

The Case Against the Employee Free Choice Act

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INTRODUCTION

The EFCA Initiative

Historical Background

The Employee Free Choice Act (EFCA) is the most transformative piece of labor legislation to come before Congress since the enactment of the National Labor Relations Act of 1935 (NLRA). To assess the potential impact of EFCA, this blunt statement needs to be put in historical perspective. The NLRA marked the culmination of a systematic effort of the Progressive movement that dominated so much of American intellectual life during the first third of the twentieth century. Its basic purpose was to displace the earlier judge-made regime that had previously governed labor relationships. That system did not carve out any special privileges, or impose any special burdens, on labor unions and their members. Instead it applied the same general legal principles applicable to other forms of business and economic associations organized to advance the interests of their members. The first major departure from that model in American labor law was the passage in 1914 of Section 6 of the Clayton Act, which insulated labor unions from the application of all antitrust laws insofar as their members were members of organizations “instituted for purposes of mutual help.”¹ In effect all efforts of workers to join together in unions were exempted from the standard antitrust law that otherwise makes horizontal arrangements between individuals a per se offense under section 1 of the Sherman Act.² Next in 1926, the Railway Labor Act conferred special privileges of collective bargaining on railroad workers,³ which was later extended to airlines.⁴ Seven years later, the Norris-LaGuardia Act of 1933 placed sharp limitations on the traditional ability of employers to obtain injunctions during the course of labor disputes.⁵ Shortly thereafter, the Congress passed the original version of the NLRA (the Wagner Act), which was upheld against constitutional challenges in *NLRB v. Jones & Laughlin Steel Co.*⁶ Since that time, the subsequent changes all took place within the framework of the collective bargaining regime set out under the Wagner Act. The most important subsequent change was the Taft-Hartley Act of 1947, which cut back on some of the main advantages that the Wagner Act had conferred upon unions. Its chief innovation was to make it clear that the NLRA respected employees’ collective choice on unionization, but did not

put its thumb on the scale in favor of unionization if the workers voted otherwise. Thus the original language of section 7 in the 1935 Act showed a strong preference for labor organization when it provided:

§7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The Taft-Hartley Act of 1947 made explicit the converse of this proposition when it added to the above provision the following clause:

And shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requirement membership in a labor organization as a condition of employment as authorized in section 8(a)(3).⁷

In addition the Taft-Hartley Act created a set of unfair labor practices with respect to union conduct, which parallel those for management, including important substantive limitations on secondary boycotts—that is—union action directed against firms that did business with any employer that was the target of a union organization drive. And finally, the Taft-Hartley Act gave its explicit blessing to state right-to-work laws that allowed individuals to remain outside the union, and not pay it dues, even after it won a union election. These changes, however, did nothing to undo the basic principle of union elections followed by good faith bargaining between the two sides once the union was selected. Finally, the Landrum-Griffin Act of 1959⁸ was directed toward issues of internal union management, with an eye to the control of union corruption—a topic which is outside the scope of this analysis of the EFCA.

As was widely acknowledged at the time, the NLRA was revolutionary in its implications for American Labor Law.⁹ The two central pillars of the original NLRA have survived to this day. The first was to introduce a system of union democracy whereby unions could only obtain the rights of exclusive representation for firms if they could prevail in an election held by secret ballot. If a union was selected, both parties were under obligations to negotiate in good faith to work towards a collective bargaining agreement. In addition, the legislative history of the NLRA went to great pains to establish a second pillar of free negotiation. In its own words, [t]he committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.¹⁰

EFCA's Three Prongs

THE CARD CHECK

EFCA rejects both these fundamental commitments of the NLRA. Its liberal defenders have attacked the current structure under the NLRA as inhospitable to unions.¹¹ Thus the EFCA contains three provisions, which if enacted into law, would transform the institution of collective bargaining. The first proposal would allow either party the option to substitute a card-check system for the current electoral system. To be sure, the EFCA leaves in place the present NLRA provisions that allow unions to proceed by filing a representation petition supported by 30 percent or more of employees in an appropriate bargaining unit and then holding elections.¹² Nonetheless, it seems clear that in virtually all cases the card check will displace the secret ballot. As a matter of current practice, virtually all major unions choose to file representation petitions only after they have accumulated signed authorization cards from well over 50 percent of unit members. They need that cushion because they know from experience that worker defections will take place during the course of any election campaign in which management can present its own case of the tradeoffs, costs and disadvantages of representation. It follows therefore that no rational union would risk the election if they have in their possession authorization cards from just over 50 percent of the members of the unit they seek to represent. As a practical matter however, the EFCA would wholly displace union elections with the new "card check" procedure. No union is likely to file for an election with over 30 but under 50 percent of signed authorization cards in the hopes of improving its position during a campaign. The conversion to the card check system is likely to prove well-nigh complete.

COMPULSORY INTEREST ARBITRATION

EFCA's second major provision would introduce a system of compulsory interest arbitration that leads to a first "contract" of two years duration. The term contract is put in quotation marks because an actual agreement that obtains the assent of both parties is not required during the initial period in question. This mandatory first contract, moreover, is not limited to wage matters, but must cover all the issues that are typically hammered out by agreement under the current system.

INCREASED PENALTIES FOR EMPLOYER UNFAIR LABOR PRACTICES

The third major change of the EFCA, which ties in closely with the adoption of the card check system, substantially increases the penalties imposed on employers with respect to violations of section 8(a)(3) of the NLRA, which prohibits discrimination against employees for their union activities.¹³ This section also requires the NLRB to give priority to charges of ULPs that arise in the course of

organizing campaign, in order to backstop the advantage that unions expect to receive from the addition of the card check alternative.

EFCA's Economic Consequences

The legislative adoption of these provisions taken together, would radically alter the balance of power between management and labor. Its impact would extend to virtually all businesses, except from some small business that fall below the "interstate commerce" thresholds that the NLRB applies in exercise of its own jurisdiction.¹⁴ But even those exemptions have little relevance to any new firm that hopes to grow over time. The bottom line therefore is that the passage of the EFCA will create huge dislocations in established ways of doing business that will in turn lead to large losses in productivity. Small businesses, which as a group are the largest source of new jobs in the country, will find themselves besieged with insistent demands for unionization, for which they are ill-equipped to cope. These businesses often operate on small budgets, without the assistance of full time lawyers. Under EFCA, their first exposure to unions could come at the conclusion of a secret campaign, which requires them to both hire and acquire expertise on contentious matters for which they are ill-equipped to deal, at a cost which they can ill afford to bear. These calls for unionization will divert management from the essential tasks of product development, marketing and sales, on which their business models necessarily depend. The likely consequence of EFCA will be to retard the formation of small businesses, as fledgling entrepreneurs will reassess their prospects of success to take into account the danger of derailment at an early stage in the process. In the long-term the EFCA will reduce the rate of firm formation, and thus deprive the economy of a central driver of new job creation and technology growth.

Large firms face a different set of difficulties. Like their smaller compatriots, they will face the heavy costs of meeting simultaneous multiple threats of unionization. Since they operate through far-flung, geographically dispersed divisions, they face the risk of inconsistent arbitral decrees that will impede the development of firm wide practices. Given the uncertain scope of these decrees, it is quite possible that restrictions designed to preserve job security within a unit will limit the ability of the firm to reorganize nonunit employees who are closely connected with them. In addition, the prospect of multiple union arbitrations covering different locations could result in inconsistent first contracts under a system that offers no clear avenues for appeal or clarification. Faced with these constraints, a firm's ability to shift and meet the rising competition from new firms could easily result in the loss of jobs from the failure of certain business lines, or the conscious redeployment by management of assets and new investment to locations that have lower costs and greater flexibility –traits most often associated with nonunion operations. The decision to send more activities offshore is also a distinct likelihood. Any efforts to stem that flow could easily lead to a collapse of the entire firm in the face of effective foreign competition. Nonunionized firms are able to make these decisions in anticipation of a union threat. Firms that are currently

bound by collective bargaining agreements of course remain subject to the core obligations under the NLRA, which include the duty to bargain in good faith, without any antiunion animus.¹⁵ Unions may try to challenge some of these decisions before the NLRB, but the powerful and economic rationales for taking these measures will reduce the chances of union success. Yet if the EFCA were in place, the level of labor tension and strife is likely to increase the frequency and intensity of public protests, political campaigns, and work slowdowns or stoppages in response to decisions to relocate or outsource. The key union leaders who link these key business decisions to “[t]he Senseless Slaughter of the Good American Job,” which are tantamount to “wanton acts of physical violence,”¹⁶ will not take kindly to wholly lawful decisions to set up shop elsewhere. The same can be said of officials like Andy Stern who is intent on the restoration of the American dream and is not likely to pull in his horns if EFCA does not meet his expectations. The next round direct action and new legislative fixes offer them the path of least resistance. The economic dislocation under EFCA will lead to further strife, not industrial peace.

Of course, the exact pattern of union threats, maneuvers, and responses is difficult to predict owing in part to the huge gaps in EFCA. But regardless of how these play out, it is certain that these devastating effects would arise chiefly from the synergistic effects of the first two provisions mentioned above. Taken together, they allow a union that acquires a sufficient number of signatures through a largely unregulated card authorization process to force management to accept a first “contract”—in reality an arbitral decree—that lasts for a two year period. Step one under the EFCA would routinely displace the long-established system of union elections by routinely allowing any union that presents a majority (e.g., 50% + 1) of the cards signed by workers in an appropriate bargaining unit to become the bargaining agent for all the workers, including those who had no knowledge of the campaign from either coworkers or the employer. For some workers at least, the misnamed EFCA would leave them no choice at all if they are not approached during the campaign.

The EFCA’s second provision introduces a system of “interest arbitration”—in reality compulsory arbitration—under which the failure of the two sides to reach an agreement within as little as 130 days after union recognition—a short time for any first-time collective bargaining agreement that starts with a blank sheet of paper—results in the appointment of a panel of arbitrators to impose by decree the first two-year contract. Under the proposed timetable, negotiations are supposed to begin within 10 days after union recognition. On the other hand, the union knows in advance the targets of its card check drives and can have its negotiation team in place before the results of the card check are computed. The element of surprise thus gives them a huge strategic advantage over small business firms, which may not be even able to find a lawyer to represent them during this short period. Large firms suffer from the same tactical disadvantage. Yet even if they take the costly step of having some negotiation teams in place, they could still be besieged by multiple claims at the same time, which could leave them short on vital resources.

These difficulties are aggravated by the remainder of the statutory cycle. In the second stage the parties would have 90 days—a short time for addressing the multiplicity of issues in play—to reach a voluntary settlement. If an agreement is not

reached by this time, then a mediator from the Federal Mediation and Conciliation Service (FMCS) would work with the parties for 30 days before the matter goes before a panel of arbitrators. Once again, it is quite possible that just scheduling meetings for the relevant negotiators—all of whom are likely to have multiple commitments—could be difficult within the statutory period.

The entire time for negotiation could easily be consumed by collateral matters that drive the case quickly to arbitration, at which point it is anyone's guess what will happen. The EFCA provides no limitation on how long the arbitration panel may take to make its decision, and does not indicate what happens to the various open issues for the bargaining unit that were left unresolved during the interim period. Its basic procedures and powers are all to be determined by regulation under the statute, none of which will be drafted when the EFCA takes effect. Any effort to participate in the process whereby these regulations are drafted imposes additional costs, which are likely to prove especially large for small businesses that have no direct experience with the administrative process.

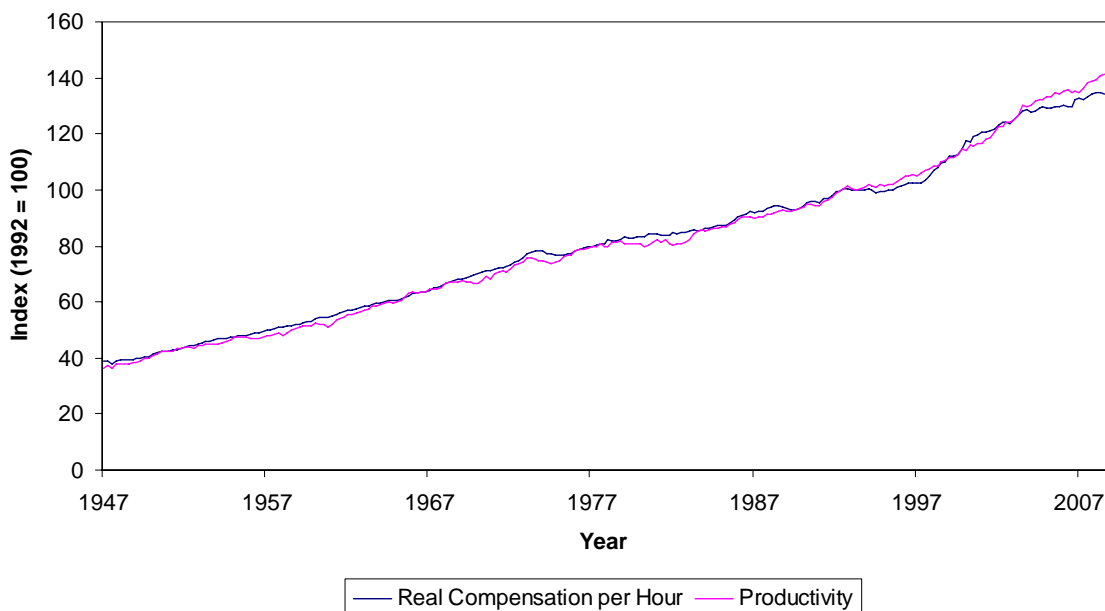
Why Unions Decline

Unions and their backers seek to justify this profound reversal of 70 unbroken years under the NLRA by claiming that radical surgery offers the only effective way to reverse the rapid decline in union membership in the private sector. It is of course undisputed that level of private sector unionization has fallen from its high of about 35 percent of eligible workers in 1954 to about 8 percent of eligible workers today. Union supporters argue that this decline in unionization rates has had adverse consequences on the overall social fabric including the fragile status of the middle class. For example, in her highly influential study on union elections, Kate Bronfenbrenner, who herself has extensive experience as an SEIU organizer,¹⁷ sounds the general theme by insisting that the overall increase in social prosperity in the 1990s did not translate into higher wages for workers. Indeed she claims that her “study conclusively demonstrates that capital mobility and the threat of capital mobility have had a profound impact on the ability of American workers to exercise their rights to freedom of association and collective bargaining.”¹⁸ Her point illustrates a misunderstanding of the basic picture. What she should have said was that it is impossible for unions (and their domestic employers) to claim monopoly rents in the face of global competition, which is more powerful for businesses that can be moved offshore to those service industries that remain at home. But it is not that the rights of association that are stripped. It is that their value cannot be preserved against new entrants. What Bronfenbrenner does not acknowledge is that only the willingness of unions to back off their demands is what saves their jobs—when it is not too little and too late. Union intransigence would not stave off the demise of firm and union alike in the absence of tariff walls.

Nor is she correct in her claim that the market has left workers behind. The basic picture can be fleshed out by looking at a data that examines the relationship in the broad economy between individual wages and individual productivity. The standard neoclassical economic theory on this point is confident in its prediction.

Workers as a group in the general economy face a competitive labor market, in large measure because of the low levels of union penetration in the private sector. Accordingly, we should expect wages to be bid up to reflect any increase in productivity, for the possibility of switching jobs will force wages up. Just that result is found by looking at government statistics that seek to correlate these two key variables. The basic chart, as prepared by the conservative Heritage Foundation shows an exceedingly close statistical correlation.

FIGURE 1
PRODUCTIVITY AND COMPENSATION GROWS, 1947-2007



It is also a mistake to think that the decline in labor union membership is unique to the United States. In fact that decline is matched by the decline in unionization in other nations that operate under different legal regimes.¹⁹ The extent of the decline can be judged by looking at Table I, which shows a uniform pattern of steep declines. In this regard, the New Zealand experience, although small in number, is of some interest because the dramatic drop after 1990—from 51 percent in 1990 to 24.9 percent in 1996—was precipitated in part by the passage of the Employee Contract Act of 1990 initiated by the National, or conservative party.²⁰ Yet when the Labour Party undid the earlier reforms by passing the Employee Contract Act upon taking power in 2000, the percentage of union participation barely budged. The key point that should be gathered from these figures is that any effort to attribute the decline in the American market to distinctive factors of our own system of labor law sorely misses the point. Larger, global trends are very much in evidence, which undercut the key union claim that distinctive American bargaining procedures drives the current decline in union membership.²¹

TABLE 1
UNION DENSITY IN 11 COUNTRIES AND E. U., ADJUSTED DATA, 1970–2003, IN %²²

| Year | United States | Canada | Australia | New Zealand | Japan | Rep. of Korea | Euro. Union | Germany | France | Italy | U. K. | Ireland |
|-----------------|---------------|--------|-----------|-------------|-------|---------------|-------------|---------|--------|-------|-------|---------|
| 1970 | 23.5 | 31.6 | 50.2 | 55.2 | 35.1 | 12.6 | 37.8 | 32.0 | 21.7 | 37.0 | 44.8 | 53.2 |
| 1980 | 19.5 | 34.7 | 49.5 | 69.1 | 31.1 | 14.7 | 39.7 | 34.9 | 18.3 | 49.6 | 50.7 | 57.1 |
| 1990 | 15.5 | 32.9 | 40.5 | 51.0 | 25.4 | 17.6 | 33.1 | 31.2 | 10.1 | 38.8 | 39.3 | 51.1 |
| 1991 | 15.5 | — | — | 44.4 | 24.8 | 16.1 | 34.1 | 36.0 | 9.9 | 38.7 | 38.5 | 50.2 |
| 1992 | 15.1 | 33.1 | 39.6 | 37.1 | 24.5 | 15.1 | 33.4 | 33.9 | 9.9 | 38.9 | 37.2 | 49.8 |
| 1993 | 15.1 | 32.8 | 37.6 | 34.5 | 24.3 | 14.5 | 32.7 | 31.8 | 9.6 | 39.2 | 36.1 | 47.7 |
| 1994 | 14.9 | — | 35.0 | 30.2 | 24.3 | 13.4 | 31.7 | 30.4 | 9.2 | 38.7 | 34.2 | 46.2 |
| 1995 | 14.3 | — | 32.7 | 27.6 | 24.0 | 12.9 | 30.4 | 29.2 | 9.0 | 38.1 | 32.6 | 45.8 |
| 1996 | 14.0 | — | 31.1 | 24.9 | 23.4 | 12.2 | 29.5 | 27.8 | 8.3 | 37.4 | 31.7 | 45.5 |
| 1997 | 13.6 | 28.8 | 30.3 | 23.6 | 22.8 | 11.9 | 28.8 | 27.0 | 8.2 | 36.2 | 30.6 | 43.5 |
| 1998 | 13.4 | 28.5 | 28.1 | 22.3 | 22.5 | 12.1 | 28.2 | 25.9 | 8.0 | 35.7 | 30.1 | 41.5 |
| 1999 | 13.4 | 27.9 | 25.7 | 21.9 | 22.2 | 11.1 | 27.8 | 25.6 | 8.1 | 36.1 | 29.8 | — |
| 2000 | 12.8 | 28.1 | 24.7 | 22.7 | 21.5 | 11.1 | 27.3 | 25.0 | 8.2 | 34.9 | 29.7 | — |
| 2001 | 12.8 | 28.2 | 24.5 | 22.6 | 20.9 | 11.2 | 26.6 | 23.5 | 8.1 | 34.8 | 29.3 | 36.6 |
| 2002 | 12.6 | 28.2 | 23.1 | 22.1 | 20.3 | 11.1 | 26.3 | 23.2 | 8.3 | 34.0 | 29.2 | 36.3 |
| 2003 | 12.4 | 28.4 | 22.9 | — | 19.7 | 11.2 | — | 22.6 | 8.3 | 33.7 | 29.3 | 35.3 |
| Absolute Change | | | | | | | | | | | | |
| 1970-1980 | -2.5 | 3.3 | -0.7 | 13.9 | -4.0 | 2.0 | 1.9 | 2.9 | -3.4 | 12.6 | 5.9 | 3.9 |
| 1980-1990 | -4.0 | -1.8 | -9.0 | -18.1 | -5.8 | 3.0 | -6.7 | -3.7 | -8.1 | -10.8 | -11.4 | -6.1 |
| 1990-2003 | -3.1 | -4.7 | -17.6 | -28.9 | -5.6 | -6.5 | -6.7 | -8.6 | -1.9 | -5.1 | -10.0 | -15.8 |
| 1970-2003 | -11.1 | -6.5 | -27.3 | -33.1 | -15.4 | -1.5 | -11.5 | -9.5 | -13.4 | -3.3 | -15.5 | -17.9 |
| Relative Change | | | | | | | | | | | | |
| 1970-1980 | -10.6 | 10.4 | -1.4 | 25.2 | -11.4 | 15.9 | 5.0 | 9.1 | -15.7 | 34.1 | 13.2 | 7.3 |
| 1980-1990 | -20.5 | -5.2 | -18.2 | -26.2 | -18.6 | 20.4 | -16.9 | -10.6 | -44.3 | -21.8 | -22.5 | -10.7 |
| 1990-2003 | -20.0 | -14.3 | -43.5 | -56.7 | -22.0 | -36.9 | -20.2 | -27.6 | -18.8 | -13.1 | -25.4 | -30.9 |
| 1970-2003 | -47.2 | -20.6 | -54.4 | -60.0 | -43.9 | -11.9 | -30.4 | -29.7 | -61.8 | -8.9 | -34.6 | -33.6 |

FIGURE 2
U.S. UNION DENSITY, 1977-2007

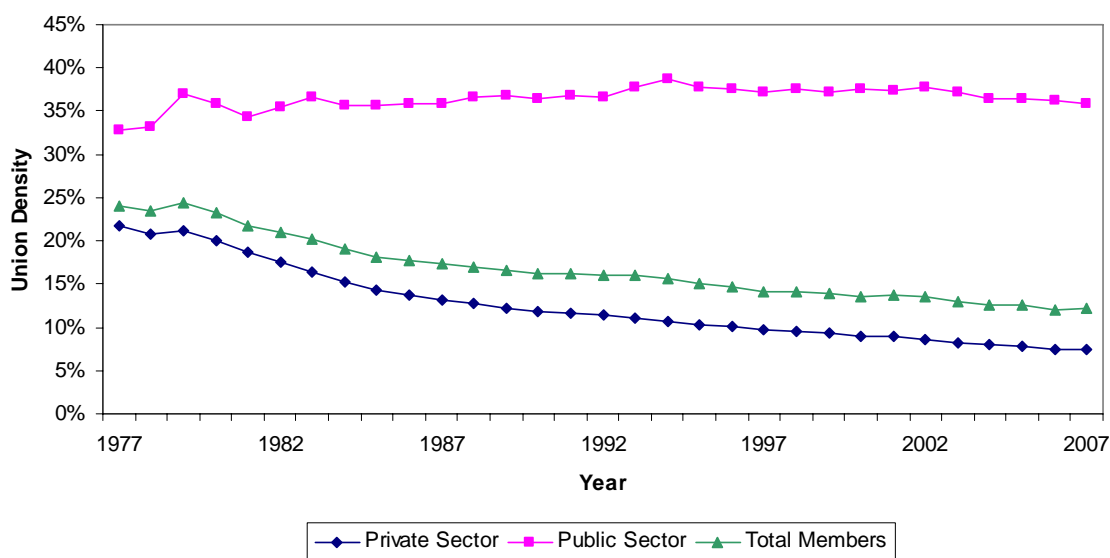


FIGURE 3
U.S. UNION MEMBERSHIP 1977-2007

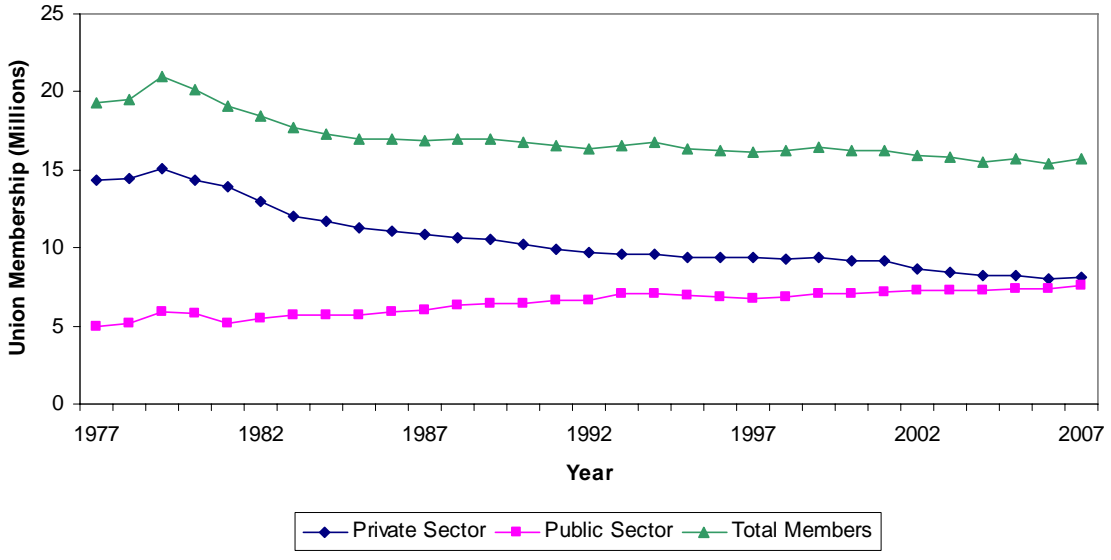
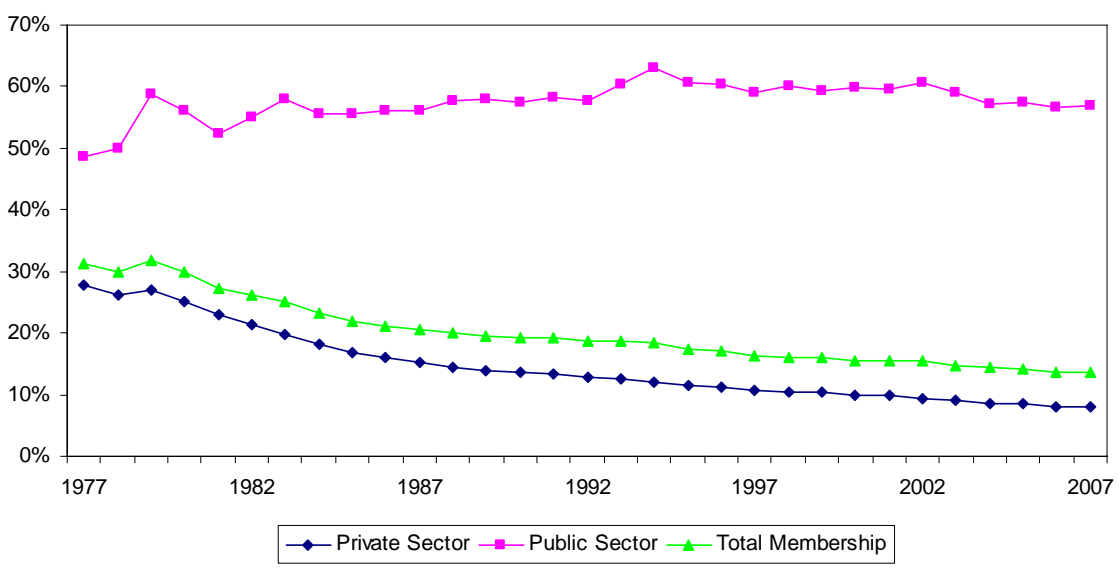


FIGURE 4
U.S. UNION MEMBERSHIP RELATIVE TO NON UNION MEMBERSHIP 1977-2007



The key dispute is over the reasons for this admitted decline. The defenders of EFCA typically claim that unions suffer a serious disadvantage in an organizing campaign because the unjustified intransigence of employers both large and small, including the use of unfair labor practices (ULPs), prevents workers from exercising

the full and free choice to join a union—the equal right to refrain from joining a union receives less attention—contained in the essential guarantee for collective bargaining after the 1947 Taft-Hartley Amendments to the NLRA.

In making this claim, the critics of the current law studiously ignore not only the global trends noted above, but all other factors that could account for the decline in unionization. Some likely candidates for the observed decline include the expansion of free trade across national borders, more intensive global competition for employees, the reduced appeal of unions to younger workers,²³ the entry of smaller decentralized firms, the rapid turnover of workers in a relatively open economy, the better wages and working conditions that nonunion employees can command in an open economy, the rise in government regulation that confers certain protections (i.e. against discrimination) that no longer are subjects of bargaining, ineffective union organizing, and the rigidity of the internal governance structure of unions themselves. Most important perhaps is the fundamental switch in the political economy of the United States. The 1930s marked a corporatist period, in which monopoly unions shared power with regulated monopoly industries, shielded from competition by a powerful state.²⁴ More recently, the economic environment has switched by allowing the free entry of smaller firms whose vitality and growth has gone a long way in undermining the old monopoly models, posing more challenges to established firms and their long-standing labor unions. No account of the decline in unionization is complete without taking these changes in account, which the defenders of EFCA blindly refuse to do.

The case in support of EFCA is also deficient for its failure to establish any tight relationship between the supposed wrong and the curative legislation. Of EFCA's three provisions, the only one that deals directly with the incidence of ULPs is the third, which imposes increased penalties on employers, without, however, imposing a similar increase on unions for any ULPs *they* might commit in handling of authorization cards or in taking positions initial agreement disputes. In other words, the EFCA does not contain any parallel provision that imposes increased penalties for unions with respect to their violation of the analogous ULPs contained in NLRA section 8(b)(1)(A), which prohibits union restraint or coercion of employees; section 8(b)(3), which imposes on union the obligation to bargain in good faith during negotiations; and section 8(b)(4), which prohibits unlawful union pressure directed against secondary parties in order to improperly place pressure on the employer engaged in union bargaining. EFCA only increases the penalties for employers.

The proposal for the standard substitution of a card-check system for the secret ballot is manifestly overbroad because it imposes this new method of union recognition in all cases based on the occurrence of ULPs in some small fraction of cases, which is systematically overstated by union defenders. Most anomalously, the insistence on interest arbitration—a fancy phrase for compulsory labor arbitration—is described misleadingly in the bill as a means of “facilitating initial collective bargaining agreements,” when in fact unions are frustrated by their inability to obtain first contracts that advance their interests under the traditional bargaining system. Federal and state law has never allowed any panel of arbitrators to impose a full array of detailed obligations on a reluctant party. In fact, the NLRA's

definition of collective bargaining explicitly states that the law does not require either party to accept a particular proposal or to make a particular concession (NLRA § 8(d), 29 U.S.C. § 158(d)). Without question, this dramatic switch in the current law enjoys no precedent in the private sector, and, as will become evident, only highly imperfect analogies in the public sector.

All the public defenses of the EFCA, including the testimony before Congress on March 27, 2007, skirt the interest arbitration question entirely. Professor Cynthia Estlund of NYU Law School, for example, ducked the arbitration issue with the simple observation that she was concerned only with “enhanced enforcement and majority sign-up process,” without ever explaining why it was appropriate to ignore the evident synergies between the two.²⁵ None of the other parties who testified addressed it either. It is as though a conspiracy of silence among the supporters of the Act envelops the one provision that most dramatically transforms the American system of collective bargaining for the worst.

In this extended essay I hope to fill the large gaps that the previous advocacy and research leaves open in understanding EFCA. My approach proceeds in two stages. The first parses the card-check and arbitration provisions of the EFCA. The second offers a detailed critique of its institutional structure and probable economic consequences, both allocative and distributive.²⁶