

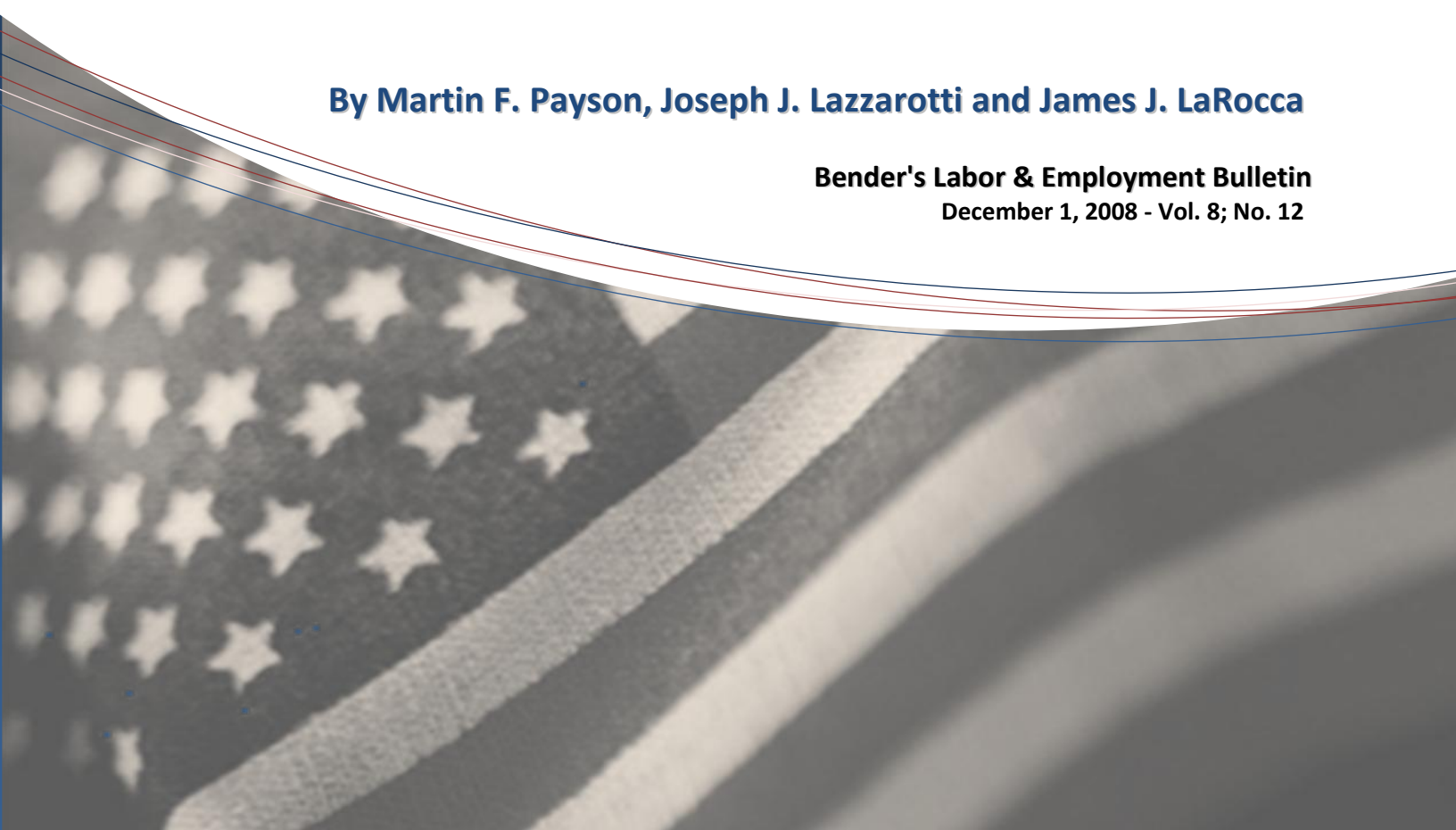
# **“EFCA”**

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A Management Perspective**

**By Martin F. Payson, Joseph J. Lazzarotti and James J. LaRocca**

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**T**he Employee Free Choice Act could deny workers "the freedom to express their will in *private*, the right to make a decision without anyone peering over their shoulder, free from reprisal... . To fail to ensure the right to vote free of intimidation and coercion from all sides would be a betrayal of what we have always championed."<sup>n1</sup>

*--George McGovern, former Senator from South Dakota and the 1972 Democratic Presidential Candidate*

## Introduction

President-elect Barack H. Obama's historic journey to the White House and the Democratic Party's increased control of Congress has revitalized the hopes and dreams of organized labor of reversing the slow decline of unionization in the United States. Since the 1980s, unionization in the private-sector workforce has dropped by nearly 20%.<sup>n2</sup> Indeed, only 7.5% of today's private-sector workers are unionized.<sup>n3</sup>

In its attempt to reverse the decline in membership, organized labor has made the enactment of the Employee Free Choice Act ("EFCA") a top priority.<sup>n4</sup> Unions generally agree that EFCA "would make it easier to organize workers"<sup>n5</sup> by allowing them to unionize "as soon as a majority signs cards in favor of a union, a process known as 'card check.'"<sup>n6</sup> In other words, under EFCA, "once a union gets a majority of ... workers to sign a card expressing a desire for a union, that union is automatically certified as the bargaining representative of, and empowered to negotiate on behalf of, all workers" without giving those employees a chance to vote privately.<sup>n7</sup> The legislation explicitly does so by prohibiting the National Labor Relations Board (the "NLRB" or the "Board") from holding an election where a majority of workers in a work unit has signed cards.<sup>n8</sup>

Under current law, § 9(e) of the National Labor Relations Act (the "NLRA") empowers the NLRB to hold a secret-ballot union certification election when at least 30% of workers in an

appropriate bargaining unit have signed union cards.<sup>n9</sup> In fact, an employer has a right to insist upon a secret-ballot certification election even where a majority of workers in the unit sign recognition cards.<sup>n10</sup>

The House passed EFCA overwhelmingly on March 1, 2007.<sup>n11</sup> The Senate did not act on the bill last session because of an anticipated filibuster and likely veto by President George W. Bush.<sup>n12</sup> Unions have contributed hundreds of millions of dollars to the campaigns of pro-EFCA supporters during the recent general election, including President-elect Obama's, which has helped many win seats in Congress.<sup>n13</sup> Should the 2009 Congress approve EFCA and the President-elect signs the bill into law as he has promised, EFCA "would represent one of the most significant revisions of federal labor law in 60 years."<sup>n14</sup>

Proponents of the legislation claim that the current private voting process is infected with widespread employer coercion, which prevents workers from voting freely. The American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO") has stated that "[a]lthough U.S. and international laws are supposed to protect workers' freedom to belong to unions, employers routinely harass, intimidate, coerce and even fire workers struggling to gain a union so they can bargain for better lives."<sup>n15</sup> Unions premise their claim primarily on a 2000 report by Dr. Kate Bronfenbrenner, a professor at Cornell University, dated 2000 (the "Bronfenbrenner Report").<sup>n16</sup>

The business community has recognized the bill as a top item on labor's agenda for 2009 and is moving to block EFCA's passage.<sup>17</sup> EFCA's opponents assert that the current secret ballot process in use for over 70 years without prior complaint by unions is the best method of allowing workers the opportunity to express their position on unionization.<sup>18</sup> To its opponents, EFCA has raised serious concerns about workers' rights to vote privately and freely without fear or coercion. Under a card check regime, they argue that workers could be forced to declare their union position publicly and face retaliation from the prospective union, employers and/or coworkers.<sup>19</sup>

While the card check provision has attracted the most attention, the bill contains other troubling provisions. For instance, the bill requires employers and unions to begin bargaining within 10 days of union recognition upon the union's request.<sup>20</sup> Additionally, EFCA would mandate that the parties use the Federal Mediation and Conciliation Service ("FMCS") to mediate any bargaining disputes remaining 90 days after bargaining begins if one party requests such assistance.<sup>21</sup> Moreover, if the parties do not reach an agreement 30 days after mediation begins, EFCA requires that binding FMCS arbitration impose a two-year collective bargaining agreement upon the parties.<sup>22</sup>

Also, EFCA would virtually require the NLRB to provide priority processing for **any charge** of an employer unfair labor practice during organizing or first contract negotiations.<sup>23</sup> This likely would include "garden variety" claims such as allegations that an employer "significantly interfered with" an employee's right to unionize and the opportunity to invoke injunctive relief by the courts--which means the Board will address these claims before already existing charges.<sup>24</sup>

EFCA also would entitle victims of unfair labor practices to triple back pay awards.<sup>25</sup> The NLRB also would be permitted to seek injunctive relief where it deems it appropriate,

and impose fines of up to \$20,000 for each violation if deemed willful or repetitive.<sup>26</sup> Presently, injunctive relief by the courts in the labor context only is available in rare instances, such as where there are "secondary boycotts" (attempts to prevent an employer from doing business because it transacts with a company whose workers are on strike) and "recognitional picketing" (picketing attempts to force an employer to recognize a specific union).<sup>27</sup>

Under EFCA, employers may be fined if they "make ... 'unilateral changes,' " to the terms and conditions of employment prior to reaching a collective bargaining agreement with a union, or "caution that unionization may cause them to shut down or move production elsewhere."<sup>28</sup> Accordingly, "[u]nion officials see the bill as a key to ... correcting a perceived weakening of workers' rights... ." <sup>29</sup>

The remainder of this article focuses on a critical aspect of EFCA--the changes to the secret ballot process and, in particular its effects on employee privacy and NLRB elections. Specifically, the next part provides legal background regarding the current secret-ballot process by focusing on how the Supreme Court of the United States, the United States Courts of Appeals and the NLRB view the current process. The final part addresses labor's and managements claims about EFCA's impact on workers' decisions regarding unionization.

## Legal Background

The Supreme Court of the United States has called the secret-ballot certification process the "preferred ... method" for accurately determining whether employees wish to recognize a union as their exclusive bargaining representative.<sup>30</sup> This view is widely accepted among the United States Courts of Appeals for the First, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth Circuits and District of Columbia Circuits.<sup>31</sup>

In *NLRB v. Gissel Packing Co.*, the Supreme Court explained that "an employer is not obligated to accept a card check as proof"<sup>n32</sup> that its workers have chosen a union. The Court added that an employer "is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting"<sup>n33</sup> that his workers want to unionize. The reasoning is simple: the process not only protects employees from undue influence by unions and management alike but also provides an opportunity for each side to "campaign"--the term the NLRB uses for describing how each side informs the voters of the facts that they should consider. It is through this campaign process that employees have an opportunity to make an informed decision by hearing divergent views, gathering information that they believe is relevant and making their choice.<sup>n34</sup> The NLRB has insisted that "laboratory conditions,"<sup>n35</sup> which are essential for a fair vote, are present.

Notably, some have acknowledged that unions can conduct card check certifications "so quickly that companies do not have a chance to explain to workers why they should not join unions"<sup>n36</sup> and leaving employees without the other side of the argument on the effects of unionization, before being approached to sign a card. In fact, if the card check provision became law, some have posited it "could allow unions to organize all or a portion of a company's work force before" the company even realized there was a campaign.<sup>n37</sup> This is particularly problematic in that it would seem to undermine the long-held recognition of employers' First Amendment rights embodied in § 8(c) of the NLRA to speak to workers about unions *before* workers make a choice about union representation.<sup>n38</sup>

While some may argue that employees can obtain information about the pros and cons of unionizing independently, every workplace being unique, employees usually do not have access to a union's track record or their

employers' finances or business plans; thus, they might not be able to assess adequately how helpful or harmful a union might be to their job security. This makes the pertinent information an employer can share with employees invaluable in weighing the pros and cons of unionization.

Interestingly, the United States political system prides itself on the secret-ballot. An adversarial system in which opposing parties argue their positions and voters cast a private ballot in the secrecy of a voting booth, it is argued, ultimately leads to informed and free voter decisions.<sup>n39</sup> If this time-honored system is appropriate for United States politics at every level, one can make a strong argument that it should be appropriate for labor law and the workplace.

### The Arguments for and against Eliminating the Secret Ballot

Labor rests virtually its entire argument in favor of EFCA on the Bronfenbrenner Report.<sup>n40</sup> Many members of Congress and the media have referred to the Report as Gospel, repeating and relying upon it in viral fashion as the basis for justifying the elimination of the private ballot and substituting the public card check process in its place.<sup>n41</sup> Management asserts that one need only read the report to see that its conclusions are questionable at best and do not justify the abandonment of the NLRB secret ballot process.

It should be noted at the outset that the study was not conducted for submission to the NLRB, the Federal Mediation and Conciliation Service, or the Department of Labor. Rather the report was submitted to the U.S. Trade Deficit Review Commission and is named "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing." The author, herself a former union organizer, chose to gather her "facts" primarily from conversations with other union organizers.<sup>n42</sup>

In essence, the Report asserts that in 25% of all union organizing drives employees are fired for their union activity<sup>n43</sup> and in 50% of the cases management threatens to close the enterprise if the union is successful in its organizing efforts.<sup>n44</sup> Critics question these numbers on the ground that there is little hard data establishing how many organizing drives take place in any year. The study's author relies on NLRB election statistics,<sup>n45</sup> which many practitioners believe significantly understates the number of organizing efforts. That is, those challenging the results in the study argue that one cannot reach a conclusion about "organizing efforts" by using NLRB statistics dealing with "elections."

The author selected what she claimed to be a "representative" sample of 600 NLRB elections from 1998 and 1999,<sup>n46</sup> which raises concerns among her critics as to whether the time frame she selected was arbitrary and why she only chose a sample that accounts for fewer than 10% of all elections conducted.<sup>n47</sup> They will point out that the study automatically eliminated from analysis about 65% of elections during this time period because those elections involved voting units of forty-nine workers or less.<sup>n48</sup>

The conduct alleged to have taken place in this sample would all be illegal and could have resulted in the filing of charges with the NLRB thereby giving actual data to be studied. The author's explanation for not using this hard data from the NLRB, rather than hearsay gathered in random conversations with union organizers, is that the union organizers often claimed that they did not have the time or the resources necessary to file a charge to initiate an investigation into alleged employer misconduct.<sup>n49</sup> Critics of the Report point out that this claim is itself questionable as the process of filing a complaint with the NLRB merely entails filling out a simple NLRB form, usually with the assistance of an NLRB employee.<sup>n50</sup>

Additionally, one can argue that if sufficient evidence of employer misconduct existed, a trial would have taken place where testimony and documentary evidence would have been presented to an impartial NLRB judge. Moreover, if employer misconduct had been proven, a finding would have been made and, at a minimum, the election results would have been set aside. Therefore, critics of the Report's conclusions can argue that had the Report's assertions had any factual basis, the objective NLRB statistics for that period would have shown that at least 25% of all elections would have been set aside--because, from the "representative sample" selected, the union filed charges 33% of the time and the Board ruled in the union's favor only 6% of the time.<sup>n51</sup> They also may call upon current election statistics. In fiscal year 2006, there were a total of 2,222 elections.<sup>n52</sup> Of that number, the union filed and the NLRB processed claims of election irregularities--called "objections"--in 132 of the 2,222 cases, or 5.9% of them.<sup>n53</sup> The Board investigated and dismissed the objections in 85.6% of the 132 cases, and sustained the objections in 19 or 14.4% of the 132 cases, which is just 0.85% of all the elections.<sup>n54</sup>

Opponents of EFCA also point out that the most recent NLRB election statistics show that unions are winning 66.8% of all elections with some individual unions winning 70% or more.<sup>n55</sup> Labor acknowledges this assertion, admitting that it actually organizes about 70% of all new members through a voluntary card check process, putting into question the claims that widespread management resistance to organizing is the cause of diminishing membership.<sup>n56</sup> Ariella Bernstein, a former supervisor at the NLRB, explains that "[t]he FMCS and the NLRB are treasure troves of information, with databases that could give us some answers. Congress should analyze these data before making any decisions" regarding EFCA, something which the author of the study apparently did not do.<sup>n57</sup>

Opponents of EFCA also point out that the most recent NLRB election statistics show that unions are winning 66.8% of all elections with some individual unions winning 70% or more.<sup>n58</sup> Labor agrees with this, admitting that it actually organizes about 70% of all new members through a voluntary card check process. Of course, this puts into question claims that widespread management resistance to organizing is the cause of diminishing membership.<sup>n59</sup>

Management would assert further that EFCA's card-signing process "could lead to unfair pressure by unions."<sup>n60</sup> There is evidence that union organizers have "used physical force to have workers sign pro-union cards" in the past,<sup>n61</sup> and the Act may only encourage and exacerbate the problem. "[I]magine you are Joe Lunch Bucket on your way to work. A beefy organizer greets you at the plan gate and asks you to sign a card in favor of representation by a union. Are you really going to say no--"<sup>n62</sup> Jennifer Jason, a former organizer trained at the AFL-CIO Organizing Institute, testified before Congress about the intimidating and coercive

tactics organizers use to get cards signed.<sup>n63</sup> As Senator George McGovern, a self-proclaimed "friend" of labor stated, "[t]o fail to ensure the right to vote free of intimidation and coercion from all sides would be a betrayal of what we have always championed." Additionally, as illustrated by a letter to the government of Mexico urging the implementation of ballot elections because of union coercion, some Congressional representatives, including one of the chief sponsors of EFCA, Representative George Miller, appear to have acknowledged the importance of ballot elections when it comes to union organizing.<sup>n64</sup>

## Conclusion

It will be up to our elected representatives in Congress early in the new administration to decide whether or not the right to decide the issue of unionization should take place in the privacy of an NLRB election booth or through a public card count. Because the NLRA guarantees employees the equal right to engage in or refrain from union activity, Congress will have to look closely at the competing arguments.

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### FOOTNOTES:

(n1)Footnote 1. George McGovern, *My Party Should Respect Secret Union Ballots*, The Wall Street Journal, August 8, 2008 at A13 (emphasis added).

(n2)Footnote 2. Kris Maher, Politics & Economics: Labor Works on Election Clout--Edwards Leads in Endorsements for Now as AFL-CIO Lays Out Plan, The Wall Street Journal, March 8, 2007 at A4.

(n3)Footnote 3. Kris Maher, Politics & Economics: Labor Works on Election Clout--Edwards Leads in Endorsements for Now as AFL-CIO Lays Out Plan, The Wall Street Journal, March 8, 2007 at A4.

(n4)Footnote 4. Michael A. Fletcher, Labor Seeks Election Rewards; Union Organizing Rights Could Be Early Obama Test, The Washington Post, November 6, 2008 at D 01.

(n5)Footnote 5. Kris Maher, Politics & Economics: Labor Rides Political-Wind Shift--Previously Thwarted Causes Advance, Somewhat, in Congress, The Wall Street Journal, February 28, 2007 at A4; *see also* James P. Hoffa, Make it Easier to Form Union: Reform Federal Labor Organizing Law to Revive Middle Class, Economy, The Detroit News, July 11, 2008 at 9A; Steven Greenhouse, Labor Seeks Boost from Pro Union Measure, The New York Times, February 23, 2007 at A18 ("With card checks, unions can often win unionization drives in two to four weeks. With secret-ballot elections, unionization efforts can drag on for months, often delayed by litigation").

(n6)Footnote 6. Maher, Politics & Economics: Labor Rides Political-Wind Shift-- Previously Thwarted Causes Advance, *supra* note 5 ; *see also* Greenhouse, Labor Seeks Boost from Pro Union Measure, *supra* note 5 . The media frequently refers to the bill as "'card check.'" *See, e.g.,* Nina Easton, CEO in Chief, Fortune, November 24, 2008 at 82.

(n7)Footnote 7. Lawrence B. Lindsey, *Abrogating Workers' Rights*, The Wall Street Journal, February 2, 2007 at A19.

(n8)Footnote 8. H.R. 800 (The Employee Free Choice Act).

(n9)Footnote 9. 29 U.S.C. §§ 151-169 (The National Labor Relations Act).

- (n10)Footnote 10. See, e.g., *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 304, 1974 U.S. LEXIS 160 (1974) . Although EFCA preserves the right to a secret-ballot where thirty to fifty percent of employees in a unit sign cards, unions rarely continue an organizing drive when they cannot obtain signatures from a majority of employees in a bargaining unit. As candidly stated by Vicki Saporta, former National Organizing Director for the Teamsters, unless a union has at least sixty percent of the workers signed up, its ability to win a Board election is less than fifty percent. Martin Payson, Michael J. Lotito and James J. LaRocca, *The Right to Vote Under Attack--Again*, Employment Law 360, August 13, 2008. Under EFCA there would be no reason for a labor organization to stop short of collecting cards from a majority of employees, only to hold an election with the possibility of losing. Thus, employers would lose their existing right to insist upon a secret ballot election where their employees can make an informed choice in private and employees would lose their existing right to a secret ballot election. Steven Greenhouse, *House Passes Top Priority of Unions*, The New York Times, March 2, 2007 at A14; see also 29 U.S.C. §§ 153, 159.
- (n11)Footnote 11. Eamon Javers, *To Be Continued in 2009*, Business Week, March 19, 2007 at 11.
- (n12)Footnote 12. Eamon Javers, *To Be Continued in 2009*, BUSINESS WEEK, March 19, 2007 at 11. (If EFCA cleared through Congress, "President George Bush will, as promised, veto it." ).
- (n13)Footnote 13. *Voter Intimidation v. Secret Ballots*, Chattanooga Times Free Press, November 11, 2008 at 1.
- (n14)Footnote 14. Dale Russakoff, *Bill Easing Organization Of Unions Passes House*, The Washington Post, March 2, 2007 at A04 (quoting The White House). EFCA has been a recurring topic of discussion on Capitol Hill; see, e.g., Diane E. Lewis, *Labor under Fire: Unions Worry NLRB Will End Organizing Tool*, BOSTON GLOBE, December 18, 2004 at E1 (discussing EFCA as early as 2004); Harold Meyerson, *Landing the White Whale*, The Washington Post, April 30, 2008 at A19.
- (n15)Footnote 15. Available at <http://www.aflcio.org/joinaunion/voiceatwork/efca/brokensystem.cfm>.
- (n16)Footnote 16. Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, September 6, 2000, available at <http://digitalcommons.ilr.cornell.edu/reports/3/> (hereafter "Bronfenbrenner").
- (n17)Footnote 17. Michael A. Fletcher, *Labor Seeks Election Rewards; Union Organizing Rights Could Be Early Obama Test*, The Washington Post, November 6, 2008 at D 01.
- (n18)Footnote 18. The AFL-CIO claims that EFCA "would put democracy back into the workplace. Majority sign-up would ensure the decision whether to form a union was made by majority choice, not by the employer unilaterally," available at <http://www.aflcio.org/joinaunion/voiceatwork/efca/10keyfacts.cfm>.
- (n19)Footnote 19. Payson, Lotito and LaRocca, *The Right to Vote Under At-tack--Again*, Employment Law 360, August 13, 2008.
- (n20)Footnote 20. H.R. 800, § 3.
- (n21)Footnote 21. H.R. 800, § 3.
- (n22)Footnote 22. H.R. 800, § 3. See also Richard Hankins, *Labor move can backfire--on workers*, The Atlanta Journal Constitution, March 2, 2007 at 11A.
- (n23)Footnote 23. H.R. 800, § 4(a).
- (n24)Footnote 24. H.R. 800, § 4(a).
- (n25)Footnote 25. H.R. 800.
- (n26)Footnote 26. H.R. 800, § 4(b).
- (n27)Footnote 27. 29 U.S.C. § 158.
- (n28)Footnote 28. Lawrence B. Lindsey, *Abrogating Workers' Rights*, The Wall Street Journal, February 2, 2007 at A19. See also H.R. 800.
- (n29)Footnote 29. Maher, Politics & Economics: Labor Rides Political-Wind Shift-- Previously Thwarted Causes Advance, Somewhat, in Congress, supra note 5 .
- (n30)Footnote 30. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602, 1969 U.S. LEXIS 3172 (1969) .
- (n31)Footnote 31. *Evergreen Am. Corp. v. NLRB*, 521 F.3d 321, 328, 2008 U.S. App. LEXIS 6482 (4th Cir. 2008) (" [I]t is the strong preference of our national labor policy not to impose collective bargaining representatives on employees except when they have, by a majority vote, elected to be so represented. "); *USW AFL-CIO v. NLRB*, 482 F.3d 1112, 1117, 2007 U.S. App. LEXIS 7559 (9th Cir. 2007) (" [Elections are the preferred method for ascertaining employee sentiment. ]; *Transp. Maint. Servs., L.L.C. v. NLRB*, 275 F.3d 112, 115, 2002 U.S. App. LEXIS 57 (D.C. Cir. 2002) (" 'Secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support' "); *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 232, 2000 U.S. App. LEXIS 18297 (6th Cir. 2000) (" In general, 'an election is the preferred method of determining the choice of employees of a collective bargaining representative.' "); *Monfort, Inc. v. NLRB*, 1993 U.S. App. LEXIS 37688, \*3 (10th Cir. 1993) (" Generally, the preferred method for determining the employee's bargaining agent is through an election. "); *NLRB v. Laverderiere's Enterprises*, 933 F.2d 1045, 1055-56, 1991 U.S. App. LEXIS 10354 (1st Cir. 1991) (" [W]e think the holding of a fair election--the 'preferred' method for determining whether a union has majority support--is the only appropriate option' " based on the facts of the case); *NLRB v. Century Moving & Storage, Inc.*, 683 F.2d 1087, 1094, 1982 U.S. App. LEXIS 17270 (7th Cir. 1982) (" [T]his is a less extraordinary case in which an order to bargain should issue only if traditional remedies are unlikely to ensure a fair election, which is the 'preferred method of establishing a union's representative status... ' "); *NLRB v. Armcor Industries, Inc.*, 1978 U.S. App. LEXIS 11415, \*11 (3d Cir. 1978) (" [S]ecret elections are the preferred method of ascertaining whether a union has majority support' "); *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446, 448, 1970 U.S. App. LEXIS 10084 (5th Cir. 1970) (" [A]n open free election rather than a bargaining order is the preferred remedy if such an election is possible' ").
- (n32)Footnote 32. 395 U.S. at 609 . When the Court in *Gissel* reached this holding, the Court purposely weakened the National Labor Relations Board *Cumberland Shoe* doctrine. 395 U.S. at 584 ; see *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268, 1963 NLRB LEXIS 1362 (1963) . The *Cumberland Shoe* doctrine said that, if a union authorization card: is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election. *Gissel Packing Co.*, 395 U.S. at 584 (emphasis in original); see also 395 U.S. at 608-09 (" ... trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the *Cumberland* rule. ").
- (n33)Footnote 33. 395 U.S. at 609 .
- (n34)Footnote 34. See, e.g., *NLRB v. Golub Corp.*, 388 F.2d 921, 1967 U.S. App. LEXIS 4329 (2d Cir. 1967) .
- (n35)Footnote 35. *Id.* at 612 .

- (n37)Footnote 37. Jeanne Cummings, *Politics and Economics: Business Seeks to Defeat Bill on Unions*, The Wall Street Journal, February 14, 2007 at A13.
- (n38)Footnote 38. *See, e.g.*, *NLRB v. Golub Corp.*, 388 F.2d 921 (2d Cir. 1967) .
- (n39)Footnote 39. Shawn C. Helms, *Translating Privacy Values with Technology*, 7 B.U. J. Sci. & Tech. L. 288 , 304 n.95 (2001) (" 'Election by secret ballot is but one example of how anonymity is used to protect one's freedom to challenge established authorities in a democracy' "); *see also* Ann Orford, *Commissioning the Truth*, 15 Colum. J. Gender & L. 851, 859 (2006) (" 'courts of law treat 'all historical accounts as *prima facie* of equal value' and reach the truth only through an adversarial process' ") (emphasis in original); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense*, 68 B.U.L. Rev. 821 , 827 (1988) (" 'procedural safeguards associated with the adversarial process were essential to ... the determination of truth' ").
- (n40)Footnote 40. *See, e.g.*, the AFL-CIO's emphasis on the Report at <http://www.aflcio.org/joinaunion/voiceatwork/efca/brokensystem.cfm>.
- (n41)Footnote 41. *See, e.g.*, State News Service, *Senator Lautenberg Joins Effort to Introduce Employee Free Choice Act*, State News Service, April 2, 2007 (explaining that United States Senator Frank R. Lautenberg supports EFCA because " '[w]e need to create an atmosphere where workers can choose to join a union free from employer intimidation and coercion. It is important to have strong laws that allow employees to make their own choices with interference from management' ").
- (n42)Footnote 42. *Bronfenbrenner* at 12 .
- (n43)Footnote 43. *Bronfenbrenner* at 44 .
- (n44)Footnote 44. *Bronfenbrenner* at 26-27 .
- (n45)Footnote 45. *Bronfenbrenner* at 12 .
- (n46)Footnote 46. *Bronfenbrenner* at 15 .
- (n47)Footnote 47. *Bronfenbrenner* at 12 .
- (n48)Footnote 48. *Bronfenbrenner* at 13 .
- (n49)Footnote 49. *Bronfenbrenner* at 40 .
- (n50)Footnote 50. Basic Guide to the National Labor Relations Act *available at* [http://www.nlr.gov/nlr/shared\\_files/brochures/basicguide.pdf](http://www.nlr.gov/nlr/shared_files/brochures/basicguide.pdf).
- (n51)Footnote 51. *Bronfenbrenner*, at 50 .
- (n52)Footnote 52. Seventy-First Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2006, Table 11B *available at* [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual%20Reports/Entire2006Annual.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2006Annual.pdf).
- (n53)Footnote 53. Seventy-First Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2006, Table 11B *available at* [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual%20Reports/Entire2006Annual.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2006Annual.pdf).
- (n54)Footnote 54. Seventy-First Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2006, Table 11B *available at* [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual%20Reports/Entire2006Annual.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2006Annual.pdf).
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- (n61)Footnote 61. Greenhouse, *Labor Pressures for Measure to Ease Unionizing*, *supra* note 36 .
- (n62)Footnote 62. Thomas J. Bray, *Cross Country: Trump Cards*, The Wall Street Journal, December 28, 2006 at A15; *see also* Jack Welch and Suzy Welch, *The Unemployment Act*, Business Week, March 12, 2007 at 108 (" '[E]mployees would likely get a phone call with a pointed solicitation, or worse, a home visit from a small team of organizers. You can just imagine the scenario. The organizers sit around the kitchen table and make their case, likely with a lot of passion. Then they slide a card in front of the employee with a pen. Who would say no--Who could--' ").
- (n63)Footnote 63. Testimony *available at* [http://www.house.gov/ed\\_workforce/testimony/020807JenniferJasontestimony.pdf](http://www.house.gov/ed_workforce/testimony/020807JenniferJasontestimony.pdf).
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