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# Card Check Labor Certification: Lessons from New York

William A. Herbert



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CARD CHECK LABOR CERTIFICATION: LESSONS FROM NEW  
YORK

*William A. Herbert\**

I. INTRODUCTION: THE RELEVANCE OF THE NEW YORK EXPERIENCE TO THE CARD CHECK DEBATE .....	95
II. PRE-WORLD WAR II NEW YORK PUBLIC SECTOR LABOR RELATIONS .....	98
III. THE CARD CHECK CERTIFICATION EXPERIENCE UNDER THE NLRA AND THE SLRA .....	107
IV. THE CONDON-WADLIN AND TAFT-HARTLEY ACTS .....	113
V. CARD CHECK PROPOSED IN NEW YORK CITY PRELIMINARY REPORT ON LABOR RELATIONS.....	118
VI. NEW YORK CITY TRANSIT REPRESENTATION ELECTIONS AND COLLECTIVE BARGAINING .....	122
VII. INTERIM ORDER AND FURTHER STUDY OF CARD CHECK AND COLLECTIVE BARGAINING .....	123
VIII. PARKS DEPARTMENT REPRESENTATION ELECTION.....	129
IX. EXECUTIVE ORDER 49 IMPLEMENTS CARD CHECK IN NEW YORK CITY.....	131
X. DEVELOPMENTS LEADING TO THE ENACTMENT OF THE TAYLOR LAW AND NYCCBL.....	141

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\* Mr. Herbert is Deputy Chair and Counsel to the New York State Public Employment Relations Board (“PERB”). The article expresses Mr. Herbert’s personal views and does not reflect the views of PERB or the State of New York. It is a revised version of papers presented at the 62nd Annual Conference on Labor at New York University School of Law, the Fourth Annual Colloquium on Current Scholarship in Labor and Employment Law at Seton Hall Law School, and at the Cornell School of Industrial and Labor Relations. Mr. Herbert would like to express his thanks to Jerry Lefkowitz, Sam Estreicher, Mike Harper, Jeff Hirsch, Lee Adler, Jean Doerr, Monte Klein, David Quinn, Steven DeCosta, and Karine Spencer, for their assistance, input, and insights. Mr. Herbert would also like to thank Cecilia Heath for her valuable assistance. The following archives provided prompt and able assistance in locating relevant documents: Tamiment Library/Robert F. Wagner Labor Archives, New York State Archives, City of New York Department of Records & Information Services Municipal Archives, and the Kheel Center for Labor-Management Documentation & Archives. In particular, Gail Malmgreen, Kenneth Cobb, David Ment, Leonora Gidlund, and Debra Christine McElligott opened the gates to primary source materials that substantially enriched the telling of New York’s history with card check labor certification. The article is dedicated to the memory of Bernard A. Herbert, Betty Herbert, and Al and May Nash.

XI.	TAYLOR LAW ESTABLISHES NEW YORK'S PREFERENCE FOR CARD CHECK .....	146
	A. <i>The Taylor Law</i> .....	146
	B. <i>NYCCBL</i> .....	149
XII.	CARD CHECK EXPERIENCES UNDER THE TAYLOR LAW AND NYCCBL .....	150
	A. <i>The Taylor Law Experience</i> .....	150
	B. <i>The NYCCBL Experience</i> .....	163
XIII.	EXPANSION OF CARD CHECK PREFERENCE TO NEW YORK'S PRIVATE SECTOR .....	165
XIV.	CARD CHECK IN OTHER JURISDICTIONS WITHIN THE UNITED STATES .....	167
XV.	CONCLUSION: LESSONS FROM NEW YORK FOR THE CARD CHECK DEBATE .....	168

#### ABSTRACT

During the debate over the card check proposal in the Employee Free Choice Act of 2009 (“EFCA”), there has been a notable lack of discussion about New York’s fifty-year history and experience with card check certification. This article challenges and contradicts much of the prior scholarship and debate over EFCA by examining New York’s development and administration of card check procedures. The article begins with an overview of the history of New York public sector labor relations prior to the establishment of collective bargaining rights. As part of that historical overview, it examines the development of informal employee organization representation, the codification of a prohibition against public sector strikes, and the establishment of formal grievance procedures by public employers which were the precursors of collective negotiations. It then describes the largely untold story behind the development of New York City’s collective bargaining system for municipal employees, which included a card check procedure similar to the one that had existed under the National Labor Relations Act. Following the description of New York City’s adoption of card check, the article analyzes the history, procedures, and precedent with respect to the use of card check under New York’s Public Employees’ Fair Employment Act, the New York City Collective Bargaining Law, and New York’s Labor Law. Finally, the article sets forth the important lessons to be learned from New York’s history, precedent, and experience, which can enhance the debate over card check.

## I. INTRODUCTION: THE RELEVANCE OF THE NEW YORK EXPERIENCE TO THE CARD CHECK DEBATE

In 1932, Justice Louis Brandeis articulated his proposition that under our federal system, each state should be permitted to function as a laboratory to experiment with public policies aimed at solving problems in that particular state.<sup>1</sup> During the debate over the proposal in the Employee Free Choice Act of 2009 (“EFCA”)<sup>2</sup> to modify United States federal labor policy to create an administrative procedure for the certification of unions without an election (generically referred to as card check), it has been notable that New York’s extensive history and experience with the use of this procedure has been ignored.

Instead, many scholars analogize to the Canadian experience, with the scholarship being primarily focused on the relationship between card check and union density without any meaningful review of the effectiveness of the procedure as a means for determining employee choice.<sup>3</sup> The most significant exception to this scholarly trend is the article by Benjamin I. Sachs, who applies default theories as part of his examination of the EFCA card check proposal.<sup>4</sup>

Public policy choices and lessons from other countries, such as Canada, can provide important insights when reexamining our federal labor laws, policies, and assumptions.<sup>5</sup> However, a far more

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<sup>1</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>2</sup> Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009). A prior bill, the Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007), passed the House of Representatives, but a cloture motion in the Senate was defeated on June 26, 2007.

<sup>3</sup> See Chris Riddell, *Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978–1998*, 57 *INDUS. & LAB. REL. REV.* 493, 493–96 (2004); William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 *U.S.F. L. REV.* 291, 301–03 (2008); Senator Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers’ Right to Choose Under the National Labor Relations Act*, 45 *HARV. J. ON LEGIS.* 311, 326–27 (2008). The Canadian fluctuation in the use of card check over the past thirty years is well-summarized by Sara Slinn. Sara Slinn, *An Analysis of the Effects on Parties’ Unionization Decisions of the Choice of Union Representation Procedure: The Strategic Dynamic Certification Model*, 43 *OSGOODE HALL L.J.* 407 (2005).

<sup>4</sup> Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 *HARV. L. REV.* 655 (2010); see also Cynthia Estlund, *Freeing Employee Choice: The Case for Secrecy in Union Organizing and Voting*, 123 *HARV. L. REV.* F. 10 (2010), [http://www.harvardlawreview.org/media/pdf/123\\_estlund.pdf](http://www.harvardlawreview.org/media/pdf/123_estlund.pdf).

<sup>5</sup> See, e.g., William A. Herbert, *Workplace Electronic Privacy Protections Abroad: The Whole Wide World Is Watching*, 19 *U. FLA. J.L. & PUB. POL’Y* 379 (2008) (comparing electronic workplace privacy protections in the European Union, its member states, Canada, and the United States).

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probative source of information for analyzing the effectiveness of a non-electoral labor certification procedure comes from New York's consistent use of the procedure over the past half-century in the public sector. Historically, New York has been an innovator and leader in many areas of public policy, including labor relations.

This article seeks to enhance the discussion over card check, which was precipitated by EFCA, by examining New York's history and experience in the use of the procedure. Consistent with contemporary usage, the phrase "card check" will refer to the utilization of various forms of non-electoral evidence, including membership and dues deduction authorization cards, petitions, and proof of dues payment, to determine majority support as the basis for certifying a collective representative for employees in a bargaining unit.<sup>6</sup>

The article begins with an overview of New York public sector labor relations prior to the granting of collective bargaining rights. As part of that historical overview, it examines the development of informal employee organization representation, the codification of a prohibition against public sector strikes, and the establishment of formal grievance procedures, which were the precursors to *de jure* public sector collective bargaining rights.

The article then examines the largely untold history behind New York City's 1958 Executive Order creating a municipal collective bargaining system, which included a discretionary non-electoral procedure for determining majority support. The article will demonstrate that New York City's grant of administrative discretion to certify an employee organization without an election had its antecedence in the National Labor Relations Act ("NLRA"), enacted in 1935, and the New York State Labor Relations Act

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<sup>6</sup> For over a century, employers have voluntarily recognized unions based upon card checks. This voluntary procedure would not change under EFCA. However, there are notable practical and procedural distinctions between voluntary recognition and an administrative card check certification. One of the primary distinctions is that an employer's grant of voluntary recognition is subject to minimal regulation in both the private and public sectors. In contrast, under a "card-check procedure, the board grants or denies most certification applications based on whether or not the union has submitted" a sufficient showing of support. Slinn, *supra* note 3, at 425. Nevertheless, Benjamin Sachs conflates the distinction by describing card check as a process that would legally obligate an employer "to recognize the union as the employees' collective representative." Sachs, *supra* note 4, at 657. As a result of his conflation, Sachs fails to treat voluntary recognition as the default rule that maximizes employer choice to accept or reject unionization based on a card check. The proposed EFCA card check administrative procedure is an alternative rule that would transfer the holder of choice from an employer to the employees with the process being subject to regulation by the National Labor Relations Board ("NLRB").

(“SLRA”), enacted in 1937.<sup>7</sup> The article then discusses the developments that led to the enactment in 1967 of the statewide Public Employees’ Fair Employment Act (“Taylor Law”)<sup>8</sup> and the New York City Collective Bargaining Law (“NYCCBL”).<sup>9</sup> It will demonstrate that the Taylor Law, unlike the 1958 Executive Order, treats non-electoral certification as the preferred means for determining employee choice. The article then provides an analysis of forty years of precedent under the Taylor Law and NYCCBL, describing how New York has resolved various issues that have been the subject of debate regarding EFCA. The article also examines the 2001 amendment to New York’s private sector collective bargaining law, which incorporated a preference for non-electoral certifications similar to the Taylor Law, and codified the Taylor Law’s approach to resolving allegations of misconduct in the gathering of evidence of majority support.

Finally, the article will demonstrate how knowledge of New York’s history, precedent, and experience would have elevated the scholarly and public discussion over EFCA’s card check proposal, and provided potential avenues for legislative compromise. While it is evident that the card check proposal in EFCA will be withdrawn prior to Congress taking final action on the bill,<sup>10</sup> the New York experience in utilizing non-electoral means for determining majority support in representation cases offers lessons and laboratory results relevant to any future dialogue about utilizing card check certification on the national level or in other States and localities.

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<sup>7</sup> National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2000)); New York State Labor Relations Act, N.Y. LAB. LAW §§ 700–718 (McKinney 2002).

<sup>8</sup> Public Employees’ Fair Employment (Taylor-Law) Act, N.Y. CIV. SERV. LAW §§ 200–214 (McKinney 1999).

<sup>9</sup> N.Y. CITY ADMIN. CODE §§ 12-301–12-316.

<sup>10</sup> Alec MacGillis, *Specter Unveils Revised EFCA Bill*, WASH. POST, Sept. 15, 2009, [http://voices.washingtonpost.com/capitol-briefing/2009/09/specter\\_unveils\\_prospective\\_de.html](http://voices.washingtonpost.com/capitol-briefing/2009/09/specter_unveils_prospective_de.html); Kevin Bogardus, *Specter: Deal ‘Pounded Out’ on Card-Check, Should Pass This Year*, THE HILL (Sept. 15, 2009), <http://thehill.com/homenews/senate/58797-specter-deal-pounded-out-on-card-check>. During the Carter Administration, a similar compromise was reached as part of a prior unsuccessful effort to enact federal labor law reform. Despite that compromise, proponents of the legislation were unable to muster enough votes in the Senate to support a cloture motion. See Gary M. Fink, *Labor Law Revision and the End of the Postwar Labor Accord*, in ORGANIZED LABOR AND AMERICAN POLITICS, 1894–1994: THE LABOR-LIBERAL ALLIANCE 239, 244–51 (Kevin Boyle ed., 1998). As Cynthia Estlund has noted, efforts at federal labor law reform in the past few decades have been defeated through a combination of effective lobbying by the business community, and the procedural hurdles inherent in the congressional legislative process. Estlund, *supra* note 4, at 10–11; see also Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 1–2 (2009).

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We begin with a historical overview of New York public sector labor law. This is necessary, in part, because public sector labor law and history is frequently treated by the academy as a stepchild or appendage to the private sector. There are many explanations for this treatment, including the respective size of each sector. However, viewing the public sector as a parallel, but secondary, legal and historical universe substantially inhibits the recognition of the various points of legal, historical, and policy intersections between the two sectors. Each point of intersection provides an opportunity for comparative analysis recognizing, at all times, the inherent differences between private and public employment.

Card check certification constitutes an important convergence point between the private and public sectors: it was born under the NLRA and the SLRA and was later grafted onto New York public sector law where it has grown to maturity. The sponsors and proponents of EFCA have sought to have the administrative process replanted into federal private sector law. To contextualize the debate over card check, and to understand the lessons to be gained from the procedure's maturation in New York, the article's historical overview begins with the period prior to the advent of public sector collective bargaining in New York.

## II. PRE-WORLD WAR II NEW YORK PUBLIC SECTOR LABOR RELATIONS

Prior to the establishment of formal public sector collective bargaining rights in New York, a non-exclusive and informal type of employee representation existed in the public sector. The scope of such representation was limited to lobbying and advocacy, traditional activities integral to our system of government and, in general, constitutionally protected.<sup>11</sup> There was, however, no

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<sup>11</sup> See HARRY H. WELLINGTON & RALPH K. WINTER, *THE UNIONS AND THE CITIES* 71–73 (1971); Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 *YALE L.J.* 1156, 1160 (1974). The United States Supreme Court, in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464–65 (1979), concluded that the First Amendment provides protections for public employees who join and participate in an employee organization; however, the First Amendment does not require a public employer to engage in collective negotiations. See William A. Herbert, *The First Amendment and Public Sector Labor Relations*, 19 *LAB. LAW.* 325, 341–46 (2004); Paul M. Secunda, *Reflections on the Technicolor Right to Association in American Labor and Employment Law*, 96 *KY. L.J.* 343, 346 (2008) (calling for a reexamination of the right of association in the workplace through proposed federal legislation). In comparison, the Supreme Court of Canada has held that the right of association, granted by section 2(d) of the Canadian Charter of Rights and Freedoms, incorporates a right to collectively negotiate workplace issues. *Health Servs. & Support-*

systematic or formalized procedure utilized by public officials to determine which, if any, employee organization<sup>12</sup> they were willing to meet or consult with over public sector working conditions. Proof of majority status was not a legal or practical prerequisite for an employee organization to obtain de facto representational status from a public employer. At this time, employee organizations were dependent on voluntary dues payments and volunteerism to fund and coordinate organizational activities. To attract and retain members, employee organizations offered various forms of non-work related services, such as group life insurance.

New York employee organizations, such as the Civil Service Employees Association (“CSEA”), the Civil Service Forum, and the New York City Patrolmen’s Benevolent Association (“PBA”), advocated, on behalf of their members, before government officials and bodies for increased wages and benefits, improved working conditions, retirement benefits, enforcement of the merit and fitness system, and changes in civil service administration.<sup>13</sup> Among CSEA’s major legislative accomplishments prior to World War II was the creation of a uniform salary classification structure for New York State employees.

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Facilities Subsector Bargaining Ass’n v. British Columbia, [2007] S.C.R. 391 (Can.).

<sup>12</sup> For purposes of consistency, this article utilizes the phrase “employee organization” to refer to an organization with a primary mission of improving the terms and conditions of public employment. The phrase will be applied to both models of public sector representational entities: unions and associations. These models are, in reality, symbolic polarities aimed at describing different structures, strategies, and approaches to public sector organizing, labor relations, and political action. A union is descriptive of a public sector organization that tends to apply traditional trade union strategies and tactics. In contrast, associations tend to favor lobbying and less aggressive approaches to labor relations. See GOVERNOR’S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS (Mar. 31, 1966), reprinted in JEROME LEFKOWITZ ET AL., PUBLIC SECTOR LABOR AND EMPLOYMENT LAW 111–20 (3rd ed. rev. 2009) [hereinafter LEFKOWITZ, PUBLIC SECTOR]. Like most labels, however, such models are imprecise. Strategic choices are generally a function of leadership vision, membership needs and expectations, and organizational culture and history.

<sup>13</sup> See JEROME LEFKOWITZ, THE LEGAL BASIS OF EMPLOYEE RELATIONS OF NEW YORK STATE EMPLOYEES, ASSOCIATION OF LABOR MEDIATION AGENCIES 3–4 (1973); Raymond D. Horton, *Public Employee Labor Relations Under the Taylor Law*, PROC. ACAD. POL. SCI. (UNIONIZATION MUN. EMP.), Dec. 1970, at 69; EMMA SCHWEPPE, THE FIREMEN’S AND PATROLMEN’S UNIONS IN THE CITY OF NEW YORK, 49–69 (1948); JOSHUA B. FREEMAN, IN TRANSIT: THE TRANSIT WORKERS UNION IN NEW YORK CITY, 1933–1966 166–68 (1989) [hereinafter FREEMAN, IN TRANSIT]. In 1915, employee organizations unsuccessfully lobbied against the repeal of a 1909 law prohibiting the hiring of aliens by the state, municipalities, and contractors for public works projects. See *Give Hearing Today on Alien Repeal*, N.Y. TIMES, Mar. 3, 1915, at 3. Based on that law, Italian immigrants were excluded from working on the construction of portions of the New York City subway system. Prior to the law’s repeal, constitutional challenges to the statutorily mandated discriminatory practice were rejected. *Heim v. McCall*, 239 U.S. 175, 194 (1915); *Crane v. New York*, 239 U.S. 195, 198 (1915).



On an annual basis, lobbying and informal non-binding negotiations took place between employee organization leaders and public officials over wages and benefits to be included in the public employer's annual budget. Employee organizations also participated in litigation on behalf of members over the proper application of the civil service system, and advocated before wage appeals boards.<sup>14</sup> With the exception of police, firefighter, and other craft-like organizations, employee organizations frequently represented employees in multiple vocations and locations, with differing civil service statuses and wage levels.

One of the many substantive legislative successes by employee organizations in the period prior to collective bargaining was the enactment of the Three-Platoon Law in 1911.<sup>15</sup> After failing to persuade New York City officials to abandon the system of two daily twelve-hour shifts for police officers, the PBA took its concerns to Albany where it successfully lobbied the State Legislature for the enactment of a law limiting a police officer to one tour of duty of eight hours during each twenty-four hour period.<sup>16</sup>

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<sup>14</sup> See, e.g., *Civil Serv. Technical Guild v. LaGuardia*, 44 N.Y.S.2d 860 (Sup. Ct. N.Y. Cnty. 1943), *aff'd*, 47 N.Y.S.2d 114 (App. Div. 1st Dep't 1944), *aff'd*, 55 N.E.2d 49 (N.Y. 1944) (challenging the privatization of services based upon the civil service competitive examination system); *Thomas v. Kern*, 20 N.E.2d 738 (N.Y. 1939) (seeking to enjoin a proposed civil service examination for policemen); *Sanger v. Greene*, 198 N.E. 622 (N.Y. 1935) (seeking the reinstatement of state employees terminated as a result of changes in the civil service status of positions).

<sup>15</sup> Three-Platoon Law, 1911 N.Y. LAWS ch. 360. SCHWEPPE, *supra* note 13, at 62–66. Other important legislative victories by employee organizations during this period were the enactment of statutory disciplinary hearing procedures for public employees. See, e.g., N.Y. CIV. SERV. LAW § 75 (McKinney 1958); *Rockland County Police Act*, 1936 N.Y. LAWS ch. 104, *amended by* 1941 N.Y. LAWS ch. 812; *Westchester County Police Act*, 1936 N.Y. LAWS ch. 526, *amended by* 1946 N.Y. LAWS 1741. These statutory due process procedures ensure greater job security for public employees than at-will private sector employees, thereby modifying one of the asymmetric impediments to employee associational activities discussed by Benjamin Sachs. Sachs, *supra* note 4, at 680–85. In contrast, certain statutory disciplinary procedures enacted for police officers have been interpreted by the New York Court of Appeals as rendering police discipline a prohibited subject of negotiations under the Taylor Law. See *Patrolmen's Benevolent Ass'n v. N.Y. State Pub. Relations Bd.*, 848 N.E.2d 448, 454 (N.Y. 2006).

<sup>16</sup> MARK H. MAIER, *CITY UNIONS, MANAGING DISCONTENT IN NEW YORK CITY* 20 (1987); see *People ex rel. MacNish v. Waldo*, 106 N.E. 116 (N.Y. 1914) *reh'g denied*, 106 N.E. 1040 (N.Y. 1914). In the late 1960s, the PBA, relying on the Three-Platoon Law, unsuccessfully attempted to stop New York City from implementing a fourth police platoon. *Patrolmen's Benevolent Ass'n of N.Y. v. City of N.Y.*, 299 N.Y.S.2d 986 (Sup. Ct. N.Y. Cnty. 1969); Raymond D. Horton, *Municipal Labor Relations in New York City*, PROC. ACAD. POL. SCI. (UNIONIZATION MUN. EMP.), Dec. 1970, at 76–77. Three decades later, New York City unsuccessfully argued that the subject of police shifts was a prohibited subject of negotiations under the Taylor Law, citing the same law. See *City of New York*, 40 N.Y. P.E.R.B. ¶ 3017 (2007), *conf.*, *City of New York v. N.Y. PERB*, 41 N.Y. P.E.R.B. ¶ 7001 (Sup. Ct. Albany Cnty. 2008), *appeal dismissed*, 862 N.Y.S.2d 858 (App. Div. 3d Dep't 2008), *leave denied*, 904 N.E.2d

In 1920, New York enacted a civil rights law to protect the right of public employees to redress grievances before the Legislature and other government officials.<sup>17</sup> The statute is primarily a statement of public policy, granting legal legitimacy to public employees who petition public officials over working conditions. It does not, however, include specific penalties for violating the statutory right, or identify a procedure for pursuing an alleged violation. As we will see, the creation of formal grievance procedures for public employees, along with the recognition of a right to employee organization representation during the processing of grievances, did not begin until the late 1940s.

Many civic reform groups viewed the formation of public sector employee organizations as a positive development which placed an important wedge between political party machines and public employees.<sup>18</sup> The growth of employee organizations was viewed as an expression of democratic and civic rights. Nevertheless, as one scholar has stated, leaders of employee organizations “relied upon their ties to politicians to secure benefits for their members, sharply limiting the ability of these organizations to act as independent forces in the electoral arena.”<sup>19</sup> This strategy was particularly true in New York City where employee organizations worked closely with the Tammany Hall Democratic machine, as well as with the reform administration of Mayor Fiorello H. LaGuardia and subsequent administrations.<sup>20</sup>

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503 (N.Y. 2009).

<sup>17</sup> Civil Rights Law, 1920 N.Y. LAWS ch. 805, § 1 (codified at N.Y. CIV. RIGHTS LAW § 15). N.Y. CIV. RIGHTS LAW §15 states: “Notwithstanding the provisions of any general or special law to the contrary, a citizen shall not be deprived of the right to appeal to the legislature, or to any public officer, board, commission or other public body, for the redress of grievances, on account of employment in the civil service of the state or any of its civil divisions or cities.” The New York Legislature enacted this law at a time when the New York City Charter placed restrictions on policeman, fireman, and teachers joining and contributing to employee organizations that may lobby on their behalf. STERLING D. SPERO, GOVERNMENT AS EMPLOYER, 58–59 (1948). It is notable that the right granted by N.Y. CIV. RIGHTS LAW §15 to grieve workplace issues goes well beyond the contours of currently recognized free speech protections for public employees under the First Amendment. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); Herbert, *supra* note 11, at 346–48.

<sup>18</sup> Hugh O’Neill, *The Growth of Municipal Employee Unions*, PROC. ACAD. POL. SCI. (UNIONIZATION MUN. EMP.), Dec. 1970, at 1–2.

<sup>19</sup> MARTIN SHEFTER, POLITICAL CRISIS/FISCAL CRISIS: THE COLLAPSE AND REVIVAL OF NEW YORK CITY 74 (1985). Today, political action remains a central and important tool in successful public sector employee advocacy, which has led conservative critics to express fear that public sector employee organizations have become too powerful, resulting in adverse fiscal consequences for state and local governments. See Dan DiSalvo & Fred Siegel, *The New Tammany Hall*, WKLY. STANDARD, Oct. 2, 2009, <http://www.weeklystandard.com/Content/Public/Articles/000/000/017/031citja.asp>.

<sup>20</sup> JEWEL BELLUSH & BERNARD BELLUSH, UNION POWER AND NEW YORK: VICTOR GOTBAUM

The use of political and moral suasion as the means for advocating in support of improved terms and conditions of employment, rather than membership mobilization and confrontation, reinforced acceptance by government officials of public sector employee organizations. By being active in the political and policymaking milieu, employee organizations were more likely to be accepted by government officials and, therefore, not portrayed as being alien third party entities distinct from their membership. Furthermore, bonds forged through political alliances frequently led to a much less adversarial relationship than that between private sector management and organized labor.

The importance of political considerations in the public sector may, in part, explain the 1937 decision by the Committee for Industrial Organizations (“CIO”) to prohibit its nationwide public sector affiliate, the State, County and Municipal Workers of America (“SCMWA”), from engaging in strikes and picketing, thus echoing the views of President Franklin D. Roosevelt. At SCMWA’s 1938 New York State convention, CIO National Director, John Brophy, called upon it to function as both a union and a political organization. At the convention, SCMWA adopted a state constitution calling for public sector collective bargaining, improvement of working conditions through “negotiation, legislation and education,” and expressly prohibited public sector strikes, as well as racial, religious, and political discrimination. In the preceding year, SCMWA had already commenced a major organizing effort in New York: a well-funded, but ultimately futile, drive to dislodge CSEA as the predominate representative of New York State employees.<sup>21</sup> A strong and pertinent explanation for SCMWA’s early anti-strike policy was the CIO’s active effort to obtain the Roosevelt Administration’s intervention, protection, and support for private sector organizing drives in the steel, rubber, and automobile industries.<sup>22</sup>

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AND DISTRICT COUNCIL 374 (1984); SPERO, *supra* note 17, at 205–212 (describing the relationship between the Civil Service Forum and New York City’s political machine between 1909 and 1935).

<sup>21</sup> *C.I.O. to Organize State Employes; Denies Strike Aim*, N.Y. TIMES, July 13, 1937, at 1; *Public Employees Urged to Organize*, N.Y. TIMES, Oct. 29, 1938, at 20; *Public Aides Ask Social Benefits*, N.Y. TIMES, Oct. 30, 1938, at 6; *Civil Servants Ask \$1,200 Minimum Pay*, N.Y. TIMES, Oct. 31, 1938, at 16; SPERO, *supra* note 17, at 2; JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962* 126 (2004).

<sup>22</sup> GILBERT J. GALL, *PURSuing JUSTICE: LEE PRESSMAN, THE NEW DEAL, AND THE CIO* 75–93 (1999). The use of politics and lobbying on the federal and state level is not limited to the public sector. These methods were essential elements of the CIO’s strategy aimed at organizing the American industrial workforce. See ROBERT H. ZIEGLER, *THE CIO 1935–1955*

The strict use of lobbying and political action as the primary means for obtaining improved wages and working conditions in New York's public sector was not universally accepted by all employee organizations. For example, between 1906 and 1911, New York City sanitation employees participated in organized strikes aimed at eliminating their own twelve-hour shifts.<sup>23</sup> In subsequent decades, SCMWA, the American Federation of State, County and Municipal Employees ("AFSCME"), an affiliate of the American Federation of Labor ("AFL"), and other employee organizations, combined organized membership activism and political action as twin tactics aimed at obtaining recognition, higher wages, and improved working conditions.<sup>24</sup>

During this period, it was unsettled whether a New York public employer could lawfully grant exclusive representation rights, collective bargaining, and a union shop. Although the New York

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90, 116, 131 (1995).

<sup>23</sup> O'Neill, *supra* note 18, at 13.

<sup>24</sup> SCMWA was formed in 1937 based upon a principled difference within AFSCME over the AFL's reliance on craft-based unionism. SPERO, *supra* note 17, at 212–213. During their years of rivalry, SCMWA utilized more militant language than AFSCME, but their tactics and goals, in some respects, were similar. SPERO, *supra* note 17, at 214; SLATER, *supra* note 21, at 126–27. Unlike AFSCME, however, SCMWA and its members were subjected to investigations regarding their ideological orientation and associations. *Red Inquiry Is on in State Bureau*, N.Y. TIMES, Sept. 15, 1941, at 19. In addition, SCMWA's policy with respect to public sector strikes fluctuated. In 1941, it abandoned its policy against such strikes. A. H. Raskin, *Civil Employees Vote Strike Use*, N.Y. TIMES, Sept. 27, 1941, at 1. The abandonment of SCMWA's anti-strike policy was strongly denounced by CSEA's leadership "as a base misrepresentation of employee thought," and "as a wholly undemocratic suggestion tending to promote selfish and destructive pressure upon public officials charged with the responsibility for high public service." See *No Strikes!*, 10 ST. EMP. 217, 219 (1941), available at [http://library.albany.edu/speccoll/findaids/eresources/csea/The-State-Employee\\_1941\\_10.pdf](http://library.albany.edu/speccoll/findaids/eresources/csea/The-State-Employee_1941_10.pdf) (reprinting the October 2, 1941 *Resolution of the Executive Committee of the Association of State Civil Service Employees*). Less than a year later, following the commencement of World War II, SCMWA joined other unions throughout the country in agreeing to a no-strike pledge for the duration of the war. *C.I.O. Board Bans Strikes; Pledge for State, County and Municipal Workers*, N.Y. TIMES, Apr. 27, 1942, at 28. The resumption of SCMWA's anti-strike policy resulted in tension within its national leadership. In his September 21, 1951 testimony as a friendly witness before the Senate Internal Security Subcommittee, former SCMWA Secretary-Treasurer Henry W. Wenning explained that he resigned from the union in 1944 because he opposed the no-strike policy pursued by SCMWA President Abram Flaxer. According to Wenning, a ban on strikes was appropriate only after public employees were granted a system that permitted collective negotiations and the settlement of grievances. Until those rights existed, Wenning believed that government employees had to engage in strikes and other aggressive tactics. See *Subversive Control of the United Public Workers of America: Hearing Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Comm. on the Judiciary*, 82d Cong. 48 (1952) (statement of Henry W. Wenning, Former SCMWA Secretary-Treasurer), available at <http://www.archive.org/stream/subversivecontro1952unit#page/48/mode/2up>. Following World War II, strikes and threatened strikes became a more prevalent form of organized activism by many public sector employee organizations. See discussion *infra* Parts IV, IX, X.

State Constitution was amended in 1938 to grant employees “the right to organize and to bargain collectively through representatives of their own choosing,”<sup>25</sup> this state constitutional right did not impose an affirmative duty on an employer to negotiate unless the Legislature enacted an implementing collective bargaining law.<sup>26</sup> It was not until the late 1950s that the New York Court of Appeals resolved the legality of public sector exclusive representation by upholding an agreement entered into by the New York City Transit Authority (“NYCTA”), granting the Transport Workers Union (“TWU”) and another employee organization exclusive representation rights of separate transit employee units.<sup>27</sup>

The general scope of achievable recognition in the pre-World War II era is reflected in the response from the New York City Welfare Department to the 1941 demand by SCMWA for voluntary recognition as the exclusive collective bargaining representative for 9000 departmental employees. The demand was summarily rejected by Welfare Department Commissioner Hodson on the grounds that public sector collective bargaining was unlawful.<sup>28</sup>

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<sup>25</sup> N.Y. CONST. art. I, § 17. The constitutional amendment was originally proposed by Murray Gootrad, a Republican constitutional delegate from Brooklyn. See Warren Moscow, *Labor Rights Bill Pressed at Albany*, N.Y. TIMES, July 21, 1938, at 1; *Labor Principles Carried at Albany*, N.Y. TIMES, Aug. 5, 1938, at 5. During the 1938 state constitutional convention, proposals to grant the rights to organize, collectively negotiate, and strike to most public sector employees were rejected. W.A. Warns, *Convention Action Opens Labor Rifts*, N.Y. TIMES, Apr. 27, 1938, at 8; *Republicans Back Right to Bargain*, N.Y. TIMES, May 18, 1938, at 9; see CITY OF N.Y. DEP’T OF LABOR, SERIAL NO. LR 2, RECOGNITION OF ORGANIZED GROUPS OF PUBLIC EMPLOYEES 16–17 n.21 (1955), (on file with New York University’s Tamiment Library/Robert F. Wagner Labor Archives, Elmer Holmes Bobst Library, Box 13) [hereinafter *Ida Klaus Papers*].

<sup>26</sup> See *Quill v. Eisenhower*, 113 N.Y.S.2d 887 (Sup. Ct. N.Y. Cnty. 1952). In 1938, SCMWA commenced an organizing drive in New York City seeking recognition and collective bargaining in all municipal departments. SCHWEPPE, *supra* note 13, at 167. As part of that campaign, a rally was held demanding that Mayor LaGuardia and other City officials support legislation granting collective bargaining rights to municipal employees. *City Workers Ask Bargaining Rights*, N.Y. TIMES, Apr. 14, 1938, at 3.

<sup>27</sup> *Civil Serv. Forum v. N.Y. City Transit Auth.*, 163 N.Y.S.2d 476, *aff’d*, 150 N.E.2d 705 (N.Y. 1958). See discussion *infra* Part VI.

<sup>28</sup> *Hodson Refuses Demand of C.I.O.*, N.Y. TIMES, Aug. 31, 1941, at 1. A right to public sector collective bargaining remains controversial. See Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1370–84 (2009). However, the level of such opposition pales in comparison to the reported levels of active oppositional intervention by private sector employers in organizing campaigns. According to Benjamin Sachs, “[m]anagement generally opposes unionization. This fact is essentially undisputed and is evident from a host of empirical studies.” Sachs, *supra* note 4, at 680; see also Estlund, *supra* note 4, at 12 (referencing “the nearly invariable fact of managerial opposition to unionization”). The comparatively low level of active managerial resistance to public sector organizing is attributable, in part, to the existence of statutory disciplinary protections, constitutionally protected associational rights, and the effectiveness of political action. See WELLINGTON & WINTER, *supra* note 11, at 16, 20.

During a subsequent meeting, however, Commissioner Hodson agreed to listen to SCMWA's ideas for changes in departmental workplace conditions, but he refused to make any commitments.<sup>29</sup>

A limited form of voluntary recognition, however, was achievable. For example, New York City voluntarily recognized AFSCME as the exclusive representative for 10,000 New York City sanitation employees "on problems relating to their employment."<sup>30</sup> In response to the City's recognition, SCMWA unsuccessfully demanded that a representation election be held under the auspices of the New York State Labor Relations Board ("SLRB"). The recognition of AFSCME took place in response to an active organizing effort by SCMWA. AFSCME retained its exclusive representational role in the New York City Sanitation Department until 1946, when SCMWA successfully petitioned newly inaugurated Mayor William O'Dwyer for equal organizational rights in that department.<sup>31</sup> As will be shown in Part III, *infra*, a dozen years later, New York City issued its first card check certification under Executive Order 49 ("EO 49") to an employee organization as the representative of Sanitation Department employees.

The status of public sector employee organizations during this

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<sup>29</sup> *Staff Union Plea Denied by Hodson*, N.Y. TIMES, Oct. 9, 1941, at 25. In other states, SCMWA was successful in obtaining formal voluntary recognition, negotiated grievance procedures, shortened workweeks, and other benefits. See *Compacts with C.I.O. Signed by Two Cities*, N.Y. TIMES, Dec. 13, 1937, at 11. Without collective bargaining in New York, SCMWA had to litigate various issues, including restrictions placed on the outside employment of Welfare Department employees. See, e.g., *Natilson v. Hodson*, 35 N.Y.S.2d 537 (App. Div. 1st Dep't 1942), *aff'd*, 47 N.E.2d 442 (N.Y. 1943). By 1946, SCMWA had negotiated eighteen written collective bargaining agreements, and forty-six other less formal agreements, with state and local governments nationwide. In comparison, AFSCME had negotiated ninety-four working agreements nationwide, including forty-two contracts. SPERO, *supra* note 17, at 217–218.

<sup>30</sup> See *City Labor Move Arouses C.I.O. Ire*, N.Y. TIMES, June 29, 1941, at 31.

<sup>31</sup> *Id.*; MAIER, *supra* note 16, at 23–24; BELLUSH & BELLUSH, *supra* note 20, at 7; JOSEPH C. GOULDEN & JERRY WURF: LABOR'S LAST ANGRY MAN 32–33 (1982). In the midst of LaGuardia's bid for reelection in 1941, his opponent William O'Dwyer, then Brooklyn District Attorney, accused him of having transformed the Sanitation Department "into his personal political club" with employees being forced to engage in campaigning during work time. *O'Dwyer Brands LaGuardia Rule Super-Political*, N.Y. TIMES, Oct. 18, 1941, at 1. LaGuardia's actions in the Sanitation Department belie contemporary efforts to portray the Little Flower as a far-sighted oppositionist to public sector employee organizational activities. See *The Public-Union Ascendancy*, WALL ST. J., Feb. 3, 2010, <http://online.wsj.com/article/SB10001424052748703837004575013424060649464.html>. In fact, LaGuardia provided "assistance to municipal employee organizations that were independent of the city's regular Democratic party organizations and wanted to advance the collective interests—as opposed to the individual interests—of their members." SHEFTER, *supra* note 19, at 33. However, LaGuardia consistently opposed legislative efforts in the New York City Council in 1938, 1942 and 1945 to grant collective bargaining rights to New York City employees. SCHWEPPE, *supra* note 13, at 167–168.

period is highlighted by the changes in the transit labor-management relationship following the public takeover of two private New York City subway lines in 1940.<sup>32</sup> TWU, another CIO affiliate, had been the exclusive incumbent union representing employees in the two private subway lines, which were the subject of a public takeover and merger with a municipally-owned subway line.<sup>33</sup> Despite extensive lobbying efforts in Albany, TWU was unable to obtain provisions in the merger legislation to mandate continued recognition and the right to collective negotiations following unification.<sup>34</sup>

TWU was a party to contracts with the two private companies at the time that ownership transferred to the New York City Board of Transportation ("Board of Transportation"), a public entity technically distinct from New York City government.<sup>35</sup> The contracts were scheduled to expire over a year after unification.<sup>36</sup> Although Mayor LaGuardia agreed not to reduce the negotiated wages and benefits contained in the contracts, he refused to honor the contract provision granting TWU exclusive representation of the transit employees.<sup>37</sup> LaGuardia also refused to negotiate with TWU for a successor agreement, but did agree to meet and confer with TWU and any other transit employee organization about terms and conditions of employment. In addition, he agreed to the establishment of a grievance procedure and the right to be represented by an employee organization. LaGuardia's refusal to recognize and negotiate with TWU was reflective of his ambivalence to public sector unionism, which was tied to his belief that the civil service system provided public employees with all necessary employment rights and protections. While LaGuardia did not

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<sup>32</sup> FREEMAN, IN TRANSIT, *supra* note 13, at 191–92.

<sup>33</sup> *Id.* Prior to unification, the TWU had won a significant legal battle when the New York Court of Appeals upheld the legality of the union shop clause in TWU's negotiated contract with the private companies. See *Williams v. Quill*, 12 N.E.2d 547, 551 (N.Y. 1938), *appeal dismissed*, 303 U.S. 621 (1938).

<sup>34</sup> FREEMAN, IN TRANSIT, *supra* note 13, at 186–90.

<sup>35</sup> *Id.* at 200; SLATER, *supra* note 21, at 132.

<sup>36</sup> FREEMAN, IN TRANSIT, *supra* note 13, at 200; SLATER, *supra* note 21, at 132.

<sup>37</sup> FREEMAN, IN TRANSIT, *supra* note 13, at 197–200; see also Edward Sussna, *Collective Bargaining on the New York City Transit System, 1940–1957*, 11 INDUS. & LAB. REL. REV. 518, 520 (1958). At an October 1941 public rally with 20,000 attendants, held at Madison Square Garden, LaGuardia was attacked for his refusal to engage in collective bargaining with TWU following unification. *20,000 Back Union in Transit Dispute*, N.Y. TIMES, May 22, 1941, at 1. During his unsuccessful 1941 campaign to deprive LaGuardia of a third term as mayor, District Attorney O'Dwyer announced at a labor rally his support for extending collective bargaining rights to public employees. *O'Dwyer Pledges Labor Fair Deal*, N.Y. TIMES, Oct. 29, 1941, at 15.

oppose non-exclusive employee organization representation, he viewed such representation as being limited to allowing employees to collectively petition and confer with management.<sup>38</sup>

Consistent with LaGuardia's promise, in November 1941 the Board of Transportation established a formal employee grievance procedure for transit employees that included the right to non-exclusive employee organization representation.<sup>39</sup> In Parts IV, V, and VII, *infra*, it will be demonstrated that New York State and New York City subsequently established similar formalized grievance procedures, with the right to representation, for their respective employees.

The establishment of public sector grievance procedures, with the right to employee organization representation, was an important preliminary step toward the development of public sector collective negotiations in New York. Eventually, New York public employees were granted an enforceable legal right to join and participate in employee organizations, rights analogous to those granted to private sector employees under the NLRA and the SLRA.<sup>40</sup> When collective bargaining rights for public employees were granted, New York borrowed, as modified, certain concepts and procedures from private sector law including card check. This article turns next to the application of card check certification under the original NLRA and the SLRA.

### III. THE CARD CHECK CERTIFICATION EXPERIENCE UNDER THE NLRA AND THE SLRA

Prior to the enactment of the NLRA in 1935, private sector recognition and collective bargaining were the results of strikes, threatened strikes, and boycotts.<sup>41</sup> The NLRA, sponsored by New York Senator Robert F. Wagner, granted private sector employees, employed by companies engaged in interstate commerce, the right

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<sup>38</sup> See Sussna, *supra* note 37, at 520; FREEMAN, IN TRANSIT, *supra* note 13, at 216–17; BELLUSH & BELLUSH, *supra* note 20, at 17; SLATER, *supra* note 21, at 132–33. A declaratory judgment action by the City against the TWU, aimed at resolving the issue of whether a union shop in the public sector was lawful, failed to result in a determination on the merits. See *City of N.Y. v. Transp. Workers of Am.*, 28 N.Y.S.2d 290, 290 (Sup. Ct. N.Y. Cnty. 1941).

<sup>39</sup> FREEMAN, IN TRANSIT, *supra* note 13, at 221–23, 242.

<sup>40</sup> National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2000)); New York State Labor Relations Act, N.Y. LAB. LAW §§ 700–718 (McKinney 2002).

<sup>41</sup> Joel Dillard & Jennifer Dillard, *Fetishizing the Electoral Process: The National Labor Relations Board's Problematic Embrace of Electoral Formalism*, 6 SEATTLE J. FOR SOC. JUST. 819, 828 (2007).



to organize and bargain collectively through representatives of their own choosing.<sup>42</sup>

During the debate over EFCA's card check proposal, there has been little attention paid to the fact that, as originally enacted, section 9(c) of the NLRA granted the National Labor Relations Board ("NLRB") broad discretion during an administrative investigation into a question concerning representation to certify a union as the result of a secret ballot election or through non-electoral means.<sup>43</sup> In 1937, the New York Legislature granted SLRB the same broad discretion when administering the SLRA, New York's private sector collective bargaining law.<sup>44</sup> As will be demonstrated later in this article, the statutory grant of administrative discretion in the use of card check was later incorporated into the 1958 New York City collective bargaining Executive Order, the Taylor Law, and NYCCBL.

Although section 9(c) of the NLRA, as originally enacted, required the NLRB to conduct an investigatory hearing, the use of an election mechanism to determine the majority status of a union was discretionary. The purpose of an election, when ordered, was "only a preliminary determination of fact."<sup>45</sup>

Specifically, section 9(c) of the NLRA stated:

Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, *or utilize any other suitable method to ascertain such representatives.*<sup>46</sup>

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<sup>42</sup> *Id.* at 829–33; Jonathan Fox Harris, Comment, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 N.Y. CITY L. REV. 107, 110–112 (2009).

<sup>43</sup> *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 706–07 (1945); Dillard & Dillard, *supra* note 41, at 831–833; Ida Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 INDUS. & LAB. REL. REV. 371, 372 (1958) [hereinafter Klaus, *Taft-Hartley Experiment*].

<sup>44</sup> REPORT OF NEW YORK STATE LABOR RELATIONS BOARD FOR THE PERIOD FROM JULY 1, 1937 TO DECEMBER 31, 1939 1–2 (1940) [hereinafter SLRB 1939 REPORT]. Joseph A. Padway, *Report of the New York State Labor Relations Board, July 1, 1937 to December 31, 1939*, 54 HARV. L. REV. 720 (1941).

<sup>45</sup> *Millis*, 325 U.S. at 707.

<sup>46</sup> National Labor Relations Act of 1935, § 9(c), Pub. L. No. 74-198, 49 Stat. 449, 453

For a short period under the NLRA, the NLRB applied its statutory discretion and administratively certified unions based upon non-electoral evidence of majority status including card check. The history of the NLRB's practices during this period is well described by James A. Gross:

Until July of 1939, the Board regularly certified unions as exclusive bargaining representatives without conducting a representation election. In 1938 and 1939 approximately thirty-one percent of the unions certified by the Board were certified that way. The Board in such cases used a variety of means to determine that a majority of those in an appropriate unit had designated a particular labor organization: signed authorization cards, membership applications, petitions signed by a majority of the employees, affidavits of membership signed by a majority of the employees, signatures on a strikers' roll at union headquarters of employees receiving union strike benefits, testimony at a hearing which was not disputed by an employee, company, or labor organization, testimony at a hearing by a majority of the employees appearing in person, and participation of a majority of the employees in a strike

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(amended 1947) (emphasis added). See Dillard & Dillard, *supra* note 41, at 831–32 n.69; Stephen E. Abraham, *How the Taft-Hartley Hindered Unions*, 12 HOFSTRA LAB. L.J. 1, 9 (1994). In drafting the SLRA, Labor Law § 705.3, the New York Legislature included a very similar provision permitting SLRB to “conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing)” as part of an investigation into questions of representation. State Labor Relations Act, N.Y. LAB. LAW § 705.3 (McKinney 2002). From its inception, SLRB interpreted Labor Law § 705.3 as granting it the discretion to utilize two alternative methods for determining majority status: a secret ballot election or “a comparison between signatures on union authorization, application or membership cards and authentic signatures of employees appearing on payroll lists or receipts, or on other documents.” SLRB 1939 REPORT, *supra* note 44, at 117. SLRB issued its first certification without an election on August 31, 1937 in a representation case filed by a CIO-affiliated labor organization seeking to represent a unit of salesmen, stock clerks, and porters employed by a men's clothing company. Crawford Clothes, Inc., 1 N.Y. S.L.R.B. 6 (1937). During the hearing before SLRB Board Members John D. Moore and Paul M. Herzog, the petitioning union presented membership and authorization cards, along with authenticating testimony by an organizer regarding the showing of interest. *Id.* at 7. Prior to the certification, SLRB compared the signatures on the authorization cards with signed salary vouchers and concluded that they were identical. *Id.*; see also Bloomingdale Bros., Inc., 1 N.Y. S.L.R.B. 895, 899 (1938) (the determination to hold an election or a card check is “indeed a practical one, and the Act contemplates that different methods for making the determination will be employed by the Board in different cases. The Act itself has as its preliminary purpose the protection of the principles and practices of collective bargaining. The Board, in determining a question or controversy as to representation, necessarily will employ the method best designed to further the principles and practices of collective bargaining.”).

called by the labor organization.<sup>47</sup>

In July 1939, the NLRB, in a swift and summary manner, abandoned the use of its statutory discretion to certify unions without an election.<sup>48</sup> In that month, the agency issued a series of 2-1 decisions concluding in each case that the policies of the NLRA would be best effectuated if the question of representation was resolved by a secret ballot election.<sup>49</sup>

In *Cudahy Packing Co.*,<sup>50</sup> the NLRB faced conflicting claims by two unions seeking to represent a bargaining unit of 157 employees in a Denver meatpacking plant. The representation petition was filed by a CIO affiliate, but an unaffiliated rival union intervened claiming that it represented the employees at issue. At the NLRB representation hearing, the CIO affiliate introduced 147 membership cards signed by bargaining unit members, and a more recent supplemental petition signed by 141 unit employees. The unaffiliated union introduced a petition signed by forty-three unit employees into evidence, designating it as their bargaining agent. Faced with valid but conflicting showings of support by two rival unions, and demands by the employer and the unaffiliated union for an election, the NLRB in *Cudahy Packing* ordered an election, concluding that the bargaining relationship “will be more satisfactory from the beginning if the doubt and disagreement of the parties regarding the wishes of the employees is, as far as possible, eliminated.”<sup>51</sup> In dissent, Board Member Edwin S. Smith objected to the scheduling of an election because the CIO affiliate had submitted evidence demonstrating majority support for its designation as the bargaining agent.<sup>52</sup> Smith also noted that the NLRB’s prior policy of certifying without an election was “to facilitate prompt collective bargaining in cases where the fact of majority adherence to a particular labor organization is made amply clear at a hearing at which all sides are free to advance their

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<sup>47</sup> JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937–1947* 20 (1981) (citations omitted).

<sup>48</sup> Louis Stark, *Labor Board Quits Card Certification*, N.Y. TIMES, July 14, 1939, at 5.

<sup>49</sup> See *Cudahy Packing Co.*, 13 N.L.R.B. 526, 531 (1939); see also *Armour & Co.*, 13 N.L.R.B. 567 (1939); *Alpena Garment Co.*, 13 N.L.R.B. 720 (1939); *Armour & Co. of Del.*, 13 N.L.R.B. 1143 (1939). In the same year, SLRB modified, but did not abandon, the use of card check. Under its new approach, secret ballot elections became the predominate means for determining majority status unless all parties consented to a card check. SLRB 1939 REPORT, *supra* note 44, at 117–18; see also KURT L. HANSLOWE, *PROCEDURES AND POLICIES OF THE NEW YORK STATE LABOR RELATIONS BOARD* 97, 99 (1964).

<sup>50</sup> *Cudahy Packing*, 13 N.L.R.B. at 528–29.

<sup>51</sup> *Id.* at 531.

<sup>52</sup> *Cudahy Packing Co.*, 13 N.L.R.B. 526, 533 (1939) (Smith, J., dissenting).

claims.”<sup>53</sup>

On the same day that *Cudahy Packing* was decided, the NLRB issued *Armour & Co.*,<sup>54</sup> with another dissent by Board Member Smith, directing an election in a case involving employees in an Oklahoma meatpacking plant. Although there was no conflicting evidence about the level of support for the petitioning union, following the company’s objection to a certification without an election, the NLRB directed an election aimed at dissipating the employer’s doubts about the union’s level of support, and thereby enhancing collective bargaining:

Although in the past we have certified representatives without an election upon a showing of the sort made by the record, we are persuaded by our experience that, under the circumstances of this case, any negotiations entered into pursuant to a determination of representatives by the Board will be more satisfactory if all disagreement between the parties regarding the wishes of the employee has been, as far as possible, eliminated.<sup>55</sup>

In *Alpena Garment Co.*,<sup>56</sup> the NLRB ordered an election despite the undisputed testimony of a handwriting expert that verified the legitimacy of signatures on the union membership cards by comparing each signature with the signature on the employee’s cancelled paycheck. The expert’s testimony established that over sixty-seven percent of unit employees supported the union.<sup>57</sup>

In a fourth case, decided a few weeks later,<sup>58</sup> the NLRB ordered, with Board Member Smith dissenting again, an election based upon a discrepancy between the named petitioner, Local 347, and the union organizing committee designated in the showing of majority support.<sup>59</sup>

Over the next decade, the NLRB relied upon this precedent as the foundation for a policy and practice of directing elections whenever an employer or rival union disputed the level of support for the petitioning union, regardless of the testimony and/or documentary evidence in the administrative record.<sup>60</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Armour*, 13 N.L.R.B. at 573–74.

<sup>55</sup> *Id.* at 572.

<sup>56</sup> *Alpena Garment Co.*, 13 N.L.R.B. 724, 726 (1939).

<sup>57</sup> *Id.* at 724.

<sup>58</sup> *Armour & Co. of Del.*, 13 N.L.R.B. 1143, 1149–50 (1939).

<sup>59</sup> *Id.* at 1149.

<sup>60</sup> *See, e.g.*, *Chrysler Motor Parts Corp.*, 55 N.L.R.B. 709 n.10 (1944); *A. Sartorius & Co.*, 40 N.L.R.B. 107, 121 n.32 (1942).

Scholars have attributed this precipitous 1939 NLRB policy change under section 9(c) of the NLRA to the agency's reaction to the multitude of attacks and proposed legislation it was facing at the time.<sup>61</sup> These attacks and criticisms came from employers, legislators, and the AFL, which, in particular, alleged that there was an agency bias favoring the CIO.<sup>62</sup> In shifting its administrative policy, the NLRB did not reference any findings of fact which demonstrated that showings of support were being obtained through coercion, deceit, or fraud. However, the agency was well aware of employer hostility to the certification without an election procedure, as well as employer allegations of union coercion. The timing of the NLRB's policy change, along with the lack of empirical evidence to support its administrative policy choice, supports the conclusion that the change was fundamentally an act of administrative self-protection aimed at appeasing critics. Even when presented with expert testimony, as in *Alpena Garment Co.*,<sup>63</sup> the NLRB refused to accept the legitimacy of employee choice, as reflected in the verified documentation submitted in support of the representation petition.<sup>64</sup> This NLRB administrative policy remained in effect until section 9 of the NLRA was substantially amended by Congress after World War II.

The historical legacy of the NLRB's 1939 dramatic decision to discontinue applying its administrative discretion, under section 9(c) of the NLRA, to issue card check certifications has influenced

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<sup>61</sup> GROSS, *supra* note 47, at 20; Dillard & Dillard, *supra* note 41, at 834–35. In contrast, SLRB's decision to modify its card check policy in 1939 was not caused by attacks upon that agency. At that time, SLRB was "the subject of little unfavorable comment by employers or by the New York State Federation of Labor (AFL), and it has frequently been praised by the State Industrial Council (CIO). More important, it has won the public approbation of a legislative committee appointed to investigate it." Walter P. Arenwald & Donald M. Landay, *Representation Problems Under the New York State Labor Relations Act*, 8 U. CHI. L. REV. 471, 472 (1941); Padway, *supra*, note 44, at 720 ("The description and analysis of the organization, policy, and work of the [SLRB], as contained in this Report, manifest a painstaking, practical, and realistic administration of the Act."). Like the NLRB, however, the substantive rationale for SLRB's policy shift is difficult to discern. In that year, it issued certifications without an election despite objections from the company. *See, e.g.*, Whitehall Improvement Corp., 2 N.Y. S.L.R.B. 513 (1939); Saks & Co., 2 N.Y. S.L.R.B. 614 (1939). In other cases, however, it ordered an election for various reasons: the turnover rate of employees; the age of the showing of interest; and conflicting evidence with respect to employee choice. *See, e.g.*, Dr. H.F. McChesney (Adelphi Hosp.), 2 N.Y. S.L.R.B. 504 (1939); M.P.H. Inc. (Madison Park Hosp.), 2 N.Y. S.L.R.B. 506 (1939); Savemore Markets, Inc., 2 N.Y. S.L.R.B. 614 (1939).

<sup>62</sup> CRAIG PHELAN, WILLIAM GREEN: BIOGRAPHY OF A LABOR LEADER 151–52 (1989); STEVEN FRASER, LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR 350 (1991).

<sup>63</sup> *Alpena Garment Co.*, 13 N.L.R.B. 720 (1939).

<sup>64</sup> *See* John Logan, *Representatives of Their Own Choosing?: Certification, Elections, and Employer Free Speech, 1935–1959*, 23 Seattle U. L. Rev. 549, 551–53 (2000).

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the EFCA debate. As we will see in Part XI, *infra*, under section 2(a) of EFCA, the NLRB would be obligated to certify a union without an election whenever there is a showing of majority support in an unrepresented workplace. In contrast, some EFCA critics have referenced the NLRB's earlier abandonment of its discretion without analyzing the historical circumstances causing that change, or acknowledging that the NLRB did not set forth any specific findings of fact to justify its sudden policy shift in 1939.

The article next turns to another important intersection point between the public and private sectors: the 1947 federal and state legislative response to the nationwide wave of strikes following the end of World War II.

#### IV. THE CONDON-WADLIN AND TAFT-HARTLEY ACTS

Following World War II, with the end of labor's no-strike pledge, there was a large nationwide resurgence of strikes in the private and public sectors. The scope and nature of these strikes led to the enactment of legislation in New York, the Condon-Wadlin Act, imposing statutory penalties on public employees for participating in strikes. It also led to the enactment of the Federal Labor Management Relations Act of 1947 ("Taft-Hartley"),<sup>65</sup> over the veto of President Harry S. Truman, which contained substantial amendments to the NLRA, including the virtual elimination of the NLRB's statutory discretion to certify unions without an election.

In 1946 and 1947, New York experienced strikes involving public employees in Rochester, Yonkers, and Buffalo, along with threatened strikes by the TWU in New York City. In Rochester, a general strike took place in May 1946, with both public and private sector employees participating. The strike had its genesis in the city's retaliatory abolition of five hundred municipal positions held by employees who supported an AFSCME organizing drive. Rochester's retaliatory actions led to pickets and protests resulting in the arrests of terminated employees and their labor and community supporters. The AFL and CIO labor councils jointly organized the general strike to protest the terminations and

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<sup>65</sup> Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, (codified as amended at 29 U.S.C. §§ 159(e), 188 (2006)). The historical intersection between private and public sector strikes is well-described by Joseph A. McCartin. See Joseph A. McCartin, *Unexpected Convergence: Values, Assumptions, and the Right to Strike in Public and Private Sectors, 1945-2005*, 57 BUFF. L. REV. 727 (2009).

arrests.<sup>66</sup> The intervention of State mediators, sent by Governor Thomas E. Dewey, resulted in the resolution of the strike. Under the terms of the settlement, the terminated employees were reinstated, the criminal charges were withdrawn, and Rochester acknowledged the general right of city employees to join employee organizations of their choosing. The strike, however, did not result in voluntary recognition or collective bargaining, but municipal officials did agree to meet with union representatives over workplace issues.<sup>67</sup> As will be illustrated in Part XI, *infra*, it took another fifteen years before AFSCME obtained exclusive collective bargaining rights for Rochester employees through a card check.

In May 1946, hundreds of Yonkers Department of Public Works employees participated in a one-day strike over wages and vacation benefits, organized by the United Public Workers of America (“UPWA”).<sup>68</sup> A second threatened strike in October resulted in Yonkers agreeing to grant UPWA preferential standing in representing employees, to establish a grievance procedure, and to discuss the establishment of a dues deduction check-off procedure.<sup>69</sup>

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<sup>66</sup> *Rochester Unions Urge Wide Strike*, N.Y. TIMES, May 21, 1946, at 24; *Rochester Faces a General Strike*, N.Y. TIMES, May 27, 1946, at 4; Warren Moscow, *Services Restored; Compromise Effected by Mediators Sent by Dewey*, N.Y. TIMES, May 29, 1946, at 24; SPERO, *supra* note 17, at 10, 221–22; JONATHAN GARLOCK & LINDA H. DONAHUE, *ALL THESE YEARS OF EFFORT: 150 YEARS OF ROCHESTER’S CENTRAL LABOR COUNCILS 66–67* (2005).

<sup>67</sup> Warren Moscow, *Thousands Return to Rochester Jobs*, N.Y. TIMES, May 30, 1946, at 2.

<sup>68</sup> *Public Workers Strike in Yonkers*, N.Y. TIMES, May 17, 1946, at 17. Three weeks before, at its founding convention in Atlantic City, UPWA called for the enactment of legislation granting all government employees the same collective bargaining rights that are granted under the NLRA. *New Union Urges Wider Labor Law*, N.Y. TIMES, Apr. 26, 1946, at 17. UPWA was formed by the CIO through a merger of its two public sector affiliates, SCMWA and the United Federal Workers of America, with a combined national membership of over 108,000. SPERO, *supra* note 17, at 198. Although the constitution adopted at its founding convention emphasized lobbying and negotiations as the organization’s primary tools for obtaining improved wages and working conditions, UPWA created a procedure permitting locals to obtain a strike authorization from the UPWA president. A. H. Raskin, *New Union Urges AFL Units Join CIO*, N.Y. TIMES, Apr. 27, 1946, at 11; O’Neill, *supra* note 18, at 7–8. This UPWA constitutional provision precipitated the inclusion in a federal appropriations bill, a prohibition against paying the salary of a federal employee who was a member of an organization that advocated the right to strike. SPERO, *supra*, note 17, at 28. The UPWA constitution also contained an explicit prohibition against discrimination based upon race, gender, creed, religion, and political beliefs. Opposition to discrimination was an important and notable element of the agendas of both SCMWA and UPWA. MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY 28–30* (2003). African-Americans were hired as organizers and held major leadership posts in both organizations. Ewart Guinier, *Impact of Unionization on Blacks*, PROC. ACAD. POL. SCI. (UNIONIZATION OF MUN. EMP.), Dec. 1970, at 176. In the midst of the Cold War, UPWA and certain private sector unions were expelled from the CIO as part of a purge of left-wing unions. See ZIEGLER, *supra* note 22, at 288–90; DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 431–45* (1978).

<sup>69</sup> *Yonkers Escapes Public Works Halt*, N.Y. TIMES, Oct. 14, 1946, at 17.

Later that year, TWU made repeated strike threats to shut down New York City's transportation system over three primary issues: the planned sale of two power plants where TWU had strong employee support; retroactive pay increases; and TWU regaining exclusive collective bargaining rights.<sup>70</sup> TWU's tactics succeeded with respect to the first two issues; however, it was unable to obtain restoration of its pre-unification role as exclusive representative. As part of a 1946 agreement to end the TWU strike threat, Mayor O'Dwyer appointed a Special Advisory Committee, headed by State Mediation Board Chairman Arthur S. Meyer, to examine transit working conditions, wages, and labor relations.<sup>71</sup>

On September 9, 1946, the Special Advisory Committee issued a report proposing the creation of a voluntary dues deduction check-off procedure for transit employees, the scheduling of elections to determine the employee organizations to represent the transit employees during future collective negotiations, and advisory arbitration to resolve negotiation disputes.<sup>72</sup> Due to continued concerns over the legality of exclusive public sector representation, the report suggested a form of plural representation by employee organizations, with the scope of such representation being dependent on their level of support demonstrated in an election. These proposals, however, were later rejected by the Board of Transportation.<sup>73</sup>

In direct response to a February 1947 strike vote by members of the Buffalo Teachers Federation ("BTF") over their levels of

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<sup>70</sup> Robert W. Potter, *TWU Yields, Transit Strike Averted*, N.Y. TIMES, Feb. 27, 1946, at 1; Paul Crowell, *4,000 Workers Act*, N.Y. TIMES, Nov. 14, 1946, at 1; FREEMAN, IN TRANSIT, *supra* note 13, at 268–74.

<sup>71</sup> FREEMAN, IN TRANSIT, *supra* note 13, at 270–72; Sussna, *supra* note 37, at 522. During World War II, Meyer served as chairman of the War Labor Board ("WLB") and was a close friend of CIO General Counsel Lee Pressman. Meyer was on the WLB when it issued the famous "Little Steel Formula." GALL, *supra* note 22, at 137–41.

<sup>72</sup> Paul Crowell, *\$18,800,000 Pay Increase Asked for Transit Workers*, N.Y. TIMES, Sept. 2, 1946, at 1.

<sup>73</sup> FREEMAN, IN TRANSIT, *supra* note 13, at 272. CSEA's adverse reaction to the wave of strikes and threatened strikes in 1946 is reflected in the June 1946 editorial by its President Frank L. Tolman in the *State Employee*, CSEA's statewide journal. In his editorial, Tolman reiterated CSEA's strong opposition to strikes and emphasized public sector exceptionalism resulting from the government being the employer. Tolman described New York's Civil Service Law as the "Magna Carta of the Public Employee" and stated that the "Civil Service Law and rules are to the public employee what the labor contract is to the private employee with the difference that the Civil Service Law cannot be amended except by law, and the Civil Service rules cannot be changed except by action of the Civil Service Commission appointed by the Governor." Frank L. Tolman, *That Strike Problem*, 15 ST. EMP. 181, 190 (1946), available at [http://library.albany.edu/speccoll/findaids/eresources/csea/The-State-Employee\\_1946-06.pdf](http://library.albany.edu/speccoll/findaids/eresources/csea/The-State-Employee_1946-06.pdf).



compensation, State Senator William Condon and Assemblyman John Wadlin introduced legislation, later to be known as the Condon-Wadlin Act, to impose strict penalties on public employees who participate in a strike.<sup>74</sup> Despite the pendency of the proposed legislation, the unaffiliated BTF proceeded with a week-long strike involving 2400 Buffalo teachers.<sup>75</sup> The strike was opposed by a rival AFL affiliate, the Buffalo Teachers Union, Local 377.<sup>76</sup> It ended in early March 1947 only after Buffalo agreed to increase the salaries for all city employees and teachers in the upcoming annual budget.<sup>77</sup>

Three weeks after the end of the Buffalo teachers' strike, Condon-Wadlin was enacted.<sup>78</sup> The law prohibited public sector strikes and mandated severe individual penalties for public employee strikers. The penalties included automatic termination, a three-year cap on compensation upon reemployment in the public sector, and a five-year probationary period.<sup>79</sup>

The legislation was strongly opposed by organized labor and various employee organizations. Both TWU and UPWA actively lobbied against the bill.<sup>80</sup> CSEA, which rejected the use of strikes as a matter of policy and tactics, opposed the legislation as well.<sup>81</sup>

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<sup>74</sup> Leo Egan, *Bill to Bar Strikes in Civil Jobs Meets Teachers in Albany*, N.Y. TIMES, Feb. 12, 1947, at 1.

<sup>75</sup> Benjamin Fine, *Buffalo Teachers Paralyze Schools in Strike Over Pay*, N.Y. TIMES, Feb. 25, 1947, at 1; Benjamin Fine, *Buffalo Strike Emphasizes the Need for Public to Analyze Teachers Role in Community*, N.Y. TIMES, Mar. 2, 1947, at E11.

<sup>76</sup> *Buffalo Strike Opposed by AFL*, N.Y. TIMES, Feb. 22, 1947, at 28.

<sup>77</sup> *Buffalo Teachers End Their Strike on Pay Raise Offer*, N.Y. TIMES, Mar. 3, 1947, at 1.

<sup>78</sup> Act of Mar. 27, 1947, ch. 391, 1947 N.Y. LAWS 842 (1947); Leo Egan, *Bill to Bar Strikes by Public Workers Goes to Governor*, N.Y. TIMES, Mar. 14, 1947, at 1.

<sup>79</sup> Act of Mar. 27, 1947, ch. 391, 1947 N.Y. LAWS 842. The enactment of Condon-Wadlin was part of a nationwide wave of anti-strike legislation in 1947 aimed at prohibiting and severely punishing public employee strikes. SPERO, *supra* note 17, at 33–36.

<sup>80</sup> Egan, *supra* note 74, at 1; see Legislative Bill Jacket to Act of March 26, 1947, ch. 391, 1947 N.Y. LAWS 842, at 38–39 [hereinafter 1947 Legislative Bill Jacket]; Letter from Saul Mills, Greater N.Y. CIO Counsel Sec'y, to Governor Dewey (March 26, 1947) (criticizing the Legislature's haste in passing a poorly drafted bill, and requesting the Governor to schedule a public hearing).

<sup>81</sup> David M. Schneider, *Executive Order Governing Procedures of Departments and Agencies of New York State for Resolution of Employee Complaints*, 4 INDUS. & LAB. REL. REV. 102, 103–04 (1950). At the time of its opposition to Condon-Wadlin in 1947, CSEA had only recently moved to open its membership to local government employees to counteract aggressive organizing efforts by UPWA and AFSCME. Prior to its June 1946 convention, CSEA's membership was limited to two-thirds of the State's 50,000 employees. *Civil Service Fight Begun at Albany*, N.Y. TIMES, June 26, 1946, at 16. By 1948, CSEA had declared victory over the CIO's decade-long effort at organizing State employees. In explaining the victory, CSEA's counsel John Y. DeGraff emphasized the importance of successful lobbying: "In the ten years since it was organized not a single bill affecting State employees and sponsored by the CIO has ever been enacted." John Y. DeGraff, *High Spots in Ass'n History*

CSEA's Executive Representative, William F. McDonough, described the bill as a "kick in the face for every man and woman who has worked or is working to upbuild the civil service system on every level."<sup>82</sup> As a means of assuaging labor's opposition, New York State Industrial Commissioner Edward Corsi recommended to Governor Dewey that he announce, simultaneously with the signing of the legislation, his intention to establish a uniform grievance procedure which would permit employee organization representation.<sup>83</sup> In his letter, Industrial Commissioner Corsi acknowledged that his suggestion "raises the issue of unionization in public service. But the right to organize is already law in this State and certainly there can be no danger in unionization without the right to strike."<sup>84</sup>

A few months after the enactment of Condon-Wadlin, Congress enacted Taft-Hartley, which substantially amended the NLRA. Among the amendments, Taft-Hartley eliminated the administrative discretion granted under section 9(c) of the NLRA to utilize card check to certify a union,<sup>85</sup> and it added a prohibition

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*Outlined*, MERIT, First Quarter 1948, at 8, 13.

<sup>82</sup> Letter from William F. McDonough (Mar. 11, 1947); 1947 Legislative Bill Jacket, *supra* note 80, at 16.

<sup>83</sup> Letter from Indus. Comm'r Edward Corsi to Governor Thomas E. Dewey (Mar. 13, 1947) [hereinafter Letter from Corsi]; 1947 Legislative Bill Jacket, *supra* note 80, at 22–24. In 1950, following three years of lobbying by CSEA, Governor Dewey issued the Executive Order, *Covering Procedures of Departments and Agencies of New York State for Resolution of Employee Complaints*. The Executive Order established a grievance procedure for state employees with a right to representation consistent with the earlier Corsi recommendation. An original copy of the Executive Order can be found in the Thomas E. Dewey Papers, University of Rochester Library, Rare Books, Special Collections & Preservation; Douglas Dales, *Governor Sets up Grievance Board*, N.Y. TIMES, Feb. 24, 1950, at 18. Following issuance of the Executive Order, CSEA continued to lobby for legislation that would codify a grievance procedure, and a bill to repeal Condon-Wadlin. *Raise Pay, Repeal 'No-Strike' Act, Employees Ask Platform Makers of Major State Political Parties*, CIV. SERVICE LEADER, Aug. 15, 1950, at 1, available at <http://library.albany.edu/speccoll/findaids/apap015/19500815.pdf>. See also David Lawrence Cole Papers, Taylor Committee Staff Study Paper #8, *Grievance Procedures for Public Employees in New York State and Local Government (1943–1947)* (box 13, folders 8–10 (on file with the Kheel Center for Labor-Management Documentation and Archives, Cornell University Library) [hereinafter David Lawrence Cole Papers] (setting forth the history of de jure grievance procedures in New York in the years following Dewey's Executive Order). From a historical perspective, the Dewey Executive Order was a major development in New York's public sector labor law, confirming the centrality of lobbying as an essential tool in public sector employee organization advocacy. As a matter of historical contrast, General Motors agreed to a similar grievance procedure with union representation only as part of the terms of the agreement ending the 1936–1937 sit-down strikes in Flint, Michigan. ZIEGLER, *supra* note 22, at 50–52.

<sup>84</sup> Letter from Corsi, *supra*, note 83, at 124.

<sup>85</sup> As Sam Estreicher has pointed out, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597–98 (1969), supports the conclusion that the NLRB continues to have the remedial power to certify a union, based upon a card check, when an employer has violated section 8(a)(5) of the

against strikes by federal government employees.<sup>86</sup>

In Part X, *infra*, the article will demonstrate that the ineffectiveness of Condon-Wadlin in deterring New York public sector strikes led to the enactment of the Taylor Law in 1967, which granted public sector collective bargaining rights throughout New York State, and made card check certification an explicit statutory preference. In addition, it will be shown in Part IX, *infra*, that eleven years after the enactment of Taft-Hartley, New York City Mayor Robert F. Wagner, Jr., adopted the recommendation of former NLRB Solicitor Ida Klaus to include language, similar to the original section 9(c) of the NLRA, in a municipal collective bargaining executive order, which granted city officials the authority to certify an employee organization based upon a card check. Like many other aspects of New York's rich history, the decision by New York City to embrace card check in the 1950s has received little scholarly attention. Nevertheless, that municipal history provides important lessons for the current national debate over card check.

#### V. CARD CHECK PROPOSED IN NEW YORK CITY PRELIMINARY REPORT ON LABOR RELATIONS

The process leading to New York's adoption of card check began with the 1953 election of New York City Mayor Robert F. Wagner, Jr., the son of Senator Wagner, the primary sponsor of the NLRA in 1935. During his successful mayoral campaign, Wagner promised that he would grant collective bargaining rights, equivalent to those guaranteed under the NLRA, to New York City's over 140,000 employees.<sup>87</sup> Wagner's mayoral campaign was strongly supported

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NLRA by refusing to voluntarily recognize a union after being presented with authorization cards from a majority of the employees. For a survey of NLRB precedent in this area, see *Refusal to Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387 (1966).

<sup>86</sup> See Labor Management Relations Act of 1947, § 9(h), Pub. L. No. 80-101, 61 Stat. 136. Unlike Taft-Hartley, the New York Legislature did not amend the SLRA to eliminate SLRB's administrative discretion to use card check as a means for resolving representation issues. Over five decades after Taft-Hartley, the New York Legislature, with the support of Governor George E. Pataki, amended New York's Labor Law to make card check the preferred means for determining employee choice in New York's private sector. See *infra* Part XIII.

<sup>87</sup> Following his victory over UPWA's Ewart Guinier and other candidates in the 1949 election for Manhattan Borough President, Wagner created a formal grievance procedure for employees in the Borough President's office, along with a right to representation. *Wagner Sets up Grievance Plan for Employees in His Jurisdiction*, N.Y. TIMES, May 8, 1950, at 8; BIONDI, *supra* note 68, at 215. In 1951, Wagner proposed a local law to require the establishment of a grievance procedure within all City departments and a citywide grievance

by organized labor.<sup>88</sup> Consistent with his cautious and deliberative style, however, final action on Wagner's promise did not take place until 1958, following exhaustive research, issuance of numerous reports and monographs, the holding of public hearings, and his successful race for reelection.<sup>89</sup>

Three months after Wagner's inauguration in 1954, New York City Commissioner of Labor Joseph O'Grady announced that his department had begun research aimed at formulating a plan for granting collective bargaining rights to municipal employees, and for the establishment of a grievance procedure. Deputy Commissioner Daniel Kornblum was assigned by Commissioner O'Grady to analyze the relevant issues, including the method for determining the level of support for employee organizations under a collective bargaining system.

Daniel Kornblum was not a stranger to labor law and

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appeals board. The proposal was made in response to an announcement by Queens City Council Member, Hugh Quinn, of the creation of a labor committee to assist in the preparation of a local law to create a collective bargaining program for New York City employees. *Progress is Made Toward Labor Act*, N.Y. TIMES, Oct. 9, 1951, at 22. A few months later, in January 1952, Council Members Quinn and Stanley M. Isaacs introduced a bipartisan bill in the City Council to grant New York City employees the right to join employee organizations and the right to bargain collectively. Included in the proposed legislation were prohibitions against retaliation for engaging in protected employee organization activities, and employer domination of, or interference with, an employee organization. In addition, it proposed the creation of an eight-member New York City Labor Relations Board to resolve labor-management disputes and disciplinary cases. However, the bill did not include a procedural mechanism for determining employee representational choice. The City Council did not enact the Quinn-Isaacs bill. Proceedings of the New York City Council, Bill No. 760 (Jan. 9, 1952); Charles G. Bennett, *Council Bill Asks Police, Fire Unions*, N.Y. TIMES, Jan. 10, 1952, at 1.

<sup>88</sup> James A. Hagerty, *Wagner's Election Record Forecast by Aides*, N.Y. TIMES, Nov. 2, 1953, at 1; FREEMAN, IN TRANSIT, *supra* note 13, at 325; BELLUSH & BELLUSH, *supra* note 20, at 63–64. According to an account by AFSCME's Jerry Wurf, Wagner's 1953 campaign commitment was the result of questioning by Wurf at an AFSCME leadership and shop steward meeting. GOULDEN & WURF, *supra* note 31, at 52–53. By this time, the Fraternal Order of Police, the Fire Firefighters Association, and AFSCME had each established a collective bargaining relationship with the City of Philadelphia. See Harriet F. Berger, *The Grievance Process in the Philadelphia Public Service*, 13 INDUS. & LAB. REL. REV. 568, 568–80 (1960); Lennox L. Moak, *The Philadelphia Experience*, PROC. ACAD. POL. SCI. (UNIONIZATION MUN. EMP.), Dec. 1970, at 124–25.

<sup>89</sup> See JACK NEWFIELD & PAUL DUBRUL, *THE ABUSE OF POWER: THE PERMANENT GOVERNMENT AND THE FALL OF NEW YORK* 141–42 (1977) (describing Wagner as a decent, reasonable, and cautious chief executive, but criticizing him for overreliance on the endless study of problems, resulting in unnecessary delays in implementing solutions); see also ROGER STARR, *THE RISE AND FALL OF NEW YORK CITY* 20 (1985) (“[Wagner] had developed immense patience, which friends who were committed to the same political goals as his own frequently criticized as sloth or impassivity. They were quite wrong. Wagner instinctively distinguished those events that would shape themselves from those that required prompt intervention.”).

representation issues. He had participated in the drafting of the SLRA, and had held high-level positions with SLRB and the New York City Division of Labor Relations.<sup>90</sup> As the former SLRB General Counsel, Kornblum had direct personal knowledge of SLRB's practices, experiences, and precedent regarding the use of card check in resolving representation disputes in New York's private sector. During his research on behalf of the Wagner Administration, Kornblum also examined the approaches taken by other jurisdictions, including the procedures utilized in ascertaining the level of support of an employee organization.<sup>91</sup>

In June 1954, O'Grady submitted a twenty-seven page report drafted by Kornblum to Mayor Wagner, entitled *Preliminary Report on Labor Relations in the Municipal Service*.<sup>92</sup> The *Preliminary Report on Labor Relations* reviewed various topics, including the right to organize and be represented by an employee organization. As an interim measure, it proposed that Mayor Wagner establish a uniform citywide grievance procedure and departmental labor-management committees, pending the completion of further study and analysis of the issues related to public sector labor relations. O'Grady attached a proposed *Interim Order on the Conduct of Relations Between the City of New York and its Employees* to the report.

Among the issues discussed in the *Preliminary Report on Labor Relations* was the continuation of the City's practice of plural, de facto recognition of employee organizations.<sup>93</sup> The report acknowledged that the City lacked standards for determining the extent of employee support for a particular employee organization. As a result of this lack of standards, employee organizations were being treated equally, regardless of their respective level of support. While conceding that non-standardized recognition of multiple organizations may work in the handling of grievances, the report

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<sup>90</sup> *City Labor Aide Quits*, N.Y. TIMES, Mar. 15, 1955, at 31; Carter B. Horsley, *Daniel Kornblum, Labor Arbitrator*, N.Y. TIMES, Sept. 10, 1979, at C20. Later, Kornblum was appointed by Governor W. Averell Harriman to a committee examining corrupt practices in labor-management relations. The committee, which also included Joseph R. Crowley, Clyde W. Summers, and Edward Corsi, issued an interim report focusing on union financial practices and the fiduciary responsibilities of union officers. INTERIM REPORT OF THE GOVERNOR'S COMMITTEE ON IMPROPER LABOR AND MANAGEMENT PRACTICES, reprinted in 12 INDUS. & LAB. REL. REV. 259, 259-78 (1959).

<sup>91</sup> Stanley Levey, *Labor Act Slated for City Workers*, N.Y. TIMES, Mar. 2, 1954, at 19.

<sup>92</sup> See DEP'T OF LABOR OF THE CITY OF N.Y., PRELIMINARY REPORT ON LABOR RELATIONS IN THE MUNICIPAL SERVICE (1954) [hereinafter PRELIMINARY REPORT ON LABOR RELATIONS]; Ida Klaus Papers, *supra* note 25, box 12.

<sup>93</sup> PRELIMINARY REPORT ON LABOR RELATIONS, *supra* note 92, at 13-14.

expressed concerns that the lack of standards might be problematic in the practical functioning of the proposed labor-management committees.

The *Preliminary Report on Labor Relations* examined the procedures that the City may consider in determining the representative status of employee organizations in a system of sole or plural representation. Significantly, it concluded that secret ballot elections were unnecessary and unwise because of workplace disruptions resulting from representation campaign activities. In proposing non-electoral means for determining employee choice, the report did not present it as a necessary ameliorative procedure aimed at countering managerial opposition to employee associational activities.<sup>94</sup> Rather, the report cited the experiences in other cities where the measure of employee choice was determined by the number of authorization cards on file with the employer's payroll department for the deduction of dues to a particular employee organization. In addition, the report discussed the practical benefits of utilizing dues deduction authorization: it is "a much more convenient and less disruptive method for dues' collection from the employees who consent to it."<sup>95</sup> In support of establishing a dues deduction authorization program, the report referenced the successful use of the procedure in the New York City transit system.<sup>96</sup> As we will see in Part IX, *infra*, the first

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<sup>94</sup> *Id.* at 14–15. As will be seen in Part X, *infra*, CSEA and the New York State Teachers' Association utilized the same rationale when they advocated in favor of card check before the Taylor Committee in 1966. Similarly, the 1994 report by the Dunlop Commission, appointed during the Clinton Administration to reexamine and propose changes to federal labor law, concluded that card check constitutes a constructive method for building trust between an employer and union by avoiding the public and private expense associated with conducting a representation election. DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, FINAL REPORT 42, available at [http://digitalcommons.ilr.cornell.edu/key\\_workplace/2/](http://digitalcommons.ilr.cornell.edu/key_workplace/2/). In contrast, Benjamin Sachs treats the EFCA card check proposal as an asymmetrical-correcting altering rule that is responsive to concerted managerial opposition to union organizing activities. Sachs, *supra*, note 4, at 657–58, 660, 682.

<sup>95</sup> PRELIMINARY REPORT ON LABOR RELATIONS, *supra* note 92, at 16–17.

<sup>96</sup> *Id.* In 1948, the Board of Transportation established the voluntary dues deduction check-off system for TWU and fourteen other employee organizations representing 35,500 transit workers. Dues deduction check-off was a major victory for TWU which had been seeking it since transit unification eight years before. Sussna, *supra* note 37, at 522. At the time of the 1948 announcement, it was anticipated that UPWA and other employee organizations would be seeking a similar program for employees in mayoral agencies. Paul Crowell, *Transit Unions Win Dues Check-Off*, N.Y. TIMES, June 12, 1948, at 17. However, UPWA leaders were in the midst of simultaneously leading citywide protests against Welfare Commissioner Hilliard's policies and attacks, as well as resisting a congressional investigation into their ideological and political affiliations. Russell Porter, *53 Welfare Aides Punished for Defying Hilliard's Orders*, N.Y. TIMES, Sept. 17, 1948, at 15; Russell Porter, *CIO Union Pickets Welfare Centers*, N.Y. TIMES, Sept. 18, 1948, at 19; Stanley Levey, *2d Union*

certification of a collective bargaining representative for City employees was issued based upon active voluntary dues deduction authorizations.

#### VI. NEW YORK CITY TRANSIT REPRESENTATION ELECTIONS AND COLLECTIVE BARGAINING

While the Wagner Administration continued its study of the issues outlined in the *Preliminary Report on Labor Relations*, the first public sector representation elections were conducted for New York City transit workers. In May 1954, the *New York City Transit Fact-Finding Committee Report* to Mayor Wagner recommended that representation issues within NYCTA, created in 1953 to replace the Board of Transportation,<sup>97</sup> be determined by card checks or by the holding of secret ballot elections supervised by an impartial organization.<sup>98</sup> Following pressure from Mayor Wagner, NYCTA agreed upon representation elections in ten bargaining units under the auspices of the American Arbitration Association, and to negotiate with the employee organization which won each unit election.<sup>99</sup> TWU won all but two of the unit elections; an AFL affiliate, the Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America ("Amalgamated"), was elected in the other two units.<sup>100</sup>

Following the representation election, NYCTA's negotiations with the TWU and Amalgamated resulted in a two year contract, effective July 1, 1954. Article VIII of the contract restored the exclusive employee organizational representation rights to TWU, lost in the 1940 transit unification, and granted similar rights to

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*Official Defies Committee*, N.Y. TIMES, Oct. 1, 1948, at 12; DANIEL J. WALKOWITZ, WORKING WITH CLASS: SOCIAL WORKERS AND THE POLITICS OF MIDDLE-CLASS IDENTITY 193-94 (1999); MARK MCCOLLOCH, WHITE COLLAR WORKERS IN TRANSITION: THE BOOM YEARS, 1940-1970 75-76 (1983).

<sup>97</sup> New York City Transit Authority Act, ch. 200, 1953 N.Y. LAWS 745 (amending N.Y. PUB. AUTH. LAW §§ 1800-1821).

<sup>98</sup> The New York City Transit Authority Fact-Finding Committee was composed of Daily News Labor Editor Jack K. Turcott, Attorney George Faunce Jr., and Chairman and President of U.S. Industries, Inc., John I. Snyder Jr. *Fact-Finders Ask Transit Pay Rise*, N.Y. TIMES, May 18, 1954, at 13; N.Y. CITY DEPT OF LABOR, SERIAL NO. LR 4, THE ASCERTAINMENT OF REPRESENTATIVE STATUS FOR ORGANIZATIONS OF PUBLIC EMPLOYEES 8 (May 1955); Ida Klaus Papers, *supra* note 25, box 13.

<sup>99</sup> Stanley Levey, *Union Vote Is Set As Transit Board Alters Its Stand*, N.Y. TIMES, June 22, 1954, at 17; FREEMAN, IN TRANSIT, *supra* note 13, at 326; MAIER, *supra* note 16, at 34.

<sup>100</sup> Civil Serv. Forum v. N.Y. City Transit Auth., 163 N.Y.S.2d 476, 479, *aff'd*, 150 N.E.2d 705 (N.Y. 1958).

Amalgamated for the other two units.<sup>101</sup> Consistent with the exclusivity granted by the contract, NYCTA no longer permitted other employee organizations to represent employees in grievances and it refused to discuss modifying working conditions with those other employee organizations.<sup>102</sup> When the agreement was challenged by the Civil Service Forum, the exclusivity granted to TWU and Amalgamated to represent employees under the grievance procedure was upheld.<sup>103</sup>

## VII. INTERIM ORDER AND FURTHER STUDY OF CARD CHECK AND COLLECTIVE BARGAINING

On July 21, 1954, Mayor Wagner issued the Interim Order that had been proposed by the Department of Labor in the *Preliminary Report on Labor Relations*.<sup>104</sup> The Interim Order proclaimed, as a matter of municipal policy, the right of employees in mayoral agencies and departments “to self-organization, to form, join or assist bona fide organization of their own choosing concerned with the protection of their interests as employees of the City and shall have the right also to refrain from any or all of such activities.”<sup>105</sup>

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<sup>101</sup> *Id.* at 479–80; Leonard Ingalls, *Quill Union Wins 2-Year Contract with Transit Unit*, N.Y. TIMES, July 9, 1954, at 1; FREEMAN, IN TRANSIT, *supra* note 13, at 327.

<sup>102</sup> *Civil Serv. Forum*, 163 N.Y.S.2d at 480.

<sup>103</sup> *Id.* at 481–83.

<sup>104</sup> *City's Labor Gets Right to Organize*, N.Y. TIMES, July 22, 1954, at 25.

<sup>105</sup> DEP'T OF LABOR OF THE CITY OF N.Y., *Suggested Interim Order on the Conduct of Relations Between the City of New York and its Employees*, in PRELIMINARY REPORT ON THE LABOR RELATIONS IN THE MUNICIPAL SERVICE 29, § 3 (1954) [hereinafter *Interim Order*]. The Interim Order excluded employee organizations determined to be ideologically motivated and it empowered the Commissioner of Investigations to investigate any suspect employee organization. *Interim Order, supra*, at 29, § 4; *City's Labor Gets Right to Organize, supra* note 104. The exclusion of employee organizations with ideologically-based analyses and relationships was primarily aimed at UPWA, and its former activists, which had previously represented New York City welfare, sanitation, teacher, and hospital employees. See JOSHUA B. FREEMAN, *WORKING CLASS NEW YORK: LIFE AND LABOR SINCE WORLD WAR II* 84–87 (2000) [hereinafter FREEMAN, *WORKING CLASS*]. Six years before the Interim Order, the Commissioner of Investigations issued a report critical of UPWA's aggressive tactics within the Welfare Department. See Paul Crowell, *Mayor Bars Union from Interfering*, N.Y. TIMES, June 5, 1948, at 1; *Murtagh Soon to End 'Communist' Inquiry*, N.Y. TIMES, May 16, 1948, at 20. In 1950, the Teachers Union, a UPWA local, was barred from any official dealings with the New York City Board of Education, and prohibited from holding meetings in Board of Education buildings. Murray Illson, *Teacher Union Ban is Voted by Board as it Hires Lawyer*, N.Y. TIMES, June 2, 1950, at 1; *City Imposes Ban on Teachers Union*, N.Y. TIMES, Sept. 7, 1941, at 14. By 1954, UPWA had been expelled from the CIO, subjected to congressional investigation, disbanded, and had its national leader, Abram Flaxer, convicted of contempt of Congress. *Union Head Is Convicted of Congress*, N.Y. TIMES, Mar. 25, 1953, at 20; see also *Flaxer v. United States*, 358 U.S. 147 (1958) (overturning the conviction of UPWA leader Flaxer for his refusal to produce a list containing the names and addresses of all UPWA



In addition, it expressly prohibited discrimination against an employee for participating in or being represented by an employee organization.<sup>106</sup>

Employees covered by the Interim Order were entitled to employee organization representation in pursuing grievances, proposing changes to their working conditions, and in participating in departmental labor-management committees which were to be established by October 1954.<sup>107</sup> The Interim Order created a four-step grievance procedure, ending with the Commissioner of Labor, and it directed each department and agency to establish rules of procedure to permit grievances over “claimed violation, misinterpretation or inequitable application of the existing policy, rules and regulations applicable to the Department or Agency.”<sup>108</sup>

After issuance of the Interim Order, Wagner hired Ida Klaus as counsel to the New York City Department of Labor. Klaus’s primary responsibility was to supervise the completion of the City’s study of the issues related to establishing a municipal collective bargaining system.<sup>109</sup> Miss Klaus was one of the first female graduates of Columbia Law School and an early female pioneer in American labor law. From 1937 until her 1954 municipal appointment, Klaus worked for the NLRB, first as a review attorney, and later as the agency’s Solicitor.<sup>110</sup> As an NLRB review attorney, she was responsible for drafting decisions for NLRB Board members in unfair labor practices and representation cases.<sup>111</sup>

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members throughout the country for a Senate Committee). UPWA leaders Ewart Guinier, Alfred Bernstein, and Arthur Stein are discussed in books written by their respective progeny. See THAI JONES, *A RADICAL LINE* 91–119 (2004) (discussing UPWA leader Arthur Stein); LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* 62–67 (2003) (discussing UPWA leader Ewart Guinier); CARL BERNSTEIN, *LOYALTIES: A SON’S MEMOIR* 65–68 (1989) (discussing UPWA leader Alfred Bernstein).

<sup>106</sup> *Interim Order*, *supra* note 105, at 34–35, § 7.

<sup>107</sup> *Id.* at 28–34, §§ 2, 5, 6.

<sup>108</sup> *Id.* at 31–32, § 5.

<sup>109</sup> MAIER, *supra* note 16, at 45.

<sup>110</sup> Nick Ravo, *Ida Klaus, 94, Labor Lawyer for U.S. and New York, Dies*, N.Y. TIMES, May 20, 1999, at B10. During the Kennedy Administration, Klaus was a consultant to the Task Force on Employee Management Relations in the Federal Service, which drafted the 1962 Federal Executive Order 10988 granting representation rights to federal employees. President John F. Kennedy, *Employee-Management Cooperation in the Federal Service*, 15 INDUS. & LAB REL. REV. 548, 548 (1962). Subsequently, she served as the Director of Staff Relations for the New York City Board of Education, as a member of the New York State Public Employment Relations Board for eight years, and as an arbitrator. Ravo, *supra*, at B10.

<sup>111</sup> Electronic Transcript, Oral Interview by Debra E. Bernhardt with Ida Klaus, *New Yorkers at Work Oral History Collection* (Mar. 10, 1981) at 20–23, New York University’s Tamiment Library/Robert F. Wagner Labor Archives, Elmer Holmes Bobst Library

During her federal tenure, Klaus witnessed the NLRB's abandonment of its discretion under section 9(c) of the NLRA to issue certifications without an election, and the 1947 amendment removing such administrative discretion from the statute.<sup>112</sup>

Commencing in September 1954, Klaus and other Department of Labor employees studied the literature on public sector labor relations, examined New York City employee programs, and analyzed the labor relations experience in other jurisdictions.<sup>113</sup> Klaus purposefully sought, within an administrative context, to conduct a study of the issues in a manner equivalent to legislative deliberations in advance of the drafting and enactment of legislation.<sup>114</sup>

As part of the research project, the Department of Labor sent questionnaires to 240 public employers inquiring into their labor relations practices; 55 public employers responded.<sup>115</sup> Klaus's intellectual vigor, single-mindedness, and thoroughness resulted in the Department of Labor issuing in 1955, scholarly monographs written by Klaus, or under her supervision, on core labor relations subjects integral to a collective bargaining program, including the means for determining majority support.<sup>116</sup>

In addition, a series of public hearings were held at City Hall as a means of soliciting comments on the content of the monographs.<sup>117</sup> Two hundred people attended the first hearing in March 1955,

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[hereinafter Klaus Oral History].

<sup>112</sup> *Id.* at 27, 39.

<sup>113</sup> *Id.* at 34, 36–37.

<sup>114</sup> *Id.* at 33, 38.

<sup>115</sup> CITY OF N.Y. DEP'T OF LABOR, SERIAL NO. LR 3, EXTENT OF RECOGNITION AND BARGAINING UNIT IN PUBLIC EMPLOYMENT 7 (May 1955); Ida Klaus Papers, *supra* note 25, box 13.

<sup>116</sup> Klaus Oral History, *supra* note 111, at 34–35. Among the other professionals working with Klaus on the monographs were New York City Department of Labor Economist Sidney W. Salzberg and Mediator Estelle M. Karpf. See CITY OF N.Y. DEP'T OF LABOR, SERIAL NO. LR 1, THE RIGHT OF PUBLIC EMPLOYEES TO ORGANIZE—IN THEORY AND IN PRACTICE (Mar. 1955); CITY OF N.Y. DEP'T OF LABOR, SERIAL NO. LR 2, RECOGNITION OF ORGANIZED GROUPS OF PUBLIC EMPLOYEES (Apr. 1955), *supra* note 25; EXTENT OF RECOGNITION AND BARGAINING UNIT IN PUBLIC EMPLOYMENT, *supra* note 115; CITY OF N.Y. DEP'T OF LABOR, SERIAL NO. LR 4, THE ASCERTAINMENT OF REPRESENTATIVE STATUS FOR ORGANIZATIONS OF PUBLIC EMPLOYEES (May 1955); CITY OF N.Y. DEP'T OF LABOR, SERIAL NO. LR 5, ORGANIZATION AND RECOGNITION OF SUPERVISORS IN PUBLIC EMPLOYMENT (August 1955); CITY OF N.Y. DEP'T OF LABOR, SERIAL NO. LR 6, THE COLLECTIVE BARGAINING PROCESS IN PUBLIC EMPLOYMENT (Oct. 1955); CITY OF N.Y. DEP'T OF LABOR, SERIAL NO. LR 7, GOVERNMENT AS EMPLOYER-PARTICIPANT IN THE COLLECTIVE DEALING PROCESS (Oct. 1955); CITY OF N.Y. DEP'T OF LABOR, SERIAL NO. LR 8, THE COLLECTIVE AGREEMENT IN PUBLIC EMPLOYMENT (Nov. 1955); Ida Klaus Papers, *supra* note 25.

<sup>117</sup> *Hearings on City Labor Code*, N.Y. TIMES, Feb. 26, 1955, at 32; Klaus Oral History, *supra*, note 111, at 38–39.

including representatives from City departments, employee organizations, and civic groups.<sup>118</sup> During that hearing, AFSCME and CIO representatives called for a uniform system of municipal collective bargaining and the repeal of Condon-Wadlin.<sup>119</sup> The Civil Service Forum, in contrast, explicitly advocated for a continuation of the representational model that limited employee organizational activities to lobbying and petitioning government for improved working conditions. It also supported the maintenance of the prohibition against public sector strikes.<sup>120</sup> At the second hearing, AFSCME advocated for the use of “reliable means” to determine majority support for an employee organization within a unit, including the use of dues deduction authorizations. It also urged the adoption of supplemental criteria for determining whether an employee organization is entitled to certification.<sup>121</sup>

In May 1955, the Department of Labor issued its third and fourth monographs which discussed the scope of recognition and collective bargaining, and the methodology for determining the representative status of employee organizations.<sup>122</sup> The third monograph reported the following results from answers received to the questionnaires

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<sup>118</sup> *Employees of City Ask Union Rights*, N.Y. TIMES, Mar. 26, 1955, at 8; CITY OF N.Y. DEP'T OF LABOR, REPORT ON A PROGRAM OF LABOR RELATIONS FOR NEW YORK CITY EMPLOYEES 26–57 (1957) (on file with the City of N.Y. Dep't of Records & Info. Servs., Mun. Archives, Wagner Departmental Files, box 825, folder 66) [hereinafter REPORT ON LABOR RELATIONS PROGRAM].

<sup>119</sup> REPORT ON LABOR RELATIONS PROGRAM, *supra* note 118, at 27–29.

<sup>120</sup> *Id.* at 29–30.

<sup>121</sup> Under AFSCME's proposed eligibility criteria, an organization had to be free of discriminatory practices and management domination, to define itself as a labor union, to be devoted to trade unionism and to not pursue subversive goals. REPORT ON LABOR RELATIONS PROGRAM, *supra* note 118, at 37. The last proposed criterion was tied to the repeated attacks by AFSCME's Jerry Wurf on Teamsters Local 237 for hiring Jack Bigel, Frank Herbst, Elliot Godoff, and Al Katz, who had been formerly active in UPWA. Columbia University Libraries Oral History Research Office, Notable New Yorkers, Oral History Transcript of Moe Foner 128 (Mar. 28, 1985), available at [http://www.columbia.edu/cu/lweb/digital/collections/nny/fonerm/transcripts/fonerm\\_1\\_5\\_124.html](http://www.columbia.edu/cu/lweb/digital/collections/nny/fonerm/transcripts/fonerm_1_5_124.html); BELLUSH & BELLUSH, *supra* note 20, at 38–40. Wurf's attacks led the Wagner Administration to conduct an investigation of Bigel and Herbst. As a result of that investigation, Wagner was advised by Department of Labor Commissioner Seitel to condition dues deduction authorization on union officials signing loyalty oaths. *Wagner May Confer on 2 Linked to Reds*, N.Y. TIMES, Dec. 11, 1956, at 43. Less than twenty years later, Bigel played a prominent role, as a pension consultant to AFSCME and other municipal unions, in helping to resolve New York City's fiscal crisis. FREEMAN, WORKING CLASS, *supra* note 105, at 268–69. At the height of his prominence during the fiscal crisis, Bigel openly and unapologetically discussed his UPWA activism and the impact of the CIO's purge of left-wing unions. Lee Dembart, *Jack Bigel Holds Many Keys to City's Mansions*, N.Y. TIMES, Dec. 11, 1976, at 20.

<sup>122</sup> EXTENT OF RECOGNITION AND BARGAINING UNIT IN PUBLIC EMPLOYMENT, *supra* note 115; THE ASCERTAINMENT OF REPRESENTATIVE STATUS FOR ORGANIZATIONS OF PUBLIC EMPLOYEES, *supra* note 116.

sent to other jurisdictions about the scope of representation granted: 61.9% recognized employee organizations as the exclusive representative for all unit employees; 26.20% extended exclusive recognition to represent only members of the employee organization in the unit; and 11.3% granted plural recognition to employee organizations.<sup>123</sup>

The fourth monograph explored the means for determining majority status of an employee organization, which it described as a “topic of practical rather than philosophical concern,” aimed at establishing an orderly and economical process.<sup>124</sup> The monograph’s dispassionate comparison of the alternative means for determining majority status is quite dissimilar from the character and quality of the arguments over the EFCA card check proposal. Relying upon policy statements and questionnaire responses from other jurisdictions, the monograph described the advantages and disadvantages of three procedures for determining majority status: secret-ballot elections, dues deduction authorizations, and card check.

Questionnaire responses from twenty-two other jurisdictions demonstrated that nine used elections, nine used dues deduction authorizations, one used card check, and two used elections in situations when card check or dues deduction authorizations were questioned. In the monograph’s discussion of card check, the authors discussed the NLRB experience under section 9(c) of the NLRA, but did not discuss the rationale for the NLRB’s 1939 policy change.<sup>125</sup> Significantly, the monograph did not report any facts that would suggest that the use of non-electoral means to determine majority status encouraged fraud, coercion, or abuse by employee organizations, or that such a procedure was necessitated by

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<sup>123</sup> EXTENT OF RECOGNITION AND BARGAINING UNIT IN PUBLIC EMPLOYMENT, *supra* note 116, at 7–8. The monograph recognized, however, that many municipal legal authorities, including the New York City Corporation Counsel, continued to maintain that the adoption of an exclusive representation model for negotiations would be unlawful because it would subvert the civil service merit system. As a counterpoint to those opinions, the monograph referenced the recommendations by the 1946 and 1954 transit labor relations reports for the adoption of the exclusive representation model as the best means for avoiding bitter disputes between rival employee organizations and the need for continuity in the processing of grievances.

<sup>124</sup> THE ASCERTAINMENT OF REPRESENTATIVE STATUS FOR ORGANIZATIONS OF PUBLIC EMPLOYEES, *supra* note 116, at 1.

<sup>125</sup> THE ASCERTAINMENT OF REPRESENTATIVE STATUS FOR ORGANIZATIONS OF PUBLIC EMPLOYEES, *supra* note 116, at 8–9. Furthermore, it does not appear that Klaus and her colleagues solicited the NLRB for relevant history with respect to the issues associated with card check.

anticipated anti-union conduct by public sector management.

At the next public hearing, the Government and Civil Employees Organizing Committee (“GCEOC”), a CIO affiliate,<sup>126</sup> proposed dues deduction authorization as the controlling evidence to be utilized for determining majority status, unless there is a dispute over its “conclusive reliability.”<sup>127</sup> Thus, GCEOC joined AFSCME in favoring the use of dues deduction check-off as the primary means for determining employee choice.

In proposing dues deduction authorization, it appears that GCEOC and AFSCME intended for certification or recognition to be granted by the City based upon the respective number of active dues deduction authorizations already on file as part of a voluntary program. The advocacy by CIO and AFL affiliates for an open, non-electoral certification process based upon dues deduction undercuts Benjamin Sachs’s suggestion that all card check regimes are inherently tied with clandestine organizing campaigns.<sup>128</sup> As noted in Part III, *supra*, voluntary dues deduction was described in the June 1954 *Preliminary Report on Labor Relations* as constituting the easiest to administer, and the most accurate reflection of employee support.

Neither GCEOC nor AFSCME expressed concerns about the potential for anti-union retaliation against employees based upon the City’s knowledge of employee support stemming from dues deduction authorizations. Their support for a dues deduction methodology was probably influenced by practical financial considerations, the existence of statutory disciplinary protections, and a strong expectation that the Wagner Administration would strictly enforce the prohibition against anti-union retaliation set forth in the Interim Order.

Ultimately, New York City implemented a dues deduction authorization system for its employees over a year before it adopted a collective bargaining system. While Ida Klaus was preparing the Department of Labor’s final report for Mayor Wagner, the New York

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<sup>126</sup> The CIO created GCEOC in 1950 to challenge UPWA’s representation of public sector employees following the CIO’s excommunication of UPWA. *C.I.O. to Recruit in Public Agencies*, N.Y. TIMES, Feb. 26, 1950, at 66; ZIEGLER, *supra* note 22, at 290. In 1956, GCEOC was accreted into AFSCME, following the merger of the AFL and CIO. BELLUSH & BELLUSH, *supra* note 20, at 3.

<sup>127</sup> REPORT ON LABOR RELATIONS PROGRAM, *supra* note 118, at 45.

<sup>128</sup> Sachs, *supra* note 4, at 670–72. Clandestine campaigns today in the private sector may be necessary because at-will employees, by definition, do not have rights similar to the statutory and constitutional rights granted New York public sector employees. See WELLINGTON & WINTER, *supra* note 11, at 16.

City Board of Estimate approved the establishment of a uniform system for automatic employee organization dues deductions, which became effective in January 1957.<sup>129</sup> At the time Mayor Wagner issued his 1958 Executive Order granting collective bargaining rights to City employees, there were already 40,000 voluntary dues deduction authorizations in effect.<sup>130</sup>

#### VIII. PARKS DEPARTMENT REPRESENTATION ELECTION

The City's research, writing, and public hearings did not take place in a vacuum. During this period, there was an active and widely publicized labor dispute developing in the New York City Parks Department. The dispute stemmed directly from the refusal of Department of Parks Commissioner Robert S. Moses to abide by the 1954 Interim Order. At the time that the Interim Order was issued, Moses had already served as Parks Commissioner for two decades, and held power and control over multiple other State and local authorities and agencies. However, as Robert A. Caro demonstrates in his masterful biography of Moses, the labor dispute in the Parks Department developed just as Moses's powerful bureaucratic empire was beginning to crumble.<sup>131</sup>

After issuance of the Interim Order, AFSCME chose the Parks Department as its first organizing target to test the newly granted legal rights. At the time, AFSCME had less than 800 dues paying members in New York City.<sup>132</sup> The Parks Department was chosen by AFSCME as its target for two strategic reasons: the level of support it had among the 5000 department employees; and the working conditions resulting from Moses's notorious autocratic

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<sup>129</sup> See Rules and Regulations Payroll Check-Off of Employee Organization Dues, N.Y. City Bd. of Estimate, August 30, 1956, Cal. #61. Two years later, the New York Legislature amended the General Municipal Law to authorize municipalities and other political subdivisions to permit dues deduction authorizations for employee organizations under certain specified conditions. N.Y. GEN. MUN. LAW § 93-b (1956). By 1962, thirty-eight states had established dues deduction authorization procedures for state or local government employees. Arnold S. Zander, *A Union View of Collective Bargaining in the Public Service*, 22 PUB. ADMIN. REV. 7 (1962). In 1967, New York City modified its dues deduction authorization policy by limiting it to employee organizations certified as the exclusive collective bargaining representative for a unit. A legal challenge to the policy change by Teamsters, Local 237 was unsuccessful. *Bauch v. City of New York*, 237 N.E.2d 211 (N.Y. 1968).

<sup>130</sup> *Union Report Asked*, N.Y. TIMES, Dec. 3, 1957, at 63.

<sup>131</sup> See ROBERT A. CARO, *THE POWER BROKER* (1974).

<sup>132</sup> The small size of AFSCME's membership at this time was due, in part, to the loss of the City sanitation employees and other groups, who joined the International Brotherhood of Teamsters.

approach to public administration.<sup>133</sup> Despite the Interim Order, Moses refused to establish a grievance procedure or a departmental labor-management committee, and he refused to recognize or meet with AFSCME representatives.<sup>134</sup> Following a creative and well-publicized AFSCME protest, Mayor Wagner and Department of Labor Commissioner Nelson Seitel intervened, resulting in a rare capitulation by Moses in which he agreed to meet with AFSCME.<sup>135</sup> Within days of Wagner's November 1955 announcement, Moses met with AFSCME representatives and agreed to permit employee organization representation in the Parks Department, and to the scheduling of a January 1956 representation election to be conducted by the Department of Labor.<sup>136</sup>

Based upon the context of the meeting, it is reasonable to presume that the terms of the agreement had already been negotiated directly between the Wagner Administration and AFSCME. The Department of Labor, however, was totally unprepared to conduct a secret-ballot representation election. It therefore had to develop ad hoc election procedures, relying on NLRB rules and practices, for a large decentralized workforce spread throughout the five New York City boroughs.<sup>137</sup>

The administrative experience overseeing the 1955 Parks Department election in a Moses's controlled department is discussed in the Department of Labor's *Report on Labor Relations Program* submitted to Mayor Wagner. The report recommended that a secret ballot election, card check, or a tally of dues deduction authorizations be utilized by the City as alternative evidentiary

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<sup>133</sup> BELLUSH & BELLUSH, *supra* note 20, at 47–53; MAIER, *supra* note 16, at 46. Moses's antipathy for employee organizational activities was not limited to the Parks Department. His efforts, as an ex officio member of the Museum of Natural History's Board of Trustees, to frustrate UPWA's organizing efforts at the Museum led UPWA to call upon Mayor O'Dwyer to terminate Moses from his position as Parks Commissioner. *C.I.O. Union Demands Ouster of Moses*, N.Y. TIMES, May 16, 1946, at 2.

<sup>134</sup> Klaus Oral History, *supra* note 111, at 41–42; BELLUSH & BELLUSH, *supra* note 20, at 55–58; MAIER, *supra* note 16, at 46.

<sup>135</sup> In conjunction with protests and picketing organized by AFSCME, uniformed Parks Department employees were placed in a steel cage on a flatbed truck with a sign stating "Bob Moses Zoo." In addition, Parks Department employees marched on City Hall to the chant of "Which Bob is boss." Klaus Oral History, *supra* note 111, at 41–42; A.H. Raskin, *Tilt With Moses Is Won By Mayor*, N.Y. TIMES, Nov. 4, 1955, at 60; BELLUSH & BELLUSH, *supra* note 20, at 55–58; MAIER, *supra* note 16, at 46; GOULDEN & WURF, *supra* note 31, at 54.

<sup>136</sup> A.H. Raskin, *Friendly Moses Agrees to Union Vote for Park Staff*, N.Y. TIMES, Nov. 8, 1955, at 1; MAIER, *supra* note 16, at 46–47; GOULDEN & WURF, *supra* note 31, at 54–55; FREEMAN, WORKING CLASS, *supra* note 105, at 202–03.

<sup>137</sup> REPORT ON LABOR RELATIONS PROGRAM, *supra* note 118, at 59.

bases for determining majority support.<sup>138</sup>

#### IX. EXECUTIVE ORDER 49 IMPLEMENTS CARD CHECK IN NEW YORK CITY

In June 1957, Department of Labor Commissioner Harold Felix submitted the one hundred-page *Report on Labor Relations Program* to Mayor Wagner, which was authored by Ida Klaus.<sup>139</sup> Commissioner Felix was an experienced labor lawyer and a close friend of Mayor Wagner.<sup>140</sup> At the time of Felix's appointment, Klaus had already completed the final draft of the report, but its formal issuance was delayed for over a year for political reasons.<sup>141</sup> The *Report on Labor Relations Program* presented a summary of the Department of Labor's four years of study. It included an analysis of the pertinent issues, a synopsis of the comments made during the public hearings, and it made specific proposals for the establishment of a municipal collective bargaining process.<sup>142</sup>

The Report proposed that Mayor Wagner issue an executive order, supplanting the Interim Order, creating a collective bargaining system for more than 100,000 City employees, excluding uniformed police and teachers. Under the proposed procedure, employee organizations with majority support would be certified as the exclusive representative for collective bargaining and the processing of grievances in departmental or multi-departmental units of employees. Employee organizations lacking majority support would be permitted to meet and confer with officials about working conditions on notice to the certified employee organization. Individual employees in a unit would also retain the right to process their own grievances.<sup>143</sup>

One of the few employee organizations to express disapproval of the Report's proposals was the Civil Service Forum. It circulated a fourteen-page brochure attacking the proposals as "a blueprint for dictatorship," contending that the civil service system precluded collective negotiations over wages, hours, pensions, and

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<sup>138</sup> *Id.* at 59, 95–96.

<sup>139</sup> Stanley Levey, *Charter Drafted for Union Status of City Workers*, N.Y. TIMES, June 17, 1957, at 1.

<sup>140</sup> *Seitel Aide Gets City Labor Post*, N.Y. TIMES, Jan. 12, 1957, at 17; *City's Labor Specialist, Harold Arthur Felix*, N.Y. TIMES, Mar. 12, 1962, at 18.

<sup>141</sup> Klaus Oral History, *supra* note 111, at 39.

<sup>142</sup> REPORT ON LABOR RELATIONS PROGRAM, *supra* note 118, at 29–30.

<sup>143</sup> *Id.* at 84–86.



vacations.<sup>144</sup>

For determining majority support for an employee organization, the Report proposed that the Department of Labor be granted the discretion to determine employee choice through “a secret ballot election, a representation authorization card check, or a tally of dues check-off authorizations.”<sup>145</sup> While there is no explicit reference in the Report to Klaus’s experience at the NLRB, Stanley Levey of the *New York Times* reported that, in preparing the Report’s proposals, Klaus applied “many of the technical procedures of the Wagner Act and the Taft-Hartley Act to purely municipal labor relations areas.”<sup>146</sup> During a 1981 oral history, Klaus openly acknowledged that her NLRB experience influenced her work on behalf of the City.<sup>147</sup>

In the *Report on Labor Relations Program*, however, Klaus did not reference the NLRB’s 1939 decision in *Cudahy Packing Co.*<sup>148</sup> and its progeny, or the Taft-Hartley amendment to section 9(c) of the NLRA. Based upon the breadth and quality of her research, as well as the importance of the Report, the absence of a discussion of the 1939 NLRB policy change is quite interesting. As noted, Klaus was a former NLRB Solicitor, fully versed in NLRA law and history, who referenced the NLRB’s experience with card check in the fourth monograph. Furthermore, she had published a scholarly article, shortly after the Report was delivered to Wagner, describing the significant changes to the NLRB’s organizational structure imposed by Taft-Hartley.<sup>149</sup> It is reasonable to speculate, at least, that Klaus’s lack of discussion of the NLRB experience with non-electoral certifications in the Report was reflective of her principled disagreement with the NLRB’s administrative choice in 1939.

Although the Report’s proposal for the use of non-electoral means for the certification of an employee organization was discussed in a front page article in the *New York Times*, it did not trigger any known criticism.<sup>150</sup> The general acceptance of the 1957 proposal is

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<sup>144</sup> Charles G. Bennett, *New Labor Code for City Pressed*, N.Y. TIMES, Sept. 29, 1957, at 66.

<sup>145</sup> REPORT ON LABOR RELATIONS PROGRAM, *supra* note 118, at 96.

<sup>146</sup> Levey, *supra* note 139.

<sup>147</sup> Klaus Oral History, *supra* note 111, at 34.

<sup>148</sup> *Cudahy Packing Co.*, 13 N.L.R.B. 526 (1939).

<sup>149</sup> Klaus, *Taft-Hartley Experiment*, *supra* note 43.

<sup>150</sup> The article by Stanley Levey succinctly described the proposal: “The Commissioner of Labor would have full power to make the certification after an election or show of membership cards, dues check-off authorizations or other means.” Levey, *supra* note 139. Another *New York Times* front page story, six months later, which referenced the plan to utilize non-electoral means to certify an employee organization, did not spur any controversy. See A.H. Raskin, *Mayor May Widen Rights of Unions in Civil Service*, Jan. 12, 1958,

strikingly dissimilar to the criticisms of the EFCA card check proposal, which has been described as undemocratic, ripe for abuse, and an unreliable means for accurately determining the choice of unit employees.<sup>151</sup> In contrast to the arguments made during the EFCA debate, at the height of the Cold War card check in New York was accepted as a legitimate, non-coercive, and effective means for determining majority support for an employee organization.

On March 31, 1958, Mayor Wagner issued EO 49 incorporating the Report's proposals.<sup>152</sup> Under EO 49, employees in virtually all New York City mayoral departments and agencies were granted the right to have exclusive representation by an employee organization of their choice for purposes of collective negotiations and the processing of grievances.<sup>153</sup> The Executive Order, however, provided that minority employee organizations, with members in a particular bargaining unit, would retain the right to meet and discuss their views and requests with City officials.<sup>154</sup> EO 49 expressly retained various elements of the Interim Order including: departmental grievance procedures; labor-management committees; the exclusion of uniformed police officers;<sup>155</sup> and the exclusion of ideologically dominated employee organizations.

The phrasing in EO 49 confirms Klaus's reliance on the language from the original NLRA, prior to the Taft-Hartley. The first paragraph of section 3 of EO 49, setting forth the substantive rights of employees to engage in employee organization activities, included

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<http://select.nytimes.com/mem/archive/pdf?res=FB0F16F9355E107B93C1A8178AD85F4C8585F9>.

<sup>151</sup> See Sachs, *supra* note 4, at 669 (citing a speculative scholarly assertion that card check is an inaccurate reflection of employee choice due to the possibility of peer pressure, misunderstandings, and coercion).

<sup>152</sup> Exec. Order No. 49 (Mar. 31, 1958), reprinted in *Labor Relations Program for Employees of the City of New York*, 12 INDUS. & LAB. REL. REV. 371, 618–25 (1959).

<sup>153</sup> A.H. Raskin, *City Workers Get Right to Organize in Union of Choice*, N.Y. TIMES, Apr. 1, 1958, at 1.

<sup>154</sup> Exec. Order No. 49, *supra* note 152, § 3, at 618. This provision was an apparent concession by Mayor Wagner to certain craft unions with members in city departments and agencies. See A.H. Raskin, *Building Crafts Get City Pledge*, N.Y. TIMES, Apr. 7, 1958, at 58.

<sup>155</sup> Despite EO 49's incorporation of the police exclusion from Interim Order section 5, the PBA demanded voluntary recognition from Mayor Wagner. Charles G. Bennett, *Police Group Seeks Recognition to Bargain for City's Patrolmen*, N.Y. TIMES, Aug. 6, 1958, at 1. After Wagner refused the PBA's request, it commenced litigation seeking to compel the establishment of a Police Department grievance procedure. In the litigation, PBA unsuccessfully argued that EO 49 did not explicitly exclude the police from coverage, or in the alternative, that EO 49 was unconstitutional because it denied equal protection to PBA members. *Patrolmen's Benevolent Ass'n of N.Y. v. Wagner*, 187 N.Y.S.2d 809, 812–13 (App. Div. 1959), *aff'd*, 164 N.E.2d 715 (1959), *amended by* 166 N.E.2d 194 (1960), *cert. denied*, 363 U.S. 810 (1960).

identical terminology from section 7 of the NLRA:<sup>156</sup>

Employees of the City of New York *shall have the right to self-organization, to form, join or assist labor organizations for their mutual aid or protection, and to bargain collectively through representatives of their own choosing concerning the terms and conditions of their employment. They shall have the right also to refrain from any or all of such activities.*<sup>157</sup>

Similarly, section 4 of EO 49 borrowed language from the original section 9(c) of the NLRA:

In order to insure the full exercise of the rights granted to the employees of the City of New York in this order, the Department of Labor shall have the authority to resolve questions concerning representation by conducting a *secret-ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees.*<sup>158</sup>

Consistent with the authority granted by EO 49, Commissioner Felix promulgated regulations for the administration of the collective bargaining program, which were issued on June 24, 1958.<sup>159</sup> The regulations permitted employee organizations the option of seeking certification with or without an election. However, that option had to be clearly stated in the employee organization's request for certification. The regulations identified the following forms of evidence that may be submitted in support of a request for certification: membership cards; petitions; authorization cards; designation cards; and dues deduction authorizations.<sup>160</sup> The identity of permissible evidence for a non-electoral certification under the EO 49 regulations was much more specific than the proposed standard for a card check certification under EFCA: "valid authorizations."<sup>161</sup>

After receiving a request for a non-electoral certification, the Department of Labor was required to publish in the *City Record* a notice for comments on the request within ten days. Thereafter, unless information was received establishing good cause for denying the request, the Labor Commissioner was required to certify the

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<sup>156</sup> National Labor Relations Act of 1935, Pub. L. No. 74-198, § 7, 49 Stat. 452 (codified as amended at 29 U.S.C. § 157 (2000)).

<sup>157</sup> Exec. Order No. 49, *supra* note 152, § 3, at 618 (emphasis added).

<sup>158</sup> *Id.* § 4, at 618 (emphasis added).

<sup>159</sup> *Rules for City Unions*, N.Y. TIMES, June 25, 1958, at 21.

<sup>160</sup> Exec. Order No. 49, *supra* note 152, § 1, at 621.

<sup>161</sup> Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2(a)(6) (2009).

requesting employee organization as the exclusive collective bargaining representative if the evidence demonstrated it had majority support within the bargaining unit.<sup>162</sup>

Under the regulations, requests for certification based upon a secret-ballot election had to be supported by at least thirty percent of the employees in a proposed unit. Upon receipt of a request for an election, the Labor Commissioner was obligated to publish in the *City Record* a notice of the filing and permit intervention by other employee organizations that submit a showing of ten percent support in the unit.<sup>163</sup>

One day following issuance of the regulations, the Uniformed Firemen's Association of Greater New York, Local Union No. 94 ("UFA"), filed the first request under EO 49 for a certification without an election for a proposed unit of firefighters. The request was supported by signed membership rolls and authorizations.<sup>164</sup>

The Uniformed Sanitationmen's Association ("USA"), a local of the International Brotherhood of Teamsters, was the second employee organization to seek certification without an election under EO 49, but the first to be certified. Unlike UFA's request, USA sought certification based upon dues deduction authorizations already in effect within the Sanitation Department. Following the required published notice and a determination about the appropriateness of the proposed unit, the Department of Labor, after examining the Sanitation Department payroll records, concluded USA had the support of 9200 of the 9800 employees in the proposed unit based upon dues deduction authorizations on file. Issuance of the first certification under EO 49 was marked by a ceremony at City Hall on August 5, 1958, during which Commissioner Felix handed the certification to USA President John DeLury.<sup>165</sup> The certification process involving USA supported the viewpoint expressed in the Preliminary Report on Labor Relations that union dues deduction authorization provides the most effective

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<sup>162</sup> Exec. Order No. 49, *supra* note 152, § 2(a), (b), at 621.

<sup>163</sup> *Id.* § 3(a), (b), at 621.

<sup>164</sup> Uniformed Firemen's Ass'n Local Union No. 94, 1 NYCDL No. 2 (1958), *available at* [http://archive.citylaw.org/ocb\\_boc/PreOCB/1%20NYCDL%202.pdf](http://archive.citylaw.org/ocb_boc/PreOCB/1%20NYCDL%202.pdf).

<sup>165</sup> Uniformed Sanitationmen's Ass'n, Local 831, 1 NYCDL No. 1, 1-3 (1958), *available at* [http://archive.citylaw.org/ocb\\_boc/PreOCB/1%20NYCDL%201.pdf](http://archive.citylaw.org/ocb_boc/PreOCB/1%20NYCDL%201.pdf); *Teamsters Expect City Recognition*, N.Y. TIMES, Aug. 5, 1958, at 13; Ralph Katz, *City Recognizes Teamster Union*, N.Y. TIMES, Aug. 6, 1958, at 26. As demonstrated in Part II, *supra*, between 1941 and 1946, AFSCME was voluntarily recognized by the LaGuardia Administration as the exclusive representative of Sanitation Department employees for the purpose of resolving workplace issues, but not for collective negotiations.

and efficient means for non-electoral certification.

UFA was the second employee organization to be certified after the Department of Labor compared the signatures on the membership rolls and authorizations submitted by UFA with the original signatures in the Fire Department personnel folders. After comparing the signatures, the Department of Labor certified UFA based upon the documentary evidence establishing that it was supported by over seventy-five percent of the employees in the unit.<sup>166</sup>

Following issuance of EO 49, there was an increase in public sector strikes and threats of strikes as a tool in negotiations. In 1960, in the midst of negotiations over a wage increase, USA organized a two day strike involving over 4000 sanitation employees.<sup>167</sup> Although Sanitation Commissioner Paul R. Screvane announced his intent to discipline the striking employees, he refused to invoke Condon-Wadlin penalties.<sup>168</sup> Two years later, AFSCME led a ten day strike of approximately 2000 police motor vehicle operators over a City wage proposal.<sup>169</sup> In response, Police

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<sup>166</sup> *Firemen's Ass'n*, 1 NYC DL No. 2.

<sup>167</sup> MAIER, *supra* note 16, at 50–51; Laymond Robinson, *Sanitation Union Quits in Protest; Garbage Piles Up*, N.Y. TIMES, July 28, 1960, at 1.

<sup>168</sup> Laymond Robinson, *Sanitation Men Return to Work; Charges Planned on Stoppage*, N.Y. TIMES, July 30, 1960, at 39. As early as 1949, the ineffectiveness of Condon-Wadlin had become evident in the aftermath of an eight-day strike by City of Yonkers Department of Public Works employees. At the conclusion of the strike, Yonkers agreed to rehire the terminated employees, renewed its 1946 promise to create an employee grievance procedure, and reserved the right to penalize any employee found to have violated Condon-Wadlin. A.H. Raskin, *Court Decrees End of Yonkers Strike*, N.Y. TIMES, Mar. 7, 1949, at 1; A.H. Raskin, *Strike in Yonkers Ends in Agreement*, N.Y. TIMES, Mar. 8, 1949, at 1. After conducting a hearing, the Yonkers City Manager determined that some of the employees had violated the anti-strike law. However, his determination was subsequently vacated by a New York appellate court which reasoned that because the employees had participated in a sympathy strike, rather than a strike for better terms and conditions of employment, they “were motivated by an entirely different reason which was innocent of any violation” of the law. *Matter of Bagot v. Peterson*, 95 N.Y.S.2d 500, 501 (App. Div. 2d Dep’t 1950). Similarly, Condon-Wadlin did not deter over 1,200 New York City sanitation workers in 1949 from skipping their work shift in order to participate in a five hour demonstration for improved working conditions and benefits. Arthur Gelb, *Sweepers’ Strike, Laid to Rest, Ended*, N.Y. TIMES, Oct. 18, 1949, at 1. Participants in that job action were not terminated as required by Condon-Wadlin; each was penalized with a fine equivalent to the loss of pay for one to two days of salary depending on whether they pled guilty or not guilty to the disciplinary charge. *1,219 Draw Fines for ‘Sick Strike’*, N.Y. TIMES, Dec. 9, 1949, at 19. In the 1950s, Condon-Wadlin penalties were imposed in response to public sector job actions by hourly employees in the City of Niagara Falls, bus drivers in the Village of Wappingers Falls, and employees in the Oswego Port Authority. David Lawrence Cole Papers, *supra* note 83, Taylor Committee Staff Study Paper #1, *History of the Condon-Wadlin Law and its Application to Public Employees*, box 13, folders 8–10; Peter Kihss, *Strike Could Cost Jobs of Teachers*, N.Y. TIMES, Apr. 10, 1962, at 35.

<sup>169</sup> MAIER, *supra* note 16, at 52; BELLUSH & BELLUSH, *supra* note 20, at 75–78.

Commissioner Murphy invoked Condon-Wadlin penalties against a small number of civilian drivers who had participated in the strike. The invocation of Condon-Wadlin backfired. AFSCME used it as an effective organizing tool to gain additional support for the strike. At a meeting of 200 national and regional union leaders, both Mayor Wagner and Commissioner Murphy were attacked for the latter invoking the anti-strike law.<sup>170</sup> In addition, local politicians sent a joint letter to Mayor Wagner reminding him of his own prior criticism of Condon-Wadlin. The strike ended after Mayor Wagner agreed to refer the negotiations impasse to an advisory interest arbitration panel, which resulted in a favorable award for the drivers.<sup>171</sup>

In August 1962, at Mayor Wagner's request, the New York City Board of Estimate issued a resolution extending EO 49 to 10,000 additional employees working in eleven non-mayoral municipal agencies. At the time of his announcement, Wagner called upon Governor Nelson A. Rockefeller to propose legislation to amend Condon-Wadlin, which Wagner described as "repressive and unworkable."<sup>172</sup> The following year, Wagner issued an executive order memorandum granting collective bargaining rights and a grievance procedure to the police force. Wagner's action constituted a major policy reversal for the City. The prior administration of Mayor Vincent R. Impellitteri had strongly opposed an organizing

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<sup>170</sup> Stanley Levey, *200 Labor Chiefs Ordering Picketing*, N.Y. TIMES, Nov. 30, 1962, at 1; BELLUSH & BELLUSH, *supra* note 20, at 75–79.

<sup>171</sup> BELLUSH & BELLUSH, *supra* note 20, at 77–78.

<sup>172</sup> Leonard Ingalls, *Mayor Proposes Bargaining Right for 10,000 More*, N.Y. TIMES, Aug. 5, 1962, at 53; LEFKOWITZ, PUBLIC SECTOR, *supra* note 12, at 31. The year before, a very different procedure was utilized to determine whether to grant collective bargaining rights to New York City public school teachers, and for determining their employee organization representative. A May 1961 report submitted to the New York City Board of Education by the Commission of Inquiry in Connection with Collective Bargaining, recommended the use of a two-step representational electoral process: a teacher plebiscite on whether they wanted representation, and a subsequent election, if necessary, to determine which employee organization would be their representative. The Commission was composed of George W. Taylor, David L. Cole, Walter Gellhorn, John A. Krout, and Clara Tead. The Commission's report did not discuss the possible use of non-electoral means for determining the teachers' representative choice. This may have been due to the plethora of employee organizations seeking to maintain their representational status on behalf of the teachers. Consistent with the report, a plebiscite was conducted in June 1961, with a majority of the teachers voting in favor of collective bargaining. Thereafter, a December 1961 mail ballot representation election resulted in the United Federation of Teachers ("UFT") being certified as the collective bargaining representative for New York City public school teachers. City of N.Y. Dep't of Records & Info. Servs., Mun. Archives, Bd. of Educ. Files, Series 319, Andrew G. Clauson, Jr. Files (1954–1961); MAIER, *supra* note 16, at 116–18; RICHARD D. KAHLBERG, TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY 46–49 (2007).

effort in the Police Department, stating that the City would not recognize an employee organization even if it won an election to represent the police officers. In August 1951, Police Commissioner George P. Monaghan issued a directive prohibiting police officers from joining “any labor union now in existence or hereafter to be formed” in direct response to the organizing drive. A legal effort seeking to enjoin the implementation of Monaghan’s directive was unsuccessful.<sup>173</sup>

Like EO 49, the executive order memorandum permitted certification based upon an election or by “utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees.” It also permitted certifications to be revoked or extended beyond the one year certification bar.<sup>174</sup> Subsequently, PBA was certified without an election as the exclusive representative for all patrolmen, excluding detectives.<sup>175</sup>

It is difficult to determine the total number of certifications issued without an election during the nine year history of EO 49. We do know, however, that by 1962, the Department of Labor had issued 162 certifications to employee organizations representing an aggregate of less than sixty percent of the eligible municipal employees.<sup>176</sup> By 1967, New York City had 232 bargaining units represented by 129 different employee organizations. There were six separate bargaining units created within the Police Department alone.<sup>177</sup> The large number of certifications issued under EO 49 strongly suggests that many were issued without an election.

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<sup>173</sup> See Stanley Levey, *Police Head, Mayor Cold to Unionizing*, N.Y. TIMES, Aug. 4, 1951, at 28; Stanley Levey, *Monaghan Forbids City’s Policemen to Join Any Union*, N.Y. TIMES, Aug. 8, 1951, at 1; Stanley Levey, *Unions for Policemen a Much-Debated Issue*, N.Y. TIMES, Aug. 19, 1951, at 136; *Butler v. Monaghan*, 106 N.Y.S.2d 861 (N.Y. Sup. Ct. 1951).

<sup>174</sup> Exec. Memorandum from Mayor Robert F. Wagner to Comm’r Michael J. Murphy (March 29, 1963), available at <http://content.cdlib.org/dynaxml/data/28722/4n/bk000401g4n/files/bk000401g4n-FID1.pdf>.

<sup>175</sup> Another employee organization, the Detective Endowment Association (“DEA”), was certified to represent a unit of detectives. PBA successfully negotiated a contract within the one-year certification bar; DEA did not. Following expiration of the one-year certification bar, PBA filed a request to decertify DEA through the holding of an election, which was denied by the Department of Labor. Instead, the period of DEA’s certification was extended by the Department of Labor on the grounds that it was not given an opportunity to negotiate with the city officials. In one of the rare pieces of reported litigation stemming from a certification under EO 49, a lower court judge dismissed PBA’s lawsuit seeking to set aside the extension of DEA’s certification. See *Patrolmen’s Benevolent Ass’n v. McFadden*, 258 N.Y.S.2d 863 (Sup. Ct. N.Y. Cnty. 1965).

<sup>176</sup> Leonard Ingalls, *Mayor Proposes Bargaining Right for 10,000 More*, N.Y. TIMES, Aug. 5, 1962, at 1; LEFKOWITZ, PUBLIC SECTOR, *supra* note 12, at 31.

<sup>177</sup> Anthony C. Russo, *Management’s View of the New York City Experience*, PROC. ACAD. POL. SCI. (UNIONIZATION MUN. EMP.), Dec. 1970, at 82.

The largest representation election conducted under EO 49 was the contentious battle between AFSCME and Teamsters Local 237 over the right to represent a unit of approximately 20,000 hospital employees in the City's twenty-six municipal hospitals.<sup>178</sup> Both employee organizations had been active in organizing and representing hospital employees in the face of hostile hospital administrators.<sup>179</sup> In 1965, Teamsters Local 237 leader William Lewis anticipated winning a contested election of hospital employees when he filed a petition with the Department of Labor. Part of his confidence stemmed from his political calculation that Mayor Wagner would support his employee organization.<sup>180</sup> Following a fierce campaign, both inside and outside of the numerous hospital workplaces, AFSCME won the election with seventy-three percent of the eligible employees voting.<sup>181</sup> Another contested representation election took place in the New York City Welfare Department, a central source of support for the disbanded UPWA.<sup>182</sup> The election resulted in a new unaffiliated employee organization, Social Service Employees Union ("SSEU"), defeating the incumbent AFSCME local as the representative of the primary staff unit.<sup>183</sup>

Over the years, EO 49 has been the subject of criticism from different perspectives. One critic has portrayed it as a labor pacification program aimed at diminishing increased militancy within the municipal workforce by granting the Commissioner of Labor, a Wagner appointee, the authority to certify only favored employee organizations.<sup>184</sup> Other scholars have criticized EO 49 as leading to the politicization of collective bargaining, by permitting Wagner to personally intervene in the certification and negotiations process, thereby resulting in him receiving political support from favored employee organizations. In fact, negotiations under EO 49 generally led only to informal memoranda of understandings between the City and employee organizations, rather than true

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<sup>178</sup> MAIER, *supra* note 16, at 53–56; BELLUSH & BELLUSH, *supra* note 20, at 141–58. Unlike many private sector representation elections today, the sole purpose of the New York City hospital representation election was to determine *which* employee organization would negotiate on behalf of the hospital employees. The election was not viewed “as a contest between management and the union over firm governance.” Sachs, *supra* note 4, at 701.

<sup>179</sup> BELLUSH & BELLUSH, *supra* note 20, at 144–47.

<sup>180</sup> *Id.* at 148.

<sup>181</sup> *Id.* at 153–55.

<sup>182</sup> MAIER, *supra* note 16, at 59–64.

<sup>183</sup> *Id.* at 62–64.

<sup>184</sup> *Id.* at 9, 47–49.



collective bargaining agreements, and were limited to salaries, benefits, promotions, and time and leave rules.<sup>185</sup> Despite labor's own frustrations with the limitations of EO 49, a critic has described the issuance of certifications as the means "to accommodate the organizational successes and traditional alignments of the various civil service unions."<sup>186</sup>

From the outset, EO 49 was intended to be an experimental framework for public sector collective bargaining. In hindsight, it is clear that it had many procedural deficiencies, including the lack of an independent agency to administer the program, the lack of clearly defined uniting standards to avoid the proliferation of bargaining units, and a neutral mechanism for resolving negotiation disputes and improper practices. These flaws were corrected through subsequent studies and the passage of the Taylor Law and NYCCBL in 1967.

Nevertheless, the historical significance and relevance of EO 49 cannot be overlooked. At the time, it granted rights equivalent to section 7 of the NLRA to the largest group of public employees in the United States. In addition, it knowingly rejected the federal public policy choice under the NLRA to abandon card check as an administrative means for determining employee choice. New York City's decision to permit non-electoral certifications was made after careful study of the practices in other jurisdictions, along with its own experiences in conducting representational elections for transit and parks department employees. Despite New York City's nine years of experience under EO 49, scholars and disputants regarding card check today have completely ignored this important municipal experiment in the use of non-electoral representation procedures.

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<sup>185</sup> Horton, *supra* note 16, at 73; MICHAEL MARMO, MORE PROFILE THAN COURAGE: THE NEW YORK CITY TRANSIT STRIKE OF 1966 35 (1990); VINCENT CANNATO, THE UNGOVERNABLE CITY 80 (2002); David Lawrence Cole Papers, *supra* note 83, Taylor Committee Staff Study Paper #7, *Informal Collective Bargaining with Public Employees in the City of New York*, box 13, folder 8-10.

<sup>186</sup> Russo, *supra* note 177, at 82. In addition, Martin Shefter has described the direct political dividends for Wagner resulting from EO 49, which substantially aided his successful campaign for a third term: "The municipal labor relations procedures promulgated by Mayor Wagner, and the way Wagner administered the rules he had drafted, helped the new city employee unions prevail over their rivals. In turn, the unions were prepared to help Wagner when he ran in opposition to the county Democratic machines in 1961." SHEFTER, *supra* note 19, at 74.

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X. DEVELOPMENTS LEADING TO THE ENACTMENT OF THE TAYLOR  
LAW AND NYCCBL

In 1962, the New York Legislature amended the General Municipal Law to require all local governments to join New York State and New York City in establishing formal employee grievance procedures.<sup>187</sup> Among the core standards included in the law was a mandate that local governments grant employees the right to be represented throughout the grievance procedure.<sup>188</sup> As a result of this amendment, virtually all public employers in New York were legally obligated to accept a limited form of representation by employee organizations without a showing of majority support. The codification of this obligation expanded the informal representational role already played by employee organizations in many New York public workplaces.

Following the example of New York City, in September 1962, the Rochester City Council enacted an ordinance granting its municipal employees collective bargaining rights, and establishing a non-electoral process for the selection of a representative.<sup>189</sup> The ordinance authorized the City Manager “to recognize a duly organized union or employee organization as the bargaining agent for an appropriate unit of city employees upon submission to him of satisfactory proof that said union or organization is representative of the unit,” and to enter into a negotiated collective bargaining agreement with respect to wages and other terms and conditions of employment.<sup>190</sup> Unlike EO 49, however, the Rochester local law did not include an election procedure as an alternative means for determining an employee organization’s level of support.

CSEA commenced litigation challenging the constitutionality of the ordinance on the grounds that it lacked standards for determining which employee organization should be recognized, and for determining the appropriate unit. In addition, CSEA alleged that Rochester was applying the ordinance in a discriminatory manner in favor of AFSCME. In support of its claim, CSEA cited to an earlier City Council resolution, which stated that AFSCME had already presented evidence of majority support among the employees and recommended legislation to “limit recognition” to

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<sup>187</sup> N.Y. Gen. Mun. Law § 684 (1962).

<sup>188</sup> N.Y. Gen. Mun. Law § 684(5) (1962).

<sup>189</sup> *Lipsett v. Gillette*, 187 N.E.2d 782 (N.Y. 1962).

<sup>190</sup> *Id.* at 783–84.

that organization.<sup>191</sup> In the litigation, CSEA unsuccessfully sought an injunction against any other employee organization being granted exclusive representation rights, and it sought a mandate granting it an equal opportunity to organize the city employees. During the pendency of the lawsuit, the City Manager recognized AFSCME and they successfully negotiated a collective bargaining agreement.<sup>192</sup> On appeal, the Court of Appeals denied CSEA's request for injunctive relief but concluded that implicit in the City Manager's authority was an obligation to act in a fair and reasonable manner when determining which entity should be recognized. In dicta, the Court of Appeals questioned, however, whether the mere signing of a dues deduction authorization card for AFSCME or CSEA demonstrated an employee's choice of a representative.<sup>193</sup>

Between 1962 and 1967, public sector strikes in New York City continued to grow. In 1965, SSEU and AFSCME led a month-long strike of 7000 Welfare Department employees over the status of various negotiation demands covering wages, work rules, and caseloads. According to one leader, the strike emanated from the inherent flaws in EO 49, which he described as constituting a unilateral measure under mayoral control that denied employee organizations any reasonable means for engaging in effective collective bargaining, and lacked an explicit impasse procedure administered by a neutral agency.<sup>194</sup> The Welfare Department strike was resolved only after a fact-finding panel report led to a contract containing City concessions on numerous subjects. In addition, Mayor Wagner agreed to support the release of union leaders jailed for non-obedience of the injunction against the strike, and to the creation of a tripartite panel under the auspices of the Labor Management Institute of the American Arbitration

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<sup>191</sup> *Id.* at 784.

<sup>192</sup> *Id.* The agreement recognized AFSCME as the bargaining agent for a unit of all City employees with the exception of police, firefighters, and managerial employees. It also included a wage increase of five cents per hour, voluntary dues deduction authorization, and leave for union stewards. See David Lawrence Cole Papers, *supra* note 83, Taylor Committee Staff Study Paper #12, *Collective Bargaining Agreements Made with Public Employees Outside The City of New York*, at 6–8, box 13, folder 8–10.

<sup>193</sup> *Lipsett*, 187 N.E.2d at 783–85. According to one account, AFSCME submitted authorization cards signed by over ninety-five percent of the employees in the Rochester Department of Public Works. See *Central Trades and Labor Council, 1910–1959*, ROCHESTER LAB. COUNCIL HIST.: ORGANIZING, [http://rochesterlabor.org/rlc-history/organizing\\_era3.html](http://rochesterlabor.org/rlc-history/organizing_era3.html).

<sup>194</sup> Testimony of Alan R. Viani, State of N.Y. Governor's Committee on Public Employee Relations Hearing (March 3, 1966) 134–137, 140–141 [hereinafter Taylor Committee Hearing]; David Lawrence Cole Papers, *supra* note 83, box 13, folders 12–14.

Association to review the collective bargaining and impasse procedures under EO 49.<sup>195</sup>

The increase in public sector strikes and threats of strikes in New York resulted in calls for legislation to amend Condon-Wadlin. In response to a 1966 TWU strike, Governor Rockefeller established a Governor's Committee on Public Employee Relations, commonly referred to as the Taylor Committee after its chairman George W. Taylor.<sup>196</sup> The purpose of the Taylor Committee was to develop a legal framework to replace Condon-Wadlin.<sup>197</sup>

At the Taylor Committee's March 4, 1966 public hearing in New York City, CSEA representative Henry Shemin spoke in favor of permitting certifications without an election. At that time, CSEA had a membership of 96,000 state employees and 39,000 local government employees.<sup>198</sup> As a statewide employee organization with a reputation for effective lobbying and a moderate approach to labor relations, CSEA had a good working relationship with the Rockefeller Administration,<sup>199</sup> and a decades-old hegemony over the public sector in many areas outside of New York City.<sup>200</sup> During his presentation, Shemin called for the use of payroll deduction cards and the examination of membership records as the primary means for determining majority status that would "avoid constant labor strife."<sup>201</sup> However, Shemin stated that CSEA did not seek representational exclusivity, following certification or recognition, with respect to the processing of individual or class grievances.<sup>202</sup>

CSEA's motivation in advocating for a non-electoral process to determine majority status should not be confused with principle. Based upon CSEA's substantial membership and presence in jurisdictions outside of New York City, a non-electoral certification process would give it a distinct advantage in becoming the

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<sup>195</sup> Emanuel Perlmutter, *Welfare Strike Ends as 2 Unions Accept Formula*, N.Y. TIMES, Feb. 1, 1965, at 1; MAIER, *supra* note 16, at 62–68; FREEMAN, *WORKING CLASS*, *supra* note 105, at 205–06; BELLUSH & BELLUSH, *supra* note 20, at 163–64.

<sup>196</sup> In addition to Taylor, the Committee was composed of other distinguished labor relations experts: E. Wight Bakke, David L. Cole, John T. Dunlop, and Frederick H. Harbison. Both Taylor and Cole served together on the 1961 Commission of Inquiry in Connection with Collective Bargaining appointed by the New York City Board of Education. See *supra* text accompany note 172.

<sup>197</sup> Martin Arnold, *Court Opens Way to Suits Seeking to Punish T.W.U.*, N.Y. TIMES, Jan. 22, 1966, at 1.

<sup>198</sup> Taylor Committee Hearing, *supra* note 194, at 5–6.

<sup>199</sup> RONALD DONOVAN, *ADMINISTERING THE TAYLOR LAW: PUBLIC EMPLOYEE RELATIONS IN NEW YORK* 47–48 (1990).

<sup>200</sup> LEFKOWITZ, *PUBLIC SECTOR*, *supra* note 12, at 68.

<sup>201</sup> Taylor Committee Hearing, *supra* note 194, at 15, 19–20.

<sup>202</sup> *Id.* at 19.

representative for newly created bargaining units.<sup>203</sup> In addition, notably absent from Shemin's remarks was any mention of CSEA's experience in Rochester four years prior, when it unsuccessfully sought to enjoin that city's use of card check to recognize AFSCME over CSEA.

The New York State Teachers' Association ("NYSTA"), an affiliate of the National Education Association, advocated at the Taylor Committee hearing for a non-electoral certification process based solely upon employee organization membership. NYSTA Executive Secretary Howard Gould testified that such a process would avoid the conflicts and disruptions caused by elections, and thereby avoid "teachers running around the school districts waving flags."<sup>204</sup>

Notably, the rationale presented by both CSEA and NYSTA for card check certification mirrored the one set forth in the City's 1954 *Preliminary Report on Labor Relations*—the avoidance of workplace turbulence tied to a certification election.<sup>205</sup> In the light of the current debate over card check, there is less than a minor historical irony that the proponents for card check before the Taylor Committee were traditional public sector associations, unaffiliated with the AFL-CIO at the time, and known to favor lobbying and cooperative labor relations.

At the same hearing, New York State AFL-CIO President Raymond B. Corbett expressed his organization's support for the certification of an employee organization based solely upon the result of a secret ballot election administered by a new labor relations agency.<sup>206</sup> Similarly, Dr. Irving Kluger, President of the Empire State Federation of Teachers, an AFL-CIO affiliate, advocated for determining majority status based upon an election rather than membership rolls, as proposed by its rival NYSTA. In opposing NYSTA's proposal, Kluger expressed concerns that such a procedure may result in school district employee organizations being dominated by school administrators.<sup>207</sup> Finally, Ernest

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<sup>203</sup> In 1966, there were four public sector collective bargaining relationships in jurisdictions outside of New York City. CSEA represented a unit of Niagara County employees, AFSCME represented municipal employees in the City of Rochester and the City of Lockport, and the Hotel, Motel, Restaurant Employees and Bartenders Union, Local 471, AFL-CIO represented the Rensselaer County Welfare Department employees. All four agreements included dues check-off but were varied in the scope of the unit. David Lawrence Cole Papers, *supra* note 83, Taylor Committee Staff Study Paper #12, *Collective Bargaining Agreements Made with Public Employees Outside the City of New York*.

<sup>204</sup> Taylor Committee Hearing, *supra* note 194, at 199–200.

<sup>205</sup> See *supra* Part III.

<sup>206</sup> Taylor Committee Hearing, *supra* note 194, at 83–84.

<sup>207</sup> *Id.* at 203–04.

Fleischman, an attorney for the United Federation of Teachers and SSEU, expressed his opposition to the use of card check certification in situations where there are competing employee organizations. Among his stated reasons for opposing card check was that individuals join and pay dues to employee organizations for various reasons, and membership is not necessarily equivalent to making a choice for a collective bargaining agent.<sup>208</sup>

Most of the speakers on behalf of labor, including New York State AFL-CIO President Corbett, advocated for a right to strike in New York's public sector. In contrast, CSEA called for Condon-Wadlin to be repealed and replaced with a new, more effective, anti-strike law because "[e]very time a strike of public employees occurs, the dignity of the law and the stature of the government itself are placed in jeopardy and disrepute." In response to a question from Chairman Taylor, Shemin emphasized that CSEA had never engaged in a strike or countenanced a wildcat strike.<sup>209</sup>

A month after the hearing, the Taylor Committee issued its report to Governor Rockefeller.<sup>210</sup> Among its recommendations was the enactment of a law to grant collective bargaining rights to the 600,000 employees of New York State and its political subdivisions.<sup>211</sup> The report contained explicit references to the experiences under EO 49 but did not specifically address the Executive Order's non-electoral certification procedure.<sup>212</sup>

The report recommended the creation of a new independent state agency, the Public Employment Relations Board ("PERB"), with various powers and responsibilities including the certification of employee organizations, the resolution of collective bargaining disputes and impasses, and the enforcement of new penalties for public sector strikes including the suspension of dues deductions privileges.

As part of its report, the Taylor Committee discussed the means

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<sup>208</sup> *Id.* at 247–48.

<sup>209</sup> *Id.* at 8–11. A few months after the Taylor Committee hearing, Shemin was appointed New York City Labor Commissioner by Mayor John V. Lindsay. In October 1966, Shemin became the target of a sit-in and picketing by SSEU over his refusal to order a representation election involving Welfare Department supervisors based upon a technical defect in the wording of the representation petitions. Jacques Nevard, *Social Workers Stage 'Wait-In' in Bid for Jurisdictional Vote*, N.Y. TIMES, Oct. 12, 1966, at 54.

<sup>210</sup> Sydney H. Schanberg, *State Panel Asks for Replacement of Condon-Wadlin*, N.Y. TIMES, Apr. 8, 1966, at 1.

<sup>211</sup> According to the Taylor Committee Report, in 1965 there were 128,322 State employees and 472,028 local government employees in New York State. LEFKOWITZ, PUBLIC SECTOR, *supra* note 12, at 6 n.1.

<sup>212</sup> *Id.* at 67.

for determining the level of support for an employee organization:

The normal procedures used in that case are the presentation of signed petitions, the presentation of membership cards, or dues deduction authorizations. These processes can be invoked if the parties are unable to agree on whether the employees in a particular employee-employer unit wish a particular organization to represent them. In the case of such a dispute, another process, that of an election, is then frequently employed.<sup>213</sup>

However, it did mention the disadvantages of granting a public employer the right to examine the evidence of support.<sup>214</sup> In addition, it emphasized the importance of administrative procedures that would ensure that disputes over representational status be resolved peacefully and without unnecessary acrimony.

Simultaneous with the issuance of the Taylor Committee Report, New York City's tripartite panel issued a report to Mayor John V. Lindsay calling for the creation of a new tripartite Office of Collective Bargaining ("OCB") with responsibilities that would include the certification of employee organizations and the resolution of collective bargaining disputes.<sup>215</sup>

## XI. TAYLOR LAW ESTABLISHES NEW YORK'S PREFERENCE FOR CARD CHECK

### A. *The Taylor Law*

In 1966, following the release of the Taylor Committee Report, a bill was introduced in the New York Senate aimed at codifying the report's proposals. The bill included a proposed certification procedure, similar in nature to the one proposed by CSEA at the Taylor Committee hearing. The proposal, however, was significantly at variance with the NLRA, SLRA, and EO 49 because it mandated the utilization of non-electoral procedures as the preferred means for ascertaining employee choice.

PERB Chairperson Jerome Lefkowitz, who participated in drafting the law, distinctly recalls that the inclusion of this unique certification language was aimed at ensuring CSEA's support for

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<sup>213</sup> *Id.* at 78–79.

<sup>214</sup> *Id.* at 79.

<sup>215</sup> It is doubtful that the timing of the reports was coincidental. Three members of the Taylor Committee were also members of the Labor Management Institute's Advisory Committee: George W. Taylor, David L. Cole, and John T. Dunlop.

the bill. CSEA's support was vital due to the strong opposition from organized labor, especially from New York City-based employee organizations, to the bill's proposed anti-strike provisions.<sup>216</sup>

As Melvin H. Osterman, Jr., counsel to the Taylor Committee, has described, the New York Legislature debated numerous versions of the proposed law before it was enacted in 1967. During this period, the proposed law was the subject of substantial criticism from many segments of organized labor primarily over the inclusion of new penalties for public sector strikes:

It took more than a year to sort through a maze of competing Democratic and Republican bills until the final statute became law. Even then, it was highly controversial. On the day of its enactment, it was described by a prominent labor leader as the "Rockefeller/Travia [the then Speaker of the Assembly] Slave Labor Act." It also was characterized as the "RAT Bill" (again Rockefeller and Travia).<sup>217</sup>

Following the Legislature's enactment of a modified version of the original bill, the law was quickly referred to as the Taylor Law.<sup>218</sup> The Taylor Law added a new provision to the New York Civil Service Law, section 207.2, which mandates PERB to:

ascertain the public employees' choice of employee organization as their representative choice (in cases where the parties to a dispute have not agreed on the means to ascertain the choice, if any, of the employees in the unit) *on the basis of dues deduction authorization and other evidences, or, if necessary, by conducting an election.*<sup>219</sup>

By its express terms, therefore, the Taylor Law deems certification based upon dues deduction cards and other evidences as the preferred administrative means for determining majority support, rather than secret ballot elections.<sup>220</sup> Prudently, the

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<sup>216</sup> Sydney H. Schanberg, *Governor Plans Own Strike Bill*, N.Y. TIMES, May 5, 1966, at 1; Melvin H. Osterman, Jr., *A Formerly Arcane Practice Now Handles A Wide Range of Issues*, 73 N.Y. ST. B.A. J. 40, 41 (2001); see also DONOVAN, *supra* note 199, at 53–54.

<sup>217</sup> Osterman, *supra* note 216, at 41. At a May 1967 rally, organized by the TWU, AFSCME and the UFT, 18,000 union members heard leaders condemn the Taylor Law's anti-strike provisions and adopt a declaration "to stand together in defense of one another until this evil law and its promoters are left in the dust of history." Peter Millones, *Rally Condemns New Labor Law*, N.Y. TIMES, May 24, 1967, at 31.

<sup>218</sup> N.Y. CIV. SERV. LAW § 200–214 (McKinney 1999 & Supp. 2010).

<sup>219</sup> *Id.* at § 207.2 (emphasis added).

<sup>220</sup> See *Town of Islip*, 8 N.Y. P.E.R.B. ¶ 3049 (1975); *Bethlehem Public Library*, 23 N.Y. P.E.R.B. ¶ 3009 (1990). The history surrounding New York's adoption of card check in the Taylor Law contradicts Benjamin Sachs's premise that card check emanates from concerns over managerial intervention, aimed at retarding employee organization support. Sachs,



statute delegated to PERB the responsibility to review non-electoral evidence in determining employee choice, and directed the holding of an election only when PERB determines an election is necessary.

Like the NLRA, the Taylor Law encourages voluntarily recognition by an employer, which requires the employer's acceptance of the proposed unit and recognition of the employee organization as the representative of the employees in that unit.<sup>221</sup> Another employee organization, however, can challenge the recognition through the filing of a certification petition.<sup>222</sup> The Taylor Law does not, however, mandate the holding of a representational election when demanded by an employer, or when there is already sufficient evidence of majority support for certification without an election. In contrast to the NLRA, upon recognition or certification, an employee organization is entitled to automatic dues deduction, upon presentation to the employer of dues authorization cards signed by unit employees.<sup>223</sup>

In contrast to the Taylor Law's preference for card check, the EFCA proposal does not provide for any administrative discretion by the NLRB. Instead, section 2(a) of the EFCA would mandate certification without an election when there is a showing of majority support through signed authorizations submitted in support of a petition for representation of an unrepresented unit:

Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit

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*supra* note 4, at 659–60, 680–85.

<sup>221</sup> See N.Y. CIV. SERV. LAW § 204(1); Joseph R. Crowley, *The Resolution of Representation Status Disputes Under the Taylor Law*, 37 *FORDHAM L. REV.* 517 (1969); see also 29 U.S.C. § 159(a) (2006) (providing parameters and determinative facts for appointing representatives in collective bargaining agreements).

<sup>222</sup> *Civil Serv. Emp. Ass'n v. Helsby*, 21 N.Y.S.2d 541 (1968).

<sup>223</sup> N.Y. CIV. SERV. LAW § 208(1)(b); *City of Glens Falls*, 32 N.Y. P.E.R.B. ¶ 3028 (1999). In addition, a certified or recognized employee organization is now entitled under the Taylor Law to automatic payroll deduction of an agency shop fee for an employee in the unit who chooses not to become a member of the employee organization. N.Y. CIV. SERV. LAW § 208(3). The right to automatic membership dues and agency shop fee deductions can be forfeited, however, when PERB finds that an employee organization caused, instigated, encouraged, or condoned a strike. N.Y. CIV. SERV. LAW § 210; LEFKOWITZ, *PUBLIC SECTOR*, *supra* note 12, at 953–54.

appropriate for bargaining has *signed valid authorizations designating the individual or labor organization* specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, *the Board shall not direct an election* but shall certify the individual or labor organization as the representative described in subsection (a).<sup>224</sup>

Two years after the Taylor Law's enactment, Fordham Law School Professor and PERB Board Member, Joseph R. Crowley, published an article discussing the representational standards and dispute mechanisms under the new law. At the conclusion of his article, Crowley stated that "[e]xperience will be a teacher; undoubtedly there will be changes as a result of the lessons taught by experience."<sup>225</sup> As will be seen in Part XII, *infra*, over the past forty years of experience, card check certification under the Taylor Law has been the subject of only minor procedural changes.

During the EFCA debate, disputants have ignored PERB's caselaw, experiences and practices under the Taylor Law. As will be demonstrated in Part XII, *infra*, unlike the criticism and the heightened rhetoric surrounding EFCA, the card check procedures under the Taylor Law have been subjected to minimal opposition. In contrast, other provisions of the Taylor Law, such as interest arbitration and the prohibition against strikes, remain the subject of perennial criticism and controversy. Despite the concerns expressed about EFCA, allegations of improper conduct in the gathering of a showing of majority support under the Taylor Law have been rare.

### B. NYCCBL

As part of the legislative compromise leading to the enactment of the Taylor Law, the Legislature included a provision permitting New York City and other political subdivisions to enact legislation substantially equivalent to the Taylor Law.<sup>226</sup> Consistent with that authority, the New York City Council enacted NYCCBL in 1967 to succeed EO 49.<sup>227</sup> The New York City Charter was also amended to

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<sup>224</sup> Employee Free Choice Act, H.R. 1409, 111th Cong. § 2(a) (2009) (emphasis added).

<sup>225</sup> Crowley, *supra* note 221, at 534.

<sup>226</sup> N.Y. CIV. SERV. LAW §§ 206, 212; LEFKOWITZ, PUBLIC SECTOR, *supra* note 12, at 6–8.

<sup>227</sup> Local Law 53, § 2 (1967); N.Y. CITY ADMIN. CODE §§ 1173-1.0 (current version at N.Y. CITY ADMIN. CODE §§ 12-301–12-316 (N.Y. Legal Pub. Corp. 1995 & Supp. 2010)).

create a Board of Certification, made up of impartial members of the Office of Collective Bargaining, which is responsible for certifying employee organizations.<sup>228</sup>

Unlike the Taylor Law, NYCCBL does not contain an explicit preference for non-electoral certification. Instead, it grants the Board of Certification an equivalent level of administrative discretion, similar to the discretion permitted under EO 49, and section 9(c) of the NLRA prior to Taft-Hartley, to determine the best means for determining employee choice. When the New York City Council drafted New York City Administrative Code section 12-309(b)(2), it utilized the language from EO 49, which had been borrowed from section 9(c) of the NLRA. Section 12-309(b)(2) requires the Board of Certification to:

To determine the majority representative of the public employees in an appropriate collective bargaining unit by conducting secret-ballot elections or by utilizing any other appropriate and suitable method designed to ascertain the free choice of a majority of such employees, to certify the same as the exclusive bargaining representative thereof; to designate representatives; and to determine the length of time during which such certification or designation shall remain in effect and free from challenge or attack.<sup>229</sup>

## XII. CARD CHECK EXPERIENCES UNDER THE TAYLOR LAW AND NYCCBL

### A. *The Taylor Law Experience*

When the New York Legislature made its public policy decision to include card check in the Taylor Law, it rejected, in part, arguments that the representational model under the NLRA “can be applied without essential change to the public sector.”<sup>230</sup> Since that time, the fundamental distinctions between private and public employment have been recognized in administering the Taylor Law and, therefore, federal private sector labor law has not been treated as binding precedent.<sup>231</sup> Precedent under the NLRA, however, is

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<sup>228</sup> N.Y. CITY CHARTER § 1172 (1967).

<sup>229</sup> N.Y. CITY ADMIN. CODE § 12-309(b)(2) (emphasis added).

<sup>230</sup> LEFKOWITZ, PUBLIC SECTOR, *supra* note 12, at 76.

<sup>231</sup> See N.Y. CIV. SERV. LAW § 209-a.6; Rosen v. N.Y. State Pub. Emp’t. Relations Bd., 526 N.E.2d 25 (N.Y. 1988) (unlike the NLRA, the Taylor Law does not contain a provision protecting activities “for the mutual aid and protection” of other employees); see also N.Y. City Transit Auth. v. N.Y. State Pub. Emp’t. Relations Bd., 864 N.E.2d 56 (N.Y. 2007) (holding

not ignored. As Joseph Crowley recognized, private sector precedent constitutes “a repository of knowledge in the field of labor relations which should not be ignored, but rather should be considered with the qualification that any conclusion derived therefrom be modified to reflect the problems and considerations unique to the public sector.”<sup>232</sup> In the same way, PERB’s published decisions, and its experiences in administering card check under the Taylor Law, may constitute persuasive precedent and lessons that can inform the debate over the use of card check in other jurisdictions.

Over the years, PERB has published decisions responding to employer challenges to the certification without election procedure, and/or the application of the procedure to the particular representation case. The relative infrequency of such claims, which are described below, along with the rarity of litigation challenging PERB’s certification decisions, is indicative of the success of the Taylor Law in minimizing acrimony in the representation process.

Following the Taylor Law’s enactment, PERB promulgated Rules of Procedure (“Rules”) in 1967 that included a procedure to implement the law’s certification without an election process.<sup>233</sup> The original Rules provided that a certification without an election would be granted if an employee organization presented proof demonstrating that at least fifty-five percent of the employees preferred that employee organization to any other to be the representative in collective negotiations.

By its express terms, the rule permitted the use of the certification without election procedure where there was more than one employee organization competing to represent the unit. The rule contained two columns of percentages. The first column set forth the minimum proportion of public employees, starting with fifty-five percent and ending with seventy percent, in a proposed unit which must support an employee organization by dues deduction authorizations and other evidences in order to be certified without an election. The second column set forth the proportion of employees, starting with ten percent and ending with thirty-five

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that the right to a union representative during an interrogation is not an inherent right guaranteed by the right to organization set forth in N.Y. CIV. SERV. LAW § 202); *cf.* N.Y. CIV. SERV. LAW § 209-a.1(g).

<sup>232</sup> Crowley, *supra* note 221, at 518. There is no evidence in the historical record to indicate that SLRB’s card check procedures, practices, and precedent had any influence on the drafting and administration of the card check provisions of the Taylor Law or NYCCBL.

<sup>233</sup> N.Y. COMP. CODES R. & REGS. tit. 4, §§ 200(1)–206(7) (2008); N.Y. P.E.R.B. § 201(6)(h)(1) (1968).

percent, who supported a competing employee organization by dues deduction authorizations and other evidence which would trigger the holding of an election between the organizations.

In 1968, PERB began to issue certifications without an election.<sup>234</sup> Although the Rules were silent on the issue, the PERB Board adopted a policy which required that documents submitted aimed at demonstrating majority support had to be executed within one year prior to the filing of the representation petition.<sup>235</sup> The acceptable format of the requisite documentation varied so long as it established membership in the employee organization and that such membership was for the purpose of representation in collective negotiations: notarized membership lists along with signed designation cards, dues deduction cards, or applications for membership designating the petitioning employee organization as the representative for collective negotiations.<sup>236</sup>

The acceptable forms of documentation for card check certification under the Taylor Law are similar, to some extent, to the practices of the NLRB and SLRB prior to their respective 1939 policy changes.

In Part VII(B), *infra*, the article will demonstrate that the New York City Office of Collective Bargaining requires proof that a majority of the unit is already paying membership dues before a certification without an election will be issued under NYCCBL. However, there is no reason to believe that these distinct administrative practices under the Taylor Law and NYCCBL were affected, in any manner, by the earlier administrative experiences under the NLRA or the SLRA.<sup>237</sup>

The administrative approach applied in *Niagara Frontier Port Authority*<sup>238</sup> provides an example of the how PERB's procedures worked in the early period of the administration of the Taylor Law. In *Niagara*, Local 1949, International Longshoreman's Association ("ILA") filed a representation petition seeking to represent all non-supervisory and non-clerical employees employed by the Niagara

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<sup>234</sup> See *Niagara Frontier Port Auth.*, 1 N.Y. P.E.R.B. ¶ 361 (1968); *Port Wash. Water Dist.*, 1 N.Y. P.E.R.B. ¶ 389 (1968); *Port Chester Bd. of Educ. Union Free Sch. Dist. No. 4*, 1 N.Y. P.E.R.B. ¶ 390 (1968); *Vill. of Lindenhurst*, 1 N.Y. P.E.R.B. ¶ 394 (1968).

<sup>235</sup> Crowley, *supra* note 221, at 532-33.

<sup>236</sup> See *Cent. Sch. Dist. No. 4*, 1 N.Y. P.E.R.B. ¶ 399.50 (1968); *Vill. of Greenport*, 1 N.Y. P.E.R.B. ¶ 399.56 (1968); *Town of Brasher*, 1 N.Y. P.E.R.B. ¶ 399.60 (1968).

<sup>237</sup> See *infra*, Part X. In discussing the uniting criteria under the Taylor Law, Joseph Crowley expressly referenced the contrasting standards under the NLRA. However, in his discussion of the standards for determining majority status, he did not reference the NLRA or the SLRA. Crowley, *supra* note 221, at 518-19, 532-33.

<sup>238</sup> *Niagara Frontier*, 1 N.Y. P.E.R.B. ¶ 361.

Frontier Port Authority. After AFSCME intervened in the representation case, two consent agreements were entered into for two units of the Authority's employees: one for the Airport Division and a second for the Marine Terminal Division. AFSCME participated only in the consent agreement with respect to the Airport Division unit. Under the consent agreements, approved by PERB's Director of Representation ("Director"), an election would be held for both units unless, within seven days, a sufficient showing of dues deduction authorizations and other evidence was submitted to PERB for a certification without an election.

For the Marine Terminal Division unit, ILA submitted nineteen signed applications for union membership forms and eighteen dues receipt slips establishing the amount of dues paid to ILA by each employee, the period covered, and the date the dues were received. Following a review of ILA's submission, PERB found that the applications for union membership, along with the dues receipt slips, met the "membership plus" requirement of PERB's Rule and established that ILA was supported by a majority of the employees in the unit. Therefore, PERB certified ILA to represent the Marine Terminal Division unit without the holding of an election. In contrast, neither ILA nor AFSCME submitted a sufficient showing to be certified without an election to represent the Airport Division unit and, therefore, PERB ordered the holding of an election with respect to that unit.

In 1969, PERB modified its certification without election procedures.<sup>239</sup> Under the new Rule, the decision as to whether an employee organization should be certified without an election was delegated to the Director. The new rule provided that the Director's determination that an employee organization submitted an insufficient showing for a certification without an election constitutes a non-reviewable ministerial act.<sup>240</sup> In other words, the Director's determination to schedule an election was not subject to immediate review by the PERB Board.

In addition, the rule substantially modified the circumstances and applicable standards necessary for an employee organization to be certified without an election:

If the choice available to the employees in a negotiating unit is limited to the selection or rejection of a single employee organization, that choice may be ascertained by the director

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<sup>239</sup> N.Y. COMP. CODES R. & REGS. tit. 4, § 201.9(g)(1) (2008).

<sup>240</sup> Manchester-Shortsville Cent. Sch. Dist., 30 N.Y. P.E.R.B. ¶ 3065 (1997).

on the basis of dues deduction authorizations and other evidences instead of by an election. In such a case, the employee organization involved will be certified without an election if a majority of employees within the unit have indicated their choice by the execution of dues deduction authorization cards which are current, or by individual designation cards, which have been executed within six months prior to the filing of the petition.<sup>241</sup>

The most significant change under the modified PERB rule was the elimination of certifications without an election when there is more than one employee organization seeking to represent the proposed unit. William Gould had, in fact, recommended that PERB adopt such a procedure shortly after the enactment of the Taylor Law.<sup>242</sup> Under PERB's amended rule, a new employee organization can be certified without an election in a decertification case only where the incumbent employee organization disclaims an interest in continuing to represent the bargaining unit.<sup>243</sup> Section 2(a) of EFCA proposes a similar prohibition against card check certification when there is a currently certified or recognized union representing the employees in the proposed unit.<sup>244</sup>

Over the years, PERB has articulated various rationales, in addition to administrative convenience, for requiring an election when there is evidence of substantial support for more than one employee organization. First, employee choice of a representative should not be determined based upon which employee organization is the first to file its petition with the necessary showing of majority status.<sup>245</sup> In addition, when there is an incumbent employee organization representing the unit, PERB presumes that the incumbent has majority status based upon its on-going relationship with the unit employees.<sup>246</sup>

Under PERB's rule, dues deduction cards can be utilized for a certification without an election if they are current, and signed

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<sup>241</sup> N.Y. COMP. CODES R. & REGS. tit. 4, § 201.9(g)(1), 3 N.Y. P.E.R.B. at 2026 (1969).

<sup>242</sup> See William B. Gould, *The New York Taylor Law: A Preliminary Assessment*, LAB. LAW J. 327 (1967). The requirement of an election to resolve conflicting claims by rival labor organizations was a norm adopted by SLRB as early as 1940. N.Y. STATE LAB. RELATIONS BD., FOURTH ANNUAL REPORT FOR THE YEAR ENDED DECEMBER 31, 1940-83 (1941).

<sup>243</sup> See *City of Lackawanna*, 18 N.Y. P.E.R.B. ¶ 4008 (1985), 18 N.Y. P.E.R.B. ¶ 3000.08 (1985); *Bayport Blue Point Union Free Sch. Dist.*, 19 N.Y. P.E.R.B. ¶ 3000.13 (1986), 19 N.Y. P.E.R.B. ¶ 4006 (1986); *Panama Cent. Sch. Dist.*, 19 N.Y. P.E.R.B. ¶ 4003 (1986).

<sup>244</sup> Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2(a) (2009).

<sup>245</sup> *Cnty. of Erie*, 19 N.Y. P.E.R.B. ¶ 3036 (1986).

<sup>246</sup> *Bethlehem Pub. Library*, 23 N.Y. P.E.R.B. ¶ 3009, 3022 (1990).

designation cards can be used only if the signatures are less than six months old. PERB has held, however, that the six-month rule is equally applicable to determining whether dues deduction cards are current.<sup>247</sup> If the submitted proof of majority status is no longer current, an election will be directed unless the petitioner supplements its evidence of majority support within a period set by the Director.<sup>248</sup>

The first major challenge to the certification without election process under the Taylor Law came in *Union Free School District No. 11, Town of Greenburgh*.<sup>249</sup> In that case, PERB affirmed the Director's decision to direct a secret ballot election unless the employee organization submitted a sufficient showing of majority status, within fifteen days from receipt of the decision, satisfying the requirements for a certification without an election, and ordering the employer to submit an eligibility list.<sup>250</sup>

On remand, the employer refused to submit the eligibility list and moved unsuccessfully for PERB to stay its order on the grounds that there was a related representation petition pending before the NLRB.<sup>251</sup> The employer's resistance to submitting the eligibility list resulted in the Director, as part of his investigation, requesting an affidavit from the employee organization. The affidavit submitted stated that there were thirty employees in the unit and that twenty-seven of the employees, who had signed dues deduction cards designating the employee organization as their representative for collective negotiations, were still employed.

Based upon the number of dues deduction cards and the affidavit of the employee organization, the Director issued a decision concluding that the employee organization should be certified without an election and expressly rejected the employer's argument against the certification.<sup>252</sup> Thereafter, PERB denied the employer's exceptions to the Director's decision and PERB issued an order certifying the employee organization.<sup>253</sup> Two years later, in 1973,

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<sup>247</sup> Vill. of Webster, 21 N.Y. P.E.R.B. ¶ 3002 (1988), Vill. of Webster, 21 N.Y. P.E.R.B. ¶ 3000.09 (1988), *petition for stay denied*, Vill. of Webster v. Newman, 21 N.Y. P.E.R.B. ¶ 7015 (1988).

<sup>248</sup> Monticello Cent. Sch. Dist., 21 N.Y. P.E.R.B. ¶ 4014 (1988), 21 N.Y. P.E.R.B. ¶ 3000.15 (1988); St. of N.Y. Unified Ct. Sys., 21 N.Y. P.E.R.B. ¶ 4051 (1988).

<sup>249</sup> Union Free Sch. Dist., No. 11, Town of Greenburgh, 4 N.Y. P.E.R.B. ¶ 3034, 3672 (1971), 4 N.Y. P.E.R.B. ¶ 3035, 3673 (1971), 4 N.Y. P.E.R.B. ¶ 3048, 3687 (1971), 4 N.Y. P.E.R.B. ¶ 3049.1, 3688 (1971), 6 P.E.R.B. ¶ 3003, 3015 (1973).

<sup>250</sup> *Town of Greenburgh*, 4 N.Y. P.E.R.B. ¶ 3034, 3672.

<sup>251</sup> *Town of Greenburgh*, 4 N.Y. P.E.R.B. ¶ 3035, 3673, 4 N.Y. P.E.R.B. ¶ 4011, 3416.

<sup>252</sup> *Town of Greenburgh*, 4 N.Y. P.E.R.B. ¶ 4011, 3416.

<sup>253</sup> *Town of Greenburgh*, 4 N.Y. P.E.R.B. ¶ 3048, 3687, 4 N.Y. P.E.R.B. ¶ 3049, 3687.



the employer attempted to collaterally attack the earlier certification in exceptions to a decision finding that it had violated section 209-a.1(d) of the Taylor Law by refusing to commence negotiations. In denying the employer's exceptions, PERB rejected the employer's arguments that a certification that is not based upon a secret ballot election is unconstitutional and improper because it is inconsistent with the NLRA.<sup>254</sup>

In *Town of Islip*,<sup>255</sup> the employer challenged a Director's decision that an employee organization was entitled to a certification without an election based upon the submission of a petition signed by the employees demonstrating majority support. The employer argued that the lack of a secret ballot election was undemocratic because it deprived employees of freedom of choice, and that the Director's acceptance of a signed petition to establish majority status for a certification without an election was inconsistent with PERB's Rules. Finally, the employer argued that it was improperly denied an opportunity to examine the signed petition.

In denying the employer's exception seeking a secret ballot election in *Town of Islip*, PERB held that the language in the Taylor Law "not only countenances reliance by PERB on evidences other than a secret balot [sic] election, but indicates a preference for such an alternative procedure unless PERB finds that an election is necessary."<sup>256</sup> This construction of legislative intent, premised upon the explicit wording and legislative history of the Taylor Law, has been consistently applied by PERB.<sup>257</sup>

In rejecting the employer's objection to the use of signed petitions as the evidentiary predicate for a certification without an election, PERB in *Town of Islip* stated:

In our judgment individually executed signatures on a petition are a sufficient indication of employee support to justify certification without an election where the requirements for such certification are otherwise satisfied. Moreover, the Act itself does not restrict evidence sufficient for certification without an election to dues deductions and

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<sup>254</sup> *Town of Greenburgh*, 6 N.Y. P.E.R.B. ¶ 3003, 3016. By 1971, SLRB was limiting private sector certifications without an election to single position units, and only when the incumbent employee testified that he or she wanted the labor organization as a collective bargaining representative. N.Y. STATE LAB. RELATIONS BD., THIRTY-FIFTH ANNUAL ANALYSIS OF DECISIONS FOR THE YEAR ENDED DECEMBER 31, 1971 27 (1972).

<sup>255</sup> *Town of Islip*, 8 N.Y. P.E.R.B. ¶ 3049, 3085 (1975).

<sup>256</sup> *Id.* at 3086.

<sup>257</sup> See *Town of Penfield*, 21 N.Y. P.E.R.B. ¶ 3019 (1988); *City of Glens Falls*, 32 N.Y. P.E.R.B. ¶ 3028 (1999); *Niagara Falls Hous. Auth.*, 37 N.Y. P.E.R.B. ¶ 4017 (2004).

individual designation cards.<sup>258</sup>

Finally, PERB denied the Town's objection to its lack of access to the employee organization's showing, reasoning that permitting employer access to a showing of interest would violate the confidentiality of the employees' preferences.<sup>259</sup> Subsequently, PERB held that the reference to "other evidences" in section 207.2 of the Taylor Law permits the use of an employee organization's current membership list for discerning employees' choice for representation as a factual predicate for a certification without an election.<sup>260</sup>

In *Bethlehem Public Library*,<sup>261</sup> PERB rejected an employer's due process and equal protection challenge to the card check certification procedures premised on the fact that a certification without an election will be issued only when an employee organization seeks to represent a unit of unrepresented employees. PERB held that the employer lacked standing to raise the constitutional claim, and that PERB's procedures were fully consistent with the public policy underlying the Legislature's broad delegation of discretionary authority to the agency, pursuant to section 207.2 of the Taylor Law:

The public policy reasons for applying different certification procedures when one employee organization is involved compared to when more than one employee organization is involved are simple. An incumbent employee organization may well have evidence of majority status, because unit members wish to have an opportunity to vote upon matters of contract ratification, union elections, and other matters, while they may, at the same time, wish to have an opportunity to select a new representative. Elections are accordingly appropriate under these circumstances, which do not apply when a single organization is involved.<sup>262</sup>

Although the constitutionality of section 207.2 of the Taylor Law has been raised before PERB in the cases cited above, the constitutional issue has never been raised in court.<sup>263</sup> During the

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<sup>258</sup> *Town of Islip*, 8 N.Y. P.E.R.B. at 3086.

<sup>259</sup> See *Union Free Sch. Dist. No. 2, Town of Hempstead*, 1 N.Y. P.E.R.B. ¶ 399.09 (1968).

<sup>260</sup> *Beaver River Cent. Sch. Dist.*, 35 N.Y. P.E.R.B. ¶ 3003 (2002).

<sup>261</sup> *Bethlehem Pub. Library*, 23 N.Y. P.E.R.B. ¶ 3009 (1990).

<sup>262</sup> Similarly, in *Town of Marion*, 26 N.Y. P.E.R.B. ¶ 3060 (1993), PERB rejected an employer's constitutional challenge to the procedure along with the employer's assertion that the procedure is inconsistent with the recommendations of the Taylor Committee Report.

<sup>263</sup> Based upon United States Supreme Court precedent holding that public employee grievances about working conditions are not protected under the First Amendment, it is

early history of the Taylor Law, however, the constitutionality of another component of the statutory certification procedure was sustained by New York courts. In *Rogoff v. Anderson*,<sup>264</sup> the precondition of certification contained in section 207.3 of the Taylor Law, requiring an employee organization to affirm that it does not assert a right to strike, was found to be constitutional.

During Ida Klaus's eight-year tenure as a PERB Board Member, from June 1976 to June 1984, four unanimous PERB Board decisions were issued involving the administration of card check. In *New York City Transit Authority*,<sup>265</sup> the Board certified an employee organization without an election to represent a unit of thirty-one employees. Following the certification, the agency received a letter signed by twenty individuals identifying themselves as unit members and asserting that they had not signed documents demonstrating support for the certified employee organization. After a review of the names was conducted, it was determined that sixteen of the names were on the eligibility list and two names appeared on the signed designation cards used by the Director in concluding that a certification without an election was appropriate. The signatures in the letter were compared by PERB with the signatures on the signed designation cards, leading to questions about the authenticity of the showing of support. After granting notice and an opportunity to be heard to the employee organization and the employer, PERB revoked the certification and remanded

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highly unlikely that New York's statutory procedure for the certification or recognition of a representative to negotiate with respect to workplace terms and conditions would be found to be unconstitutional. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Smith v. Ark. State Highway Emps.*, 441 U.S. 463 (1979); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979); Herbert, *The First Amendment and Public Sector Labor Relations*, *supra* note 11. A court would be hard pressed to find the Taylor Law's non-electoral certification process unconstitutional without also concluding that voluntary recognition, a procedure that existed before the Wagner Act, is equally constitutionally impaired. In fact, the United States Supreme Court, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), has upheld the use of card check as a remedy under the NLRA. The legal significance of voluntary recognition under the NLRA, however, remains uncertain. In *Dana Corp.*, 351 N.L.R.B. 434 (2007), the NLRB modified that agency's recognition bar doctrine premised on a policy judgment that voluntary recognition following a card check should not be treated as an equivalent demonstration of employee choice to the results emanating from an NLRB supervised election. Recently, the NLRB granted a petition for review to determine whether it should modify or overrule *Dana Corp.*, and return to its original recognition bar doctrine. *Rite Aid Store #6473*, 355 N.L.R.B. 157 (2010). Interestingly, a recognition bar has never been applied in representation cases under New York's private sector collective bargaining law. See *Handi-Man Co.*, 5 N.Y. S.L.R.B. 1171 (1942); *Four Hour Dry Cleaners, Inc.*, 9 N.Y. S.L.R.B. 763 (1946).

<sup>264</sup> *Rogoff v Anderson*, 310 N.Y.S.2d 174 (App. Div. 1st Dept 1970), *aff'd*, 271 N.E.2d 553 (N.Y.1971), *appeal dismissed*, 404 U.S. 805 (1971).

<sup>265</sup> *N.Y. City Transit Auth.*, 15 N.Y. P.E.R.B. ¶ 3037 (1982).

the case to the Director to conduct an election.

In contrast, in *Board of Cooperative Educational Services of Sullivan County*,<sup>266</sup> PERB denied an employer's effort to vacate a certification without an election premised on a letter signed by employees stating they wished to withdraw their support for the petitioning employee organization. In denying the exceptions, PERB stated that the letter had not been submitted to the Director and was not part of the administrative record. In addition, PERB found the letter to be immaterial because the dates of the designation cards, signed by the employees and relied upon by the Director, were signed many months after the date of the purported withdrawals.

The third card check certification case issued during Klaus's tenure with PERB was in *Lancaster Central School District*.<sup>267</sup> In that case, PERB rejected exceptions filed by a school district arguing that, as a matter of policy, certifications involving per diem substitute teachers should be issued only after an election due to the irregular relationship between the substitutes and the school district. Finally, in *Village of Monticello*,<sup>268</sup> Klaus was a member of PERB when it affirmed the dismissal of a representation petition filed by an employer seeking to nullify its prior recognition of an employee organization following a card check. In its petition, the employer asserted that it had received information from over half of the unit demonstrating that the employee organization did not have majority support. However, after the employer refused to submit an offer of proof to substantiate its allegations, the petition was dismissed.

In other cases, PERB has set aside card check certifications when the evidence demonstrates that an employee organization did not have majority support among the unit members. In *Town of New Haven (Highway Department)*,<sup>269</sup> an employer's exceptions to a certification were sustained based upon the content of affidavits from four of the six employees in the proposed unit stating that they did not wish to be represented by the employee organization. In response to the evidence, PERB remanded the case to the Director to schedule an election. Following the remand, an election was held and the employees voted against being represented.<sup>270</sup>

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<sup>266</sup> Bd. of Coop. Educ. Servs. of Sullivan Cnty., 14 N.Y. P.E.R.B. ¶ 3101 (1981).

<sup>267</sup> Lancaster Cent. Sch. Dist., 15 N.Y. P.E.R.B. ¶ 3063 (1982).

<sup>268</sup> Vill. of Monticello, 16 N.Y. P.E.R.B. ¶ 3077 (1983).

<sup>269</sup> Town of New Haven (Highway Dep't), 20 N.Y. P.E.R.B. ¶ 3015 (1987).

<sup>270</sup> Similarly, in *Town of Campbell*, 17 N.Y. P.E.R.B. ¶ 3071 (1984), PERB remanded a case

However, if no persuasive evidence is presented challenging the showing of support for the petitioning employee organization, PERB and the Director will not sustain a challenge to a certification without an election.<sup>271</sup> For example, in *Mohawk Valley General Hospital*,<sup>272</sup> the employer submitted six employee affidavits, and a letter signed by three other employees, stating that they signed designation cards based upon misrepresentations. PERB found the submission to be an insufficient basis for ordering an election. In reaching its conclusion, PERB reasoned that the number of unchallenged designation cards alone was sufficient to support a certification without an election. Furthermore, PERB stated:

[W]e find that the probative value of the affidavits and letters is relatively weak given the wording of the designation cards. These cards are unusually explicit in their statement that the signatories seek to be represented by CWA. While we might be persuaded by the affidavits of individuals who say that they themselves did not read the cards before they signed them, we are unwilling to give any credit to the hearsay statements that other unit employees were unaware of the content of the designation cards which they signed. Similarly, we find that the statements regarding "strong persuasion" are not sufficient to raise an issue of duress.<sup>273</sup>

In *Addison Central School District*,<sup>274</sup> the Director rejected an employer's request for the scheduling of an election premised on allegations in its response to the representation petition, that several employees had informed the employer that they regretted signing the dues authorization cards and were unaware of the representation procedures. During the course of the representation investigation, however, the employer was unable to substantiate its conclusory assertions resulting in the issuance of a certification without election.

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to the Director for further investigation based upon information it had received suggesting that the employee organization no longer had the necessary proof of majority support for a certification without an election.

<sup>271</sup> See *Mohawk Valley Gen. Hosp.*, 19 N.Y. P.E.R.B. ¶ 3020 (1986); *North Greece Fire Dist.*, 31 N.Y. P.E.R.B. ¶ 4022, 31 N.Y. P.E.R.B. ¶ 3000.13 (1998); *Addison Cent. Sch. Dist.*, 28 N.Y. P.E.R.B. ¶ 4024 (1995); *Town of N. Salem*, 23 N.Y. P.E.R.B. ¶ 4009, 23 N.Y. P.E.R.B. ¶ 3000.18 (1990).

<sup>272</sup> *Mohawk Valley*, 19 N.Y. P.E.R.B. ¶ 3020.

<sup>273</sup> *Id.*

<sup>274</sup> *Addison*, 28 N.Y. P.E.R.B. ¶ 4024.

Similarly, in *North Greece Fire District*,<sup>275</sup> the Director rejected an employer's argument in favor of holding an election premised upon a letter referencing statements from individuals outside the proposed unit alleging that some within the unit had second thoughts about signing the showing of interest petition. The Director noted that there was no evidence submitted from the employees demonstrating their intent or desire to revoke their prior authorizations. Following the Director's determination, the employee organization was certified by PERB without an objection from the employer.<sup>276</sup>

In *Village of Webster*,<sup>277</sup> PERB ruled that the six-month time restriction, contained in section 201.9(g)(1) of the Rules, is applicable to the date of the proposed certification rather than the date when the Director determines that a certification without an election is appropriate. Subsequently, in 1992, the Rule was amended to permit the timeliness of the evidence of majority status to be assessed on the date of the Director's determination recommending a certification without an election. In one of the few court cases challenging PERB's administration of the Taylor Law's card check procedures, a court reversed PERB's conclusion that the timeliness of dues deduction authorization cards, for purposes of a card check, could not be cured through an affidavit by the employee organization stating that the cards had not been revoked.<sup>278</sup>

The 1992 amendment to section 201.9(g)(1) of the Rules also added a specific procedure with respect to a challenge to the Director's determination:

- a). The Director must inform all the parties in writing if the Director determines that there is sufficient evidence demonstrating sufficient support for a certification without an election; and
- b). The Director's determination is reviewable by the Board by written objections filed with the Board within five working days after its receipt of the determination. The objection must set forth the grounds and supporting facts for challenging the certification without an election and the other parties are entitled to respond.

Consistent with PERB's procedures, as part of the representation

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<sup>275</sup> *North Greece*, 31 N.Y. P.E.R.B. ¶ 4022.

<sup>276</sup> *Id.* at ¶ 3000.13.

<sup>277</sup> *Vill. of Webster*, 21 N.Y. P.E.R.B. ¶ 3002 (1988).

<sup>278</sup> *Town of Ossining*, 32 N.Y. P.E.R.B. ¶ 3013 (1999), *vacated*, *CSEA v. N.Y. State Pub. Emp. Relations Bd.*, 33 N.Y. P.E.R.B. ¶ 7013 (Sup. Ct. Alb. Cnty. 2000).

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investigation, the Director carefully scrutinizes proof of majority support before determining whether a certification without an election is appropriate. The Director's determination to direct an election, rather than certify without an election, is a ministerial act which is not subject to Board review.<sup>279</sup>

Upon receipt of the file with the Director's determination, PERB will also examine the evidence to ensure that the employees' choice, as demonstrated by the content of the evidence submitted, is effectuated. As demonstrated above, objections to certifications without an election are relatively rare. Even without the filing of an objection, however, if PERB finds an irregularity or has reason to believe that the employee organization may not be supported by a majority of the unit, the case may be remanded to the Director for further investigation.

PERB will not refuse to certify an employee organization without an election when an employer asserts, following the Director's determination, that certain employees in the agreed upon unit should be excluded.<sup>280</sup> On the other hand, an employee organization will not be certified until the Director has completed the investigation, required by section 201.9(a) of the Rules,<sup>281</sup> to determine the appropriate composition of the proposed unit.<sup>282</sup>

These legal principles underscore an essential truth about the administrative card check certification process under the Taylor Law. A misjudgment by an employee organization with respect to the size and composition of a proposed unit, combined with possible employer oppositional tactics during the representational investigation, can result in the submitted evidence of support being deemed insufficient for a certification without an election. In such situations, the employee organization will be granted additional time to supplement its proof of majority status. However, delays resulting from the investigation can diminish support for the petitioning employee organization necessitating the scheduling of an election.<sup>283</sup>

The review of the four decades of Taylor Law precedent with respect to card check certification reveals that the administrative procedure has remained relatively non-controversial in New York. In the few cases where evidence was presented establishing that

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<sup>279</sup> N.Y. COMP. CODES R. & REGS. tit. 4, § 201.9(g)(1) (2010).

<sup>280</sup> City Sch. Dist. of Niagara Falls, 16 N.Y. P.E.R.B. ¶ 3039 (1983).

<sup>281</sup> N.Y. COMP. CODES R. & REGS. tit. 4, § 201.9(a).

<sup>282</sup> Town of Ramapo, 40 N.Y. P.E.R.B. ¶ 3016 (2007).

<sup>283</sup> Manchester-Shortsville Cent. Sch. Dist., 30 N.Y. P.E.R.B. ¶ 3065 (1997).

employee organization did not have majority support, PERB has refused to certify without an election and, in one case, vacated the certification. In contrast to concerns expressed by EFCA critics, the Taylor Law caselaw shows that a well-administered card check certification procedure can ensure a process that accurately determines the scope of employee support for a petitioning employee organization. Next, the article turns to the card check certification experience in New York City under NYCCBL.

### *B. The NYCCBL Experience*

The administrative experience under NYCCBL in non-electoral certifications has been both distinct and less extensive than PERB's experience under the Taylor Law. The relative paucity of caselaw is reflective of union density in New York City. Nevertheless, the precedent from the New York City Board of Certification provides an alternative perspective on the means for administering a card check procedure.

In 1968, in *New York State Nurses Association*,<sup>284</sup> the Board of Certification first announced its certification policy under NYCCBL. In that case, an employee organization and the City filed a stipulation consenting to a certification based upon employee affidavits of membership in the employee organization. In reviewing the stipulation, the Board of Certification stated that the two primary means for determining employee choice under NYCCBL are an election, or a review of the number of dues deduction authorizations on file with the Comptroller. While acknowledging it had the discretion to consider other means for ascertaining the level of support, the Board of Certification stated that as a matter of policy it would not certify without an election unless there was evidence of actual dues payment by a majority of the unit employees:

The Board will not issue a certification solely on the basis of cards or petitions, signed by employees, designating a public employee organization as their collective bargaining representative. Mere designation, without more, does not have the probative value of a check-off authorization, which buttresses the act of designation with evidence of membership and dues payment.<sup>285</sup>

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<sup>284</sup> *New York State Nurses Ass'n*, 2 OCB 39 (BOC 1968).

<sup>285</sup> *Id.*



In that case, despite the lack of dues deduction authorizations, the employee organization was certified by the Board of Certification based upon submitted affidavits because they attested to the fact that a majority of employees were paying dues to the employee organization.

The principle of requiring proof of membership dues payment as a prerequisite to a certification without an election under NYCCBL has been reaffirmed in subsequent Board of Certification decisions.<sup>286</sup> Thus, an election will be scheduled by that Board if the submitted proof of majority support is limited to signed authorization cards.<sup>287</sup>

The requirement of proof of current dues payments to demonstrate majority status is a departure from the procedures under EO 49. In addition, it places a higher evidentiary burden on an employee organization to obtain a certification without an election than under the Taylor Law. This difference stems, in part, from the respective provisions of the Taylor Law and NYCCBL, with the Taylor Law expressly preferring certifications based upon "dues deduction authorization and other evidences."<sup>288</sup>

There has been only one court challenge to a certification without an election under NYCCBL. In *City Employees Union, Local 237*,<sup>289</sup> a rival union was unsuccessful in challenging a certification for the representation of certain employees working for the New York City Housing Authority. In dismissing the lawsuit, the court held that issuance of the certification was well within the discretion granted to the Board of Certification by NYCCBL.<sup>290</sup>

The article next turns to the most recent legislative action in New York with respect to card check; specifically, the extension of New York's preference to the private sector.

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<sup>286</sup> *Comm'n Workers of Am., Local 1187, AFL-CIO*, 4 OCB 9 (BOC 1969). Although N.Y. Civ. Serv. Law section 212(2) requires local government procedures to be substantially equivalent to Taylor Law procedures, the NYCCBL card process has not been challenged.

<sup>287</sup> *Local Lodge No. 5, Int'l Brotherhood of Boilermakers, AFL-CIO*, 48 OCB 7 (BOC 1991) ("Authorization cards, distributed in the field by union officials, are not the equivalent of a secret ballot election conducted by an impartial agency.").

<sup>288</sup> N.Y. CIV. SERV. LAW § 207.2 (McKinney 1999).

<sup>289</sup> *City Employees Union, Local 237*, 6 OCB 51 (BOC 1970), *confirmed sub nom.* *Penta v. Anderson*, No. 19045/70 (N.Y. Sup. Ct. Cnty. 1971).

<sup>290</sup> *See infra* note 292 and accompanying text.

### XIII. EXPANSION OF CARD CHECK PREFERENCE TO NEW YORK'S PRIVATE SECTOR

Since the enactment of the Taylor Law and NYCCBL, the use of card check to resolve representational questions in New York has retained bipartisan support. In 2001, the Legislature enacted, and Governor George E. Pataki signed into law, an amendment to the State Employment Relations Act ("SERA") granting greater discretion to the New York State Employment Relations Board ("SERB") to issue certifications without an election for employees in private sector workplaces, which are not subject to the NLRA.<sup>291</sup> The general lack of controversy regarding this measure is demonstrated by the fact that it passed unanimously in both the State Senate and State Assembly.<sup>292</sup>

In amending section 705.1 of the Labor Law, the Legislature incorporated language from section 207.2 of the Taylor Law to make certifications without an election the preferred means for determining employee choice:

In cases where the parties to a dispute are without agreement on the means to ascertain the choice, if any, of employee organization as their representative, the board shall ascertain such employees' choice of employee organization, on the *basis of dues deduction authorization and other evidence, or if necessary by conducting an election.*

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<sup>291</sup> State Employment Relations Act, ch. 534, sec. 1, § 705(1), 2001 N.Y. LAWS 3015. In 1991, when SERB was created to replace SLRB, the SLRA was renamed SERA. State Employment Relations Act, ch. 166, sec. 251, § 717, 1991 N.Y. LAWS 2659. In 2001, the Legislature also mandated, as a precondition to a tribal-state compact with the Seneca Nation of Indians, a guarantee that labor unions will be recognized as the exclusive collective bargaining representatives of employees based upon a demonstration of majority support through a card check as verified by an arbitrator appointed by SERB in consultation with the Nation, and the union. N.Y. EXEC. LAW, ch. 383, pt. B, sec. 2, § 12, 2001 N.Y. LAWS 2777, 2780; N.Y. EXEC. LAW § 12(a)(3) (McKinney 2010). Effective July 22, 2010, the responsibilities for administering SERA were transferred to PERB. 2010 N.Y. LAWS ch. 45.

<sup>292</sup> Assembly Roll Calls A9202, 2 J. Assembly N.Y.S. 2084 (2001); Senate Voting Record A9202, J. Senate N.Y.S. 291 (2001). It does not appear, however, that the supporters of the amendment were aware that SERB already had the statutory discretion under Labor Law § 705.3 to certify without an election. See *supra* note 46. This may explain, in part, the standing ovation Governor Pataki received at an AFL-CIO convention when he publicly announced his support for the card check legislation. See Steven Greenhouse, *A.F.L.-C.I.O. Embraces Pataki at Convention*, N.Y. TIMES, Dec. 5, 2001, available at <http://www.nytimes.com/2001/12/05/nyregion/afl-cio-embraces-pataki-at-convention.html>; Juan Gonzalez, *Just Call the Gov, Mr. Union*, DAILY NEWS, Dec. 6, 2001, available at [http://www.nydailynews.com/archives/news/2001/12/06/2001-12-06\\_just\\_call\\_the\\_gov\\_mr\\_union.html](http://www.nydailynews.com/archives/news/2001/12/06/2001-12-06_just_call_the_gov_mr_union.html). In contrast, Pataki's embrace of card check was seen by critics as demonstrating that "he lacks an ideological compass." Steven Malanga, *Pataki Blows It Again*, CITY J. (Winter 2002), available at [http://www.city-journal.org/html/12\\_1\\_sndgs04.html](http://www.city-journal.org/html/12_1_sndgs04.html).

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In addition, Labor Law section 705.1 codified, in essence, PERB's practices and procedures with respect to allegations of fraud or coercion in the gathering of majority support:

In the event that either party provides to the board prior to the designation of a representative, clear and convincing evidence upon which the board would otherwise rely to ascertain the employees' choice of representative, are fraudulent or were obtained through coercion, the board shall promptly thereafter conduct an election.

According to former SERB Chair Barbara C. Deinhardt, SERB issued a handful of certifications based upon a card check since the 2001 amendment but only after obtaining the consent of the parties.<sup>293</sup>

The most prominent card check certifications administered by SERB involved representation units of thousands of New York child care provisions. In 2007, Governor Eliot L. Spitzer issued Executive Order No. 12 ("Child Care Worker EO") granting representation rights to private sector child care providers, defined as operators of a group family day care home or a family day care home, or individuals providing child care in a residence.<sup>294</sup> The Child Care Worker EO created four representation units for child care providers and established a certification without an election procedure to determine a representative for each of the four units, unless an election is deemed necessary.

Pursuant to section 4 of the Child Care Worker EO, the responsibility for determining the representatives for the four units was delegated to SERB or a successor agency. Under the Executive Order, if the agency determines that a representative has submitted authorization cards for more than fifty percent of the child care providers in a particular unit, that representative will be certified without an election. Alternatively, the agency is authorized to schedule an election if a representative submits authorization cards from between thirty percent and fifty percent of the child care providers in a particular unit.<sup>295</sup> Following SERB's examination of the submission of evidence of majority support, it certified one union to represent 24,000 child care providers in upstate New York

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<sup>293</sup> Emails from former SERB Chair Barbara C. Deinhardt to author (May 19, 2009, Sept. 22, 2009) (on file with author). SERB's requirement of consent by the parties before conducting a card check, rather than a secret ballot election, is similar to the policy originally adopted by SLRB in 1939. *See supra* note 49 and accompanying text.

<sup>294</sup> N.Y. EXEC. ORD. NO. 12, N.Y. COMP. CODES R. & REGS. tit. 9, § 6.12 (2007).

<sup>295</sup> *Id.* §§ 4, 6.12.

in two separate units, and another to represent two other units composed of 28,000 New York City child care providers.<sup>296</sup>

#### XIV. CARD CHECK IN OTHER JURISDICTIONS WITHIN THE UNITED STATES

Over fifty years ago, the research conducted by Ida Klaus and her colleagues found that at least ten public employers already utilized various forms of non-electoral evidence as the bases for certifications.<sup>297</sup> In the past decade, other jurisdictions have followed New York's lead in enacting public sector card check legislation: Illinois, New Jersey, California, Oregon, Massachusetts, New Hampshire, and the District of Columbia.<sup>298</sup>

In 2003, Illinois amended the Illinois Public Labor Relations Act to require the Illinois Labor Relations Board to issue a certification to an organization that has submitted a "showing of majority interest . . . on the basis of dues deduction authorization or other evidence, or, if necessary, by conducting an election."<sup>299</sup> The legislative history of the amendment reveals that the Illinois legislature drafted the amendment based upon the provisions of section 207.2 of the Taylor Law and PERB's administrative practices.<sup>300</sup> Like the 2001 New York amendment to SERA, the Illinois amendment requires the Illinois Labor Relations Board to investigate complaints of fraud and coercion, and claims that dues authorization cards were changed, altered, or withdrawn.

Following the amendment, the Illinois Labor Relations Board amended its Rules to provide procedures for certifications without an election.<sup>301</sup> Under the amended Rules, majority status can be

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<sup>296</sup> See *SERB Conducts Child Care Provider Representation Elections*, N.Y. STATE LAB. REL. BOARD, <http://www.labor.state.ny.us/erb/pdf/website%20childcare.pdf>; see also David L. Gregory, *Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers*, 5 FORDHAM URB. L.J. 277, 298 (2008). In October 2010, Governor David A. Paterson signed into law, legislation codifying the Child Care Worker EO, including its card check provisions. 2010 N.Y. LAWS ch. 540.

<sup>297</sup> THE ASCERTAINMENT OF REPRESENTATIVE STATUS FOR ORGANIZATIONS OF PUBLIC EMPLOYEES, *supra* note 116, at 3–5.

<sup>298</sup> See Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 140 n.188 (2009); ROBERT BRUNO, MAJORITY AUTHORIZATIONS AND UNION ORGANIZING IN THE PUBLIC SECTOR: A FOUR-STATE PERSPECTIVE (May 14, 2009), *available at* <http://www.ler.illinois.edu/labor/images/Multi-State%20EFCA%20Report.pdf>; ROBERT BRUNO, A STUDY OF ILLINOIS' MAJORITY INTEREST PETITION PROVISION 2003–2009 (2009), *available at* [http://theplumline.whorunsgov.com/wp-content/uploads/2009/05/efca\\_illinois.pdf](http://theplumline.whorunsgov.com/wp-content/uploads/2009/05/efca_illinois.pdf).

<sup>299</sup> 5 ILL. COMP. STAT. 315/9(a-5) (2009).

<sup>300</sup> See *Cnty. of Du Page v. Ill. Labor Relations Bd.*, 900 N.E.2d 1095, 1103–04 (Ill. 2008).

<sup>301</sup> ILL. ADMIN. CODE tit. 80, § 1210.80(d)(2)(E) (2004).

demonstrated by authorization cards, petitions or any other evidence signed within six months of the representation petition.<sup>302</sup> In contrast to New York's experience, the application of the certification without election process in Illinois has already been the subject of litigation resulting in a decision by the Illinois highest court.<sup>303</sup>

In *County of Du Page v. Illinois Labor Relations Board*, the Illinois Supreme Court rejected a public employer's challenge to an administrative rule permitting the use of authorization cards, petitions, or other evidence to demonstrate majority support for certification without an election.<sup>304</sup> The employer argued unsuccessfully that the rule was inconsistent with the statute which states that certification may be granted based upon "dues deduction authorization and other evidence."<sup>305</sup>

In May 2009, various labor relations schools issued a joint study based upon an examination of the certification without election procedures in four states, including New York. The study found that in the prior six years, four public sector labor relations agencies issued a total of 1073 certifications without elections for bargaining units representing a total of 34,148 public employees. Consistent with New York's experience in the past half-century, the study found that during the period examined there were few complaints alleging misconduct, coercion, or fraud in the gathering of evidence of majority status.<sup>306</sup>

#### XV. CONCLUSION: LESSONS FROM NEW YORK FOR THE CARD CHECK DEBATE

In his provocative call for the federalization of labor and employment law, Jeffrey M. Hirsch has described state regulation of the workplace as creating "a self-defeating race-to-the-bottom in which certain states compete against each other on the basis of labor costs."<sup>307</sup> Contrary to Hirsch's assertion, however, many states have enacted legislation in the field of labor and employment law that provide innovative and alternative means of responding to the same issue or problem.

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<sup>302</sup> § 1210.80(d)(2)(C).

<sup>303</sup> *Du Page*, 900 N.E.2d at 1110.

<sup>304</sup> *Id.* at 1104-05.

<sup>305</sup> *Id.* at 1104.

<sup>306</sup> BRUNO, MAJORITY AUTHORIZATION, *supra* note 298, at 1.

<sup>307</sup> Jeffrey M. Hirsch, *Taking States Out of the Workplace*, 117 YALE L.J. POCKET PART 225, ¶ 8 (2008).

Hirsch's argument is part of a renewed debate over the proper balance between federal and state power and jurisdiction in the area of labor law. Debates over federalism are as old as our republic with the specific subject matter changing over time.<sup>308</sup> In fact, Alexander Hamilton and Thomas Jefferson provide convenient iconic images for the conflicting drives in American history for centralization and decentralization of power and policymaking. Advocacy for centralization or decentralization is not always based upon principle. Too frequently, such arguments stem from a calculated judgment as to which level of government is more likely to be receptive to a public policy argument that will aid a particular interest.

What is refreshing about Hirsch's argument, however, is that it is premised on a basic principle that the establishment of uniformity in employment law will ensure greater order and predictability for employers, unions, and employees. Nevertheless, one of the fundamental weaknesses to his proposal is that it will lead to the loss of the dynamism inherent in our system of federalism. In symmetrical counterpoint to Hirsch's argument, Henry H. Drummonds has proposed the reformation of federal preemption to provide states with greater latitude to experiment in the area of private sector labor relations issues.<sup>309</sup> Among the labor law issues discussed by Drummonds is the use of card check by states because they offer "flexible laboratories for experimentation."<sup>310</sup>

New York's history and experience with card check is an example of the fruit that can grow as the result of a legal structure that permits states to experiment with substantive and procedural laws and rules in the area of labor and employment law. This article has shown that over the past half-century, a discarded federal policy

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<sup>308</sup> See GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* (1999).

<sup>309</sup> Drummonds, *supra* note 298, at 140–41. Granting States the authority to experiment in the field of traditional private sector labor law has the potential for the expansion or retrenchment of the rights of unions, employees, and employers. For example, 2010 ballot measures passed in Arizona, South Carolina, South Dakota, and Utah would ban card check recognition and certification unless courts determine that these measures are preempted by the NLRA. See *Union Card Checkmate*, WALL ST. J., Nov. 9, 2010 <http://online.wsj.com/article/SB10001424052748704353504575596790376536822.html>. See generally, Chamber of Commerce of U.S. v. Brown, 554 U.S. 60 (2008) (holding that a California law prohibiting private sector employers from utilizing state funds to assist, promote, or deter union organizing is preempted by the NLRA).

<sup>310</sup> Drummonds, *supra* note 298, at 140–41. However, Drummonds suggests that State experimentation with card check is a relatively recent development, citing only States that have enacted card check provisions in the past few years.

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permitting labor certifications without an election was incubated to maturity in New York's public sector, and then expanded to the private sector through an amendment to SERA.

There are many lessons from New York's history, precedent, and experience that can enhance the dialogue over card check and provide potential avenues of compromise. At minimum, the study of New York's experience provides a healthy fact-based antidote to the current level of public discourse over card check.

After four years of study, card check was introduced in New York's public sector in 1958 during the height of the Cold War without the vitriol heard today about card check. In the midst of public sector militancy in New York in the 1960's, CSEA and another traditional civil service employee organization successfully advocated for the inclusion of card check in the Taylor Law, along with more effective anti-strike penalties as a means for avoiding unnecessary labor conflict. Card check was not proposed, adopted, and implemented in New York as a prophylactic to counteract opposition from management aimed at persuading employees to oppose collective representation. Rather, it was viewed as an effective and practical administrative means for determining employee choice and avoiding unnecessary workplace disruptions caused by electioneering.

The New York City Department of Labor's reports from the mid-1950s expressed no reservations about the effectiveness of card check in determining majority status. In fact, EO 49 emulated the provisions of the original NLRA and the SLRA by granting administrative discretion in the utilization of card check. Following EO 49, the inclusion of card check in the Taylor Law and in NYCCBL did not provoke any known assertions that the laws imposed an undemocratic procedure for determining employee choice, or that card check diminished the right of public employers to provide accurate information to employees on the question of collective representation.<sup>311</sup>

Since the introduction of card check in New York's public sector, it has not been a major source of controversy or litigation as

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<sup>311</sup> In contrast, as Cynthia Estlund has stated "[t]he opponents of labor law reform have had a field day attacking EFCA's substitution of card check for secret ballots and painting its union proponents as undemocratic." Estlund, *supra* note 4, at 19. In addition, the deprivation of employer information on the question of unionization is one of the arguments made against the EFCA card check proposal. Sachs, *supra* note 4, at 706-07. However, nothing in an administrative card check regime prohibits a private or public employer from providing regular accurate factual information to unrepresented employees on the question of unionization.

demonstrated by the caselaw described in Parts XI and XII, *supra*. The 2007 report on the Taylor Law, prepared by the Empire Center for New York State Policy, a project of the Manhattan Institute for Policy Research think tank, is further evidence of the acceptance of card check in New York. Although the authors criticize various aspects of the Taylor Law, including interest arbitration, they do not call for any changes in the card check process or claim that the procedure has been improperly or unfairly administered by PERB.<sup>312</sup>

While critics of card check express concerns over the potential for fraud and abuse, such concerns are raised without regard to New York's empirical experience. Although there are clear differences between private and public sector workplaces, especially in the area of job security, there are fewer differences when it comes to the tactics and strategies employed in labor organizing. A review of the caselaw under the Taylor Law in Part XII, *supra*, demonstrates that allegations of fraud and abuse have been rare over a period of four decades. The data contained in the 2009 labor relations reports, described in Part XIV, *supra*, supports the conclusion that New York's experience is not an aberration. The fact that private sector employers are now more interventionist than their public sector counterparts in seeking to persuade employees against collective associational activities does not alter the facts from state experiences in administering card check.

To the extent that New York's empirical experience does not assuage the expressed fears among card check critics, New York's bipartisan approach to card check provides a potential means for compromise. As we saw in Part XIII, *supra*, the 2001 legislation amending SERA codified a procedure requiring the holding of an election if compelling evidence is presented demonstrating that the evidence of majority support is fraudulent or obtained through coercion. Similarly, EFCA may have been more palatable if it had been amended to include statutory standards and procedures with respect to all forms of misconduct and coercion in the events leading

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<sup>312</sup> See TERRY O'NEIL & E.J. MCMAHON, TAYLOR MADE: THE COST AND CONSEQUENCES OF NEW YORK'S PUBLIC-SECTOR LAWS 6 (2007), available at [http://www.empirecenter.org/Documents/PDF/TaylorLaw\\_Final.pdf](http://www.empirecenter.org/Documents/PDF/TaylorLaw_Final.pdf). Less than two years later, the same think tank published a report by Richard A. Epstein, critical of the EFCA card check proposal. See RICHARD A. EPSTEIN, THE EMPLOYEE FREE CHOICE ACT: FREE CHOICE OR NO CHOICE FOR WORKERS 7-9 (2009), available at [http://www.manhattan-institute.org/pdf/cjf\\_45.pdf](http://www.manhattan-institute.org/pdf/cjf_45.pdf). Like other recent scholarship analyzing card check, Epstein's critique is silent with respect to New York's fifty-year history with non-electoral certification procedures. See *supra* note 3 and accompanying text.



up to a card check or a representational election.

Another potential means of compromise would have been an amendment to the EFCA proposal that adopts New York's approach to administrative discretion. Unlike the EFCA proposal, New York law has never mandated card check certification. Instead, it has granted administrative discretion to certify based upon an election or other forms of evidence. As we saw in Part XI, *supra*, the Taylor Law introduced an innovation by expressing a statutory preference for card check and limiting the holding of an election to when it is deemed necessary by PERB. This policy innovation was later incorporated into New York's private sector labor law through the SERA amendment.<sup>313</sup> In the face of the wide political polarization over labor policies in our current era, it is important to reflect upon the fact that both statutory provisions establishing a preference for card check in New York were enacted during administrations of Republican governors, Nelson A. Rockefeller and George E. Pataki, with bipartisan support in the State Legislature.

Finally, the history and experiences under EO 49, Taylor Law and NYCCBL raise another potential basis for a card check compromise: non-electoral certification based upon proof of union dues payment. As we have seen in Parts IV, V, VII, and IX, *supra*, systems of voluntary automatic employee organization dues deduction were implemented in New York prior to the grant of public sector collective bargaining rights. Evidence of payments under the dues deduction system formed the basis for the first certification of an employee organization under EO 49 to represent a bargaining unit of 10,000 employees. Subsequently, proof of actual dues payments by a majority of unit employees became the sole form of acceptable evidence for non-electoral certifications under NYCCBL. Evidence of dues payment as a predicate for card check certification may be a compromise not yet explored by supporters and opponents of card check. Nevertheless, it is certainly an efficient, effective, and material means of gauging employee support that fundamentally reinforces the associational underpinnings of collective employee action.

Regardless of the outcome of the current card check debate, a review of New York's public sector labor law, history, and experience reinforces the importance of examining the lessons from states and local governments when developing and debating changes to federal labor policies. By ignoring New York's

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<sup>313</sup> See *supra* Part XIV.

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experience with card check, advocates for and against EFCA have debated the subject in an ahistorical manner.

As Joseph A. McCartin has pointed out, there are multiple explanations for why labor historians have long ignored American public sector labor history.<sup>314</sup> The treatment of the public sector as a footnote in American labor historiography does not justify, however, the lack of knowledge of New York's extensive public sector experience with card check by those debating and critiquing EFCA. On the other hand, it does powerfully underscore the need for public sector labor law and history to be included in law school, history, and political science curricula.

There remain numerous public sector legal and historical issues from jurisdictions throughout the country that are ripe subjects for future scholarship. Some of these issues, including the political response in New York to different forms of public sector organizing, and the history of long-forgotten organizations like UPWA, have been touched upon in this article, but warrant further study. This type of scholarship can increase our comparative understanding of private and public sector labor law, enhance our understanding of American labor history, elevate our knowledge of relevant local political and legal history, and at the same, further develop our appreciation for the fruits of federalism.

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<sup>314</sup> Joseph A. McCartin, *Bringing the State's Workers In: Time to Rectify an Imbalanced US Labor Historiography*, LAB. HIST., Feb. 2006, at 73–94.