped from 9.5 to 9.4 percent. Daily Lab. Rep. (BNA) No. 13, at AA-1 (Jan. 20, 2000). The 300,000 overall membership increase represents the largest annual membership growth in more than 20 years. The private-sector increase "represents a growth rate nearly twice as big as the only other such annual increase in two decades." Daily Lab. Rep. (BNA) No. 13, at AA-2 (Jan. 20, 2000). The maintenance of a 13.9 overall density rate is notable given that the economy added 2.7 million new jobs in 1999. Id. Because of membership attrition and growth in the economy, unions will need to organize approximately 400,000 new members each year to maintain current density. Bacon, supra note 6, at 20 and each 1 percent increase in density will require the addition of 800,000 to 1 million new members. Id.; see also Daily Lab. Rep. (BNA) No. 13, at AA-2 (Jan. 20, 2000) (The estimate from Kirk Adams, AFL-CIO Organizing Director, is that, because of attrition and growth in the economy, unions will not be able to raise density rates unless the American labor movement organizes between 500,000 and 1 million workers annually.).

11. See discussion infra notes 16-96 and accompanying text.

administration of it. Rectifying these impediments to effective organizing constitutes the nucleus of proposals for legislative labor law reform. What emerges from this discussion, therefore, is a clearer understanding that the neutrality agreement is not simply another innovative organizing tool. It is that. But it is also an elegant mechanism carefully fashioned to provide the labor movement non-legislative labor law reform. Sweeney calls this reform “the civil rights issue of the 1990s”\(^\text{13}\) because it makes the right of self-organization more meaningful.

Part II examines the important question of how unions manage to secure these agreements.\(^\text{14}\) Normally, unions trade for them. What a union can offer depends on many factors, such as whether some of the employer’s operations already are organized, whether an employer needs to resolve certain legal conflicts with a union, and whether the employer is vulnerable to the vagaries of governmental regulation and in need of the union’s assistance in winning beneficial regulatory rulings. One of the most important ways a union secures a neutrality agreement is when a state or local government requires one from a private sector employer with whom it does business. In addition, unions sometimes are able to leverage their own financial power by investing union funds only with corporations that agree to enter into neutrality agreements.

Part III catalogs the most important legal issues neutrality agreements are likely to generate, locates the primary points of disagreement within each issue, and clarifies the likely considerations on which the outcomes will depend in neutrality agreement litigation.\(^\text{15}\) Neutrality agreements are likely to create both statutory and constitutional litigation. The statutory issues will arise under the Taft-Hartley Act. They will involve the negotiation and enforcement of neutrality agreements as well as their effect on third parties. The constitutional controversies will arise because neutrality agreements can create labor preemption concerns. Preemption issues will most likely arise—when local government requires a neutrality agreement from a private developer as a condition of being provided access to public land or public financing.

\(^\text{13}\) See Daily Lab. Rep. (BNA) No. 145, at A-5 (July 29, 1997) (arguing that workers can promote their civil right to organize and effect “meaningful labor law reform” through their own efforts).

\(^\text{14}\) See discussion infra notes 97-137 and accompanying text.

\(^\text{15}\) See discussion infra notes 138-206 and accompanying text.
II.
STRATEGIC UNION ORGANIZING AND ASCENDANCE OF THE NEUTRALITY AGREEMENT

A. The New Organizing Model

John Sweeney was elected President of the AFL-CIO in 1995 on a platform to energize the American labor movement and introduce a new organizing approach. Sweeney's task force on organizing concluded that in the past twenty years unions "chose the shortsighted strategy of trying to protect current contracts of members instead of organizing new members. More and more resources poured into defensive contract battles, plant closings and crippling strikes, leaving little time and few resources for organizing." Soon the AFL-CIO developed a five-point response, designed to alter the terms of organizing and effect what Sweeney called "real labor law reform." The result has been a new culture of organizing that employers are beginning to acknowledge is sophisticated and effective. Some of the more striking features of this new culture are:

1. Financial Commitment

The unions' new approach to organizing began with a dramatic reallocation of resources. By 1997, the AFL-CIO had committed $30 million to revitalize the labor movement: $10 million was devoted to organizing. Many unions have reported meeting or exceeding this goal. As one union leader has stated, "the National Labor Relations Act is a joke when it comes to organizing workers. That's just the way it is... Workers' rights shouldn't be subject to bureaucracy. We have to use different strategies that are non-board, like neutrality agreements. That's the way to go." Muriel H. Cooper, Seven-Year Battle Yields Card-Check Win At SF Marriott, AFL-CIO NEWS, October 11, 1996, available at http://www.aflcio.org/publ/news/online/96oct11/marriott.htm.


17. Bacon, supra note 6, at 20 (quoting the AFL-CIO Task Force on Organizing).

18. Sweeney has argued the labor movement cannot, and need not, wait for legislative labor law reform. See AFL-CIO Delegates Pass Enhanced Organizing Plan, 162 Lab. Rel. Rep. (BNA) 216, 217 (Oct. 18, 1999). This gospel has fallen on willing ears. As one union leader has stated, "the National Labor Relations Act is a joke when it comes to organizing workers. That's just the way it is... Workers' rights shouldn't be subject to bureaucracy. We have to use different strategies that are non-board, like neutrality agreements. That's the way to go." Muriel H. Cooper, Seven-Year Battle Yields Card-Check Win At SF Marriott, AFL-CIO NEWS, October 11, 1996, available at http://www.aflcio.org/publ/news/online/96oct11/marriott.htm.

19. See Ariz. Bus. Gazette, March 5, 1998, at 1, available in 1998 WL 7736988 ("You don't have the good-old-boys who didn't finish high school, sitting in some back room smoking stogies. These are professionals. They're smart people, and they're hired to do one thing: organize workers.").


21. Daily Lab. Rep. (BNA) No. 159, at C-1 (Aug. 18, 1999) (advocacy of a 30 percent goal); Bacon, supra note 6, at 20 (current average was 5 percent). At its 23rd biennial convention held in October 1999, the delegates to the AFL-CIO convention approved a resolution to this effect applicable...
exceeding this 30-percent goal.\textsuperscript{22}

2. \textit{Technical Assistance to Affiliates}

The AFL-CIO has established a “first ever” organizing department to assist in coordinating union campaigns\textsuperscript{23} and a $20 million organizing fund from which it makes grants to support organizing drives by affiliated unions working together in industry-wide campaigns.\textsuperscript{24} The Federation has increased the funding to its Organizing Institute, and in 1999 doubled the number of organizers it trained and made available to affiliates.\textsuperscript{25} It has formed a new “solidarity and rapid response team” charged with “go[ing] to bat for workers involved in organizing and first contract.”\textsuperscript{26}

3. \textit{A More Focused Strategic Approach to Organizing}

Unions now are concentrating on organizing entire industries and sectors of the economy. The Communications Workers of America (CWA), for example, has concentrated on the wireless communications industry and the Building and Construction Trades Department of the AFL-CIO initiated a campaign to organize the entire construction industry in Las Vegas.\textsuperscript{27} The Federation has supported organizing strawberry workers in California,\textsuperscript{28} and

\textsuperscript{22} The United Steelworkers of America (USW) committed to this percentage at its 1998 convention and subsequently tripled its organizing budget from $13 million to $40 million. Daily Lab. Rep. (BNA) No. 159, at C-1 (Aug. 18, 1999). By further example, the Operating Engineers, with less than 300,000 members, has committed $15 million annually to organizing, a budget percentage seen as unprecedented. Daily Lab. Rep. (BNA) No. 13, at AA2 (Jan. 20, 2000). The Service Employees International Union, which for years has committed 30 percent of its budget to organizing, has increased that amount to 47 percent. Daily Lab. Rep. (BNA) No. 159, at C-1 (Aug. 18, 1999).


\textsuperscript{24} See Daily Lab. Rep. (BNA) No. 159, at C-1 (Aug. 18, 1999); Bacon, supra note 6, at 20.


\textsuperscript{28} For a description of the labor struggles in the strawberry fields of California from the point of view of the union, see \textit{Driscoll’s Abuse of Strawberry Workers}, http://www.ufw.org/ufw/driscoll (the United Farm Workers web site). For a less sympathetic summary, see Marc Lifsher, \textit{How Monsanto and Democrats Failed in Their Efforts to Aid UFW}, \textit{WALL ST. J.}, August 5, 1998, at C1, available in 1998 WL-WJS 3504418. For a balanced view and update, see David Bacon, \textit{Strawberry Crush}, THE
other international unions are working in joint campaigns to organize large sectors of the industries in which they concentrate their efforts.29 The result seems to be fewer elections but a higher win ratio for the unions.30

4. Community-Based Organizing

An important feature of the unions’ revamped approach to organizing is enlisting the cooperation of community organizations as well as religious and political leaders.31 Part of that effort entails exposing employers thought to have opposed organizing efforts unfairly.32 In June 2000, the AFL-CIO sponsored “Seven Days in June,” consisting of one-hundred fifty events in thirty-six states to publicize such employers.33 In 1997 the Federation launched a multimillion dollar campaign that included extensive television advertising “aimed at creating wider public support for unions.”34 The Federation has initiated what it calls the “Union Cities” program described as drawing central labor councils together “in an effort to rebuild the labor movement community by community.”35 Further, it has sponsored “Union Summer,” a program employing college students as summer interns.
working on various projects including union organizing campaigns. Some of these students have returned to their schools and assisted in organizing janitors, while students elsewhere have worked in support of cafeteria workers organizing at their universities.

5. Negotiating Neutrality Agreements

At the AFL-CIO's October 1999 convention, Morton Bahr, the President of the Communications Workers of America, reported his union's success in organizing using neutrality and card check recognition agreements and urged all unions to mobilize their bargaining strength to obtain neutrality agreements. The next several sections of this article describe neutrality agreements and the leverage unions exert to obtain them.

B. Emergence of The Neutrality Agreement in Contemporary Organizing

Neutrality agreements are emerging as the organizing instrument of choice. Interestingly, some unions employed neutrality agreements as early as the mid-1970s. Apparently, the first to be negotiated, and certainly the one most widely reported, was a 1976 letter agreement between the United Auto Workers (UAW) and The General Motors Corporation (GM). Later that decade, the UAW successfully negotiated neutrality agreements with

36. Coie, supra note 10, at 2. For example, in the summer of 1997, a group of 50 summer interns and union organizers worked together in the Flathead Valley area in Montana. Michael Jamison, Union Summer Settles, With No Takes for Labor, MISSOULIAN, Sept. 13, 1997, at A1, available in 1997 WL 9096590. Among other things, they conducted a door-to-door canvass of households and obtained signatures from two-thirds of 400 residents on a petition supporting workers' right to organize. Id. They also secured neutrality agreements from businesses in Missoula and Billings. Id.


38. See, e.g., Students Take Over Pitzer College Office, L. A. TIMES, April 28, 2000, at B4, available in 2000 WL 2235611 (reporting that students had padlocked college president's office and occupied administration building in support of cafeteria workers' demand for neutrality agreement from contractor providing food services).

39. See AFL-CIO Delegates Pass Enhanced Organizing Plan, 162 Lab. Rel. Rep. (BNA) 216 (Oct. 18, 1999). Bahr reported that his union had organized 5,000 new members who work in the wireless operations of SBC Communications, Inc. using these agreements. Id.

40. See discussion infra notes 41-137 and accompanying text.


42. Kramer, Miller, & Bierman, supra note 41, at 40; accord Guzick, supra note 5, at 422, 434.
the other major automobile companies, as well as the International Harvester Corporation and the Dana Corporation. James Craft reports 1970s' neutrality agreements negotiated by the Rubber, Cork, Linoleum, and Plastic Workers (URW), the International Union of Electrical, Radio, and Machine workers (IUE), and the Bakery, Confectionery, and Tobacco Workers. Guzik reports 1970s' agreements not to "actively oppose the Union's attempts to organize" in the steel industry. During the 1980s, other unions, most prominently the CWA and the steelworkers, also began pursuing neutrality agreements aggressively. Not until the 1990s, however, did the neutrality agreement become the fixture in union organizing strategy that it is today. According to Adrienne Eaton and Jill Kriesky, who have collected one-hundred thirty-two neutrality agreements, "the overwhelming majority . . . , about 80% . . . , emerged in the 1990s."

The early neutrality agreements focused primarily on two impediments to successful union organizing: intimidation and delay.

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43. Guzik, supra note 5, at 436 n.71.
44. Kramer, Miller, & Bierman, supra note 41, at 41.
45. J. Craft, supra note 41, at 754.
46. Guzik, supra note 41, at 438-39 & n.76 (reporting an agreement negotiated by the United Steelworkers of America (USW) in the "basic steel settlement in 1977").
48. Id. at 8. Eaton and Kriesky describe their research as "the most comprehensive collection of agreements and experience under them ever assembled." They contacted the Research Director or President of every international union with 10,000 or more members, seeking to "identify any neutrality or non-interference agreement . . . and any other agreements regarding organizing unorganized workers such as card check arrangements, unit accretions, physical access, etc. . . to which their union had been or currently was a party . . . ." Id. The 132 agreements this search uncovered understates the use of neutrality agreements because the sample contains few agreements from the United Food And Commercial Workers Union (UFCW) although that union is estimated to have organized over 100,000 new members through card check recognition and, in addition, following the close of the data search, the authors report becoming aware of other agreements not used in their study. Id. at 8-9.
49. Id. at 9. One can still find contemporary references by journalists that the neutrality agreement is "rare." See, e.g., Jim Weiker, Union Demand Threatens Denver Marriott Convention Center Hotel, KNIGHT-RIDDER TRIBUNE BUSINESS NEWS, June 6, 2000, available at 2000 WL 22619928 (referring to a neutrality agreement as a rare clause). They hardly are that. Indeed, in certain sectors of the economy they are customary. For example, "[l]abor peace agreements [neutrality agreements] are not uncommon in public projects." Stewart Yerton, N.O. Airport Hotel Deal a Winner for Union Project Is to Include "Labor Peace Agreement," NEW-ORLEANS TIMES-PICAYUNE, April 26, 2000, at A1 (reporting the view of an experienced union organizer). Neutrality agreements are "common," they "[h]appen [] all over the country." Id. (quoting the president of a major corporation engaged in real estate redevelopment financed partially through public funds). In October, 1998, a coalition of eight major chlorine manufacturing companies (six American) entered into a neutrality agreement with a coalition of 404 unions in 115 countries that represent 20 million workers. It provides a pledge "that [the companies] will not oppose union organizing efforts in their plants." Daily Lab. Rep. (BNA) No 203, at A-8 (Oct. 21, 1998).
1. Intimidation

Union leaders regard employer anti-union speech as a leading cause of union organizing failure, particularly when orchestrated by labor-management consultants. Some speech that unions consider to be coercive currently is not prohibited by the NLRA. A considerable body of industrial relations research supports the causal role of employer opposition in union election losses.

From the earliest neutrality agreements, the effort to neutralize employer anti-union speech has followed two models. In the first, employers waive their right to communicate their views about the union—a pledge of complete neutrality. Typically, neutrality agreements accomplish this by providing that employers will neither discourage nor encourage the union’s organizing efforts, sometimes by requiring a posture of “strict neutrality.” In the second model, employers agree to a partial waiver of their right to communicate with employees during the organizing period. For example, the waiver might state that the “Company will remain neutral... providing that the Union conducts itself in a manner which neither demeans the Corporation as an Organization nor its representatives as individuals.”

In the Eaton and Kriesky study, ninety-three percent of

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50. See, e.g., Eaton & Kriesky, supra note 47, at 1 (discussing “the labor movement’s view that management opposition is the key factor explaining union losses in representation elections”); Guzick, supra note 5, at 428 (“Unions strongly believe that the emergence of labor-management consultants is a major cause of the recent failure of traditional union organizing efforts. Labor leaders believe that this ‘brand new industry...’ is one of the major obstacles to union organizing under the NLRA.”).

51. See Strom, supra note 41, at 55 (“[A]ny message conveyed by someone who has the authority to hire, fire, promote, or discipline has an undercurrent that is inherently coercive.”); Daily Lab. Rep (BNA) No. 159, at C-1 (Aug. 18, 1999) (quoting the SEIU organizing director: “We have to make it unacceptable for employers to use the legal intimidation and coercion they are able to use... “); see also Bacon, supra note 6, at 20 (explaining that “[a]nti-union law firms and union-busting consultants have devised legal and illegal ways to intimidate workers—and many of the legal ways are through the NLRB”).

52. See Eaton & Kriesky, supra note 47, at 1 (“A long stream of industrial relations research demonstrates the role of employer opposition in union election losses.”); id. at 2 (“Industrial relations research has long identified employer opposition as a major factor in explaining union losses in certification elections and, ultimately, in the decline of the U.S. unionization rate...”). Eaton and Kriesky cite a considerable body of academic research as establishing the adverse role of employer opposition in union organizing success. Id. at 2-4 (collecting authority).

53. For a discussion of early agreements, see Kramer, Miller, & Berman, supra note 41, at 40-43 & nn.6 & 24 (discussing the Rubber Workers’ 1979 agreement with B.F. Goodrich Tire and Rubber Company and the 1976 UAW-GM agreement proscribing the employer’s active opposition to the union during organizing and the union’s disparagement of the employer). Some early agreements did not waive the employer’s right to speak, but rather provided that the company would not disseminate “misleading or false assertions” nor use “derogatory statements about the union.” Id. at 45-46 n.33. In the basic steel settlement in 1977 the signatory employers agreed not to “actively oppose the Union’s attempt to organize production and maintenance employees at any basic steel-producing operations which they may hereafter contract.” Guzick, supra note 5, at 438 n.76.

54. Kramer, Miller, & Berman, supra note 41, at 47 (discussing the 1979 Tobacco Workers—
the agreements surveyed "contained explicit neutrality language" of some type.\textsuperscript{55}

Neutrality agreements do not necessarily "gag" the employer, as is sometimes thought,\textsuperscript{56} but often only require a civil atmosphere for the discussion of the issues surrounding the question of union representation. Examples might include bans on referring to the union as a "third party," or attacking or demeaning the union or its representatives.\textsuperscript{57} Often these provisions forbid union attacks on the company or its management, or require the union to notify the employer of the union's intention to initiate a union organizing campaign.\textsuperscript{58} Sometimes the employer commits to conducting a "fact-based" campaign to present the company's position.\textsuperscript{59} In the hotel industry, the parties have adopted a neutrality agreement limiting the employer's participation in the debate to "correct[ing] misstatements and/or distortions of facts."\textsuperscript{60} Or, the employer may agree to confine itself to answering employee questions, truthfully, accurately, and "not mak[ing] any disparaging or negative remarks about the union."\textsuperscript{61} A review of neutrality agreements negotiated after the close of the Eaton and Kriesky study shows an increasing number requiring the employer to state it does not object to employees choosing to be represented by a union.\textsuperscript{62}
Sometimes, the neutrality agreement may not attempt to limit the content of the employer’s speech at all but rather may regulate the time, place, and manner of its communication. Neutrality agreements may, for example, proscribe one-on-one meetings between supervisors and employees, forbid captive audience speeches to assembled groups of employees, disallow an employer’s communicating in writing or by telephone, or bar interrogating employees about union activities.\(^3\)

2. Delay

From their earliest negotiation, neutrality agreements have attempted to protect unions from delay. Unions identify delay during the organizing process as a leading impediment to their organizing efforts.\(^5\) "It takes years" one union leader has stated, to resolve representation questions. "It’s like Chinese water-torture."\(^4\) There is empirical evidence that delay benefits employers during organizing struggles.\(^5\) The claim that the NLRB

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63. Eaton & Kriesky, supra note 47, at 12.
64. See, e.g., Daily Lab. Rep (BNA) No. 16, at A-13 (Jan. 26, 1999) (AFL-CIO Organizing Director quoted as stating: "Despite the fact that more money is being spent, more organizers are being trained, and more outreach is taking place, . . . organizing efforts are held back by the NLRB process, which . . . is 'inherently slow and counterproductive,' and by employer efforts to take advantage of that process to slow down organizing campaigns."); Diane E. Lewis, IBEW Local 2222 Joins Early Talks Between Bell Atlantic, CWA, BOSTON GLOBE, Jan. 8, 1998, at C7, available in 1998 WL 9111105 (quoting union leader that “[w]e want to take the NLRB out of the process because it’s time-consuming”); see also Eaton & Kriesky, supra note 47, at 4 (reporting that unions have sponsored labor law reform legislation “to reduce the time required for the union election process [and] limit[ ] the opportunity for management opposition”); Daily Lab. Rep (BNA) No. 159, at C-1 (Aug. 18, 1999) (reporting a judicial reversal of a union election victory six years after the representation election at Avondale Industries, in which over 3,500 out of 4,000 employees cast votes).
65. Jake Mattox, Culinary Feels Optimistic About Next Waive of Resorts, LAS VEGAS BUS. PRESS, March 18, 1996, at 26 (quoting union organizer of culinary workers in Las Vegas); id. (The delay in resolving representational matters “reminds me of the Nixon White House: ‘obstruct, delay, and hope they go away.’”). The then director of the AFL-CIO’s Organizing Department, Richard Bensinger, is reported to have stated that “[t]he current NLRB process is so slow and inefficient that it is virtually useless, and therefore we’re choosing that route fewer and fewer times.” Worker Agreement Seen As Union Model, HOTEL & MOTEL MGMT., Nov. 18, 1996, at 3, available in 1996 WL 13827747.
66. Eaton & Kriesky, supra note 47, at 3 (citing academic research); Myron Roomkin & Richard Block, Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence, 1981 ILL. L. REV. 75, 88. It is not clear whether delay is an independent variable or correlates inversely with union organizing success only when paired with employer coercive tactics during the organizing campaign. See id. at 76 (finding that delay causes loss of union support because of employer coercion
is ineffective in protecting workers' right to organize has centered on the delay inherent in the Board's representation procedures and the delay created by its "caseload crisis." It is understandable, therefore, that eliminating NLRB delay has been a goal both of labor law reform and of neutrality agreements.

Unions use neutrality agreements to combat delay in two ways. One approach is to agree to participate in NLRB-conducted elections but commit the employer to an obligation not to cause delay. For example, the parties may agree to an expedited NLRB election. Or, the neutrality agreement may provide that the employer not delay in recognizing the union once it has won an NLRB-conducted representation election. The 1998 agreement between the CWA and AT&T offers a hybrid example: it provides for an expedited NLRB representation election coupled with an agreement that if the employer violates the neutrality agreement, the union has the right to prove that fact before an arbitrator. The arbitrator may remedy the breach by ordering AT&T to grant recognition, if the union can prove to the arbitrator that it has majority support.

The second approach avoids the NLRB's processes altogether. This

67. Guzick, supra note 5, at 431-32 (concluding that "[e]mployers can use delay as a strategic weapon to sabotage the effectiveness of the Board's remedies"); see also Strom, supra note 41, at 50-51 & n.3 (reporting a delay of 314 days in 1990 between the filing of a representation petition and a decision by the NLRB). There is at least some recognition of the Board's delay at the NLRB itself. In December, 1999, NLRB Chair John Truesdale, remarking on the $21 million NLRB funding increase for the 2000 budget, stated that "[t]here are no real obstacles now, nothing to hold us back, in making an all-out attack on the backlog of pending cases. . . . 'Wouldn't it be great' . . . to read court decisions praising the Board's promptness, rather than chastising it for delay, and to read press reports quoting union and management attorneys praising the Board for its efficiency, instead of complaining about how long it takes the Board to resolve cases?" Truesdale, Page Sworn In As Chairman, GC At NLRB, 162 Lab. Rel. Rep. (BNA) 472, 472-73 (December 13, 1999).

68. Guzick, supra note 5, at 426 (an important goal of labor law reform in 1977 was "expediting union representation elections, and increasing remedies for employer delays.").

69. See Eaton & Kriesky, supra note 47, at 5.

70. As early as the 1979, the URW/B.F. Goodrich agreement provided that "the company and its agents will not engage in dilatory tactics of any kind to delay its obligation to bargain with the URW once the NLRB has certified the URW. . . ." Kramer, Miller, & Bierman, supra note 41, at 43 n.24. That agreement acknowledged that resort to federal courts would not constitute a breach of the commitment if litigation is pursued in "good faith and "in an expeditious manner." Id. Neutrality agreements continue to contain provisions barring employer dilatory tactics once a union wins an NLRB-conducted election. See Eaton & Kriesky, supra note 47, at 14.

71. See Jeff May, Workers Charge AF&T Blocking Union Efforts, THE STAR LEDGER (NEWARK, N.J.), June 27, 2000, at 30, available in 2000 WL 23585658. Another hybrid, this one also designed to ensure employer compliance with the neutrality agreement, is found in the USW contract with the American National Can Company. It provides for employer neutrality during organizing of the employer's nonunion plants with a provision for a permanent arbitrator to "resolve any disputes arising from the provision [who] is authorized to order the company to recognize the union [upon the union demonstrating majority support] if the company is found to have committed an 'egregious' violation of the neutrality agreement." Daily Lab. Rep. (BNA) No. 44, at A-1 (Mar. 6, 1998).
generally is done either by agreeing to card-check recognition or agreeing to recognition upon the union’s winning an election conducted by a party other than the NLRB.

Card check recognition agreements date from the earliest days of neutrality agreements, but were rarely used until recently. Card check recognition agreements are now a standard provision in neutrality agreements. Eaton and Kriesky found that seventy-three percent of all of the agreements in their sample provided for card-check recognition. There are variations in the form that card-check agreements take, of course. One of the most important is the requirement that a union possess a super-majority showing of support, often 65 percent, before the obligation to recognize the union attaches. A super-majority precondition to card-check recognition is neither unprecedented nor particularly onerous for unions. To prevent the problem of the employer “salting” the bargaining unit with anti-union employees while the union is engaging in an organizing campaign pursuant to a card-check recognition arrangement, a neutrality agreement could contain language that freezes the bargaining unit’s membership as of the date the first card is signed. None of these variations seem to affect one of Eaton and Kriesky’s central findings: that union organizing success improves quite dramatically when a neutrality agreement contains a neutrality pledge combined with a provision for card-check recognition. Alternatively, the parties may agree to bypass the

72. Card check recognition arises when an employer agrees to recognize a union as the exclusive bargaining representative based on a showing of majority support manifested by union authorization cards signed by a majority of the bargaining unit employees.

73. A 1979 agreement between the UAW and the American Motors Corporation provided “for a private card check procedure in order to facilitate organizing in new plants.” Guzick, supra note 5, at 436 n.71.

74. Eaton & Kriesky, supra note 47, at 12.

75. Id. at 12 n. 8 (discussing the requirement that unions gain a 65% showing of support). For example, the Steelworker-Alcoa neutrality agreement provides for a 65 percent super majority for card-check recognition. See 68 Metals Week No. 30, at 11 (July 28, 1997) (available at 1997 WL 9116305). The super-majority requirement may be designed to protect against a false showing of union majority support caused by some employees signing union authorization cards as a result of peer pressure. Gould, supra note 4, at 163.

76. The laws in several Canadian provinces require recognition when unions obtain 55 or 60 percent card support. Craver, supra note 1, at 1635. Indeed, assembling a showing of support in excess of 50 percent is not uncommon in traditional union organizing drives since 70 percent card support before an election is generally thought necessary to win an election victory in an NLRB conducted election. Coie, supra note 10, at 2 (“70% or so generally viewed as necessary for election victory.”); accord Craver, supra note 1, at 1635 (A super majority requirement of 55 or 60 percent “would not affect most labor organizations, because few petition for Labor Board elections until they have obtained cards signed by sixty or seventy percent of the employees in proposed units.”).

77. See id. at 18 (reporting union success rate of 45.6% with a neutrality pledge and no card check arrangement and 78.2% success rate with both neutrality and card check). Anecdotal evidence supports these findings. A labor leader in Las Vegas actively involved in organizing hotels has reported that “[t]he union has never failed to organize a hotel through the union authorization card check method.”
NLRB totally by having the question concerning recognition resolved through a non-Board election process conducted, for example, by the Federal Mediation and Conciliation Service or an arbitrator. Neutrality agreements may provide that these non-Board elections are to be held off-site since holding them on-site, as the NLRB normally does, often disadvantages the union.

3. Access

Except in rare circumstances, non-employee union organizers have no legal right of access to an employer’s property. Moreover, the union has no legal right of access to employee name and address information until seven days following the NLRB regional director’s direction of election or approval of a consent election agreement. The employer, of course, has immediate access to employee name and address information and unlimited


78. See Eaton & Kriesky, supra note 47, at 12, 32, tbl.1 (finding that 11.1% of the agreements in the sample provided for non-NLRB elections). Eaton and Kriesky discuss an agreement that combines traditional NLRB procedure, non-Board elections, and card check recognition. It provides for card check recognition if the union gains 65 percent support, a non-Board election if the union obtains 50-65 percent support, and an NLRB election if the union gains less than 50 percent but more than one-third support. Id. at 12.

79. For example, in December, 1998, an election officer appointed by the Federal Mediation and Conciliation Service conducted a union representation election among 2,600 employees of the Sunrise Hospital and Medical Center in Las Vegas. Daily Lab. Rep. (BNA) No. 159, at C-1 (Aug. 18, 1999). This was pursuant to a neutrality agreement between the employer and the SEIU. Id. The election was held at a neutral off-site location. Id.

80. The NLRB will order that a rerun election be held away from the plant in order to neutralize the effects of previous coercive behavior by employers. Daily Lab. Rep. (BNA) No. 159, at C-1 (Aug. 18, 1999). However, the NLRB policy to its agents continues to be that the “best place to hold an election’ is the worksite and, further, that absent ‘good cause to the contrary’ the election must be held there . . . .” Craig Becker, Democracy in the Workplace: Union Representation Elections and Federal Labor Law, 77 MINN. L. REV. 495, 566 (1993) (quoting NLRB, Case Handling Manual, pt. 2, § 11302.2).

81. One explanation is that “[t]he weight of employer authority in the workplace is augmented by the Board’s practice of holding union elections there.” Becker, supra note 80, at 565-66. This advantage arises from the employer being able to move “among employees on election day, and even during the polling’ while banning the union from its premises. Id. at 566. Moreover, by having the election at the workplace, employers can monitor employees’ movements and the mix of voters is likely to be more anti-union compared to the mix that would travel to an off-site location to vote. Id. at 566-67. For these, and other reasons, employers usually consent to having elections held on-site even though the NLRB may not compel it. Id. at 568.

82. See Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992). Unions gain access to employer’s property, as a matter of right, only when the union can demonstrate that “‘the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.’” Id. at 533-34. It is unlikely that a union can meet its “‘heavy’ burden except in remote locations such as lumber camps and mines and mountain resorts. See id. at 539.

access to its own property. In most cases, the employer lawfully may use the workplace for non-coercive anti-union speech while preventing any union access to the workplace.84 One indication of the importance of equal access is that it is one of the remedies the NLRB provides when an employer has engaged in unfair labor practice conduct during the pre-election period resulting in the ordering of a rerun election.85 Labor law reform efforts in the 1970s unsuccessfully attempted to redress this access inequality.86 Not surprisingly, unions use neutrality agreements to reduce the access disadvantage that national labor policy creates.

In the Eaton and Kriesky study, more than a third of the neutrality agreements studied provided for access to employee names and addresses.87 About two-thirds required the employer to provide unions access to the employer’s property.88 Access can be given to the employee cafeteria or other locations throughout the workplace.89 It is noteworthy that Eaton and Kriesky found that access to employee name and address information correlates more significantly with subsequent union organizing success than

84. The are two primary exceptions. First, neither party may deliver a captive audience speeches to massed groups of employees during work time within 24 hours of the election. Peerless Plywood Co., 107 N.L.R.B. 427 (1953). Second, an employer may not deliver a non-coercive captive audience speech, while denying the union all access to the workplace to communicate its message, when the employer also enforces an unlawful employee no-solicitation rule or a broad but lawful no solicitation rule that bans employee-to-employee solicitation anytime in work areas. May Dept. Stores Co., 136 N.L.R.B. 797 (1962), enforcement denied, 316 F.2d 797 (6th Cir. 1963). While in most cases national labor policy assigns the employer exclusive access to the workplace to convey its anti-union message, it assigns the union exclusive use of employee homes. See Phelps Dodge Corp., 177 N.L.R.B. 531, 532 n.3 (1969) (suggesting that employer face-to-face communication with workers at their home tends to restrain and coerce).

86. See Guzick, supra note 5, at 426 (noting that the proposed labor law reform in 1977 included provisions for permitting greater union access to employer property).
87. Eaton & Kriesky, supra note 47, at 32, tbl.1. A union labor lawyer has reported that “unions also want . . . to obtain . . . names, addresses, phone numbers, and e-mail addresses of employees.” Daily Lab. Rep. (BNA) No. 99, at A-1 (May 22, 2000) (quoting lawyer representing the SEIU); see also Unions Seek to Galvanize Workers at Alcoa Plant Near Goose Creek, S.C., KNIGHT-RIDDER TRIB. BUS. NEWS, Aug. 5, 1999, available at 1999 WL 2200337 (reporting agreement with Alcoa Corp to provide employee names and addresses and “other information about workers eligible to join the union”).
88. Eaton & Kriesky, supra note 47, at 32, tbl.1.
89. For example, a 1998 neutrality agreement between the Service Employees International Union (SEIU) and the Sunrise Hospital and Medical Center provided union access to “employees in non-patient-care areas on each floor of the hospital, as well as in the cafeteria, exterior employee smoking areas, and parking lots.” Daily Lab. Rep. (BNA) No. 159, at C-1 (Aug. 18, 1999). A neutrality agreement with a California hotel employing 600 employees provided that “union representatives [may] meet anywhere on [the] property with newly hired employees . . . .” Union Halts Pact with New Hotel, S.F. CHRONICLE, Sept. 10, 1987, at 27, available in 1987 WL 4054742; see also David Phillips & David Welch, UAW Deal Loaded With Perks: DCX to Give Holiday Bonuses, Election Days Off, Pension Hikes, DETROIT NEWS, Sept. 21, 1999, at A1 (discussing neutrality pledge given by Daimler Chrysler AG that “give[s] the union limited access to employees in non-work areas, during non-work time, as long as plant operations are not disrupted”).
does access to the employer's physical property.90

4. First Contract

Perhaps more than any other scholar, Paul Weiler has highlighted the recurring problem of newly certified unions' inability to achieve a first contract. His research shows that in approximately forty percent of the cases, newly certified unions never obtain a first contract.91 First contract interest arbitration has been used in Canada for some years92 to address this problem and has been advanced as a useful labor law reform in the United States.93 Nevertheless, Eaton and Kriesky only found "some examples" of neutrality agreements containing provisions designed to assist unions in achieving a first contract.94 There is good reason to anticipate that this trend will continue because unions will not need first-contract provisions. As Eaton and Kriesky found, when a neutrality agreement results in recognition (which occurred in the Eaton-Kriesky study 78.2 percent of the time when a neutrality pledge is combined with an arrangement for card check recognition)95 unions achieve a first contract almost one-hundred percent of the time.96 If those findings hold up to the harsh light of

90. Eaton & Kriesky, supra note 47, at 35, tbl.4. While the data suggests that providing unions access to lists has proved quite helpful to organizing efforts, and while physical access to employer property has not, one cannot be certain because "the level of management campaigning varies based on the language as well . . . ." Id. at 21.

91. Striking a New Balance, supra note 4 at 354-55 n. 5; accord Subcomm. On Labor-Management Relations, House Comm. On Educ. & Lab., 98th Cong., 2d Sess., The Failure of Labor Law—Betrayal of American Workers, 10 (comm. print 1984), excerpted in LOREY S. MERRIFIELD ET AL., LABOR RELATIONS LAW 63, 59, 66 (10th ed. 1999) ("As 10% of these newly certified unions are in companies that already have a union somewhere in their organization, it is more accurate to say that only half the time will a new union achieve a first contract."); Lab. Rel. Rep. (BNA), No. 8.250, at C-1 (Dec. 31, 1998) (reporting estimate of union consultant that "a first contract is never reached in at least one-third of representation elections where employees vote for representation").

92. Governing the Workplace, supra note 4, at 249-51. In Ontario, certified unions experience an 84 percent success rate in achieving first contracts. Craver, supra note 1, at 1642 (citing GOULD, supra note 4 at 223, tbl. 7-3).

93. GOULD, supra note 4, at 168-70; Craver, supra note 1, at 1636.

94. Eaton & Kriesky, supra note 47, at 14. Interest arbitration of unresolved first-contract issues if negotiations are not satisfactorily concluded by a time certain following recognition can be found in Steelworker neutrality agreements. See, e.g., Lab. Rel. Rep. No 152, at AA-1 (Aug. 9, 1999) (1999 USW contract with U.S. Steel Corporation and Bethlehem Steel Corporation provides for 90 days of bargaining starting from when the union is first recognized, another 90 days when the union's bargaining committee chairman and the company's Vice President-Employee Relations attempt to resolve issues, and finally final offer interest arbitration.); see also Daily Lab. Rep. No 224, at A-1 (Nov. 20, 1998) (discussing neutrality agreement in gaming industry that provides for card check recognition of casino employees, the beginning of contract negotiations sixty days after recognition, bargaining for ninety days, mediation of unresolved issues for thirty days, and best offer interest arbitration to settle first contract).

95. See discussion supra note 77 and accompanying text.

96. Eaton & Kriesky, supra note 47, at 19 ("The rate of reaching a first contract after gaining
generalized organizing experience, one can expect that unions will conclude that the key to first contract success is a neutrality commitment coupled with card check recognition agreement. With that, no additional provision directed at achieving a first contract will be needed.

III.
SOURCES OF LEVERAGE TO OBTAIN NEUTRALITY AGREEMENTS

At the AFL-CIO's 1995 convention, one of John Sweeney's political opponents accused him of championing civil disobedience excessively by supporting the blocking of bridges across the Potomac River during a Justice for Janitors organizing drive in Washington, D.C. As reported in the media, "Sweeney responded, saying he was willing to cooperate with employers when they recognized the legitimacy of the union, but he was also willing to use civil disobedience and get arrested when they didn't." In that simple calculus can be found much of the answer to the question of how unions manage to obtain neutrality agreements when, intuitively, one would expect most employers to resist them vigorously. Sweeney's point is that, as business partners, unions bring valuable trading assets to the table for employers who want a truly bilateral partnership, but the partnership must proceed from a basis of mutual legitimacy. A clear understanding of what a union can offer to encourage an employer to deal with it as a legitimate part of the enterprise is essential for understanding the neutrality agreement phenomenon.

A. Neutrality Negotiations Within the Framework of an Existing Bargaining Relationship

When the parties have an existing collective bargaining relationship, unions have much with which to trade. The AFL-CIO's Organizing

recognization approaches 100%."). The Eaton and Kriesky sample included 294 organizing campaigns. Id. at 34, tbl.3. One hundred and ninety-nine of these campaigns resulted in recognition (67.7 percent) and of these 199 recognitions, the union obtained a first contract in all but seven cases. Id. at 19. Of these seven, the parties had just begun negotiations in five, a decertification petition had been filed in one, and in the last, the employer had been found guilty of bad faith bargaining. Id. at 19.

97. Bacon, supra note 11, at 20.

98. Cooperative industrial relations rather than Congressional reform of labor law is not Sweeney's invention, nor has he ever so claimed. Over a decade ago, A.H. Raskin, for many years the chief labor correspondent and member of the editorial board of The New York Times, argued that the "right road" to improving union's position is not Congressional action but rather "cooperative industrial relations based on recognition of mutuality in the interest of industrial survival and individual fulfillment in the workplace." A.H. Raskin, Elysium Lost: The Wagner Act at Fifty, 38 STAN. L. REV. 945 (1986).

99. Indeed, the early literature on neutrality agreements seemed to suggest—erroneously as it turned out—that the presence of the neutrality agreements as a labor relations staple might be limited to "large corporations with multiple [organized and unorganized] plants," in industries "dominated by a few firms, all of which have a strong union tradition [with the neutrality agreement] maintaining [the]
Director in 1999 confirmed that unions attempt to negotiate neutrality agreements by applying leverage in national negotiations “where they are strong . . . particularly in the industrial sector where . . . there is substantial bargaining power.”

A union’s leverage may result from its willingness to trade a previously negotiated contract provision for a neutrality agreement. Or, a unionized employer might view the neutrality agreement as an investment “to keep healthy [the employer’s] long term relationship with the union.” A unionized company finding itself in financial difficulty may need contract concessions from its unions, as the LTV Corporation found in the lean 1980s. Then the neutrality agreement becomes a *quid pro quo*, at the time of the concession or later. Sometimes employers wish to begin contract negotiations earlier than required by labor law or the parties’ current contract. A union may agree

ongoing relationship . . .,” and where there is “a dominant union or small group of unions in the industry.” Guzik, *supra* note 5, at 439 (citing the research of Craft, *supra* note 41).

100. Lab. Rel. Rep. (BNA), No. 16, at A-13 (Jan. 26, 1999); accord Steve Early, *Organizing Efforts Getting Some Nonunion Help, BOSTON GLOBE*, June 27, 1999, at F1, *available at 1999 WL 6069534* (“Unions are trying to improve [organizing success] statistics in several ways. One approach is by winning a neutrality agreement in which companies that are already heavily unionized agree not to oppose recruitment of new members in nonunion departments or subsidiaries.”).

The two-week strike by IBEW- and CWA-represented employees of Verizon Communications, Inc. in the Summer of 2000 focused significantly on the unions’ insistence that the company agree to a neutrality agreement covering Verizon’s wireless and Internet operations. The strike ended when the parties agreed to a neutrality agreement and card check recognition arrangement for these employees. See Sarah Schafer, *Most Workers End Strike at Verizon, WASH. POST*, Aug. 21, 2000, at A1, A8, *available at 2000 WL 25411293*.

101. This occurred in the 1998 negotiations with the major container manufacturers. “To gain neutrality language [in the contract with American National Can Company] the union gave up a contract provision—the ‘expanded employment program’—that allowed workers to take 13 weeks vacation every five years after they had been on the job for 15 years.” The union struck the Crown, Cork, and Seal Company to secure a neutrality agreement that year, arguing that “[u]nless the union gets the neutrality agreement, it will not agree to give up the 13-week vacation provision . . . .” Lab. Rel. Rep. (BNA) No 44, at A-1 (Mar. 6, 1998).

102. Darrell Hasser, *Union Neutrality Agreed by LTV, AM. METAL MKT.*, July 2, 1999, at 1 (quoting an industry analyst: “It’s in [the employer’s] best interest to mend fences with the union . . . . That’s what it’s all about.”); *id.* (“The union spokesman said that with the neutrality deal out of the way, negotiations began this week for a new labor contract at LTV . . . .”); accord Peter Fairley, *Labor Reenergized: Companies Divided on Response, CHEMICAL WEEK*, Nov. 27, 1996, at 25, *available in 1996 WL 14225189* (reporting view of manager of chemical company: “We realized we needed to invest in the relationship to build trust and understanding . . . . Since virtually all of the company’s domestic workforce was unionized, union cooperation was a must.”).

103. *See Jim McKay, USW Claims Victory in Long Battle, Pittsburgh Post-Gazette, June 30, 1999*, at C1 (recounting the USW’s successful argument to the LTV Corporation that without a neutrality agreement to organize Trico Steel Co., owned jointly by LTV and a British and Japanese company, LTV’s investment in Trico would constitute “a slap in the face of its members who had granted LTV concessions during the lean 1980s and helped the company emerge from a seven-year bankruptcy reorganization.”); *see also id.* (reporting a statement by the USW President characterizing the neutrality agreement as “an admission fee to this year’s round of contract bargaining [for the major steel companies]”).

104. Early renegotiation usually benefits employers because it reduces the union’s leverage that
to early contract renegotiation but only if the company requesting it agrees to a neutrality agreement. A unionized employer may need a union's support to implement a quality-of-work-life program. When AT&T, for example, requested its unions' support of the "Workplace of the Future" cooperative agreement, the response was, "Okay—but let's start laying down the basis of mutual trust that will be necessary for a true partnership." That reasoning prevailed and part of that AT&T-CWA cooperative program is a neutrality agreement.

B. Neutrality Negotiations Outside the Framework of an Existing Bargaining Relationship

With nonunion employers, different incentives operate. Sometimes a company's legal difficulties will provide a union bargaining leverage. For example, litigation sometimes lingers for years and part of the settlement can include a neutrality agreement, or a nonunion company may find comes with the possibility of a work stoppage. See Lab. Rel. Rep. (BNA), No. 8.250, at C-1 (Dec. 31, 1998).

105. See Lee Bloomquist, Steel Companies, Union May Begin Contract Talks Early, KNIGHT-RIDDER TRIB. BUS. NEWS, April 30, 1999, available at 1999 WL 17335446 (reporting willingness of USW officials to begin renegotiation early with any company "willing to agree to a list of conditions that includes a promise of neutrality [which] would mean a steel company [agreeing] to recognize the union if it presented election cards signed by a majority of the company's non-union workers."); see Lab. Rel. Rep. (BNA) No. 8.250, at C-1 (Dec. 31, 1998) (reporting the view of a union official that "a precondition for early bargaining should be a binding amendment to the existing contract that inserts strong neutrality card check language . . .").

106. As of 1993, only two percent of U.S. Companies had viable employee participation programs—but many desired them because they increase productivity. Daily Lab. Rep. (BNA) No. 178, at D-21 (Sept. 16, 1993).

107. CWA-IBEW-AT&T Reach Tentative National Settlement, U.S. NEWSWIRE, July 2, 1992, available at 1992 WL 7880703 (reporting the position of Morton Bahr, President of the CWA in a joint statement with AT&T's Vice President of Communications & Technology upon their agreeing to contract terms that included the "Workplace of the Future" cooperative agreement).

108. Daily Lab. Rep. (BNA) No. 178, at D-21 (Sept. 16, 1993). Morton Bahr, President of the CWA has put it this way: "If [workers] cannot participate in determining their wages and benefits, why should they participate in improving productivity?" Id. That same linkage was well-summarized by a Scott Paper Company's Vice-President who stated that his company agreed to a neutrality agreement as part of an employee participation program "because you can't act jointly at one site and fight organizing at another . . . . the people who are being organized should be the ones to make the decision about representation . . . ." Id. This idea of partnership everywhere or nowhere has become a mantra among union leaders.

109. Resolving outstanding litigation was the crucial factor in the negotiation of a 1995 neutrality agreement in Las Vegas with the MGM Grand Hotel. The Bartenders union had filed a suit over the public status of a stretch of sidewalk in front of the hotel after the hotel had obtained the arrest of 500 union members for trespassing on that sidewalk during a 1994 demonstration. Green, supra note 77, at 1A. The suit alleged violation of the members' free speech rights. Id. The hotel strongly desired that the sidewalk be considered private to permit it to keep the sidewalk free of "smut peddlers and others who negatively impact the image of our city." Id. In return for a neutrality agreement, the union settled the suit, agreeing that the sidewalk was private property—but negotiating access to that sidewalk to organize the hotel employees. Id. The unions subsequently gained recognition for 2,800 of the 6,000
itself with a tarnished image resulting, for example, from a federal fraud investigation. Then, the neutrality agreement, and the better labor relations it brings, can help polish up the corporate image.\textsuperscript{110}

Sometimes economic exigencies provide the union the ability to negotiate a neutrality agreement. The prospect of lost business caused by picketing or hand billing in front of a business might be sufficiently unappealing that a neutrality agreement seems the better choice.\textsuperscript{111}

Alternatively, an employer may consider that negotiating a neutrality agreement will provide an opportunity to obtain bargaining concessions from a union that would be unavailable following a successful, but contentious, organizing campaign by the union.\textsuperscript{112}

Unions also can make signing a neutrality agreement a wise marketing strategy for a company. For example, unions persuaded 4,600 supermarkets to agree to "favor producers [of produce] who had signed a neutrality pledge . . . ,"\textsuperscript{113} thereby creating an incentive for farms to enter into neutrality agreements in order to secure the resulting marketing edge.

A declining economic environment in certain sectors of the economy might also produce fertile ground for negotiation of neutrality agreements. For years, high wages and benefits, coupled with guaranteed employment, were some companies' "best weapons against the unions."\textsuperscript{114} Now, if investors in some of these industries insist on downsizing, layoffs, pay cuts, 

\textsuperscript{110} There is reason to believe that the "unexpected olive branch" from Columbia/HCA Healthcare delivered when one of its largest hospitals agreed to remain neutral during an SEIU organizing drive may have been linked to a federal fraud investigation. Keith Snider, \textit{Columbia HCA Drops Objections: Labor Negotiations Surprise Workers}, \textit{The Tennessean}, Dec. 10, 1998, at 1E, available in 1998 WL 21649931 (reporting a union leaders reaction that "the fight [with the Company] in Las Vegas was 'bitter' until Columbia/HCA was hit with a federal fraud investigation and began a restructuring that officials said would restore its corporate ethic.").

\textsuperscript{111} The owner of a restaurant in Providence, Rhode Island agreed to a neutrality agreement in the face of a union’s threat to picket and leaflet outside the restaurant. Gregory Smith, \textit{Davio's Settles Difference With Union}, \textit{Providence J.-Bull.}, Apr. 22, 1997 at C01, available at 1997 WL 7327526. The owner took the threat seriously because previously, in Boston, a community group, seeking jobs for local residents, had forced the closing of one of his restaurants "because noisy demonstrations outside discourage customers." \textit{Id.} The owner of the New Haven Yale Hotel agreed to remain neutral when the union agreed not to picket if it opened as a nonunion hotel. Mark Zaretsky, \textit{Omni, Union Agree On "Neutrality"}, \textit{New Haven Reg.}, July 8, 1997, at A3, available at 1997 WL 9350689.

\textsuperscript{112} Coie, supra note 10, at 2 (discussing how the offer of labor peace obtained through a neutrality agreement carries an implicit "carrot" in the promise of contract concessions and "stick" in the possibility of boycotts and demonstrations if labor peace cannot be attained).


\textsuperscript{114} Fairley, supra note 102, at 25 (suggesting that these companies could boost worker involvement in the pursuit of productivity and quality without the need of unions).
and imposed job changes, employers in substantially nonunion industries may lose the high-wage-guaranteed-employment foundation of their nonunion strategy. If, as some believe, "quality and productivity improvements require closer cooperation between labor and management," these nonunion employers may see in a neutrality agreement the opportunity to regain increased productivity through cooperation with unions to whom neutrality has been pledged.

Unions also gain leverage for a neutrality agreement through their ability to assist companies in their dealings with government. The narrow defeat of a municipal referendum to ban gambling in Kenosha, Wisconsin is illuminating. Before the 1998 vote, the Menominee Tribe wished to build a casino. The Tribe concluded it did not want the unions in Kenosha to support the referendum prohibiting gambling because Kenosha was a "good union town." The Tribe therefore negotiated a neutrality agreement with four unions and "[o]nce the agreements were signed, the unions engaged in a [successful] campaign to defeat the referendum... which included sending letters to members, leafletting at plants throughout the city, and getting out the vote."116

Employers may find it beneficial to align themselves with a union, when attempting to obtain a beneficial regulatory ruling from government. This need for partnership can create a favorable environment for negotiating a neutrality agreement. In 1996, for example, Bell Atlantic and NYNEX agreed to merge but encountered regulatory opposition. Initially, the CWA indicated it would oppose the merger. The union withdrew its opposition after the proposed new company announced that during the first year of operation, the chief operating officer would be the CEO of NYNEX, with whom the union had a productive bargaining relationship and with whom it previously had signed a neutrality agreement.117

The need to settle NLRB charges similarly can produce a favorable negotiating environment. The AFL-CIO Metal Trades Department negotiated a neutrality agreement with Avondale Industries after many years of turbulent labor relations between the two. Many factors coalesced, including new ownership of the company, but one important provision of the parties’ agreement was that they would use their best efforts to resolve outstanding charges already before the NLRB. There were many

115. Id. The productivity increase resulting from employee participation programs is reported to be 30 percent greater in union than nonunion companies, because in unionized companies, "[t]he workers are more likely to support the program... because they know the 'union is there to keep [the program] honest,' and to protect them from any adverse impact that greater efficiency may have on their jobs." Daily Lab. Rep. (BNA) No. 178, at D-21 (Sept. 16, 1993) (quoting Jerome M. Rosow, president of Work in America Institute).
outstanding charges, and the union pledged that if the unfair labor practices were resolved, it would "use its best efforts to ensure that the Board charges and circumstances underlying them will not be the basis for a finding that the company is not a responsible bidder or contractor [on federal shipbuilding projects]."\(^{118}\)

Sometimes a company needs a union's political influence to secure enactment of favorable legislation at the state level. In 1998, the CWA supported legislation in Indiana that would have given the Ameritech Corporation "pricing flexibility in markets where it faces local exchange competition and would have limited regulator's authority."\(^{119}\) When Ameritech refused to enter into a neutrality agreement following the CWA's loss of a union election at one of its facilities, the union withdrew its support of the legislation, which then had little chance of passage.\(^{120}\)

Gaining public support can generate the leverage to help unions obtain a neutrality agreement. Sometimes a state or local government official will intervene directly to assist unions in obtaining a neutrality agreement. This might take the form a city council adopting a resolution backing workers' right to organize or state legislators signing a pledge "to act against employers who 'harass, threaten, or fire employees for trying to form a union.'"\(^{121}\) Similarly a unit of local government might conduct a hearing and pass a resolution in support of workers.\(^{122}\) Another tactic for gaining public support to aid unions in their attempt to obtain a neutrality agreement is advertising the amount of public money that a public entity, or other business substantially dependent on public funds, has expended on resisting unionization rather than entering into a neutrality agreement.\(^{123}\) These


\(^{119}\) Counterattack at Ameritech Reflects CWA Board Position on "Union Values," CWA on the Web, http://www3.cwa-union.org/home/aboutcwa/cwapubs/9705news/art2.htm (web address no longer available via internet but copy of text available from author). The company at that time was facing "significant legislative hurdles in all five states of Indiana, Ohio, Illinois, Michigan and Wisconsin." Id.

\(^{120}\) Id.

\(^{121}\) Early, supra note 100, at F1.

\(^{122}\) Daily Lab. Rep. (BNA) No. 243, at A-8 (Dec. 18, 1997) (recounting hearings held in Connecticut arranged by the local Board of Alderman and attended by union officials, community leaders, and interested individuals and a "community truth commission" hearing held in California organized by three City Council members in Santa Monica, California).

\(^{123}\) See, e.g., UConn Doctors Discuss Union, HARTFORD COURANT, April 13, 2000, at A4, available at 2000 WL 4238992 (publicizing allegation that UConn Health Center Board of Trustees in one year had spent nearly a half a million dollars on lawyers and consultants resisting unionization of its physicians, dentists, and researchers rather than enter into a neutrality agreement); Daily Lab. Rep. (BNA) No. 243, at C-1 (Dec. 20, 1999) (reporting suit brought by union and California Congress for Seniors against hospital challenging its use of Medicare and California's Medicaid program to finance extensive anti-union campaign followed by hospital agreeing to a neutrality agreement).
political methods are part of a larger effort to bring together public officials, academics, the clergy, civil rights leaders, and neighborhood activists to communicate that the community is aware of, and is prepared to react against, coercive tactics used against workers attempting to organize.\textsuperscript{124}

Increasingly, to secure labor peace, some local jurisdictions have decided to require a neutrality agreement from any private investor seeking access to public land or financing. A typical example is a real estate developer bidding to build a public works project. Often the developer will own and manage a hotel, for example, that is built on public land or financed in part through tax abatements, public loans, or other forms of public financing.\textsuperscript{125}

Unions also are beginning to realize the organizing potential of their own financial power. The AFL-CIO has created “a new corporate affairs department that is ‘teaching [unions] how to use [their] financial power to

\textsuperscript{124} A company’s desire for a positive public corporate image is a powerful lever available to unions attempting to secure a neutrality agreement. A desire to keep that image untarnished by massive union demonstrations may sometimes prove the motivating force for negotiating a neutrality agreement. \textit{See, e.g., Union Hails Pact with New Hotel, S.F. CHRON., Sept. 10, 1987, at 27, available at 1987 WL 4054742 (describing how a neutrality agreement “head[ed] off possible picketing and bad publicity at the opening bash of the $110 million [Fairmont] hotel [since] [u]nion leaders had planned a massive demonstration outside the building if no pact was signed.”). Many unions combine negative publicity and traditional economic warfare. The strategy is to attack a company’s reputation with government agencies, suppliers, customers, and the general public to limit the company’s ability to conduct business. \textit{See Fairley, supra note 102, at 25. The OCAW’s five-year battle to counter the lockout by the BASF Corporation has been called “one of the prototypes for corporate campaigning in the 1990s . . . .” Id. (quoting Kate Bronfenbrenner, an organizing expert at Cornell University). It “publicized toxic spills at the [company’s] plant, advertised BASF’s use of Nazi-supplied slave labor during World War II, blocked plant expansions by raising safety concerns with regulators, and leveraged international support from unions representing BASF production workers in Germany and Japan.” Id.}

\textsuperscript{125} \textit{See Yerton, supra note 49, at A1 (describing a decision by the New Orleans International Airport’s governing board to require a neutrality agreement from the private developer chosen to build and operate a new 300-room airport hotel on airport property). Similar linkages between neutrality agreements and providing access to public land or dollars have occurred in many other cities. \textit{See, e.g., Hotel Employees & Restaurant Employees, Local 2 v. Marriott Corp., No. C-89-2707 (N.D. Cal. Aug. 23, 1993) (describing decision of San Francisco Redevelopment Agency to condition access to public property on the company building and managing a hotel providing assurance of labor peace, an assurance which was satisfied by a neutrality agreement with hotel workers union); Weiker, supra note 49, at C01 (explaining that Denver offered a developer a tax subsidy valued at one-quarter of the cost of the hotel and, in return, required the developer to sign a neutrality agreement covering the workers in the hotel); Daily Lab. Rep. (BNA) No 10.243, at A-8 (Dec. 18, 1997) (detailing a decision by New Haven, to provide $10 million to help finance the renovation of a hotel and in return require that the developer agree to enter into a neutrality agreement with the union representing the hotel’s employees). Additionally, St. Louis and the state of Missouri invested $80 million in a redevelopment project in the form of a tax subsidy, loan, and revenue bonds; the recipient of this public financing was required to sign a neutrality agreement. \textit{See Editorial, Building a Consensus, ST. LOUIS POST-DISPATCH, March 27, 2000, at D16, available at 2000 WL 3516239 (reporting convention business stagnant and success of negotiations); Mark Schlinkmann, Kimberly-Clark to Fund St. Louis Hotel, KNIGHT-RIDDER TRIB. BUS. NEWS (ST. LOUIS POST-DISPATCH), Mar. 24, 2000, available at 2000 WL 17759309 (reporting $80 million public investment); Yvette Shields, Hard Financing, EZ Issue, THE BOND BUYER, Mar. 22, 2000, at 1, available at 2000 WL 5810496 (discussing the various funding mechanisms employed).}
bring anti-union employers in line."  

From some of the early ventures one can begin to discern how unions will use their own financial power to gain leverage to obtain neutrality agreements.

Unions can exercise considerable economic power as consumers and use that power to assist in securing neutrality agreements. Union conventions and meetings, for example, represent a large, and lucrative, business for hotels and convention centers. In San Diego, the convention center is undergoing a major renovation, and there is considerable redevelopment of downtown San Diego in the vicinity of the convention center. In the spring of 2000, the Convention Center Corporation’s Board of Directors passed a resolution that requests hotel developers and owners of existing hotels to “discuss the adoption of labor neutrality agreements’ . . . [and] calls on parties involved in redevelopment projects related to the convention and hospitality industry in downtown San Diego to meet with the AFL-CIO to talk about ‘areas of mutual interest and benefit.’”

The Convention Center’s chief executive officer, and chair of its board of directors, explained that “[t]he city has been unable to attract union convention business . . . because there are no unionized hotels in the vicinity of the center [causing the city to] miss[] out on a lucrative market [that] would be a boon for San Diego’s economy.”

As an added inducement to persuade local businesses in San Diego’s hospitality industry to sign neutrality agreements, John Wilhelm, president of HERE, “promised that his union would take an active role in helping to steer union business to San Diego if the neutrality agreements were forthcoming.”

Union health and welfare funds can be used effectively to help barter neutrality agreements. In Las Vegas, local unions whose members use the Sunrise Hospital and Medical Center are reported to have helped persuade

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128. Id. (also explaining that union conventions are particularly lucrative for hotels because attendees typically stay in the hotel for their food and beverages rather than patronize outside restaurants).
129. Id. (also reporting that Sweeney had sent a letter to the Convention Center offering the observation that “organized labor’s convention and meeting business is significant and I’m sure that many of our affiliates would be interested in holding events in San Diego should sufficient union facilities be available”).

A California company has enrolled at least seven unions, that represent more than two million members, to participate in United Labor Online (ULOL). Daily Lab. Rep. (BNA) No. 31, at A-2 (Feb. 17, 1999). The unions have agreed that the company will be their Internet service provider, furnishing their members in 170 cities access to e-mail and the Internet at a cost that is lower than current rates throughout the United States. Id. The service also provides customized home pages with hyperlinks to the Web pages of the International union of the subscriber, chat rooms where union members can communicate with one another, and “appointment only” chat rooms for Internet “conversations” with officers of the subscriber’s union. Id. Union leaders can conduct “town hall meetings” with members during, for example, collective bargaining negotiations or strikes. In return for this patronage, the company has agreed to sign a neutrality agreement. Id.
the facility to sign a neutrality agreement with a local of the Service Employees International Union (SEIU). The Las Vegas local of the Culinary Workers was reported to have been “very helpful in this regard since its health and welfare fund is a big customer of the hospital.” In what has been referred to as “one of the largest labor-management partnerships ever” the AFL-CIO and Kaiser Permanente agreed to an arrangement that requires Kaiser Permanente to place employees and their unions in corporate policy-making positions and provides a pledge that the company will both remain neutral in any organizing drives among its nonunion employees and recognize the union upon its gaining majority support. In return, the AFL-CIO has committed itself to “steer union members to the health maintenance organization as a health care plan of choice [and] work[] with [the unions’] Taft-Hartley [health and welfare] funds and other plans to include Kaiser as an option . . .”

Finally, union pension funds are major potential real estate investors. Because the capital markets currently are wary of hotel investments, union pension funds have become a welcome alternative source of funding for real estate investments such as hotels. Through such real estate investments, unions have been able to leverage neutrality agreements. This is the conclusion of the editors of Hotel and Management, a leading voice of the hotel industry. Union funding for real estate projects has come from the AFL-CIO’s Building Investment Trust, which is a “real-estate investment vehicle for pension funds of AFL-CIO member unions . . .” and has invested in excess of $120 million in six hotels as of the spring of 2000. A condition of its investment is that the hotels be built using union labor and the owners and operators enter into neutrality agreements covering those who will work in the hotel. An estimated dozen other union pension-fund programs invest in real estate with more planned for the future. Union Labor Life Insurance Company (ULLICO) was established in 1927. It manages over $6 billion in union pension funds and has $1.4

130. Daily Lab. Rep. (BNA) No. 243, at C-1 (Dec. 20, 1999) (also describing the support of an “interfaith group and other members of the community [who] constantly wrote letters, participated in candlelight vigils, and conducted informational picketing”).
132. Id. (noting the intention of the partners to engage in “other joint marketing”).
134. Id. (reporting that the BIT makes new investments of $4 to $5 million annually, allocating 10 percent to hotels). The BIT’s usually makes construction loan that converts to an ownership joint venture or a permanent loan position in the project. Id.
135. Id.
billion of this invested in real estate. ULLICO will not provide a mortgage loan to any property whose owner or operator has not signed a neutrality agreement.

IV. POTENTIAL SOURCES OF LITIGATION OVER NEUTRALITY AGREEMENTS

Because neutrality agreements have so recently developed as unions’ organizing instrument of choice, they have produced very little litigation. Disputes under the Taft-Hartley Act can be expected to arise with respect to their negotiation, enforcement, and impact on third parties. When neutrality agreements are obtained through government sponsorship, they also likely will spawn challenges based on labor preemption. Part III sketches some of the more important of these future disputes, locates the primary points of disagreement, and discusses the contentions courts likely will need to resolve.

A. Negotiation of Neutrality Agreements

The NLRB has not yet addressed any of the legal issues that the negotiation of neutrality agreements creates. The most significant is whether a neutrality agreement is a mandatory subject of bargaining, which it must be for a union lawfully to insist upon it to impasse. This question can arise only within the framework of an existing bargaining relationship. Otherwise, there is no duty to bargain in the first place. Typically, during collective bargaining negotiations, a union requests that the employer agree to remain neutral with respect to the union’s efforts to organize other employees of the employer, for example in another plant or subsidiary the employer controls. Because such a neutrality agreement concerns “matters involving individuals outside the employment relationship,” the critical issue determining whether the neutrality proposal is a mandatory subject of bargaining is whether it “vital[ly] affect[s]” the terms and conditions of employment of the employees covered by the collective bargaining agreement being negotiated. The academic literature is in conflict on this

136. Id. (also explaining that ULLICO is a debt fund while BIT is an equity fund).
137. Id.
138. See NLRB v. Wooster Div., Borg-Warner Corp., 356 U.S. 342, 349 (1958) (explaining that one party may bring economic pressure on the other to yield to its bargaining demands only with respect to mandatory subjects of bargaining but not permissive subjects of bargaining).
139. This was the context of the unions’ attempt to secure a neutrality agreement from the Verizon Corporation in the Summer of 2000. See discussion supra note 100.
140. Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971) (a subject of bargaining that affects conditions of employment of out-of-unit employees is mandatory only if it “vital[ly] affects the ‘terms and conditions’ of . . . employment [of the employees in the bargaining unit covered by the contract being negotiated].”).
question.\textsuperscript{141}

Initial indications from the NLRB suggest what is intuitive: the answer depends on the specific clause being proposed in a neutrality agreement.\textsuperscript{142} In \textit{Sahara Hotel}, an unfair labor practice charge case presented to the NLRB General Counsel for advice,\textsuperscript{143} the union and the employer had a long-term bargaining relationship. During renegotiation of their collective bargaining agreement the union insisted on inclusion of an "after-acquired" clause, which provided that the contract would extend to all employees at after-acquired facilities if a majority of those employees designated the union as the exclusive bargaining agent.\textsuperscript{144} The union also insisted on a neutrality provision containing an employer speech clause,\textsuperscript{145} an access clause,\textsuperscript{146} a roster clause,\textsuperscript{147} and a card-check recognition clause.\textsuperscript{148}

In an unusual resolution, the NLRB General Counsel directed that a complaint be issued alleging that the employer speech clause, the roster clause, and the access to property clause are permissive, not mandatory, subjects of bargaining and that the union violated its duty of good faith bargaining by insisting on them to impasse.\textsuperscript{149} However, the General

\textsuperscript{141} Compare Kramer, Miller, & Bierman, supra note 41, at 49-53 (concluding neutrality agreements are not mandatory subjects of bargaining); with Guzik, supra note 5, at 447-50 (concluding the opposite).

\textsuperscript{142} That was the conclusion of the Office of the NLRB General Counsel as set forth in an Advice Memorandum, dated November 30, 1995. NLRB Gen. Counsel Adv. Mem., Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165 (Sahara Hotel & Casino), Case No. 28-CB-4349 (Nov. 30, 1995) (available at 1995 WL 937191) [hereinafter \textit{Sahara Hotel}] withdrawn as moot, NLRB Gen. Counsel Adv. Mem., Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165 (Sahara Hotel & Casino), Case No. 28-CB-4349 (Feb. 13, 1996) (available at 1996 WL 931978).

\textsuperscript{143} Id.

\textsuperscript{144} \textit{Sahara Hotel}, at *1, *4. All such employees would be absorbed into the existing bargaining unit covered by the contract being negotiated. \textit{Id.} at *4.

\textsuperscript{145} \textit{Id.} at *2 (providing that the employer advise its employees that it "welcomes their selection of a collective bargaining agent" but otherwise remain neutral by not expressing "preference for or opposition to any particular union as a bargaining agent").

\textsuperscript{146} \textit{Id.} (providing that the union be provided access to the employer's premises to communicate with employees "to the extent such access is permitted by the Employer's lawful solicitation rules").

\textsuperscript{147} \textit{Id.} (providing that the employer provide the union a roster of employee names and addresses as well as their job classifications and departments). The roster clause contained an exception for any employee who objected to such disclosure of personal information. \textit{Id.}

\textsuperscript{148} \textit{Id.} at *1 (providing that the employer extend recognition to the union upon certification by a neutral third party agreeable to both the employer and union that a majority of the employees had designated the union as the exclusive bargaining representative).

\textsuperscript{149} \textit{Id.} at *3. The General Counsel concluded that the after-acquired clause and card-check recognition provision were mandatory subjects of bargaining based on NLRB precedent in \textit{Houston Division of the Kroger Co. (Kroger II)}, 219 N.L.R.B. 388 (1975).

\textit{In Kroger II}, the Board concluded that an employer violated its duty to bargain in good faith required by section 8(a)(5) of the Act by refusing to recognize two unions pursuant to an after-acquired clause. This clause was similar to the one in \textit{Sahara Hotel} since it also provided that all employees brought under the contract through the union's subsequent organizing efforts would be absorbed into the
Counsel concluded that only the employer speech clause in fact was a permissive subject. As to the other clauses, the General counsel directed that a complaint be issued solely to present the issue to the NLRB and directed that the NLRB regional office argue to the NLRB that "the better view is that the last two [the roster and access clauses] when coupled with the after-acquired clauses, are mandatory subjects concerning the implementation of the after-acquired clauses . . . ." The NLRB never adjudicated these questions because the General Counsel subsequently ordered that the complaint be dismissed when the issues became moot. As the insistence on neutrality agreements becomes even more widespread, the NLRB surely will again face the existing bargaining unit. Implicit in the Board's conclusion in Kroger II that breach of this clause by the employer constituted bad faith bargaining is the further conclusion that an after-acquired clause is a mandatory subject of bargaining. This is because in Pittsburgh Plate Glass, 404 U.S. at 188, the Supreme Court held that the NLRA does not require adherence to any contractual term other than mandatory subjects of bargaining. "[T]he remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract . . . not in an unfair labor practice proceeding." See Sahara Hotel, 231 N.L.R.B. at *4-*5.

It should be noted that another variant of an after-acquired clause is an "application-of-the-contract" clause. It typically provides that the existing collective bargaining agreement will apply to separate bargaining units at after-acquired facilities once a majority of the employees at those facilities choose the union as the exclusive bargaining representative. The difference is that, unlike a Kroger-type clause, these employees are not absorbed into the bargaining unit covered by the contract containing this "application-of-the-contract" clause. See Sahara Hotel at *4-*5.

In United Mine Workers of America (Lone Star Steel), 231 N.L.R.B. 573 (1977), enforcement denied in pert. part sub nom, Lone Star Steel Co. v. NLRB, 639 F.2d 545 10th Cir. 1980), cert. denied 450 U.S. 911 (1981), the NLRB held that this distinction made no legal difference but the Tenth Circuit disagreed. The Board had argued that the application-of-the-contract clause vitally affects the employment conditions of the employees covered by the collective bargaining agreement that would contain the clause "by removing incentives which might otherwise encourage Lone Star to transfer such work to other mines under its control." Lone Star Steel, 231 N.L.R.B. at 574. The Tenth Circuit did not necessarily disagree with this reasoning but held that the clause in that case was so broad that it could be applied to operations other than mines. Then, there would be no "direct frontal attack" on bargaining unit employees' working conditions [in mines] if facility where the employer might refuse to apply the contract is something other than a mine. Lone Star Steel, 639 F.2d at 558.

150. Sahara Hotel at *6. The General Counsel's view was that it was the peculiar prerogative of each party to decide whether to waive its right to speak, a right secured explicitly by section 8(c) of the Act. Accordingly, in Sahara Hotel, the union had no right to insist upon that waiver to a point of impasse.

151. Id. at *3. As the NLRB General Counsel explained, "These provisions merely describe the mechanisms that the Union has asked the Employer to agree to as a way of implementing the Kroger clause. [S]ince the union may lawfully insist to impasse on the Kroger clause, the . . . Union may lawfully insist to impasse on the procedure to be used—providing names and addresses of unit employees and access to the facility where the employees are located—to facilitate the ultimate implementation of the Kroger clause." Id. at *7.

152. The employer that had resisted negotiating the after-acquired clauses and the neutrality agreement sold the hotel and the purchaser agreed to a collective bargaining agreement containing them. See NLRB Gen. Counsel Adv. Mem., Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165 (Sahara Hotel & Casino), Case No. 28-CB-4349 (Feb. 13, 1996), available at 1996 WL 931978.
mandATORY/PERMISSIVE QUESTIONS NEUTRALITY AGREEMENTS PRESENT. A RECENT CASE, UNITED FOOD AND COMMERCIAL WORKERS LOCAL 951, 7, AND 1036 (MEIJER, INC.), MAY PLAY AN IMPORTANT ROLE. THAT CASE PRESENTED THE QUESTION OF WHETHER EMPLOYEES MUST PAY THAT PORTION OF UNION DUES ATTRIBUTABLE TO A UNION'S ORGANIZING EXPENSES. THE GENERAL RULE IS THAT OBJECTING EMPLOYEES WHO ARE NOT UNION MEMBERS, BUT ARE REPRESENTED BY A UNION AND SUBJECT TO A LAWFUL UNION SECURITY AGREEMENT, MAY BE REQUIRED TO PAY ONLY THAT PORTION OF UNION DUES THAT ARE "GERMANE TO THE UNION'S ROLE IN COLLECTIVE BARGAINING ..." IN MEIJER, THE NLRB CONCLUDED THAT UNION ORGANIZING ACTIVITIES ARE "GERMANE" TO CURRENTLY-REPRESENTED EMPLOYEES' CONDITIONS OF EMPLOYMENT BECAUSE ORGANIZING SUCCESSES ASSIST CURRENTLY-REPRESENTED EMPLOYEES TO ACHIEVE THEIR OWN BARGAINING GOALS. BY PARITY OF REASONING, THE NLRB MIGHT ALSO CONCLUDE THAT A NEUTRALITY AGREEMENT COVERING EMPLOYEES IN ANOTHER BARGAINING UNIT "VITALLY AFFECTS" CURRENTLY-REPRESENTED EMPLOYEES.

B. ENFORCEMENT OF NEUTRALITY AGREEMENTS

A FLEDGLING BODY OF JUDICIAL PRECEDENT AND ACADEMIC COMMENTARY HAS NOW DEVELOPED REGARDING THE ENFORCEABILITY OF NEUTRALITY AGREEMENTS IN FEDERAL COURT PERSUANT TO THE FEDERAL JURISDICTION CREATED BY SECTION 301 OF THE ACT. IN SUCH SECTION 301 SUITS, PLAINTIFFS CONFRONT TWO HURDLES. THE FIRST IS THAT EFFECTIVE ENFORCEMENT MAY REQUIRE OBTAINING INJUNCTIVE RELIEF. THE SECOND IS THAT ENFORCEMENT OF THESE AGREEMENTS MAY BE SEEN AS RENDERING JUDICIAL DECISIONS WITH RESPECT TO THE UNION'S REPRESENTATION OF EMPLOYEES—A MATTER WITHIN THE PRIMARY JURISDICTION OF THE NLRB.

OBTAINING INJUNCTIVE RELIEF IN FEDERAL COURT IN A CASE ARISING OUT OF A LABOR DISPUTE IS GENERALLY BARRED BY SECTION 4 OF THE Norris-LAGUARDIA ACT. OVER THE YEARS, CONGRESS HAS ENACTED LIMITED EXCEPTIONS TO THE Norris LaGuardia Act's jurisdictional bar, and the Supreme Court has

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155. Id.
156. Section 301 of the Act provides for federal court jurisdiction over "suits for violations of contracts between an employer and a labor organization, representing employees . . . ." The contracts referred to in section 301 are not limited to collective bargaining agreements. Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc, 369 U.S. 17, 25-26 (1962).
158. For example, section 10(j) of the Taft-Hartley Act permits the NLRB, in its discretion, to seek pendente lite injunctive relief and section 10(l) requires the NLRB General Counsel, in the name of the NLRB, to seek injunctive relief in certain cases involving secondary boycotts and recognition picketing.
carved out several important implicit exceptions. One of the most significant implicit exceptions is found in Boys Markets v. Retail Clerks Local 770. It permits federal court injunctions of breaches of no-strike clauses with respect to strikes "over a grievance which both parties are contractually bound to arbitrate." The reason for this exception is to aid the arbitration process by securing for the employer the benefit of its bargain when it agrees to arbitrate contractual disputes in return for a no-strike commitment from the union. Boys Markets protects the employer's expectation interest, and thereby protects the arbitration process, by removing the union's ability to strike instead of arbitrating. It has been argued that federal court injunctions to remedy breaches of neutrality agreements do not fall within the Boys Markets exception because an employer's violation of the neutrality agreement is not a self-help measure designed to avoid commitments made by an employer in an arbitration agreement. Though accurate, that fact may not be conclusive.

Following Boys Markets, the circuit courts developed standards for issuing federal court injunctions to restrain an employer's actions pending arbitration in order to preserve the efficacy of the arbitration process—even when the employer actions enjoined were not taken in order to avoid any commitment made to a union in an arbitration agreement. The critical consideration, according to these cases, is whether a union can be ensured the benefit of its bargain only through injunctive relief because maintenance of the status quo is needed to preserve an effective arbitral remedy for the union. The Supreme Court has not yet ruled on these "reverse Boys Markets" cases. If the theory of the "reverse Boys Markets" cases withstands the Court's scrutiny, the question in neutrality agreement injunction cases then would be whether enjoining an employer's breach of a neutrality agreement is needed to preserve the efficacy of a union's arbitral remedy, assuming the neutrality agreements provides an arbitral remedy.

A second hurdle that a plaintiff seeking federal court enforcement of a neutrality agreement is likely to confront is the general rule prohibiting

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161. Id. at 254.
162. Therefore, when the union's strike is not "over a grievance which both parties are contractually bound to arbitrate," id., no injunction is permitted. Buffalo Forge Co. v. Steelworkers, 428 U.S. 397 (1976) (concluding that no injunction may issue when strike is a sympathy strike in support of bargaining demands of another union); accord Jacksonville Bulk Terminals v. Longshoremen (ILA), 457 U.S. 702 (1982) (concluding no federal jurisdiction to grant injunctive relief when strike was to protest the Soviet Union's invasion of Afghanistan).
163. See Kramer, Miller, & Bierman, supra note 41, at 60-62.
164. See, e.g., Newspaper & Periodical Drivers' & Helpers Local 921 v. San Francisco Newspaper Agency, 89 F.3d 629 (9th Cir. 1996) (citing cases); see also Guzik, supra note 5, at 464-67 (arguing injunction in federal court should be available to preserve efficacy of the arbitral process).
federal courts from adjudicating representation issues because they fall within the primary jurisdiction of the NLRB.  However, enforcing a neutrality agreement does not necessarily, or usually, entail a court adjudicating representational issues that the NLRB has reserved for itself. Rather, as many courts have reasoned, in a neutrality agreement the parties have resolved certain representation issues and the court merely is interpreting their intent and enforcing their private agreement. Accordingly, the federal court’s jurisdiction to enforce a neutrality agreement normally should not be precluded based on the argument that judicial intervention interferes with the NLRB’s primary jurisdiction.

C. Section 8(a)(2) and Neutrality Agreements

Neutrality agreements also can be expected to generate litigation raising Taft-Hartley Act section 8(a)(2) issues, the section of the Act that prohibits employer interference or assistance in the formation or administration of labor unions. Specifically, when, if at all, will an employer’s agreement to waive its right to make anti-union statements, its agreement to provide a union the names and addresses of its employees, or its decision to permit the union to enter the work facility to convey the union message directly to the employees be considered unlawful employer “assistance?” The NLRB has not addressed any of these questions. What is clear is that section 8(a)(2) neither requires an employer to speak against a union nor prohibits an employer from expressing a preference for one union over another. It is equally clear that section 8(a)(2) does prohibit

166. See, e.g., Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 567 (2d Cir. 1993) (citing cases); Hotel & Restaurant Employees Local 2 v. Marriott Corp., 961 F.2d 1464, 1468 (9th Cir. 1992).
167. See George N. Davies, Neutrality Agreements: Basic Principles of Enforcement and Available Remedies, 2000 A.B.A. SEC. LAB. & EMPL. LAW 2-12 (Presented to the Development of the Law Under the NLRA and Practice and Procedures Under the NLRA Joint Committee Program); see also Strom, supra note 41, at 70-74 (concluding that much doubt remains with respect to whether section 301 creates federal court jurisdiction to enforce neutrality agreements); cf. Amalgamated Clothing & Textile Workers v. Facetglas, Inc., 845 F.2d 1250 (4th Cir. 1988) (holding no section 301 jurisdiction to adjudicate voting eligibility of four employees in a representation election conducted pursuant to a private-election agreement).
168. This section provides: “It shall be an unfair labor practice for an employer ... (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it ... .” Labor Management Relations Act (“Taft-Hartley Act”), 29 U.S.C. § 158(a)(2) (1994).
an employer from discriminating in favor of one of two unions vying for support—for example in granting access to its facilities,\textsuperscript{171} offering preferential use of the employee bulletin board,\textsuperscript{172} or application of its no-solicitation rules.\textsuperscript{173} The neutrality agreement section 8(a)(2) cases will present a new variable: the employer’s contractual commitment to neutrality. The NLRB will have to determine whether this additional factor requires a different section 8(a)(2) outcome from \textit{ad hoc} decisions by an employer to remain neutral or even express a preference for a union.\textsuperscript{174}

Negotiation of pre-recognition conditions of employment that will take effect upon a majority of employees choosing union representation raises additional section 8(a)(2) concerns\textsuperscript{175} because of the NLRB’s \textit{Majestic Weaving} decision.\textsuperscript{176} There, the NLRB interpreted section 8(a)(2) to prohibit pre-recognition negotiation of terms and conditions of employment. The academic commentary is in conflict with respect to whether \textit{Majestic Weaving} precludes all preliminary negotiations over conditions of employment when the parties negotiate a neutrality agreement. One view argues that law reform is needed because when a union does not represent any of a company’s employees, \textit{Majestic Weaving} precludes the parties “from engaging in preliminary negotiations prior to recognition” as part of their negotiation for a neutrality agreement.\textsuperscript{177} \textit{Majestic Weaving} arose from an allegation by one union that the employer

\textsuperscript{171} See, e.g., Davis Supermarkets, 306 N.L.R.B. 426 (1992), \textit{aff'd}, 2 F.3d 1162 (D.C. Cir. 1993), \textit{cert. denied}, 511 U.S. 1003 (1994) (holding that discriminatory access to employer’s facility favoring one of two rival unions violates section 8(a)(2)).

\textsuperscript{172} See, e.g., Raley’s Inc. v. NLRB, 703 F.2d 410 (9th Cir. 1983).

\textsuperscript{173} See, e.g., M. K. Morse Co., 302 N.L.R.B. 924 (1991) (discriminatory application of no-solicitation rule favoring one of two rival unions).

\textsuperscript{174} Compare Kramer, Miller, & Bierman, \textit{ supra} note 41, at 63-72 (concluding neutrality agreements constitute unlawful assistance); with Guzick, \textit{ supra} note 5, at 452-457 (concluding the opposite—at least when the employer does not favor one of two competing unions). \textit{See also} Suzanne L. Telsey, \textit{Judicial Review of Labor Board Decisions and the Midwest Piping Doctrine}, 60 N.Y.U. L. Rev. 499, 513-18, 535-39 (1985) (showing that the NLRB’s movement from the rule of Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945), to the rule of Bruckner Nursing Home, 262 N.L.R.B. 955 (1982), and RCA Del Caribe, Inc., 262 N.L.R.B. 963 (1982), signals a reduced concern that the employer’s showing of preference for a union will create an “unwarranted prestige” interfering with employee free choice).

\textsuperscript{175} The parties’ neutrality agreement might, for example, contain a provision for interest arbitration of disputes arising during the negotiation of a first contact. \textit{See} discussion \textit{ supra} note 94 and accompanying text.

\textsuperscript{176} Majestic Weaving Co., Inc. of New York, 147 N.L.R.B. 859, 860 (1964), \textit{enforcement denied on other grounds}, 355 F.2d 854 (2d Cir. 1965).

\textsuperscript{177} \textit{See} Strom, \textit{ supra} note 41, at 57-64.
had assisted a competing union unlawfully by engaging in pre-recognition contract negotiation. Accordingly, no change in the law may be needed to permit preliminary discussions of substantive contract terms during the negotiation of a neutrality agreement when only one union is attempting to organize the employer’s employees.\textsuperscript{178}

\textbf{D. Section 8(e) and Neutrality Agreements}

A neutrality agreement also may raise section 8(e) issues\textsuperscript{179} when, for example, it contains an obligation that a joint venture, of which the signatory employer is a significant participant, is bound to remain neutral during an organizing campaign.\textsuperscript{180} It is well established that section 8(e) makes unlawful a contract term, sometimes referred to as an “anti-dual-shop” clause, that requires the signatory employer to apply the contract to any other enterprise formed by the “partners, stock holders or beneficial owners” of the signatory employer.\textsuperscript{181} The reason is that such a clause is deemed to regulate the labor relations of a separate employer, a clear violation of 8(e), at least outside the construction industry.\textsuperscript{182} In 1996, the NLRB distinguished that type of clause from one extending the contract’s

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\textsuperscript{178} See Nicholas W. Clark, \textit{Organizing at the Bargaining Table}, Workshop on Non-NLRB Organizing and Worker Advocacy Strategies, AFL-CIO Lawyers Conference, New Orleans, La. at 3-4 (May 12, 1999) (concluding 1) that when negotiating a neutrality agreement, employers typically desire “some idea of the economic impact recognition will have on its business,” 2) that the union may wish to allay fears by “communicating . . . the contract terms the union will recommend to the members for ratification” in the event of lawful recognition, and 3) that the post-Majestic Weaving cases strongly indicate that its prohibition on pre-recognition substantive negotiations is applicable only when two unions are competing for majority status—the fact situation in Majestic Weaving).

\textsuperscript{179} This section provides: “It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person . . . .” 29 U.S.C. § 158(e) (1994).

\textsuperscript{180} For example, the 1999 steelworker five-year agreements with U.S. Steel, a subsidiary of USX Corporation and Bethlehem Steel modified a provision in the current agreement that extended a neutrality pledge to affiliates in which the Companies directly or indirectly own more than 50 percent of the voting power. The 1999 contract replaced this with a provision extending the neutrality agreement to 1) any “venture” defined as a company in which the signatory company owns a “material interest” or 2) an “affiliate” defined as a company in which the signatory company owns “more than 50 percent of the voting power or has the power to direct policy.” See Daily Lab. Rep. (BNA) No. 152, at AA-1 (Aug. 9, 1999); see also Darrell Hassler, \textit{Union Neutrality Agreed by LTV}, Am. MtL. Mkt., July 2, 1999, at 1, available at 1999 WL 11247891 (reporting USW-LTV Corporation neutrality agreement providing that LTV will achieve a neutrality agreement by its joint venture partners at Trico Steel Co. LLC with the USW or exit the joint venture); Daily Lab. Rep. (BNA) No. 69, at D-5 (Apr. 10, 1996) (reporting an agreement between USW and Gulf States Steel Company providing for the extension of a neutrality agreement “at any steel venture in which Gulf States participates as a partner . . . even if the company holds only a minority interest in the joint venture).


\textsuperscript{182} Section 8(e) contains an explicit exception for “an agreement between a labor organization and an employer in the construction industry relating to the contracting or sub-contracting of work to be done at the site of the construction . . . .” 29 U.S.C. § 158(e) (1994).
\end{footnotesize}
provisions to an enterprise when the signatory employer "exercises management, control, or majority ownership." The majority held that this type of clause creates a presumption that the signatory employer controls work assignment at such other entity and, for that reason, the extension-of-the-contract clause does not violate section 8(e). These section 8(e) principles would lead to the conclusion that a neutrality agreement made applicable to a subsidiary in which the signatory employer "exercises management, control, or majority ownership" would not violate section 8(e). Former NLRB Member Charles Cohen has done some of the most extensive preliminary work on these questions. He has argued that under the NLRB’s current version of control, “virtually any participation by principals of a signatory company in the operations of a non-union dual shop, even without common ownership, would constitute ‘control’” sufficient to shield a neutrality agreement from section 8(e) by operation of the contract’s work preservation clause. If that accurately reflects the current state of the law, then unions will have great latitude to negotiate neutrality agreements that are applicable to organizing at many other entities “controlled” by the signatory employer, such as subsidiaries and joint ventures.

E. Labor Preemption and Neutrality Agreements

Neutrality agreements also can present labor preemption issues. The Taft-Hartley Act does not contain an explicit preemption provision. Its provisions nevertheless preempt some state or local legislative, executive, and judicial actions that proscribe conduct protected or even arguably protected by federal law, actions that regulate behavior Congress has determined falls within the NLRB’s primary jurisdiction, and actions that regulate conduct Congress intended should “be controlled by the free play of economic forces.”

184. Cohen, supra note 56, at 211. “The employer challenging a Manganaro-type clause would be permitted, of course, to prove that it actually did not have the right of control over the assignment of work at the other entity or joint venture. If that were proved, the insistence on the [neutrality] clause would be unlawful.” Id.
185. But, it has been argued that “the Board’s application of Manganaro has been uneven [and] [h]ow . . . these cases will ultimately sort out as well as their effect, if any, on the legality of neutrality agreements is an open question.” Id.
187. Id. This arises usually when a state or local government prohibits what section 8 of the Act already prohibits.
188. Lodge 76, Machinists v. Wisconsin Empl. Rel. Comm’n, 427 U.S. 132, 140 (1976). Such interference by a state or local government creates the risk of “upset[ting] the balance of power between labor and management expressed in our national labor policy.” Id. at 146.
These preemption principles raise the issue of whether labor law preempts a decision by a state or local government to require a neutrality agreement from a private business wishing to enter into a business relationship with the governmental entity. Such a contractual precondition might be viewed by a court as a regulatory act designed to force the enterprise to waive certain rights protected by the Act, such as the section 8(c) right to express its views during a union organizing campaign, the section 9 right to petition the NLRB to conduct a representation election when a demand for recognition has been made, or the right to deny a union access to its property to communicate with its employees.

The outcome depends on whether a court concludes that a state or local government engages in an act of “regulation” when it requires a neutrality agreement from a company before it will engage in a business transaction with that company. This is because in Building & Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island (Boston Harbor) the Supreme Court held that the “preemption doctrines apply only to state regulation.” The NLRA “supplants state labor regulation, not all legitimate state activity that affects labor.” The crucial inquiry then is how will the courts define “regulation” in this context and whether requiring a neutrality agreement from an employer desiring to do business with a state or local government fits the definition.

In Boston Harbor, the Court held that Massachusetts acted as a “market participant,” and not as a regulator, when the Massachusetts Water Resources Authority (MWRA) entered into a project labor agreement (PLA) with the local Building and Construction Trades Council (BCTC) that recognized the Council as the exclusive bargaining representative of all employees on a harbor renovation project. Among other things, the PLA contained a 10-year no strike commitment but also required all contractors and subcontractors on the Boston harbor project to agree to be bound by the project labor agreement. The Court found that the MWRA was primarily

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189. Section 8(c) provides: “the expressing of any views, argument, or opinion, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c) (1994).
190. See section 9(c)(1)(B). This section provides that a representation petition may be filed with the NLRB “by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a).” 29 U.S.C. § 159(c)(1)(B) (1994).
191. See the discussion of the Supreme Court’s decision in Lechmere, supra note 82 and accompanying text.
193. Id. at 227.
194. Id.
195. Id. at 221-22.
responsible for constructing sewage treatment and other facilities for the Boston harbor area, which it would own and manage upon completion of the project.\textsuperscript{196} It also found that the motive for entering into the project labor agreement was “to ensure an efficient project that would be completed as quickly and efficiently as possible at the lowest cost.”\textsuperscript{197} Moreover, the PLA “was specifically tailored to one particular job [the Boston harbor project]” and, therefore, did not affect the labor relations choices on any other public or private construction site.\textsuperscript{198} Finally, the Court concluded that the incentives that operated on the MWRA to enter into the PLA are “those that operate elsewhere in the construction industry, incentives this Court has recognized as legitimate.”\textsuperscript{199} The Court thus held that the MWRA, “in the role of purchaser of construction services,” “act[ed] just like a private contractor would act, and condition[ed] its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected to find . . . .”\textsuperscript{200} Accordingly, “[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.”\textsuperscript{201} 

Boston Harbor is factually distinguishable from virtually all scenarios in which a state or local government requires a neutrality agreement. For example, in Boston Harbor, the state owned and managed the facilities being constructed and was acting in the proprietary capacity as a purchaser of construction services, as would any private sector business constructing facilities that it would own and operate. That almost never is the case when local government requires a neutrality agreement. First of all, the government entity requiring a neutrality agreement does not own and operate the facilities covered by the neutrality agreement.\textsuperscript{202} Moreover, the neutrality agreement is not sought by the governmental entity in its capacity

\textsuperscript{196} Id. at 221.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 232.
\textsuperscript{199} Id. The Court also concluded that if this agreement had been entered into by parties subject to the jurisdiction of the NLRA, would have been lawful. Id. at 222, 230.
\textsuperscript{200} Id. at 232 (quoting Associated Builders & Contractors of Massachusetts/Rhode Island v. Massachusetts Water Resources Authority, 935 F.2d 345, 361 (1st Cir. 1991) (Breyer, C.J., dissenting)).
\textsuperscript{201} Id. at 231-32.
\textsuperscript{202} See, e.g., Hotel Employees & Restaurant Employees Union, Local 2 v. Marriott Corp, No. C-89-2707, 1993 WL 341286, at *1 (N.D. Cal. Aug. 23, 1993) (explaining that redevelopment agency that induced an employer to sign a neutrality agreement owned land on which the developer built a hotel that it owned and operated). If the local government owned and operated the facilities it built, it would be the employer of those who work at those facilities and would have no need to induce a private employer to enter into a neutrality agreement. It is because a private sector business will operate a hotel, for example, that is built with the assistance of public funds that local government requires the hotel operator to sign a neutrality agreement.
as purchaser of construction services.\textsuperscript{203}

In addition, in \textit{Boston Harbor} the MWRA used the incentive of a construction contract to induce adherence to the project labor agreement, something the Court found any private owner might do when constructing some facility. In addition, the MWRA required the project labor agreement "to ensure an efficient project that would be completed as quickly and efficiently as possible at the lowest cost."\textsuperscript{204} By contrast, when a local government requires a neutrality agreement in return for government offering access to public land or by offering certain tax incentives, government acts in ways that are unique to government—attracting private investment into the community through the use of the power of eminent domain, or the taxing power.

The post-\textit{Boston Harbor} cases will need to determine whether or not these differences preclude applying \textit{Boston Harbor}'s market participant principle to shield government-sponsored neutrality agreements from preemption challenges. The answer is far from clear. On the one hand, courts might be reluctant to extend \textit{Boston Harbor} beyond its facts for fear of creating an open-ended principle permitting state and local governments to engage in sham market participation when the real intent is to disrupt the balance of economic power contained in national labor policy.\textsuperscript{205} However, if courts interpret \textit{Boston Harbor} in the context of the new federalism manifested in many other contexts over the past five years,\textsuperscript{206} they may well

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\item \textsuperscript{203} Unlike a project labor agreement, a neutrality agreement takes effect after a facility is built and influences efforts by a union to organize employees hired to work in the facility. Thus, while a project labor agreement is required by government in its capacity as a purchaser of construction services, a neutrality agreement is required by government in its capacity as an inducer of private investment in the community—with the neutrality agreement being a quid pro quo for the offer of access to public land or financing assistance.

\item \textsuperscript{204} \textit{Boston Harbor}, 507 U.S. at 221.

\item \textsuperscript{205} See \textit{Associated Builders & Contractors of Rhode Island v. City of Providence}, 108 F.Supp. 2d 73 (D. R.I. 2000) (preempting City policy of requiring private developers to execute and enforce a project labor agreement in exchange for favorable tax treatment because: 1) "the city... is not 'purchasing' construction services or otherwise exhibiting behavior analogous to that of private parties in the marketplace [but rather] is carrying out is 'primeval government activity' of assessing taxes..." making the City's motive irrelevant; 2) the favorable tax treatment arose from a policy applied to many projects, not just one, making it more "regulatory" than "proprietary;" and 3) the policy linking project labor agreements with favorable tax treatment "also set forth requirements regarding minority business and city resident involvement in the Project [indicating] that the city is attempting to set policy through its grant of favorable tax treatment").

\item \textsuperscript{206} See, e.g., \textit{Alden v. Maine}, 527 U.S. 706, 711 (1999) ("[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state court."); \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank}, 527 U.S. 627 (1999) (Congress does not possess section 5 power to extend the federal patent statute to the states); \textit{College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board}, 527 U.S. 666, 680 (1999) (Congress lacks legislative power to extend the federal trademark statute to the states and states will not be viewed to have consented to suit in federal court "based upon the State's mere presence in a field subject to congressional regulation"); \textit{City of Boerne v. Flores}, 521 U.S. 507, 520 (1997) (Congress lacks legislative authority under section 5 of the
conclude that *Boston Harbor* is grounded in the principle that government does not "regulate" except when its aim is some labor relations objective. Then most state-sponsored neutrality agreements should avoid preemption, at least when a state or local government can demonstrate its aim was local economic development and not reconfiguring the balance of labor relations in the community.

V.

CONCLUSION

The pre-recognition neutrality agreement is a cornerstone of a reinvigorated union organizing model built around notions of cooperative industrial relations rather than reliance on legislative labor law reform. But beyond that, these agreements are the foundation of a new civil rights movement that seeks, through union organizing, to reestablish the progressive social vision that inspired an earlier generation to risk so much for the hope of a better future through employee concerted activities. The neutrality agreement invigorates this civil rights movement and is invigorated by it. Union's traditional adversaries can be expected to resist by raising legal challenges. But, the neutrality agreement also threatens unions' traditional political friends—the liberal political order. John Sweeney, the President of the AFL-CIO, has not played hide-the-ball here. He has stated openly that the new organizing initiatives—including neutrality agreements—are designed to take labor law reform out of the hands of the Congress.207 Because neutrality agreements place labor law reform within the control of workers themselves, they provide unions at least a partial escape from the grip of both the legal and political processes. If Sweeney's gambit succeeds, the union movement then will have gained not just additional bargaining rights but also a measure of political independence from both the Republican and Democratic parties. So understood, the neutrality agreement threatens the labor-political order like nothing since the union organizing drives during the New Deal itself. It is in this context that the legal struggles described in this article are likely to take place.

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207. Characterizing the right to organize "the civil rights issue of the 1990s," Sweeney has argued that workers will effect "meaningful labor law reform" through their own efforts to organize using diverse strategies. *Daily Lab. Rep.* (BNA) No. 145, at A-5 (July 29, 1997).