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ONE BRIDGE TOO FAR: WHY THE EMPLOYEE FREE CHOICE ACT RIGHTLY FELL SHORT

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ABSTRACT

The Employee Free Choice Act has enjoyed strong academic support. but thus far has been stymied by fierce political resistance to its central provisions, which first institute a card-check for the selection of a union and then require mandatory arbitration if the parties cannot agree to a new contract within 130 days of union recognition. This article critiques the arguments offered by Craig Becker, Benjamin Sachs, and Catherine Fisk & Adam Pulver in support of this fundamental revision of labor law, all of whom purport to show that flaws in the current system of collective bargaining need major pro-union adjustments. The key theoretical insight of this paper is that no ad hoc justifications for particular changes in the statute can be considered in isolation from the fundamental decision under the National Labor Relations Act to impose a system of mandatory collective bargaining. Once an employer may not refuse to bargain with a union, it must receive in exchange a broad number of offsetting rights, such as the ability to speak during organizing campaigns and to reject in good faith those offers that it finds unacceptable, as current law provides. EFCA has failed because of the widespread political perception that it would usher in a new wave of union dominance that would destroy job opportunities while creating major administrative burdens and political dislocations.

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Introduction For the past several years, Democratic majorities in both houses of Congress have championed the passage of the Employee Free Choice Act ("EFCA"). Some defenders of the proposed legislation did not see it as a sea change. But that position was belied by the vast amounts of energy and money that the dominant players on both sides invested in the battle. Those expenditures are more consistent with the view that passage of the bill would have revolutionized management and labor relations over at least some substantial portion of the labor force, most likely in low-paying jobs in the service industries.

When Barack Obama was elected President in November 2008, the odds were good that EFCA would be enacted quickly into law. Obama was elected with strong majorities in both houses of Congress, and the public had soured on American business and had accepted much of the populist critique that attributed the great financial crisis in the fall of 2008 to corporate greed and financial machinations. Relationships between the administration and organized labor were close, and the two groups showed every sign of working effectively together on a powerful Congressional campaign to turn the bill into law. Unlike the pending health care legislation that faced some titanic struggles before eventually becoming law,[1] EFCA is a short bill whose implementation does not require levying any new taxes or creating any major, new administrative agency. Intellectually and emotionally, EFCA fed off the widespread and determined perception within pro-labor circles, both those in practice and those in the academy, that the feeble union remedies under the National Labor Relations Act ("NLRA")—usually holding new elections or issuing bargaining orders—leave employers who consciously breach the statute better off than they would have been if they had complied with the law. Time after time, pro-union scholars often identify the NLRA's weak remedial side as the major

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[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (to be codified as amended at scattered sections of 42 U.S.C.).

explanation for the rapid decline of labor union membership in the private sector. Those numbers had leveled off in 2006 and 2007, only to plummet again in the post-2008 meltdown to a new low of 7.2 percent of the private workforce today.[2] That figure is down from a high of about 35 percent in 1954. Indeed, so great is the transformation in union membership that today there are more members of public unions than private unions, by a respectable margin of 7.9 million to 7.4 million workers.[3]

There are, of course, other ways to explain the decline in union representation. One point worth noting is that the basic legal framework has changed only in modest ways since 1954. If the system could support high levels of unionization then, it is fair to ask, why not now? Other explanations point to the increase in labor market fluidity, the rise in foreign competition, and the observation that the decline in unionized workforce is not unique to the United States but is paralleled in other advanced industrialized countries.[4]

However, that this dispute resolved one point seems clear. As this article is written, in the fall of 2010, EFCA seems dead in the water, and given the near certainty of increased Republican representation in both the House and Senate, there is no likely prospect of its revival. The change in sentiment is apparent. In the first two years of the Obama presidency, the enthusiasm of labor for the bill was matched every step of the way by the undying hostility of employer groups toward the legislation. With few exceptions,[5] these groups acted with a unity of purpose that is not normally found in the fractious ranks of American industry, where businesses are often at loggerheads with each other. One sign of that unity is that these organizations funded my own book, *The*

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[2] News Release, Bureau of Labor Statistics ("BLS"), Union Members – 2009 at 1 (Jan. 20, 2010), *available at* http://www.bls.gov/news.release/pdf/union2.pdf ("More public sector employees (7.9 million) belonged to a union than did private sector employees (7.4 million), despite there being 5 times more wage and salary workers in the private sector.").

[3] *Id.* ("More public sector employees (7.9 million) belonged to a union than did private sector employees (7.4 million), despite there being 5 times more wage and salary workers in the private sector.").

[4] Samuel Estreicher, *"Think Global, Act Local" Employee Representation in a World of Global Labor and Product Market Competition*, New York University Public Law and Legal Theory Working Papers No. 90, (2008) available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1090&context=nyu/plltwp.

[5] *See* FairEconomyNow.org, Business Leaders For a Fair Economy, http://www.faireconomynow.org/more-than-225-colorado-businesses-support-the-employee-free-choice-act/, which included SEIU as its Featured Employer. For the dominant sentiment *see* U.S. Chamber of Commerce, The Employee Free Choice Act - the "Card-check" Bill, http://www.uschamber.com/issues/labor/employee-free-choice-act-card-check-bill.

Case Against the Employee Free Choice Act.[6] To be sure, not all firms were equally opposed to EFCA. Those businesses that were already unionized could obtain some compensatory advantage if their rivals were subject to similar (or even more burdensome) union contracts. But even that small advantage was not, in general, enough to swing many employers into the pro-EFCA camp, for EFCA also held out the distinct possibility of further unionization of firms in which unions had already acquired a foothold. It is no deep secret that, within their gates, employers do not welcome unions with open arms. Whether these employers could have succeeded against a full-court administration press remains unclear. But employers were surely aided by the decision of the Obama administration to subordinate labor law reform to health care legislation,[7] financial legislation,[8] and climate control legislation, the first two of which have passed, and the third of which is not going anywhere soon.

However, the full explanation for the stalemate over EFCA does not rest solely in the relative strength of management over labor in this struggle. All partisan disputes take place in arenas where neutral third parties can choose sides. On this particular occasion, the unions faced intense public antipathy to the most conspicuous portion of EFCA, which allowed unions to gain representation by a card-check, without going through secret ballot elections. The obvious risks of fraud and coercion in such a procedure brought out such individuals as George McGovern, the Democratic Presidential nominee in 1972, against the bill.[9] I regard these developments as both welcome and long overdue. EFCA represents a potentially catastrophic federal intervention in already fragile labor markets, perhaps on par with the 1935 NLRA. Rather than compound that New Deal mistake, I would urge a position that goes against the dominant political ethos

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[6] RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT (2009) [hereinafter EPSTEIN, EFCA]. By way of full disclosure, these organizations have nothing to do with the writing of this article. I also wrote several independent pieces toward the same end. *See, e.g.*, Richard A. Epstein, *The Employee Free Choice Act: Free Choice or No Choice for Workers*, 45 MANHATTAN INST., CIV. JUST. F., (2009), *available at* http://www.manhattan-institute.org/pdf/cjf_45.pdf; Richard A. Epstein, *The Employee No Choice Act*, CHIEF EXECUTIVE MAG., Dec. 12, 2008, at 36, *available at* http://www.chiefexecutive.net/ME2/dirmod.asp?sid=&nm=&type=Publishing&mod=Publications%3A%3AArticle&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=F1B3BCFCDF70481394CAE1010C468E0B; Richard A. Epstein, *The Ominous Employee Free Choice Act*, 32 REG. 48 (2009).

[7] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (to be codified as amended at scattered sections of 42 U.S.C.).

[8] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[9] George McGovern, *My Party Should Respect Union Ballots*, WALL ST. J., Aug. 8, 2008, at A13.

both in the United States and overseas: the NLRA should be repealed in favor of a return to the common law system of labor relations that prevailed prior to the New Deal.[10]

Needless to say, this normative outlook is not shared widely by the academics who specialize in labor relations, and who, in general, are highly supportive of the current law and, in most but not all instances, remain in favor of some if not all of EFCA's major innovations, especially the effort to boost the remedies against employers during organization drives. The purpose of this article is to critique the recent arguments that pro-labor scholars have advanced for EFCA as a way to make up for the remedial shortfalls of the NLRA. Make no mistake about it: the adoption of EFCA would, in fact, be a more dramatic development than a return to the 1935 Wagner Act[11] by the repeal of the Taft-Hartley Act of 1947, insofar as EFCA eliminates the employer's ability to stand firm against union demands during the collective bargaining process, which even the original Wagner Act allowed employers to do.[12] Front and center are the questions of how to allow and increase the odds of union success in organizing drives, as well as their ability to gain, as of right, first contracts thereafter. These measures are the only way to stem the rapid decline in unionization that takes place through the unrelenting attrition of large unions in old-line industries. It is no surprise, therefore, that EFCA has nothing to say regarding other key issues associated with labor relations, such as the operation of the grievance process or the use of the strike and lockout as economic weapons in labor disputes.

In the end, their effort to transform established law has proven a bridge too far to cross. The Democratic and unionized effort to transform American labor law by brute political force failed in the face of the widespread public uneasiness with the bill. But, however dormant EFCA is politically, it continues to garner major support inside labor unions and among its many academic backers. It is important, therefore, to give close

[10] For the basic position, *see* Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the* New Deal Labor Legislation, 92 YALE L.J. 1357 (1983) and Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435 (1983). *See* Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415 (1983). My abiding antipathy to the NLRA dates back to my student days. *See* Richard A. Epstein, Note, *Individual Control Over Personal Grievances Under* Vaca v. Sipes, 77 YALE L.J. 559 (1968) [hereinafter Epstein, *Individual Control*].

[11] National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151-169 (2006).

[12] Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (2006).

attention to the arguments for unionization in general and to this bill in particular, given that EFCA could be reintroduced at any time, be it as freestanding legislation or as a rider to some other bill. The purpose of this paper is to examine and refute the case that has been made for the legislation. On this issue, there is no middle ground: none of the provisions in EFCA should ever be enacted into law.

EFCA itself consists of three separate provisions. The first two, which are best considered together, have as their objective the exclusion or reduction of employer influence in the union organization process. The first departure from current law, benignly described as "Strengthening Enforcement," modifies the rules governing employer unfair labor practices ("ULPs") during organization campaigns.[13] This section increases the penalties for ULPs imposed against employers during an organization drive without touching the penalties for unfair labor practices by labor unions. The second provision, which under the EFCA goes by the soothing name of "Streamlining Union Certification," allows, at the option of "either the union or any group of employees,"[14] the routine substitution of the card-check for the National Labor Relations Board ("NLRB")-supervised secret election that now represents the preferred approach under the Act. That card-check procedure effectively allows unions to undertake organization campaigns in relative secrecy, thus neutralizing, without prohibiting, much of the employer's influence in an organization campaign. These first two elements are considered together because each is meant to reinforce the other.

The third major reform, described as "Facilitating Initial Collective Bargaining Agreements," calls for the use of a two-year mandatory "contract" that is determined by an arbitral board selected by the Federal Mediation and Conciliation Service ("FMCS"), if the parties fail to come to an agreement after a negotiation process lasting as little as 130 days, all stages included.[15] This mandatory arrangement is imposed even when both the union and management have, in good faith, bargained to impasse under the present NLRA. All three provisions are set out in full in this Chapter's appendix. The cumulative effect of these three provisions would lead to a massive shift in the balance of power between labor and management and, I fear, to new levels of mutual animosity in

[13] Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 4 (2009).
[14] *Id.* at § 2.
[15] *Id.* at § 3.

an area where political relations between the two sides are, to put it mildly, already frayed.

The question is how to evaluate these three proposals. In doing so, I propose to take the analysis in four steps. In part I, I look at two sets of arguments that have been made to strengthen the union position in organizing drives. The first of these was written in 1993 by Craig Becker, who has now come into prominence thanks to determined Republican opposition to his presidential recess appointment to the board, stemming from his article *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*.[16] A more recent effort that builds on the Becker work is a recent article of Professor Benjamin Sachs, who explicitly addresses EFCA in his analysis of the organizational process.[17] In part II, I turn to a recent defense of the system of mandatory arbitration offered by Professors Catherine Fisk and Adam Pulver.[18] Part III offers an overall examination of EFCA. Part IV examines some estimates of the probable negative effects of EFCA on job formation and retention. A brief conclusion follows.

I. Employee Organizational Drives

A. *Becker and Employee Autonomy*

Becker's critique of modern labor law makes no bones about where he stands in his suspension of the operation of market forces in labor markets. In his conclusion, he quotes from the famous article of Roscoe Pound,[19] which deplored the Supreme Court for its ostrich-like behavior in cases like *Lochner v. New York*.[20] To Becker, as to Pound, the thought that individual employees could bargain effectively with employers sacrificed all practical wisdom for some misguided fascination with an outdated notion of formal equality. "Actual industrial conditions" just did not square with the naïve view of the

[16] Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993).
[17] Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010).
[18] Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47 (2009).
[19] Roscoe Pound, *Liberty of Contract*, 18 YALE L. J. 454 (1909).
[20] 198 U.S. 45 (1905).

world held by the defenders of laissez-faire.[21] Becker's leitmotif was that Pound's basic orientation should carry through to understanding and interpreting American labor law. In his view, its halcyon period was the heady time between 1935 and 1939 when there was much judicial support for the view that, under the NLRA, employers did not have any right to be involved in any way during the representation proceedings prior to the selection of the union either by election or by designation.[22] Becker goes on to make the further case that this was indeed the right set of legal relationships on the ground that the creation, internal affairs, and operation of the union were of no concern to an employer. And he further notes that in the early years after the passage of the NLRA, the Board was sympathetic to union efforts to exclude the employer from worker deliberations over union representatives. A union did not have to be chosen solely through a secret ballot election, but could be chosen via a card-check, which had the advantage that "[m]embership cards could be solicited without employers knowing that their employees were organizing."[23] His bottom line, therefore, was that employers should be relegated to the role of distant observers in union elections, without any participation in the basic process, and without any rights of speech associated with the campaign process. In effect, the employer should have no seat at the table in dealing with the autonomous actions of unions and their members. To implement that position, the NLRB "should exercise this discretion by specifying that the only parties to both pre- and post-election hearings are employees and the unions seeking to represent them."[24] He makes this dire prediction: "One thing therefore is certain. So long as the law construes employers and unions as equals in union elections, industrial democracy will remain as much a legal fiction as liberty of contract."[25]

I believe that Becker is correct in his claim that, as a matter of first principle, any selection of a union should be a matter for potential workers to decide for themselves. After all, no other business organization has to gain the consent of its negotiating adversary in order to decide how to form its ranks. Becker notes that appeals to this notion of internal autonomy were commonly made by supporters of the Wagner Act, who

[21] Pound, *supra* note 19, at 454, 487.
[22] Becker, *supra* note 16, at 507-09.
[23] *Id.* at 535.
[24] *Id.* at 586
[25] *Id.* at 603.

wanted to insulate union deliberations from any management influence: "suppose the United States and Mexico were seeking to adjust a boundary matter by negotiation through commissioners. How would it be regarded if the United States sought to influence the selection of certain commissioners to represent Mexico?"[26] This meddling would be totally improper. But, then again, under the strong conceptions of state sovereignty that dominate international law, the United States did not have the power to force the Mexican government to negotiate with it in good faith. Note, therefore, Becker's astute rhetorical ploy: he uses the strong theory of individual autonomy for internal workers affairs, but rejects that same theory by making it an unfair labor practice for an employer to refuse to bargain with the recognized union and its representatives. The paramount difficulty with using this homely international example over that of the NLRA is that it does not take into account the other profound adjustments that the NLRA works on the arrangement between an employer and employee.

It would be perfectly acceptable to follow Becker's striking position in a world in which freedom of association governed every aspect of management/labor relationships. Under that view, it is clear by parity of reasoning that labor groups could exert no influence in the way in which employers choose to govern their businesses or in the policies that they choose to pursue in relation to their employees and to the labor unions that wish to represent them. In particular, those principles would allow the employer not to deal with any union representatives at all, and to insist that any worker agree not to join any union or promise to join any union so long as they continue to work for the employer. These "yellow dog" contracts, in effect, would force a firm's workers to be loyal to one side or the other. But no worker could, in a regime that honors strong autonomy, have his cake and eat it too, by forcing the employer to hire when he is a union member or has committed to joining the union on its request.

A second precondition for adopting Becker's proposal for employer noninterference in union affairs is that the current legal framework would have to change such that unions could no longer bind those workers who decided to stay outside the union orbit. Any accurate rendition of the statutory or determined bargaining unit could

[26] Becker, *supra* note 16, at 531 (quoting *Nat'l Labor Relations Board of 1935: Hearing on S. 1958 Before the S. Comm. on Educ. and Labor*, 74th Cong. 150 (1935) (statement of Charlton Ogburn, Counsel, AFL)) (internal quotation marks omitted).

be used to bind dissenters, such that even their own prior contracts could be abrogated by a collective bargaining agreement.[27]

In order to avoid this conclusion, the NLRA, in line with the view of Pound and others, adopts the dubious rhetorical ploy that workers do not have "full" or "actual" freedom of contract so long as they are opposed by firms that consist of an aggregation of shareholders.[28] As Becker himself notes, Senator Robert Wagner constantly appeals to the notions of individual freedom to defend the statute: "It is the next step in the logical unfolding of man's eternal quest for freedom. . . . Only 150 years ago did this country cast off the shackles of political despotism. And today, with economic problems occupying the center of the stage, we strive to liberate the common man . . . ."[29] And so the Constitution of limited government becomes a justification for massive interference into the economy. Wagner's argument that the NLRA somehow advances the principle of freedom of association has become a staple of the academic literature.[30] Nor is its appeal local, for the same position, on much the same grounds, has been endorsed by the many signatories of the International Labor Organization, with its 183 nations.[31]

Notwithstanding the overwhelming political consensus on this issue, as a matter of first principles, the argument does not play out as Wagner suggests. The modern rhetoric makes repeated reference to the ideal of "employee choice." Yet the repeated use of that idea in this context[32] is the homage that vice pays to virtue. Quite simply, the traditional principle of freedom of association, both actual and full, bears no relationship

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[27] *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

[28] 29 U.S.C. § 151 ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.").

[29] Becker, *supra* note 17, at 496 (quoting 79 Cong. Rec. 7565 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2321 (1949)).

[30] *See, e.g.*, Archibald Cox, *Rights under a Labor Agreement*, 69 HARV. L. REV. 601 (1956) (arguing that labor law instantiated the sound view of freedom of contract. His views were adopted in large measure in Vaca v. Sipes, 386 U.S. 171 (1967), per Justice White, who was strongly pro-labor during his entire tenure of service. *Vaca* denied any individual work the right to press his own grievance under a collective bargaining agreement if the union in good faith did not go along.). For my student response, *see* Epstein, *Individual Control*, *supra* note 10, at 563-64, 577-78 (attacking both Cox's account of freedom of association and White's rule in *Vaca*). I stand by that student note today.

[31] For further information, *see* International Labour Organization, About the ILO, http://www.ilo.org/global/About_the_ILO/lang--en/index.htm.

[32] *See* discussion of Sachs, *infra* at Part I.B.

to that which is invoked under the Labor Act. Justice Brennan, in *Roberts v. United States Jaycees*, wrote, "Freedom of association . . . plainly presupposes a freedom not to associate,"[33] only to restrict the application of that principle to a narrow set of intimate associations.[34] That right not to associate is not honored today in the antidiscrimination laws, for example. Yet there is no principled reason why the gains from free association should be available to some types of transactions but not to others. Properly understood, that principle in its generalized form also negates government efforts to impose any duty to bargain on an employer in a competitive market. Any agreement between workers can bind only those agreeing; it cannot increase their rights against third persons, employers included. If an employer can refuse to bargain with individual workers, in principle it should certainly be able to refuse to bargain with a collectivity of workers whose monopoly power has long been regarded with suspicion by the law for its tendency to lower output, raise wages, and reduce overall social welfare.

Thus, it is misguided for defenders of the NLRA to appeal to the notion of employee choice under the guise of the principle of freedom of association. The NLRA violates that position in both cases, by stripping from employers rights that principle should grant them, and conferring unwarranted advantages on unions that do not deserve them. Removing this linguistic veil makes clear that far from advancing free choice, the statute carried out its main purpose—the creation of union monopoly power. Indeed, given that position, the antidiscrimination norm, which in my view has no place in competitive labor markets,[35] should apply against unions to be sure that they do not use their power to discriminate against some workers in favor of others. The most obvious axis of discrimination is of course race, which is why the Supreme Court grafted onto the basic statute a duty of fair representation to protect minority workers from majority

[33] 468 U.S. 609, 623 (1984) (noting tension between the principle of freedom of association with a general antidiscrimination law).

[34] For my critique of this subject matter specific view of freedom of association, *see* Richard A. Epstein, *Church and State at the Crossroads:* Christian Legal Society v. Martinez, CATO SUPREME CT. REV. 117-121 (2010).

[35] *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (arguing against antidiscrimination laws in the private sector, and in favor of the per se legalization of all affirmative action programs).

exploitation in *Steele v. Louisville & Nashville R.R. Co.*,[36] only to have to grapple with the implications of that duty in race cases for over a decade afterwards.[37]

It follows, therefore, that the principle of freedom of association for workers cannot be invoked to defend the NLRA when that statute has irrevocably altered all the background conditions under which a claim of freedom of association becomes defensible. Thus in ordinary cases, any group that decides to organize is subject to the constraints of antitrust law to the extent that it seeks to dominate one side of the market. Put otherwise, the collective refusal to deal should count as a per se violation of the antitrust laws,[38] just as it did before the passage of the modern labor statutes. Indeed, on this point there has been an instructive set of historical reversals. In the so-called Danbury Hatters' Case, *Loewe v. Lawlor*, a union was held liable in a unanimous opinion under the Sherman Act for organizing a nationwide secondary boycott against dealers who traded in hats made by the Danbury Hat Co.[39] Chief Justice Fuller held that the same principles that governed boycotts in ordinary commerce applied to labor unions.[40] His concern was not based on formal principles in blithe disregard to facts on the ground. In fact, that secondary boycott had real teeth and led seventy of eighty-two hatters in the United States to capitulate to the union demands.[41]

As a matter of straight antitrust law, there is no serious argument that the decision was incorrect. Progressive forces, however, quickly overturned *Loewe v. Lawlor* in 1914 by passing Section 6 of the Clayton Act,[42] which largely immunized the efforts of unions

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[36] 323 U.S. 192 (1944).

[37] *See, e.g.*, Conley v. Gibson, 355 U.S. 41 (1957), which had to clean up fair representation cases under *Steele*.

[38] Fashion Originators' Guild of Am. v. FTC, 312 U.S. 668 (1941) (applying per se rule notwithstanding the Guild's purpose to stop production of knock-off garments).

[39] Loewe v. Lawlor, 208 U.S. 274 (1908).

[40] *Id.* at 294-96.

[41] *Id.* at 305.

[42] Clayton Antitrust Act of 1914, 15 U.S.C. § 17 (2006) ("The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.") (establishing antitrust laws are not applicable to labor organizations). In its terms, Section 20 of the Clayton Act limited the ability of courts to issue injunctions against unions or their members in various labor disputes "unless necessary to prevent irreparable injury to property, or to a property right." In *United States v. Hutcheson*, 312 U.S. 219 (1941), the Supreme Court held that Section

to organize workers,[43] at least insofar as they did not collaborate with unionized firms to drive non-unionized firms out of business.[44] That exemption from the general antitrust law is both a major and ad hoc boon to labor unions, which fundamentally alters the background conditions under which the claim for strong union autonomy should be examined. Yet even that strong pro-union position did not last, because one of the major reforms of the Taft-Hartley Act was to reinstate the prohibition against secondary boycotts, of course without touching the right of a union to bargain collectively on behalf of its workers.[45]

Next, of course, is freedom of association among the workers themselves. In principle, "freedom of association" should require acceptance by unanimous decision, not by majority vote. To be sure, all the workers in a given workplace could grant their assent to have their membership in a union, and the conditions and incidents of membership could then be determined by the majority of vote of all of those who join together. That type of arrangement is common in all sorts of associations, from charitable foundations to condominium associations. But that is not the arrangement that prevails under the NLRA. Indeed, if the logic of freedom of association had not prevailed under the NLRA, there would be no need for a union to show that the workers who choose to join are members of some bargaining unit determined by occult statutory rules such as those found in Section 9 of the NLRA.

In the name of employee choice, the NLRA also confers upon unions a second privilege that flies in the face of the orthodox principle of freedom of association. No agreement between A and B, however voluntary, can give them additional rights against C. I cannot agree with my best friend that a third person will sell his house to us for $10.

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20 also barred criminal prosecutions in light of the Norris-La Guardia Act's intention to boost union organizing efforts. Justice Frankfurter never stopped to ask whether the attack on the labor injunction rested on the institutional risk of allowing a private party to use the labor injunction, which is removed when the action is taken by the government. Frankfurter had insisted that distinction in FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 220 (1930), written just before the passage of the Norris-La Guardia Act, which noted that the legislation "explicitly applies only to the authority of United States courts 'to issue any restrained order or injunction.'"

[43] *See* Clayton Antitrust Act §§ 6, 20.

[44] *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (refusing to extend the protection of the Clayton Act to agreements that unions made with businesses in order to induce non-union firms to sign union contracts). For discussion, *see* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, 87-88 (2006).

[45] Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (2006).

That contract may, after a fashion, be binding on the two of us, but it in no way alters the right of C to refuse to deal with either of us on the terms stated. The same would be true of an agreement between my friend and me to force C to negotiate with us "in good faith" in order to reach the terms and conditions on which the house could be sold. The labor statutes flatly reject this necessary and standard side-constraint to the robust account of freedom of association, by explicitly authorizing a majority union to force the employer to negotiate with it against its will.[46]

Union defenders like to describe these extraordinary statutory privileges as a commendable form of realism in the face of the employer's overwhelming market power. Indeed, Becker treats these built-in union advantages as given by some state of nature, but cannot, in an article of 49,296 words, once utter the words "statutory monopolist" to describe the union's position vis-à-vis the employer. To be sure, the level of monopoly power that any union holds today has been eroded, in part, by the more open market in trade on both the domestic and international fronts. But if that erosion removed all site-specific gains, no union would seek to obtain passage of EFCA because strong competitive forces would hold wages at or close to their pre-unionization levels. Yet if unions could make real inroads in domestic markets for restaurants and hotels, for instance, they could indeed shift the wage curves upward without worrying, at least in the short run, about direct forms of foreign competition. It is, therefore, proper to think of EFCA as a way to obtain those economic advantages.

In entering those markets, there remains the question of whether the union, with its current panoply of statutory rights, works under some systematic disadvantage. That proposition is commonly supported, but as to facts or data to support any conclusion that unions are systematically overmatched in the current situation, Becker (like Pound before him) offers no probative evidence at all. That is not to say that unions do not face steep odds. Of course, it is easy to collect, as Professor Sachs surely does, evidence of strong

[46] The National Labor Relations Act, § 157 reads: "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, and shall also have the right to refrain from any or all of such activities [subject to a closed shop exceptions]…"

employer resistance to unionization.[47] It would be amazing if the position were otherwise. Such behavior is only rational in light of the complex bargaining arrangements under the current law. Indeed, there is irrefutable evidence that somewhere over 96 percent of employers oppose union organization drives.[48] Likewise, it is no surprise that, in aggregate, employers spend close to one billion dollars annually in defensive efforts to ward off these union drives, including about $200 million in external payments to third parties and the rest in the company time of managers and supervisors.[49]

Who would expect otherwise? Unions themselves can bring formidable resources to organizing campaigns, and are able to win a substantial fraction of contested elections. In addition, they can resort to other tactics, including publicity drives, to discredit firms outside the collective bargaining field. They can also find political allies who will help pass zoning laws to keep non-union firms out of local markets. These tactics cannot be ignored in evaluating the relative bargaining strength of the parties. Faced with these and other tactics, stout resistance to union initiative is always rational and often effective. Does *anyone* think that unionization makes the unionized firm better off?[50]

It is possible to go still further. Given the size of the stakes, the conventional estimates of the costs that businesses expend to resist unionization are in all likelihood far too *low*. First, these estimates do not include the costs that the United States incurs in overseeing these complex processes. Second, even with respect to private expenditures, both direct and indirect, the full total should include not only those that kick in once a union drive is in the offing, but those that occur in anticipation of possible union activity. An astute employer and its internal legal team will never wait until union activity is underway to make their influence felt on company decisions. In a world that allows yellow dog contracts, employers have little need to take defensive actions. But once

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[47] *See* Sachs, *supra* note 17, at 680-81 (2010) (collecting recent references including: John Logan, *Consultants, Lawyers, and the 'Union Free' Movement in the USA Since the 1970s*, 33 INDUS. REL. J. 197, 198 (2002); John J. Lawler, UNIONIZATION AND DEUNIONIZATION: STRATEGY, TACTICS, AND OUTCOMES (STUDIES IN INDUSTRIAL RELATIONS) 79-117 (Hoyt N. Wheeler & Roy J. Adams eds., 1990); John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. INDUS. REL. 651, 656 (2006).

[48] Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing* 10 tbl. 3 (Econ. Policy Inst., Briefing Paper No. 235, 2009).

[49] *See* Logan, *supra* note 47, at 198.

[50] The point is pushed by RICHARD FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984), which posits that unions help mediate disputes between workers and employers and supply needed public goods to the firm. For my criticism of these arguments, *see* RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 125-32 (2009).

those sensible, pro-competitive contracts are made illegal, the employer, fearing the loss of both management prerogatives and overall productivity, is well-advised to choose plant locations, to design its plants and other facilities, to structure assembly lines and to contract out in ways that minimize vulnerability to union initiatives. These expenditures are not easily quantifiable because they all involve decisions that mix union-related with non-union motivations. Furthermore, no prudent employer would ever broadcast these elements, lest it bring the wrath of reformers, unions, and the NLRB down on its shoulders. Employers take this step because they are conscious of the seriousness of the threat that unionization poses to the efficiency of the firm, which is some measure of the *social* losses of unionization. If matters were otherwise, and unions helped firms, the opposition would instantly melt away. But so long as unionization relies on coercive mechanisms, it cannot obtain the same level of trust that is found in voluntary organizations.

At this juncture, the purpose is not (only) to plea for a repeal of established labor law. It is also to point out that there has to be some limit to the legal advantages that unions should receive. Indeed, the better reading of the history shows that many of the major adjustments in the law, both by the Taft-Hartley amendments and by judicial interpretation, were perceived as countervailing responses to the advantages the unions received under the original Wagner Act.[51] Here are three examples.

1. Secondary Boycotts

Consider the position of the secondary boycott that was insulated from challenge in federal court under the Clayton Act. The power of these boycotts is only increased if the boycotts can be combined with the direct pressure that unions can place on employers through the collective bargaining process. In the end, the one-two combination proved to be too powerful. Once unions had gained the statutory right to bargain collectively with the employer, the pressure of secondary boycotts could prove too great. The Taft-Hartley law thus included an elaborate statutory provision in section 8(b)(4), which sought to limit such boycotts' scope and control their influence. The boycotts that might have been

[51] For example, consider the addition of new unfair labor practices against unions, including the restrictions on secondary boycotts, the insistence that substantial evidence support board decisions, and the broader definition of independent contractors.

tenable when unions had little power against their primary employer had proven much more ominous when those powers were in place.[52]

2. Labor Injunctions

To progressives, the labor injunction against organizing activities was one of the great abuses of the pre-1932 period. This was rectified by the Norris-La Guardia Act,[53] which greatly narrowed the federal courts' power to issue injunctions in all labor disputes by abolishing their use, for example, to enforce yellow dog contracts. But the question arises as to whether that hostile attitude toward injunctions makes sense when the union has agreed to a "no-strike clause"—that is, a collective bargaining provision that prohibits any "cessation or stoppage of work, lock-out, picketing or boycotts."[54] In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,[55] Justice William Brennan held that the injunction should issue in these circumstances. He knew full well that many state courts could issue injunctions in labor disputes because they were not covered by Norris-La Guardia or by any parallel state statute.[56] He was, therefore, most uneasy about any law that encouraged unions to remove state court suits for injunctive relief to federal court, where Norris-La Guardia would apply.[57] Yet his larger reason for allowing the injunction paralleled all the arguments that courts had adopted prior to Norris-La Guardia:

> Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union.[58]

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[52] *See, e.g.*, BERNARD MELTZER & STANLEY HENDERSON, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 539 (3d ed. 1985). The same point is made in Fisk & Pulver, *supra* note 18, at 64.
[53] 29 U.S.C. §§ 101-115 (2006).
[54] *See, e.g.*, Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 239 (1970), *overruling* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962).
[55] *Id.*
[56] *See, e.g.*, McCarroll v. Los Angeles Dist. Council of Carpenters, 315 P.2d 322 (Cal. 1957), *cert. denied*, 355 U.S. 932 (1958).
[57] *Boys Markets*, 398 U.S. at 245-46.
[58] *Id.* at 248.

His argument offers a textbook account of why injunctions should issue when damages are inadequate. Once again, the advent of collective bargaining requires a fundamental realignment of other portions of the law. The labor injunction (which was the object of such wrath in 1932) rightly became the preferred legal remedy in 1970, at least when the labor contract had been formed. The hostility to labor injunctions in other cases still remain, in ways that were consistent with the statutory scheme.

3. Employer Speech

Closer to the Becker thesis is the evolution of law governing employer speech during organization campaigns. Today, the basic statutory compromise, which is said to reflect the requirements of the First Amendment,[59] reads as follows:

> (c) **Expression of views without threat of reprisal or force or promise of benefit.** The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.[60]

Becker disapproves of this section because he thinks that it resurrects the false equivalence between employer and employee speech that the original Wagner Act rejected.[61] But look at the question from the other side. How, one might ask, does Section 8(c) meet the normal constitutional standard of robust and uninhibited debate, generally characteristic of democratic institutions? "Democracy" is the first word in the title of Becker's article. So where is the disconnect between the statute and the theory? Not in its use of the term "force," at least if that is confined to physical force or the threat thereof. The term "reprisal," however, is filled with studied ambiguity because it covers simultaneously both managerial resistance and bodily harm, which give rise to widely divergent responses at common law. So why can't an employer take reprisals by firing

[59] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).
[60] 29 U.S.C. § 158(c) (emphasis added). For the constitutional acceptance of the statutory provision, *see* Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2413 (2008).
[61] Becker, *supra* note 16, at 544-54 (explicitly attacking the dicta in Justice Jackson's concurring opinion in *Thomas v. Collins*, 323 U.S. 516, 545-48 (1945)).

workers who don't want to work on the (non-union) terms that the employer finds acceptable? Because it would undermine the collective bargaining structure envisioned under the Act.

The same is true for the benefit side of this statutory equation. Outside the area of labor law, offering benefits is the antithesis of coercion, and the proper way to elicit the support of others. But in the context of collective bargaining agreements, offering benefits to workers cannot be allowed if the statutory scheme is to function well. Suppose, for example, that at the outset of a union organization drive, the employer vows to match, term-for-term, the best union offer, so long as workers do not join the union. That strategy is deemed too potent because few unions will initiate an organization drive if they know that employers can take advantage of this powerful strategy counterstrategy. So the survival of the collective bargaining process depends on backing off from the traditional protections offered to free speech outside the labor context.

The key question is how far to back off. The gist of the Becker proposal is to take 8(c) one step further: just keep the employers from speaking at all about the internal affairs of unions as part of the grand statutory recalibration of labor law. Against the backdrop of pre-New Deal common law rules, the position is tenable so long as the employer can refuse outright to deal with organized workers. But now that option is gone, as the duty to bargain gives the workers a real club against the employer. Faced with that reality, why should the employer be powerless to speak on its own behalf about an institution with whom it is obliged to bargain, if the potential outcome of the election goes against its interest? Silencing employers who are obligated to bargain shifts the advantage too far to one side and allows unions to make claims that undecided workers could have little chance to examine. Right now, employers get their opposing message through by describing firms that failed after unionization, only to predict that the same thing will happen here. The message is effective and tends to change minds and votes, which is why it should remain legal, at least so long as it is not tainted by an implicit threat to close the business if the union should win the recognition election.

To be sure, this system is not perfect. But unions also have countermeasures. If the information in question is thought to be incorrect, the union can seek to counteract it, often outside the purview of the workplace, unfettered by the parallel to those contained

in section 8(c). To be sure, unions cannot get all the information that they desire about the employer's status. Yet note that this information would, in general, be irrelevant in a competitive market, where the only question that matters is whether the employer can match the bid of rival firms. The need to force information transfer is thus another unhappy consequence of the collective bargaining regime. Given the changes in the background rules of negotiation wrought by the labor statute, the speech rules should stay exactly where they are. In its own way, the current law makes the appropriate adjustments in light of the initial commitment to collective bargaining.

B. *Sachs and Default Rules*

Writing seventeen years later, Professor Sachs' article mounts a defense for EFCA on two of its three issues: unfair labor practices during organizational campaigns and the use of the card-check. In writing about this subject, he deals only obliquely with EFCA, about which he expresses certain ambiguities. But on the basic question of empowering unions, he is determined to ride the flawed notion of "employee choice" as hard as he can in order to persuade his readers to adopt that set of labor rules that will reduce management interference with labor choices, and thus increase the odds of union success in organizational activities.

Of course, two issues that matter on this topic are rapid organizational campaigns, which Sachs strongly endorses, and card-check, on which, to his credit, he expresses more ambivalence. On the latter issue, Sachs takes a complex position that leaves him unhappy with what he calls the "open" nature of the card-check, which he thinks renders workers vulnerable to management pressure,[62] an odd result given the ability of a union to collect cards in secret. Sachs does not address the compulsory arbitration piece of the labor relations puzzle, and he does not think that EFCA offers the solution to the current defects, although he would certainly embrace its passage. Instead, in his general critique of labor relations, he seeks to identify certain key "asymmetries" in the bargaining process that give an unfair advantage to employers. As with Becker before him, he accepts as given the soundness of the original commitments of the Wagner Act, insofar as it allows a single union to be the exclusive bargaining representative of workers within a

[62] Sachs, *supra* note 17, at 713-71.

given unit. And, as with Becker again, the words "statutory monopoly" never appear in Sachs' 37,915-word article. Rather, Sachs denies this market reality by claiming what no one would care to dispute: "Unionization, for better or worse, does not effect a shift in sovereignty over the firm. It is a far more limited process, one in which employees decide to bargain collectively, rather than individually, with their employers and to name their agent for these purposes."[63] This statement is only half right. The evocative word "sovereignty" would apply only if the union took over the firm lock, stock, and barrel. But it is false if it is meant to say that the employer should be indifferent to the arrival of a union. The law does force the employer to the bargaining table, which amounts to a partial takeover of its operations and a potential lien on its assets. Once the union is established, it has a stake that is tantamount to part ownership in the business. Given that level of power, it is hard to conclude (as Sachs does) that this "impact" on employers not does "not entitle employers to an affirmative right to intervene in that [unionization] process."[64] The impact in this case is not just that of a competitor, for the union has a positive claim against firm assets, which increases as its bargaining rights become more powerful.

At its core, the Sachs plea for revised unionization procedures repeats the Becker error. The union can have explicit claims against employers but should also be immune from any employer counterclaims on workers. As before, the case against the employer's additional speech rights under the NLRA disappears in the face of its duty to bargain with the union. At that point, its legal interest in the union election, and thus its right to speak about union elections, is not zero. The right is at least as great as any random outsider who wishes to comment on the union position. Indeed, given that unions and management are joined at the hip, its stake is surely larger. None of this matters to Sachs' enterprise, which is premised on the unquestioned soundness of some collective bargaining regime, with this caveat: it must lead to an increase of unionized workers over the current level, by strengthening the hand of unions in their organization drives, which often fail not because sanctions are weak but because whatever the union offers by way of gains is offset by the risky nature of the negotiations and the precariousness of the

[63] *Id.* at 661.
[64] *Id.* at 662.

unionized firm. Consistent with the objective to expand the unionized workforce, Sachs' political objective is to minimize or eliminate the influence that employers can exert over the question of whether workers will be represented by unions. In his view, the card-check serves that goal admirably because it is designed "to allow workers to complete a unionization effort before management is aware that such an effort is underway."[65] Note that the choice of the word "workers" is somewhat disingenuous, for Sachs is well aware that under EFCA, any union is allowed to trigger the card-check process without any showing of union support among the rank of employees. He also quotes at length from the organizing manuals of the American Federation of State, County and Municipal Employees ("AFSCME") and the Teamsters to the effect that secrecy is a premium virtue.[66]

The ostensible targets of that secrecy are, moreover, not just the employer, but also those members of the employer's workforce who would likely be opposed to unionization. The system that allows a majority—or even a supermajority—of cards to settle the question of union organization could freeze out these workers from the deliberative process, which still has some faint aspiration of full participation by all persons within the unit. But all that is only a fig leaf. The processes chosen have no neutral valence to them.

Consistent with his basic orientation, Sachs discusses two separate strategies for reformulating the structure of American law. They deal, respectively, with what he calls initial *default* position, and the *alteration* rules that might be adopted to flip the default to the opposite position. Under the current law, the non-union position is regarded as the default, and a successful organization drive by the union is needed to flip the presumption to a unionized state. Sachs has serious reservations on both counts. He thinks that the law has settled on an uncomfortable (if unavoidable) default provision, and that the current secret ballot position makes it far too difficult to flip over to the opposite position. Let us look at these two points in order.

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[65] *Id.* at 657. In this passage, Sachs appears to approve of the secret drive, which he later criticizes, *id*. at 718.

[66] Sachs, *supra* note 17, at 665 (noting the "importance of conducting organizing without employer knowledge").

1. The Default Position

Sachs' basic position is to support "employee choice,"[67] which he thinks "provides conceptual support for both a new default rule of unionized collective bargaining and a new altering rule that minimizes managerial intervention in organizing."[68] Ultimately, he understands that it is not possible to have a unionized workforce without any idea of who that union might be. He therefore goes through this conceptual analysis to explain why, in the real world, the protection of that employee choice requires that the law minimize employer participation in the unionization process. To soften up the defense of the current non-unionized baseline, Sachs relies heavily on *Human Behavior and the Law of Work*, the well-known article by Cass Sunstein, his now-colleague at Harvard. Sunstein argues that the common law baseline rules should be critically reexamined in light of the new learning from behavioral economics, which in his view should render us much more sympathetic to for-cause labor contracts at common law and to unionization under the NLRA.[69]

Sunstein's work builds on the assertion of Paul Weiler that there is no reason for modern legislatures to accept what Weiler calls "the tacit legal assumption that the 'natural' status for a workplace is non-union."[70] That point is developed in more systematic fashion by Sunstein's well-known, but misguided, critique of the contract at will: "In the workplace, as elsewhere, the law cannot 'do nothing.' . . .[I]t is necessary to start somewhere – not with nature or voluntary arrangements but with an initial allocation of legal rights."[71] To Sunstein, the place to start is with the recognition that both the analytical and the behavioral foundations of the common law rest on the assumption that employers receive what he terms "waivable employers' rights." These are rights that the common law confers on the employer, which the employee could then decide to purchase

[67] *Id*. at 656, 657.
[68] *Id*. at 660.
[69] Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205 (2001). Sachs also appeals to more general critiques of statutory construction that seek to use a public choice perspective to figure out the proper meanings of different languages such as Einer Elhauge's argument in favor of "preference-eliciting default rules, in EINER ELHAUGE, STATUTORY DEFAULT RULES 151-67 (2008), and Lucian A. Bebchuk and Assaf Hamdani's effort to construct optimal default rules for corporations, Lucian A. Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489 (2002). Ultimately, these intriguing positions take Sachs too far afield to be of much relevance to the issues at stake here.
[70] PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990).
[71] Sunstein, *supra* note 69, at 208.

if they were of greater value to him. Yet on that score, the endowment effect, whereby people value what they own more than what they do not, could easily interfere with the transaction by creating sticky default rules.[72] He takes issue with my views, noting that "[w]hat Epstein does not sufficiently acknowledge is the extent to which a number of rights are conferred on the employer by the common law; any suggestion that the common law reflects 'laissez-faire,' or promotes 'voluntary interactions,' should be prefaced with this point."[73] The stark models of rational economic calculators, he suggests, should give way to a more complex behavioral model that recognizes the imperfections in evaluating the interests of workers on all matters, from their asymmetrical attitude towards gains and losses, to their ignorance of legal rules, to a tendency towards "excessive optimism," to an improper lack of attentiveness to the future, among other issues.[74]

These criticisms are idle on both analytical and behavioral grounds. On the first point, it is important to note what a default rule does. One simple question: can the default rule be changed by agreement *before* the initial contract, or only *after* it is formed in accordance with the stipulated norm? To Sunstein it looks to be the latter, although it is hard to be really sure.[75] The initial contract must create some sort of entitlement that, *only after formation*, the other party can decide to purchase. It is for that reason that he makes the dangerous suggestion that workers should be given an initial entitlement to a for-cause contract that the employer could then buy away. Conventional default rules do not serve that function at all. They are gap fillers when parties have incomplete

[72] *Id.* at 221.
[73] *Id.* at 209, note 10.
[74] Sunstein, *supra* note 69, at 206.

[75] The implicit coercive nature of Sunstein's position is found in his endorsement (with Richard Thaler) of the provision in the Model Employment Termination Act which provides that " a complete waiver [of the at will rule] is obtainable only if the employer agrees to severance pay upon dismissal equal in amount to one month's pay for each full year of employment-up to a maximum amount of 30 months' pay." National Conference of Commissioners on Uniform State Laws, Model Employment Termination Act, *available at* http://www.nccusl.org/update/uniformact_summaries/uniformacts-s-meta.asp. For Sunstein and Thaler's's qualified endorsement, see Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1187 (2003) (noting that the proposal is "less libertarian than it might be. But freedom of choice is nonetheless respected."). In fact the level of intrusion is massive if employers by law must provide severance pay equal to 2.5 times the annual salary to dismiss older workers. The paternalism clearly dominates the libertarianism. For one demonstration of the authoritarian nature of the Sunstein/Thaler position, see Mario Rizzo & Douglas Glen Whitman, *Little Brother is Watching You: New Paternalism on Paternalist Slopes*, 51 ARIZ. L. REV. 685, 697 (2009).

contracts. The default rule could be set, for example, in favor of a for-cause contract. But if it is only a default rule; the employer can announce to all prospective employees, *prior to any actual agreement*, that either they work on the employer's terms or they do not work at all. There is no duty to make an initial contract turn on the default rule. In this conventional sense, the law could set the legal default any way it wants, but so long as it allows employers to insist on yellow dog contracts, the workers can waive their rights to join a union so long as they work for the employer. No one has to buy anything from anyone. On matters as critical as this, the for-cause default rule is not sticky. Employers will make it clear to employees in a thousand ways that this is the rule of engagement, so much so that switching a default rule has no consequence at all—unless it is only the employee who has the right to switch out of the for-cause default position.

We are, however, dealing with a very different animal if the default rule is a necessary feature of any first contract, which can only be eliminated thereafter by paying for a release from the other side. That appears to be what Sunstein advocates with his disastrous intervention on the contract at will. The initial contract must be entered into on a for-cause basis. Thereafter, the employer could buy out the worker if he could afford it. That seems to be what Sunstein is saying when he writes: "[The law] might give employees certain waivable rights, saying, for example, that an employee is presumed to have a right to at least four weeks of vacation each year, but that employers can buy that right through a suitable deal."[76] If that right can be purchased only *after* an at-will contract is formed, which is how I read it, the rule will kill so many transactions that its consequences are too horrible to contemplate. Why four weeks of vacation? And which four weeks of vacation? If it allows the employer to switch to the at-will contract during the initial negotiation, it will have, as noted, no effect at all.

The labor law defaults are only of this hard second variety. It is not possible, under the law, for any employer to tell his workers, "I will only hire you if you agree to sign away all rights to join a union under procedures set out by the NLRA." The issue here has nothing to do with default provisions and everything to do with the invalidity of contract provisions that are against public policy. At this point, it is also illegal, once the employment relationship is formed, to attempt to interfere with the statutory machinery

[76] *Id.* at 205.

by offering each worker $10,000 to avoid the union drive. We can be relatively agnostic about the setting of contract default provisions, so long as we are aware that in virtually every case an explicit provision in bold letters will say that whatever informal promises are in the contract, the overall agreement is only a contract at will. But we cannot be indifferent to the choice of default arrangements like those contained in the NLRA, which reshape an industry.

In dealing with these statutory requirements, it is a huge mistake to claim that the defenders of common law rules think that "the common law system of property rights has some natural, preconventional status."[77] No one thinks that. The common law of property establishes a set of individual baselines that will reduce the costs of voluntary transactions, and the common law of contract seeks to facilitate and enforce those transactions. Together, they are the foundations of a competitive market economy, which is needed in order to reach the system that has, on average, the highest output. As noted, this drives the antitrust law as well as the common law.

Once we recognize that nature is not the source of the common law baseline, what's next? That piercing insight does not exonerate the attackers of the common law rules from the duty to explain why their normative baseline, from which the pro-union position can work, is superior to the baseline that they dislike. That is a task that they have *never* attempted to undertake, in part because of the practical difficulties of knowing which union would represent which workers when. Still, they push their case for the reform of labor law under the guise of employee choice, which is somehow thought to lead to a higher likelihood of union activity, if only the employer influences could be put to one side. Yet even at that conceptual level, the difficulties of these supposedly neutral positions are fatal to the proposed reform efforts. Start with the cognitive difficulties: once we know that people are subject to biases and have limited ability to assimilate information, the last thing that we need is a unique and convoluted labor law whose many features people cannot understand. Does anyone think that impaired workers are better off deciding on the benefits of having a union that could negotiate a contract that may or may not pay off, rather than just having an offer of a job at a stated salary? The simpler the legal system (and the fewer the relevant players), the better the information. The so-

[77] Sunstein, *supra* note 69, at 209.

called "employee choice" baseline that leads to a strengthening of the union position only makes things worse for imperfect minds. Do they really have information as to how their union agent will behave over long periods of time? And should they pre-commit to that representation without knowing how union policies and leaders will shift?

But, just for the sake of argument, assume that the common law baseline is wrong, and that some strengthened collective bargaining should be put in its place. Again, the question is, what's next? At a minimum, that baseline must have the same degree of universality found under the common law rules so that it explains how parties should proceed in each and every employment relationship subsumed under the new rule. The common law rule specifies that the owner has his capital and the worker has his labor. They can exchange these on whatever terms and conditions they see fit. They are not obligated to fit themselves into some predetermined category of employee and employer, but could easily choose to work as partners or as independent contractors. Their joint intention, as expressed in public language, controls all matters of contractual interpretation. The rule works to cover everything from small two-person businesses to large and complicated corporations. Each set of contracts builds on those that worked before it. The secret of the system is to have clarity in terms (for which intelligent default provisions help) and consistency in enforcement. The hope in all cases rests on two fundamental propositions. The first is that voluntary trade between the parties produces mutual gain. The second is that greater levels of wealth for both parties increase opportunities for third persons. The antitrust laws remain a limitation that sometimes bites against contracts in restraint of trade, which, as in *Loewe v. Lawlor*,[78] is a nontrivial binding constraint against unions.

So just what baseline might be proposed in the common law baseline's place? I cannot conceive of any pro-union default rule that could be made operational, for example, in the context of a new firm that has hired two or a dozen workers. Is it not possible for anyone to hire a worker unless he first goes to some union? To which one should he turn, and why? In the event of some jurisdictional dispute, should one union be able to insist that it has the right to represent workers to this nascent firm even before it is formed? Do the workers, or prospective workers, have to be polled in advance to see

[78] 208 U.S. 274 (1908).

whether they would like to join that union? And must that poll be taken multiple times, as new workers are added and current ones leave? It is not necessary to insist that the ordinary contractual regime is natural, God-given, or, in some mysterious sense, pre-political. It is enough to show that it is blessed with a versatility and simplicity that no ad hoc pro-union baseline could hope to achieve.

Ultimately, Sachs does well not to pin down any new default position. You can't beat one well-established baseline with a philosophical objection to its intrinsic desirability without offering the prospect of setting some better one. The critique of the status quo has to articulate an alternative baseline that is able to withstand the functional criticism of its common law opponents. Sachs' effort to soften up the opposition to advance his own expanded version of employee choice also fails, for he does not explain why a rule that gives the union essentially exclusive control over the bully pulpit is the correct way to reform labor relationships. True choice for all parties, employers included, can only occur by jettisoning the basic structure of collective bargaining.

Much of this troubled discussion on the proper baseline reflects the vast gulf that separates questions of contract interpretation from those of institutional design. The default position at stake does not involve the proper default norm for contract interpretation. Rather, it involves the more ambitious task of creating a set of institutions that can be put in place on the ground, which is a far more ambitious matter. There is little question that Senator Wagner sought to ease the path to unionization. Wagner did not envision a world in which a union could be regarded as the default position for all firms. Rather, like Sachs, he saw sufficient defects in the common law rule that allows an employer to hire (and fire) workers on an at-will basis—a position that I have long defended.[79] At this point, the issue becomes what it always was, and not one of default rules intended to realize the intention of the parties. Rather, it is a question of institutional arrangements that are intended to drive outcomes to a preferred position that one party desires and the other opposes, namely the increase of union penetration in the workforce. Setting that alternative baseline by statute is a dead loser. Its downfall lies not just in the theoretical attacks on its inefficiency. It lies in the utter inability of its supporters to define the rules of the game and to offer principled reasons of social welfare

[79] *See* Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984).

in support of their complex arguments for protecting labor monopolies in the name of "employee free choice" (which necessarily deprives employers of their free choice not to negotiate with a union). So the defenders of EFCA and labor law reform move on to the second point. If the statutory rules are where they are, what alteration in their content improves the employees' chances of success from its current low level?

2. Alteration

Sachs' second line of defense of EFCA and similar reforms thus focuses on the less ambitious – but still vital – task of easing the costs of transition from a non-unionized to a unionized firm. His endeavor assumes that if the baseline is somehow put in the wrong place, the law should make it easier to get to the right position by adopting one of two mechanisms: rapid elections or a card-check. To Sachs, the former is more obtainable. The latter is one on which he is ambivalent, but which has attracted enormous concern elsewhere. The impetus for adopting either is that they function as 'asymmetry-correcting altering rules'—that is, as ways of "mitigating the impediments now available to employers, that block departure from the non-union default."[80] But this presupposes that we know who has the advantage in the dealing with these elections – the calculus for which is tricky.[81] It is quite clear that the analysis here is more complicated than in a political election where both parties compete, more or less, on a position of parity, subject to the imbalances that incumbency introduces. In this asymmetrical conflict, the union has advantages that management does not. It can usually formulate the bargaining unit of its choice. It can time the onset of the campaign to take advantage of short-term employer weaknesses or worker unrest. It is not bound by speech rules. It can sow discord with customers long before the election takes place. The employer, of course, can respond with speech on company time and a strong show of hostility. But who knows which set of advantages matters most? A look at actual elections shows that each side has its fair measure of success, with the unions winning somewhat fewer elections in somewhat larger units.[82]

[80] Sachs, *supra* note 17, at 656.
[81] *See* EPSTEIN, EFCA, *supra* note 6, at 42-43 (for the union advantages).
[82] *Id.* at 54-67.

Now that there are no huge 1930s-style assembly lines left to organize, how much any change in campaign rules can alter the labor landscape is an open question. But it is still worthwhile to analyze two proposed alternative schemes. The first common device is an expedited election that gives an employer less than two weeks after the campaign announcement to make its case, instead of the nearly six weeks allowed for an election campaign today. The major union reason for speeding up the election is to prevent the influence of employer speech from negating the union's initial advantage of surprise in timing the call for an election. The danger here is *not* that the employer will say things that violate section 8(c), but that the employer will be able to point out examples and make arguments that turn out to be persuasive to workers. In effect, the argument in favor of the expedited election is that incomplete information that favors unions is better than full information that does not, which is hard to square with any effort to ensure informed worker choice. The argument quickly blends into the view that *all* persuasive speech should be regarded as an improper threat rather than as sound argument.[83] That claim is inconsistent with the revisions found in Taft-Hartley that give equal weight to the right to remain free of union influence. The card-check is even worse because it allows the union campaign to proceed by stealth. Once again, the point here is to force the issue before full information is acquired by workers who might turn against the union, which is again inconsistent with any version of a full participation model.

The supposed reason for adopting either or both of these strategies is to overcome the coordination problem that workers have in getting a union in place against the implacable opposition of the employer.[84] But the actual reasons are more complex than that.[85] The first point is that the union that runs the organizational campaign has no problems with its internal organization. It is not subject to any limitations like those imposed on employer speech under section 8(c) and can therefore promise the moon with impunity. And just as employers can resort to tactics that might involve unfair labor practices, so too can unions resort to all sorts of rough stuff on their side in order to make the position of the employer as painful as possible. They can hire picketers (who are not

[83] *Id.* at 48-53.
[84] *See* Sachs, *supra* note 17, at 697 ("Employees who wish to unionize therefore bear the coordination costs of identifying and contacting other employees during nonwork time and at nonwork locations."). So do antiunion workers, whom management helps at its peril.
[85] For a fuller discussion, *see* EPSTEIN, EFCA, *supra* note 6, at 22-34.

workers at the plant) to protest working conditions in efforts to drive away customers. They can file complaints, often anonymously, with regulators that bring snap inspections against employers. They can make direct political appeals to zoning boards to keep out firms that do not agree to accept union demands. They can isolate individual workers through intimidation via house calls. In these cases, the longer time for an election tends to increase the employer's chances in large measure because they can put out the opposite message and neutralize the advantage of union surprise. A union always wants the *option* for the early election, which it can waive if it chooses. Its reason is clear. They fear not only illegitimate coercion but also truthful information, which is exactly what election campaigns should encourage.

Most ironically, disorganized workers opposed to a union do badly under a card-check. Thus a worker whose first preference is to keep out of the union may well sign a card if he or she fears that the union will be selected over his or her opposition. The point is not fanciful, because right now workers often sign cards to support elections, only to vote against them on a secret ballot, which offers protection against reprisal of both sides. At this point, enough swing votes could put matters back the opposite way. One could quarrel about the relative strengths of these difficulties, given the current structure. But the overarching point is that eliminating the entire union election apparatus gets rid of this whole dilemma of deciding which side wields untoward influence and why. Right now most workers in the private sector function quite well. In sum, both parts of the reform campaign under EFCA are wrong. There is no case for altering the rules on union organization or adopting any form of card-check authorization.

II. *Fisk and Pulver and the Allure of First Contract Arbitration*

The task of Fisk and Pulver is to defend the back end of the union agenda–namely, the push to mandatory arbitration. As with the organization phase of the campaign, the key objection to the current status quo is that determined employers just hold out too long against union demands.[86] It is rarely stated that the unions, too, may be reluctant to moderate their demands, lest they lose the support of rank and file—even though it always takes two to make an impasse. The source of these drawn-out

[86] Fisk & Pulver, *supra* note 18, at 56-58.

negotiations, moreover, lies in the NLRA's basic commitment to a collective bargaining regime that leaves both employer and union with no one to negotiate with but each other with respect to employees.

While these negotiations are supposed to be carried out in mutual good faith, this bilateral monopoly structure invites holdout and bluffing on both sides. The pattern of this bargaining game depends critically on the perceived size of the bargaining range. The union hopes to move the agreement toward a monopoly wage. The employer knows that it cannot go below the competitive wage. In the immediate New Deal period, the want of foreign competition (coupled with various domestic barriers to entry in such key industries as communications) created a large bargaining range.[87] The willingness of unions to go on strike and of employers to lock out made sense when there was a good deal to be gained or lost. But the corporatist model that relied on big government to regulate the relationships between big labor and big business led to a form of economic stagnation that, in the end, spelled that model's undoing.[88] As the removal of entry barriers, both domestic and foreign, made labor markets more competitive, there was less to gain through either strikes or lockouts, so a greater measure of calm returned to labor markets. Prolonged negotiations no longer meant a disruption in production, so employers had much to gain from preserving the status quo ante. Unions, for their part, could not succeed if they could not bring wage and benefit packages that mattered, which is a tall order in competitive product markets.

That pattern of decline has not held true for public unions. Their public employers face few or no competitive pressures, and they are often under explicit state law commands to bargain under compulsory arbitration regimes. As noted earlier, the union ranks of public employees have swelled to the point that they now exceed—in absolute terms—the number of union members in the private sector. These compulsory arbitration regimes usually offer a laundry list of relevant factors for arbitrators to

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[87] For discussion of the competitive landscape, *see* Lee E. Ohanian, *The Impact of the Employee Free Choice Act on the U.S. Economy*, AEI ONLINE (Apr. 23, 2010), *available at* http://www.aei.org/docLib/OhanianEmployeeFreeChoiceAct.pdf.

[88] Michael L. Wachtler, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PENN. L. REV. 581 (January 2007) (noting how the corporatist model fed union growth); for comment, *see* Cynthia L. Estlund, *Are Unions Doomed to Being A "Niche Movement" In a Competitive Economy?*, 155 U. PA. L. REV. PENNUMBRA 165 (2007), *available at* http://www.pennumbra.com/responses/02-2007/Estlund.pdf (suggesting that unions could make new gains today in localized low-end labor markets).

consider, including comparable wages and benefits, conditions data in comparable markets, and often, ominously, "the financial ability of the unit of government to meet these costs."[89] That is, the richer you are, the more we can demand—a form of wage discrimination that is consistent with the exploitation of monopoly power. Not surprisingly, the resort to these factors has led to constant wage and benefits increases to keep up with other places of employment, to the point where now the salary premiums and pension packages have ruined public finances, as unionized workers in the public sector comprise over 40 percent of the workforce.

For union supporters, unfortunately, the debate takes place on myopic terms. From their point of view, a forced first contract regime is superior to the holdout game that the NLRA invites. In effect, Fisk, Pulver, and others argue that there is little risk that savvy and conservative arbitrators will make a mess of first contract arbitration by imposing onerous terms on employers. From the union perspective, arbitration is preferable to the current bargaining system. Management, of course, regards the loss of control over vital labor functions as a risk that it cannot run no matter how soothing the assurance of arbitral neutrality and professional competence. But unions do not care whether compulsory arbitration is a positive sum game. The exit rights under the current system are just too valuable to a firm that could otherwise be forced to make adjustments in its labor practices whose consequences could easily outlast any two-year first contract. Nor in assessing the relative risks of holdout problems versus forced contracts do union supporters ever acknowledge that the best way to avoid *both* the holdout and the expropriation game simultaneously is to repeal the NLRA in its entirety, thereby removing both risks by creating a competitive market.

That possibility does not enter into Fisk and Pulver's discussion. Rather, the argument that they construct for compulsory arbitration is in the negative: don't worry about a wholly untested system that is loathed by one side of the transaction. There is no reason, they argue, to think that the arbitrators that will be appointed will be biased toward one side or another. Arbitration, after all, has been used in a number of contexts including, most notably, with public employees, as under the Taylor Act in New York[90]

[89] Fisk & Pulver, *supra* note 18, at 66.
[90] Public Employees Fair Employment (Taylor) Act, N.Y. CIV. SERV. LAW § 209 (McKinney 2000).

and fifteen other states.[91] It has also been used to deal with disputes over screen credits in Hollywood, and in interpreting and applying the grievance provisions of collective bargaining agreements under the current law. And final offer arbitration ("FOA") has long been a staple for resolving salary disputes in professional sports. The clear implication is that the importation of this practice by statute into labor relations is no major departure. The gains from stopping holdouts are large. The dislocations from improvident bargains are small. Why then worry?

For many good reasons, it turns out. In critiquing their case, we can quickly dismiss any reliance on schemes of arbitration put into place by contract. In the case of arbitration under a contract, the terms of the contract will explicitly limit the arbitrator's discretion and provide safeguards against runaway arbitrators (who will not be hired a second time if they do badly the first). The best way to understand these arbitral agreements is as a voluntary substitution for litigation in ways that reduce transaction costs. The arbitration system is not a substitute for negotiation, because the function of the arbitrator is to enforce an agreement that the parties have already made, not to fashion an agreement out of whole cloth to a set of terms that neither side has accepted.

The real question is how compulsory arbitration works, as we leave the voluntary market behind. For this, the closest reference point is the disastrous experience with compulsory arbitration in the public sector, where industrial peace was purchased at the price of fiscal implosion. That expansive history shows that no list of relevant factors can control the upward pressure of individual agreements. Fisk and Pulver write as if the social objectives of any arbitration system are achieved by reaching final agreements that avoid holdouts without bankrupting private firms. Those goals certainly matter, but they are at best stepping-stones to a larger question of whether this system of arbitration will improve the overall operation of labor markets. It won't. The price for industrial peace in the public sector has been runaway increases in salaries and public pension programs that today are the major threat to the solvency of states like New York, precisely because the Taylor Act is in place. The same story can be told about California.[92]

[91] Fisk & Pulver, *supra* note 18, at 50-51.
[92] Steven Malanga, *The Beholden State: How public-sector unions broke California*, 20 CITY J. 2. (Apr. 18, 2010).

The clear pressure in the public arena is for arbitrators to impose unsustainable burdens on public bodies that cannot resist. It is quite likely that private employers—at least those large enough to put up a struggle—will put up stouter resistance than public employers, given that they face the short-term risk of bankruptcy. But once again, the evidence suggests that the advent of unionization, on average, leads to a reduction in the value of the firm under the current regime by $60,000 per worker, a figure worth fighting over.[93] That number will not get smaller with a compulsory arbitration program, in which it would be foolhardy to assume that adroit firms can prevent these losses from occurring. Even if these firms *are* more adroit, their margin of error is far smaller because they operate in an intensely competitive environment. Firms cannot thrive if for months they are uncertain as to how to assign and organize their workforce. Arbitrators, for all their supposed expertise, do not have a stake in the business. They could too easily hand out generous awards for other people to pay.

The unions may well be willing to take these risks because they will suffer only a small fraction of the losses if the firm goes insolvent, but will keep all the gains from a lucrative first contract. They will have, moreover, strong incentives to enter into cushy deals for the benefit of current employees, promising fiscal relief to the firm in concessions from *future* union members, which is the pattern of negotiation that took place in the recent face-off between Governor David Paterson and the public unions in New York.[94] All the pension reductions come from workers not yet hired. Fisk and Pulver think that FOA could salvage compulsory bargaining by allowing each side to submit a wage bid to an arbitral panel that is told to take one or the other, but not split the difference. The most obvious objection to this point is that in professional sports, FOA is used only for single-year contract extensions under standardized terms. FOA is never used to negotiate long-term contracts. Nor is it used to deal with contracts with many simultaneously moving parts. Fisk and Pulver think that this is possible with labor contracts, as it is possible to take, for example, the workers' wage demands and the

[93] David Lee & Alexandre Mas, *Long-Run Impacts of Unions on Firms: New Evidence from Financial Markets, 1961-1999* (Nat'l Bureau of Econ. Research, Working Paper No. 14709, 2009), *available at* http://www.nber.org/papers/w14709.pdf.

[94] *See, e.g.*, Nicholas Confessore, *Paterson Offers Choice: Furloughs or a Shutdown*, N.Y. TIMES (May 4, 2010), *available at* http://www.nytimes.com/2010/05/05/nyregion/05furlough.html.

employer's pension benefit system.[95] The theoretical objection is that if the terms are considered separately, the interactions between them are necessarily ignored. That point is probably true even with two related terms, but it is surely true with the thousands of different issues that have to be resolved in negotiating a collective bargaining agreement, which has to cover hot button issues such as contracting out work, health care benefits, discipline, and seniority, among others. Splitting the difference won't work in an environment where no arbitrators have the detailed knowledge of firm-specific practices.

Public arbitrators have no experience in dealing with issues such as mergers and contracting out, because these activities are not features of the static public setting. And public arbitrators do not realize how the pressures of innovation could require radical changes in workplace deployment to keep competitive. Renegotiation with the usual collateral concessions for waiving contract rights is too little or too late. Yet, as Fisk and Pulver note, with apparent approval, arbitrators (in a field they in which have never worked) tend to show a bias toward the status quo,[96] which is the kiss of death for innovative firms in competitive industries who regularly shake up job classifications. In so doing, they underrate the need for rapid adaptive responses once competition appears. Unfortunately, the costs of renegotiation make it likely that the union responses will be sticky, even though unions in principle have some incentive to moderate their wage demands in the face of competition, which poses the risk of bankruptcy. But the internal conflicts of interest within unions matter, for senior workers are better able to withstand the downturn than recent members, and both are likely to do better than individuals who have yet to join unions. It is for that reason that two-tier pricing in many industries always works to the benefit of incumbent workers against outsiders.[97] These devices, however, do not work so well from the management side. In the end, therefore, all union agreements suffer from want of flexibility. Those that are not negotiated are likely to be further from the ideal than those that are. That, in turn, increases the need for adaptive responses both during the life of the contract and after it. Unilateral decisions are needed in these areas, for workers as well as employers. The hope to protect some workers from dismissal creates the far greater risk that the entire edifice will come tumbling down on

[95] *See* Fisk & Pulver, *supra* note 18, at 70.
[96] Fisk & Pulver, *supra* note 18, at 75-76.
[97] *See* EPSTEIN, EFCA, *supra* note 6, at ch. 3 TAN 188.

employer and employees alike. That problem does not disappear when one looks more closely at the operational features of EFCA.

III. The Internal Operations of EFCA

Thus far I have examined in general form the arguments against changes in the rules governing organizational drives, card-checks, and compulsory bargaining. That critique took place on the assumption that it was possible to design each of these elements in some coherent fashion so that the means chosen would be calibrated to achieve their ends. Real statutory design always adds a second level of implementation problems, which can be quite daunting. Let me add a closer look at the operational particulars of EFCA in all three areas. What the statute sets out is a broad framework. What it lacks is a sense of how to fill in all the critical pieces.

A. *Unfair Labor Practices During Negotiations*

This portion of EFCA is the least radical because it accepts the traditional framework in which union organizational campaigns precede union elections. But it adds three distinct turns of the screw that are most notable. First, this provision grants a priority of enforcement resources to this class of violations over all other claims of misconduct, including any and all forms of union statutory violations. Second, the provision also trebles the back pay awards that are made to workers in the event of a finding of an employer unfair labor practice. Third, the statute, for the first time, authorizes fines up to $20,000 per "violation"—a term that receives no statutory definition—of either the overlapping provisions of section 8(a)(1) or 8(a)(3) of the Act, dealing with employer coercion against employees or employer discrimination against pro-union workers. That per-violation fine is only triggered against employers who "willfully or repeatedly" commit these unfair labor practices.

In administering this section, EFCA only instructs the Board to "consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on

the public interest."[98] That general language has a notable defect in that it gives no method for counting the number of violations, while the use of the word "repeatedly" opens up a legion of possibilities. Read literally, it looks as though each violation covers "the charging party." Written in the singular, the expression suggests that a single violation could, and perhaps must, involve employer coercion directed against a single worker. From that, it follows that if multiple workers were held to be subject to untoward prejudice or anti-union animus, each such offense would generate its own distinct violation. In addition, separate attempts by employer representatives to influence each worker on different days, or by different people, could also augment the total independent violations. Yet EFCA contains no aggregate cap on damages that might control that additive risk. Nor does EFCA add mitigating circumstances into the mix. Nor does it explicitly provide for judicial review of the fines levied. To be sure, judicial review might, but need not be, read in into the provision to avoid serious due process objections, given the normal NLRA rule that allows parties to challenge fines or other penalties that are not supported by "substantial evidence."[99]

To my mind, this simple reality raises the serious question of whether the want of any appeal outside the board is the imposition of a fine without due process of law. To be sure, an appeal need not on all occasions be required as a matter of due process. But in this instance, the case seems to be otherwise, for the NLRB is an inherently political body that, in the Obama administration, is now staffed with three Democrats and two Republicans. Those fixed party loyalties should raise a red flag for radical increases in sanctions. A judicial appeal allows some body in which the party lines are not so sharply drawn to look at the arrangement. They can clarify the outcomes in these cases and supply some judicial involvement in the interpretation of statutory provisions that will otherwise remain in the NLRB's exclusive competence.

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[98] Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 4(b) (2009).

[99] National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. § 160(3). For discussion of what all this means, *see* Universal Camera and the instructive line of cases in dealing alleged reprisals against union workers, both before and after the passage of the Taft-Hartley Amendments. NLRB v. Universal Camera Corp., 179 F.2d 749 (2d Cir. 1950) (sustaining charge of an unfair labor practice with obvious misgivings), *rev'd and remanded*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); NLRB v. Universal Camera Corp., 190 F.2d 419 (2d Cir. 1951) (rejecting unfair labor practice finding under the new and higher statutory standard). Both Second Circuit decisions were written by Judge Learned Hand. The Supreme Court decision was written by Justice Felix Frankfurter.

B. *Card-check*

The card-check provisions are every bit as one-sided as the organizational provisions. As noted earlier, there is no precondition for any type of deliberation by all union members before the union is authorized. EFCA allows "an employee or group of employees or any individual or labor organization acting in their behalf" to file the petition at any time, and to obtain success even if 49 percent of the workers had no idea of the pending union representation. [100] In addition, there is nothing in the statute that indicates the time period in which the cards for any individual application may be signed, or whether a worker who has signed an authorization card is entitled to insist on its return if it is handed over to the union for safekeeping. EFCA contains no provision to deal with the treatment of cards that have been obtained by misrepresentation, trickery, or coercion. There is no obvious answer to the question of what should happen if the union represents that the card is being signed in support of an election and then uses it to obtain recognition. The gaps in the statute could, in principle, be filled by regulation, although there is no indication of any duty to do so. The only specific topics for discussion are the creation of an authorization form that serves as a safe harbor for a union, and the determination of criteria by which the validity of disputed cards would be determined. Whether those rules could go beyond the invalidation of forged cards is not clear. Nor is there any sense of what the appropriate burdens of proof are with respect to these cards. The huge level of administrative discretion thus adds to the basic uncertainty of the law.

C. *Compulsory Arbitration*

The procedures of compulsory arbitration also raise serious questions. The initial provision requires the employer to commence collective bargaining within ten days of receiving notification of the card-check selection.[101] This short fuse applies even for an employer who had no knowledge of the card-check campaign before its success. Within that time (which includes at least one weekend), it becomes necessary to hire representation and organize all the document disclosure that is required for bargaining

[100] Employee Free Choice Act § 2(a).
[101] *Id.* at § 3.

under EFCA. A large union has the huge advantage of having permanent teams that can be prepared in advance for individual cases. It seems clear, meanwhile, that many employers will not be able to meet the tight deadline, at which point EFCA gives no indication of what sanctions are available or what procedures should be used to enforce them.

The parties then have ninety days to seek out a collective bargaining agreement, regardless of the size of the unit or the complexity of the transaction.[102] Once again, it is not clear whether the usual rules for unfair labor practices apply or whether the ability of the aggrieved party to go to arbitration renders those determinations irrelevant. The statute then provides that the Federal Mediation & Conciliation Service ("FMCS"), a political branch of the Department of Labor, may "promptly" get involved in the case.[103] But once again it gives no indication of what happens to the statutory timetable if the FMCS is unable to supply that assistance. Is the statute tolled, or does the time continue to run toward compulsory arbitration? Nor does the statute specify what is to be done if the FMCS is alleged to favor one side or another in the mediation. Can its conduct be put under the microscope, and if so, what kind of showing has to be made to sustain the outcome?

The most controversial provision is the last, which requires that the case be referred to an "arbitration board established in accordance with such regulations as may prescribed by the Service."[104] The difficulties here are legion. There are no time triggers that indicate when the Service must act, and no sense of what should be done in the event of any delay. Nor is there any limitation on the composition of the Board, which need not take the form of one arbitrator chosen by each side, with a third chosen by the other two. EFCA does not specify any of the arbitral procedures, nor does it require a final arbitral determination by a date certain; it does not even specify whether the two year period runs from union recognition, the onset of arbitration, or the final resolution. Those levels of uncertainty are unacceptable in any legislation that introduces such fundamental changes.

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[102] *Id.*
[103] *Id.*
[104] *Id.*

This effort to intensify the regulation of labor markets is peculiarly unfortunate in a time of economic distress. Compulsory arbitration on the heels of a card-check is likely to produce very pronounced declines in employment levels, which is the last thing needed today, when unemployment rates are wholly resistant to the stimulus programs that seek to create jobs in the pubic sector by priming the financial pump. A far better way to attack that problem is to relax the direct regulation of labor markets, where it is all too easy to trace much of the decline in employment to short-run union victories that led to long-run labor dislocations.

All these elements were at play in the automobile industry, which has bled workers in recent years. The colossal miscalculations of the United Auto Workers ("UAW") in getting (and GM in accepting) a hugely favorable 1979 collective bargaining agreement presaged its implosion over a generation later. These are numbers worthy of note. The UAW had 1,500,000 members in 1979, a number which had dropped to 431,000 by the end of 2008, before the final crack up of GM, and 355,000 members by the end of 2009, according to the World Socialist Web Site.[105] The modest turnaround in the post-reorganization period only took place with the aid of massive infusions of government capital, which have yet to be repaid.[106] Prior to that time, over 1,000,000 jobs disappeared without the commission of a single unfair labor practice. It is not possible to expect anything else, for when the price of labor goes up, the quantity of labor goes down. And as the evidence of the UAW shows, the quantity of labor goes down by a whole lot. The natural restraint of arbitrators, real or imagined, will prove no check against major dislocations. The risks that occur with bargaining will surely occur with mandatory arbitration. There are no dots to connect in the relevant graph:[107]

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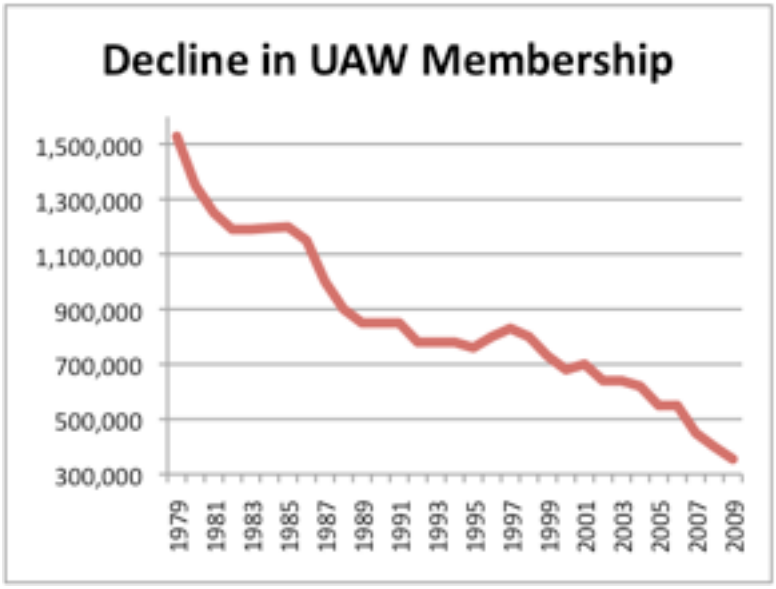
[105] Jerry White, *UAW Membership Continues to Plummet*, World Socialist Web Site, Apr. 1, 2010, *available at* http://www.wsws.org/articles/2010/apr2010/uawm-a01.shtml.

[106] Richard Davies, *Buick Makes a Big U-Turn, Leads U-turn at GM*, ABC NEWS, April 18, 2010, *available at* http://abcnews.go.com/Business/buick-leads-gm-turnaround/story?id=11428049. The percentage increases were large, but the total units sold were small, at 12,181 units in April, 2010. Chevrolet sold 135,369 units in the same period. Patrick Rall, *April sales numbers: General Motors* (May 5, 2010), *available at* http://www.examiner.com/autos-in-detroit/april-sales-numbers-general-motors.

[107] White, *supra* note 106.



Fisk and Pulver never address the numbers. Rather, they insist correctly that employers always have some incentive to settle in order to avoid the greater expense and risk of compulsory arbitration. The possibility of settlement can never justify the choice of any legal regime over another. Gains from settlement are available, no matter what the legal regime, from the combined effect of reducing the costs of both uncertainty and litigation. One settles disputes in market economies as well. But the key question is whether compulsory arbitration creates a sound framework so that the right settlements are reached – which is unlikely.

Yet another way to make the same point is to look at the job growth in non-unionized firms against the job growth of unionized firms. Here is one example. The unionized firm Safeway had 106,000 jobs in 1993 and 201,000 jobs in 2007, the last year before the 2008 market meltdown By 2009 that number declined to 186,000.[108] For the non-union Target, the numbers were 174,000 in 1993, 352,000 in 2007, which remained steady at 351,000 in 2009. Two points are worth noting here. The first is that after the 2007 year, the unionized firm lost about 8 percent of its workforce while the nonunion firm held its ground. The second point involves the increase in the size of the workforce that ended in 2007. There Safeway increase is about 90 percent, that of Target around 110 percent. Not such a big difference, at first look. But of the 95,000 new Safeway

[108] My thanks to William Schwesig of the University of Chicago Law School Library for gathering much of the information about these two firms from 10-k forms filed with the Securities and Exchange Commission.

employees, 75,000 were acquired by merger. The revised growth increase shrinks to about 11 percent. Not so good.

Compulsory arbitration will only make unions more potent. As such, it will only aggravate, not ameliorate, the concerns of the current system. Consider the dynamic consequences. Facing the prospect of instant and costly unionization will dampen the rate of formation of new firms that fear a serious financial hit early on in their life cycles. It will also retard the expansion of existing firms that fear that a tide of new workers could bring in a unionized regime. Overall, the most adverse consequences are likely to fall on low income, low skill jobs; the price increases will prove most devastating to the total number of employees.[109] The only question is the size of these effects, and the evidence suggests that it will be large. Here is some simple data evidence that should not be ignored. Ohanian presents evidence that for each one percent expansion in the level of the unionized workforce, overall employment rates will drop substantially, depending on the fraction of workers unionized and the market premiums that they can obtain. His data reads as follows:

Table – Estimated Job Loss Under Higher Unionization (Millions of Lost Jobs)

Premium for New Workers/Union Share	25% Union Share	20% Union Share	15% Union Share
15% Wage Premium	4.46	2.84	1.49
10% Wage Premium	2.97	2.16	1.08
5% Wage Premium	1.50	1.09	.54

The high estimate of four and one half million jobs does not seem creditable, not because the premium is off, but because the share of union workers seems too high. Indeed, the

[109] Ohanian, *supra* note 87, at 22.

general consensus is that in those cases where unions take hold, they can exert an increase of 15 to 20 percent in real wages over competitive numbers.[110] Those figures, however, are tricky to interpret, because they only address those firms that were able to survive with union representation, not those that fell by the wayside because they could not meet those premiums, or that never formed given the fear of an expensive labor market. But the 1.5 million jobs lost, or an increase of one percent overall in a work force of 150 million workers, does have some plausibility.

Nor does Ohanian's work stand alone. Anne Layne-Farrar attacked the same question from a different point of view by asking the extent to which card-checks and first-contract arbitration (both of which have been deployed in Canada in times past) influenced levels of unemployment. Her analysis of the Canadian data led to a prediction that passing EFCA "would lead to a 1 percentage point increase in the unemployment rate for every 3 percentage points gained in union membership brought about by a system of card-checks and mandatory arbitration."[111] That conclusion can be, and has been, criticized for being too extreme, notably by Canadian labor law scholars who published a number of technical articles attacking her work.[112] But there is no conceivable way the data could be interpreted to suggest that somehow EFCA will *improve* the employment figures. Adding costs and reducing employer options is not a pro-growth signal to new businesses, where most job creation takes place. With unemployment stable at close to 10 percent, and job creation in the private sector at close to zero, this is hardly the time to move aggressively with new labor reforms. In general, the view that labor statutes create labor monopolies as their usual effect survives both theoretical and empirical attack.[113]

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[110] *See, e.g.*, David Card, *The Effect of Unions on the Structure of Wages: A Longitudinal Analysis*, 64 ECONOMETRICAL 957 (1996).

[111] Anne Layne-Farrar, Working Paper, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications* 4 (2009), *available at* http://ssrn.com/abstract=1353305.

[112] *See, e.g.*, Susan Johnson, *Comments On "An Empirical Assessment of the Employee Free Choice Act: The Economic Implications" by Anne Layne-Farrar*, 15 JUST LABOUR: CANADIAN J. WORK & SOC. 14 (Nov. 2009); Pierre Fortin, *Faulty Methodology Generates Faulty Results: Comments on the paper entitled "An empirical assessment of the* Employee Free Choice Act*: the economic implications"*, 15 JUST LABOUR: CANADIAN J. WORK & SOC. 26 (Nov. 2009); Gary Saran & Jim Stanford, *Further Tests of the Link Between Unionization, Unemployment, and Employment: Findings from Canadian National and Provincial Data*, 15 JUST LABOUR: CANADIAN J. WORK & SOC. 29 (Nov. 2009).

[113] See, e.g., Bruce E. Kauffman, *What Unions Do: Insights from Economic Theory* 12, in WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE (2004) (outlining the familiar risks of rent seeking, monopoly wages, feather bedding, reduced investment and the like). See also the response of Richard B. Freeman, *What Do Unions Do? The 2004 M-Brine String twister Edition* 607, *id.* (claiming that worker savings under

So why not reconsider the repeal of the NLRA? After all, unions represent only 7.2 percent of the private workforce.[114] Ordinary competitive forces seem to work well for the other 92.8 percent—or would, if there were not so many other regulatory obstacles that stand in the way of the operation of free labor markets. Why not try competition across the board—which would lead to the repeal of virtually every labor law that regulates wages and terms of employment, except perhaps with respect to heath and safety? A modest topic for another day.

Conclusion: An Economic Menace

EFCA represents a concerted effort by organized labor to regain much of the power that it has lost over the last fifty years. In some real sense, this concerted political campaign is quixotic because the liberalization of product markets, both at home and abroad, reduces the possibility that any union could extract huge settlements from any employer. But that does not mean that EFCA could not cause a great deal of harm along the way. All of its provisions work well together to create a seamless structure in which unions can lodge powerful sanctions against employers that oppose their organization drives, which end in recognition through card-check. Card-check can be obtained without the full participation of all workers in discussion, let alone a secret ballot election. Once a union is chosen, it can force a contract through to arbitration, again without consulting the rank and file. Taken as a whole, the workers lose the two major checks that the current law and practice gives them against their union representatives: the secret-ballot election and contract ratification. The huge shift in power allows the union to impose on firms terms that, in the best of circumstances, impede their operation and may well reduce their ability to expand or, at worst, drive them from the marketplace altogether.

Labor supporters ask for us to trust them with this power, promising not to abuse it. But the institutional constraints built into EFCA are so weak that the doomsday

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union pension plans offset the reduced levels of union firms). Note that all of the many fine essays in this volume were written before the recent labor market implosion.

[114] News Release, Bureau of Labor Statistics ("BLS"), Union Members – 2009 at 1 (Jan. 20, 2010), *available at* http://www.bls.gov/news.release/pdf/union2.pdf.

scenario is all too likely to occur. Higher rates of unionization mean fewer jobs and lower levels of production. EFCA tightens that screw several notches. None of its overall consequences will work for the benefit of employers or union members, no matter how much power the statute confers on the union hierarchy. Defenders of labor unions spin out all sorts of clever theories to explain why the world would be a better place with more extensive union representation. But the grim truth is that no one profits from legal complexity, higher costs, and transactional confusion, all of which EFCA will sow.

May it never, never pass.