THE EMPLOYEE FREE CHOICE ACT: BREATHING NEW LIFE INTO UNIONS OR DEAD IN THE WATER?

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I. INTRODUCTION

Since 1935, the National Labor Relations Act (NLRA) has provided the framework for unionization in the United States.[1] Many organizers and lawmakers have blamed coercive employers for the decline of union membership in recent years.[2] For these detractors of the current labor situation in the United States, the NLRA itself provides the source of the coercion.[3] Coupled with this problem is the NLRA's inherent inability to guarantee solutions for labor disputes.[4]

Under the NLRA, union organizers can request a representation election when at least thirty percent of the workforce signs authorization cards in what is known as a "card check."[5] At this point in the process, the employer can choose to forego the election and simply recognize the union as a bargaining unit, or can choose to move forward with the election.[6] The election is conducted via a secret ballot, and the union will be certified if it receives support from a majority of the workers.[7] Despite the ability to vote in private, many union proponents are concerned with the activity that can occur during

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1. 29 U.S.C. §§ 151–169 (2006).

2. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2009, (Jan. 22, 2010), *available at* http://www.bls.gov/news.release/pdf/union2.pdf; *see also* 153 CONG. REC. S8276-01 (2007) (arguing that the long gap before NLRB elections often leads detractors to work prejudices for or against a candidate into the minds of employees); Mark Weisbrot, *Employee "Free Choice Act" Could Be Biggest Reform Since New Deal, Organic Consumers Association* (Aug. 28, 2008), http://www.organicconsumers.org/articles/article_14441.cfm.

3. *Id.*

4. 29 U.S.C. § 158(d)(4).

5. NATIONAL LABOR RELATIONS BOARD, OUTLINE OF LAW AND PROCEDURE: SHOWING OF INTEREST (2005), *available at* http://www.nlrb.gov/nlrb/legal/manuals/outline_chap5.html.

6. 29 U.S.C. § 159(c)(1)(B).

7. *Id.*

the vast amount of time prior to the actual election.[8] On average, it takes two years to complete a National Labor Relations Board (NLRB) election.[9] Union supporters see two problems with this large gap: ample time for anti-union employer coercion, and a general loss of interest on the part of the employees due to frustration with the system.[10]

If a union is successfully formed at a workplace, the NLRA mandates that the union and the employer bargain collectively.[11] "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."[12] Despite this obligation, some disputes may not be settled in this manner. When mere negotiation cannot bring the two sides into accordance, a strike is an option that is protected by the NLRA.[13] Other than this recognition, the NLRA does not specifically set forth any other means for settling disputes between employers and their organized labor force.[14] Although strikes can be an effective means of ending disputes, they are costly to both the employer and the employees. With a lack of palatable options available when disputes arise, the current NLRA provides a flawed framework for handling the delicate relationship that often exists between employers and employees.

Because of these problems, it is easy to see why changes to the current NLRA have been proposed. Such proposals have sparked harsh political debate, as they reflect a controversial split between Democrats and Republicans. However, in addition to the ideological arguments for and against changes, the debate also includes fundamental constitutional arguments that invoke speech, privacy, and property rights. For detractors of the changes, these arguments should prevent the passage of any legislation, or should warrant an overturning of that legislation if it ever passes into law.

This Note addresses the legal ramifications that could result from the passage of the Employee Free Choice Act, a specific piece of proposed legislation that seeks to cure the problems that many have with the current

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8. 153 CONG. REC. E463-01 (2007); *see also* CONG. REC. E456-02 (2007).

9. 153 CONG. REC. S8276-01, 8277 (2007).

10. *Id.*

11. 29 U.S.C. § 158(d).

12. *Id.*

13. 29 U.S.C. § 163 ("Nothing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.").

14. *See generally* 29 U.S.C. §§ 151–169.

NLRA. Section II discusses this legislation and explains the changes that it would make to the NLRA. Section III examines the constitutional arguments that may prevent the legislation from surviving challenges following its possible passage. Section IV analyzes these arguments using past precedent and ultimately concludes that all of the questioned provisions of the legislation would survive judicial challenges. Section V brings the Note to a conclusion.

II. THE EMPLOYEE FREE CHOICE ACT

In response to the aforementioned criticism of the current NLRA, a bill known as The Employee Free Choice Act (the Act) was introduced in the United States House of Representatives on February 5, 2007.[15] The Act was meant to amend the existing NLRA,[16] and the House passed the Act on March 1, 2007 by a margin of 241 votes to 185.[17] Despite this success in the House, the Act ultimately fell nine votes short of the sixty votes needed to break a Republican filibuster and send it to a vote in the Senate.[18] However, this failure did not kill the Act; rather, it was left open for possible consideration should the votes later be obtained. Due to the overwhelming Democratic support and the Republican opposition in the Senate,[19] it is likely that the newly increased population of Senate Democrats and the election of Barack Obama as President will lead to a renewed interest in the Act and possibly to its passage.[20]

The proposed Act contains two sections that specifically deal with the previously discussed problems of the current NLRA.[21] Section 2 of the Act addresses the issue of an employer's coercive tactics that may occur before an NLRB election can take place.[22] In order to achieve this, the section eliminates elections in specific circumstances.[23] Section 3 of the Act addresses the inevitable disputes that arise between a newly formed union and the

15. Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007).
16. *Id.*
17. 153 CONG. REC. H2091 (2007).
18. 153 CONG. REC. S8398 (2007).
19. *Id.*
20. 153 CONG. REC. S8398, H.R. 800 (Senator Obama voted in favor of the cloture, which, if successful, would have broken the Republican filibuster and sent the bill to a vote.).
21. *See* H.R. 800.
22. *See* H.R. 800 § 2.
23. *Id.*

employer.[24] To counteract the possibility of harmful labor stoppages, this section introduces a limited form of mandatory arbitration.[25]

Section 2 would amend § 9(c) of the NLRA by adding a provision that allows a union to be certified without an NLRB election.[26] Specifically, the Act states that the NLRB will investigate a petition to obtain union representation if the petition alleges that a majority of employees support the representation.[27] The Act goes on to state that if the Board determines that a majority of employees have indeed signed "valid authorizations," the Board shall not certify an NLRB election, but shall certify the labor organization.[28] In other words, the Act would permit union certification if a majority of employees signed valid authorization cards and only would require an election if at least thirty percent, but less than fifty percent of employees signed cards.[29] This is a stark contrast to the current NLRA framework, which permits the employer to decide whether or not an election should take place when a majority of signatures has been obtained.[30] This provision also vastly limits the power of employers to influence the union selection process since the lengthy time before elections will be removed;[31] a time in which employers can present their side of the unionization argument.[32]

Section 3 would amend § 8 of the NLRA by adding a provision that mandates arbitration in the collective bargaining of the first contract if the two parties are unable to reach an agreement.[33] First, the Act lays out a procedure to follow after a bargaining unit is initially certified. Once a union is certified, the two sides should meet within ten days to bargain collectively and must bargain in good faith, putting forth their best effort to reach an agreement.[34] If the two parties cannot reach an agreement after ninety days, either party is free to contact the Federal Mediation and Conciliation Service (Service).[35] At

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24. H.R. 800 § 3.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. Nat'l Labor Relations Bd., An Outline of Law and Procedure in Representation Cases, Ch. 5 (2008), http://www.nlrb.gov/nlrb/legal/manuals/outline_chap5.html.
30. 29 U.S.C. § 159(c)(1)(B) (2006).
31. 153 CONG. REC. S8276–77 (1977).
32. *See* 153 CONG. REC. E463 (2007) (explaining some of the anti-union rhetoric that may take place at this time).
33. H.R. 800 § 3.
34. *Id.*
35. *Id.*

this point, the Service will contact the parties and assist with the negotiations, but will not directly adopt a contract.[36]

Finally, under § 3, a thirty day clock begins to toll after the Service is contacted.[37] If the parties haves not agreed upon a contract after that thirty day period of mediation, the Act explains that the dispute will be sent to an arbitrator.[38] That arbitrator then has the power to settle the dispute by creating a contract, which will be in effect for two years (unless a different time is agreed upon by both parties).[39] In other words, if the two parties ultimately cannot reach an agreement, the Act provides that the federal government, not the employer, will have the power to set the wages and other employment benefits of a company's union employees.[40]

III. OPPOSITION

1. Criticisms of Section 2

Detractors of the Act argue that reliance on "card check" in § 2 violates two major constitutional rights. These opponents argue that this section abridges the employers' First Amendment right to freedom of speech.[41] The opponents also argue that § 2 strips employees of their Constitutional right to privacy.[42]

In regard to the violation of an employer's free speech rights, opponents of the Act cite the elimination of the secret ballot elections as the source of the problem.[43] Under the current NLRA, significant time often stands between the request for an NLRB election and the time when the election actually takes place.[44] During this time, many employers take the opportunity to speak out against the formation of the union by explaining the possible and probable consequences that would result from a unionized workforce.[45] Some of these

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36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *See* Richard A. Epstein, *The Employee Free Choice Act Is Unconstitutional*, WALL ST. J., Dec. 19, 2008, at A15; 153 CONG. REC. S8286–87 (2007) (statement of Sen. Enzi).
42. *See* James Sherk & Paul Kersey, *How the Employee Free Choice Act Takes Away Workers' Rights*, Heritage Foundation Reports, Apr. 23, 2007, http://www.heritage.org/research/Labor/bg2027.cfm; *see also* 153 CONG. REC. E522 (2007).
43. *See* Epstein, *supra* note 41; 153 CONG. REC. S8286–87 (statement of Sen. Enzi).
44. 153 CONG. REC. S8276–77 (2007).
45. *See* 153 CONG. REC. E463 (2007); 153 CONG. REC. S8286–87 (2007).

concerns can be of the utmost importance, and conveyance of them may be vital in order to ensure the continued success and operation of the business.[46] If the NLRB elections are eliminated, so too is this time period for speaking out. Critics of the Act see the elimination of this opportunity to speak out against a union as an unacceptable violation of that employer's First Amendment right to freedom of speech.[47] As Senator Mike Enzi explained, "The supporters of this bill . . . would seek to strip away even these limited democratic rights and to kill off any opportunity for free speech and open debate in the workplace."[48] Following this reasoning, other opponents argue that "[t]here is simply no legitimate government interest in promoting unionization that justifies a clandestine organizing campaign which denies all speech rights to the unions' adversaries."[49]

With regard to the violation of an employee's right to privacy, opponents cite the coercion and pressure inherent in the card check process as the source of the problem.[50] Under the current NLRA, a secret ballot election is likely to occur at the request of the employer even if a majority of employees sign.[51] As a result, regardless of whether or not an employee signs the card, he or she will still have the opportunity to vote his or her true feelings in privacy. Practically, this means that, should union leaders apply any form of pressure toward employees; these employees have the option of acquiescing at the time, but later voting differently when their identity is shielded. Furthermore, this same logic also applies to employers who pressure employees not to support the union. Withdrawing support in public, but voting in favor of the union in private, is an available strategy under the current NLRA.

While these arguments represent strong policy questions surrounding the Act, the question that remains is whether or not the reliance on card check violates an employee's Constitutional right to privacy.[52] Opponents of the Act ultimately fear that union leaders will begin to apply pressure to holdout employees as the number of signed cards reaches a majority.[53] Opponents thus

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46. Epstein, *supra* note 41.

47. *Id.*; 153 CONG. REC. S8286–87 (2007).

48. *Id.* (statement of Sen. Enzi) (referring to the elimination of the election process).

49. Epstein, *supra* note 41.

50. JONATHAN KANE & CHRISTOPHER P. ZUBOWICZ, CONSEQUENCES OF THE EMPLOYEE FREE CHOICE ACT: WHAT'S LEFT OF SECTION 7?, at 2 (2007), http://www.abanet.org/labor/annualconference/2007/materials/data/papers/v2/070.pdf.

51. Chapter 5, Showing of Interest, Outline of Law and Procedure 2005, http://www.nlrb.gov/nlrb/legal/ manuals/ outline_chap5.html.

52. *See* Sherk & Kersey, *supra* note 42.

53. KANE & ZUBOWICZ, *supra* note 50.

feel that a private ballot, free of coercion, is essential to the process, and given how much the decision will affect each employee's life, they feel that the absence of the secret ballot election is a violation of the employees' Constitutional right to privacy.[54] Since citizens of this country are provided the protection of a secret ballot when selecting leaders, opponents argue that the same protection unquestionably applies to the election of union leadership.[55]

2. Criticisms of Section 3

The Constitutional questions surrounding the mandatory arbitration requirements in Section 3 of the Act focus mainly on the rights that are taken away from employers as a result. "The idea that an arbitrator would be able to set wages for two years should give pause to every employer. Simply stated, an outsider determines fundamental issues such as wages, benefits and working conditions."[56] In addition to questions of fairness, opponents of the Act argue that stripping the employer of the power to set wages and other benefits is unconstitutional.[57] These detractors argue that the Act violates the Fourteenth Amendment protection against the taking of property without compensation and the freedom to contract.[58] Given that unsuccessful contracts can lead to the economic downturn of a business, taking away the right to contract is the equivalent of the government taking away a valuable piece of property without compensation.[59] Furthermore, any taking of this property right is only constitutional if the government provides due process to the entity that is losing the property.[60] Opponents, like California Representative George Radanovich, also argue that the Act lacks any of the procedural safeguards, such as the right to notice and to present evidence, necessary to ensure that the businesses receive due process.[61] Even if the NLRB were to enact such procedures, the Act sets up no procedures for reviewing the decision of the Board.[62] Without such procedures, and given the economic importance of

54. 153 CONG. REC. E522 (statement of Rep. Radanovich).
55. *See* Sherk & Kersey, *supra* note 42.
56. *See* Arnold E. Perl, *Bill Puts Workplace Democracy at Risk*, AUTOMOTIVE NEWS, Sept. 1, 2008, http://www.autonews.com/apps/pbcs.dll/article?AID=/20080901/OEM/309019874.
57. *See* 153 CONG. REC. E522 (statement of Rep. Radanovich); *see also* Perl, *supra* note 56.
58. U.S. CONST. amend. XIV, § 1.
59. KANE & ZUBOWICZ, *supra* note 50.
60. U.S. CONST. amend. XIV, § 1.
61. 153 CONG. REC. E522 (statement of Rep. Radanovich).
62. *Id.*

these contractual decisions, opponents of the Act view it as a violation of the Fourteenth Amendment.

IV. LEGAL ANALYSIS

1. First Amendment Claims

The First Amendment prohibits the federal government from abridging a person's right to free speech.[63] The United States Supreme Court has examined the issue of whether or not the elimination of secret ballot elections violates an employer's right to free speech.[64] In *NLRB v. Gissel Packing Co.*, the Court scrutinized three separate instances of grievances that were filed against employers for unfair labor practices.[65] In each case, the union embarked on an organizational campaign and managed to obtain a majority of card signatures from the employees.[66] The employers also put forth "vigorous antiunion campaigns" that resulted in numerous unfair labor practice charges due to the coercive and threatening nature of the campaigns.[67] In each instance, NLRB elections were either not held, or their results were thrown out because of the unfair labor practices of the employers.[68] As a result, the unions sought certification from the card signatures alone, and the employers argued against that certification on numerous grounds.[69] One of those grounds was that the cards were insufficient to determine the true will of the employees because "an employer has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one."[70] This contention mirrors the First Amendment argument, as both seek an answer to the question of whether or not sole reliance on the card check process violates an employer's fundamental speech right.

The Court answered the free speech question in a manner that was specifically tailored to the cases at that time.[71] It acknowledged that, under the NLRA, employers have the right to insist on an election unless they commit unfair labor practices that are "likely to destroy the union's majority and

63. U.S. CONST. amend. I.
64. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).
65. *Id.* at 580–82.
66. *Id.* at 580.
67. *Id.*
68. *Id.* at 580–82.
69. *Id.* at 602.
70. *Id.*
71. *Id.* at 603.

seriously impede the election."[72] In fact, the Court acknowledged the superiority of elections over the card check process, but noted that "where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice."[73] As a result, the Court reasoned that, in order for these unfair labor practices to take place, the union would first have to be aware that the certification campaign was taking place.[74] It also observed that oftentimes, it is the union who informs the employers of the campaign in order to subject them to the unfair labor practice provisions, thus allowing them to proceed without an election.[75] Given this knowledge, and the anti-union campaigns that resulted in the unfair labor practices, the Court reasoned that under the current NLRA, employers have ample time to speak their minds, even without an election, because this speech ultimately could lead to certification via card check only.[76]

Despite this apparent approval of the card check process, the Court's analysis would be overruled by the passage of the Act because a majority of signatures allows the union to bypass an election regardless of whether unfair labor practices take place.[77] As a result, the absence of an election would no longer mean that, by definition, the employer has spoken out against the union. Fortunately, for proponents of the Act, the Court addressed the issue of notice and opportunity to speak without incorporating unfair labor practices into the analysis.[78] For instance, in *National Labor Relations Board v. Gissel Packing Company*, the union's demand for recognition occurred only one week prior to the outset of the campaign.[79] The Court held that the employer had sufficient time to influence the situation despite this short period because "the employer was able to deliver a speech before the union obtained a majority."[80] This analysis implies that the employer does not have the right to speak out during the specific time period before an NLRB election takes place. Instead, this shows that the employer simply has the right to speak out against the union at some point in time.

When this analysis is applied to the First Amendment argument against the Act, it is apparent that the argument would fail. By passing the Act, the

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72. *Id.* at 600.
73. *Id.* at 602.
74. *Id.* at 603.
75. *Id.*
76. *Id.*
77. H.R. 800 § 2.
78. NLRB v. Gissel Packing Co., 395 U.S. 575, 603 (1969).
79. *Id.*
80. *Id.*

government would not be taking away the right of an employer to speak out against a union. The government simply would be taking away a time period which allows employers to speak out.[81] It is hard to imagine a situation where union supporters would be able to hide a certification drive from an employer. While it is true that some solicitation would take place outside of work, it is also true that recruiting will be done, to some degree, on the premises. Employers may see organizers, may overhear employees discussing union issues, or may be directly informed about the organizational drive by the employees. In any of those situations, the employer is put on notice of the existence of the drive. The moment that an employer learns of such a drive, that employer is free to present the reasons why the union should not be formed. This is a freedom that will not be taken away by the Act.

In the rare instances where the campaign remains a secret, there is nothing in the Act that prevents an employer from routinely communicating with employees about the potential negative effects of union formation at that particular workplace. If an employer believes that the business would suffer and possibly fold under union control, it is in management's best interest to inform the employees of these reasons. This type of preemptive strike is currently well within an employer's rights and will not be taken away by the Act.

For these reasons, it is highly unlikely that the free speech argument would be successful. The Act simply eliminates a specific period of time when employers often speak out against unions, not an employer's right to speak out against a union altogether.[82]

2. Employee Privacy Claims

Although a right to privacy is not expressly mentioned in the Constitution, it has been inferred from numerous amendments such as the First Amendment, the Third Amendment, the Fourth Amendment, the Fifth Amendment, and the Ninth Amendment.[83] Opponents argue that this right to privacy is being taken away by the Act's reliance on card check.[84] The Court

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81. *See* H.R. 800 § 2.

82. *Id.*

83. U.S. CONST. amend. I (privacy of beliefs); U.S. CONST. amend. III (privacy at home); U.S. CONST. amend. IV (privacy against unreasonable searches); U.S. CONST. amend. V (privacy of personal information); U.S. CONST. amend. IX (the inclusion of rights, such as privacy, that are not listed in the previous eight Amendments).

84. *See* Epstein, *supra* note 41; 153 CONG. REC. S8286–87.

in *Gissel* faced a similar argument.[85] There, the employers argued that "without a secret ballot an employee may, in a card drive, succumb to group pressures or sign simply to get the union 'off his back' and then be unable to change his mind as he would be free to do once inside a voting booth."[86] This argument contends that sole reliance on card check campaigns for certification takes away an employee's freedom to vote privately, resulting in coerced results. However, the Court concluded that the influence of union leaders remains the same in card check certification and secret ballot elections because "election cases arise most often with small bargaining units where virtually every voter's sentiments can be carefully and individually canvassed."[87] In other words, the Court ruled that privacy does not really exist in any type of union certification campaign because unions normally do an excellent job of accounting for all employees necessary to obtain approval.[88]

Under this reasoning, opponents of the Act cannot argue that relying on the card check process violates an employee's right to privacy. If privacy never existed, it is impossible for the government to take it away. However, the Court's analysis is questionable when applied to practical situations.

The Court assumes that a union would know how the employees voted even if the votes were cast in private.[89] This assumption is based upon the knowledge of voter sentiment, as well as, presumably, the results of the election itself.[90] What these assumptions fail to acknowledge is the argument that employees may express support for the union during the card drive, but vote against it during the election. Unions not only have a reputation of assisting employees, but also have a reputation of using intimidation to enlist support. In the face of pressure that could range from embarrassment in front of fellow employees to threats of physical or financial harm, it is not hard to imagine that some employees may agree to support the union in public, but then rescind that support in the privacy of a voting booth. In these cases, even the sentiment of an apparently staunch supporter could not be accurately tracked. In other words, although union organizers may factor one's public sentiment and card signature into their approval numbers, they never can truly know for sure which employees voted as expected.

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85. NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).
86. *Id.* at 603–04.
87. *Id.* at 604.
88. *Id.*
89. *Id.*
90. *Id.*

For this reason, the employee free speech argument stands some chance of success. Union organizers may like to believe that they can determine how each employee will vote, but given the coercive nature of many organizational drives, such predictability is highly unlikely. As a result, employees currently enjoy some type of privacy via the secret ballot election process, a privacy that would be taken away by the Act. However, as it stands now, the Supreme Court does not recognize this privacy at all. Even though there is a compelling argument that the Act takes away a fundamental employee right, opponents will have the daunting task of overturning the existing precedent.[91] In the end, it is this precedent that makes a successful challenge unlikely.

3. Fourteenth Amendment Claims

The Fourteenth Amendment of the Constitution provides that no state shall deny any person of "life, liberty, or property, without due process of law."[92] Regarding the mandatory arbitration principle of the Act and its relation to the Fourteenth Amendment, opponents of the Act point to the Supreme Court case of *Chas. Wolff Packing Co. v. Court of Industrial Relations*.[93] In *Wolff Packing*, the Court reviewed a Kansas statute that set industrial working principles such as employee wages, work hours, and overtime pay.[94] The Court found that this statute violated the Fourteenth Amendment:

> The system of compulsory arbitration which the Act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. . . . Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment.[95]

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91. *See* Alexander Tahk & Stephen Jessee, SUPREME COURT IDEOLOGY PROJECT (June 2, 2008), http://sct.tahk.us/current.html; *see also Current U.S. Supreme Court Justices*, About.com, http://usgovinfo.about.com/od/uscourtsystem/a/supctjustices.htm (last visited May 13, 2010); The current make-up of the Supreme Court consists of four right-leaning Justices and four left-leaning Justices, with Justice Kennedy acting as a swing vote between the two ideologies. Of the four Justices over the age of seventy, the possible retirements of conservative Justice Scalia and moderate Justice Kennedy would allow President Obama to dramatically shift the balance of power. However, even without this shift, the lack of a solid conservative majority makes it unlikely that former precedent will be ignored in favor of overturning a liberal piece of legislation.

92. U.S. CONST. amend. XIV, § 1.

93. 267 U.S. 552 (1925).

94. *Id.* at 559–60.

95. *Id.* at 569.

The Court viewed mandatory arbitration as an unconstitutional limitation on the freedom to contract, equaling a taking of property because it decided how an owner should run his or her own business.[96] Using this case as a benchmark, it is easy to see how critics of the Act would feel that its mandatory arbitration principles are unconstitutional.

Wolff Packing was decided in 1925, during an era in which economic regulations were often struck down due to freedom of contract principles. The seminal case that defined that era was *Lochner v. New York*.[97] In *Lochner*, a New York statute made it illegal to employ bakery employees for more than sixty hours a week.[98] The Court held that the statute was unconstitutional, reasoning that "the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution."[99]

Following the stock market crash in 1929 and the New Deal, freedom of contract principles were called into question, culminating in the landmark decision of *West Coast Hotel Co. v. Parrish*.[100] In *Parrish*, the Court recognized that the working class was in an unequal bargaining position to that of their employers.[101] As a result, it upheld a statute that set minimum wages for women,[102] and in doing so, established the long-standing principle that economic regulations will only be struck down if they are arbitrary and capricious, and if the goals of the regulations bear no rational relation to the means of achieving those goals.[103]

With this new regulatory standard in place, the Supreme Court revisited the issue of mandatory arbitration in collective bargaining agreements. In *H.K. Porter Co. v. NLRB*, a union wished to have the employer deduct or "check-off" union dues from employee pay.[104] Although it was common practice for employers to deduct other expenses from paychecks, the company refused to do so, not out of inconvenience or cost, but because they refused to "aid and comfort the union."[105] Because of this stance, the union filed a grievance with the NLRB, and the Board found that "the refusal of the

96. *Id.*
97. *See generally* Lochner v. New York, 198 U.S. 45 (1905).
98. *Id.* at 52.
99. *Id.* at 64.
100. 300 U.S. 379 (1937).
101. *Id.* at 399.
102. *Id.* at 400.
103. *Id.* at 398–99.
104. *See generally* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).
105. *Id.* at 100–01.

company to bargain about the check-off was not made in good faith, but was done solely to frustrate the making of any collective-bargaining agreement."[106] As a result, the Board ordered the company to further resume bargaining with the union and when doing so, to stop bargaining in bad faith.[107] The union interpreted this order as one that forced the company to accept the deduction proposal, rather than simply discussing possible alternatives.[108] The D.C. Court of Appeals later agreed with this interpretation, leaving the Supreme Court to decide whether or not the NLRB had the power to compel the employer to deduct the dues from the employees' wages.[109]

The Court held that the NLRB has the power to require parties to continue negotiating with each other, but does not have the power to force either party to accept any provisions set forth during collective bargaining.[110] In reaching this decision, the Court focused on § 8(d) of the NLRA, which states that "such obligation does not compel either party to agree to a proposal or require the making of a concession."[111] In light of this portion of the NLRA, the Court argued that "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."[112]

Although this seems to be an indictment of the mandatory arbitration portions of the Employee Free Choice Act, the Court limited this decision to the current NLRA.[113] Responding to the argument that the current NLRA is insufficient to handle labor disputes, the Court said that "it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands."[114] In other words, the Court acknowledged that although the current NLRA does not allow mandatory arbitration, Congress has the power to amend the NLRA to include such a provision. In line with the principles of *Parrish*, such an amendment

106. *Id.*
107. *Id.* at 101.
108. *Id.*
109. *Id.* at 102.
110. *Id.*
111. *Id.* at 106 (citing National Labor Relations Act, 29 U.S.C. § 158(d) (1970)).
112. *Id.* at 108.
113. *Id.* at 109.
114. *Id.*

would be appropriate as long as the desired ends of the legislation were rationally related to the means.[115]

The mandatory arbitration principle in Section 3 of the Act is similar to the type of amendment that was envisioned in *H.K. Porter*.[116] Given this general approval by the Court, the amendment would only have to pass the rational basis test established in *Parrish* in order to survive any challenges to its constitutionality.[117] Under this test, it is unlikely that the Court would strike the amendment down. For instance, should the amendment be called into question, it could be argued that the goal is to alleviate any potentially harmful work stoppages that are likely to occur after a newly-recognized union is certified. Since the goal inherent in any form of arbitration is to settle disputes that two or more parties may have, it could be argued that mandatory arbitration is rationally related to the goal of avoiding work stoppages. This argument fits well within the flexible framework set forth in *Parrish*,[118] and the amendment itself falls within the Congressional power recognized in *H.K. Porter*.[119]

V. CONCLUSION

There is no question that the Employee Free Choice Act is a controversial political issue. There are numerous arguments for and against the Act that ultimately will affect its ability to pass into law. Given the current structure of Congress and the Presidency, the likelihood of passage has grown significantly. Should this occur, it is highly likely that the opponents of the Act will question its Constitutional validity on at least one of the three main issues discussed earlier.

If and when this occurs, there is no guarantee that current Supreme Court precedent will be followed. Precedent has been overturned numerous times throughout history due to social changes or to ideological changes in the make-up of the Court. However, under the current standing of the law, it appears as though each of the three major challenges outlined above will be unsuccessful.

The challenge to the free speech rights of employers will be unsuccessful given the fact that the Act merely eliminates a time period for employer

115. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–99 (1937).
116. *See* H.R. 800 § 3; *Porter*, 397 U.S. at 109.
117. *Parrish*, 300 U.S. at 398–99.
118. *Id.*
119. *Porter*, 397 U.S. at 109.

speech without eliminating the speech altogether. Of the three challenges, the violation of privacy argument has the best chance of succeeding; however, given the current state of the law, courts most likely will strike down the challenge on the grounds that a privacy right never existed in the first place. Finally, the challenge to the contract and property rights of the employers will be unsuccessful because of the limitations placed upon the freedom to contract.

In the end, should the Act survive a bitter political battle, it likely will remain sound law even in the face of numerous court battles.