University of Chicago Law School

Chicago Unbound

Coase-Sandor Working Paper Series in Law and Economics Coase-Sandor Institute for Law and Economics

2010

One Bridge Too Far: Why the Employee Free Choice Act Has, and Should, Fail

Richard A. Epstein
dangelolawlib+richardepstein@gmail.com

Follow this and additional works at: https://chicagounbound.uchicago.edu/law_and_economics

Part of the [Law Commons](#)

Recommended Citation

Richard A. Epstein, "One Bridge Too Far: Why the Employee Free Choice Act Has, and Should, Fail" (John M. Olin Program in Law and Economics Working Paper No. 528, 2010).

This Working Paper is brought to you for free and open access by the Coase-Sandor Institute for Law and Economics at Chicago Unbound. It has been accepted for inclusion in Coase-Sandor Working Paper Series in Law and Economics by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 528
(2D SERIES)

One Bridge Too Far: Why the Employee Free Choice Act Has, and Should, Fail

Richard A. Epstein

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

August 2010

This paper can be downloaded without charge at:
The Chicago Working Paper Series Index: <http://www.law.uchicago.edu/Lawecon/index.html>
and at the Social Science Research Network Electronic Paper Collection.

**ONE BRIDGE TOO FAR:
WHY THE EMPLOYEE FREE CHOICE ACT HAS, AND SHOULD, FAIL**

by

Richard A. Epstein*

ABSTRACT

The Employer Free Choice Act has had enjoyed strong academic support, but thus far has been stymied by fierce political resistance to its central positions that first institute a card-check for the selection of a union and then requires mandatory arbitration if the parties cannot agree to a new contract within 130 days of union recognition. This article critiques the arguments made in support of this fundamental revision of labor law offered by Craig Becker, Benjamin Sachs, and Catherine Fisk & Adam Pulver, all of which purport to show that flaws in the current system of collective bargaining need major prounion adjustments. The key theoretical insight of the paper is that no ad hoc justifications for particular changes in the statute can be considered in isolation of 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 to 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 and create major administrative burdens and political dislocations.

For the past several years, Democratic majorities in both Houses of Congress have championed the passage of the Employee Free Choice Act (EFCA). By every account, the bill would revolutionize management/labor relations if it were adopted. After 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

*Laurence A. Tisch Professor of Law, New York University Law School, the Peter and Kirsten Bedford Senior Fellow, Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law, The University of Chicago. I would like to thank Brett Davenport, Maxine Sharavsky and Christopher Tan, New York University Law School, Class of 2012 for their excellent research assistance.

American business and 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 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 eventually did become law after some titanic struggles,¹ EFCA is a short bill whose implementation does not require levying any new taxes or creating of any major new administrative agency. Intellectually and emotionally, EFCA fed off the widespread and determined perception within pro-labor circles, both in practice and the academy who were (and are) convinced that the feeble union remedies under the National Labor Relations Act—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 weakness of the remedial side of the NLRA as the major 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 against 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 in private unions, by a respectable margin of 7.9 million to 7.4 million workers.³

Nonetheless, as this is written in the summer of 2010, EFCA seems dead in the water, with no likely prospect of its revival in the short run. 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.

¹ Patient Protection and Affordable Care Act

² Bureau of Labor Statistics (BLS), News Release, Union Members 2009, January 20, 2010, found 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.” P. 1.

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.” P. 1.

These groups acted with a singleness 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 unit is that these organizations funded my own book *The Case Against the Employee Free Choice Act*.⁴ (They have had absolutely nothing to do with this article.) 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 any employer 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 employers do not welcome unions within their gates. Whether these employers could have succeeded against a full-court administration press remains unclear. But the employers were surely aided by the decision of the Obama administration to subordinate labor law reform to health care legislation, financial legislation (which still hangs in the balance, and climate control legislation (which is going no where soon).

The full explanation for the stalemate over EFCA does not rest, however, solely in the relative strength of management and labor in this struggle. All partisan disputes take place in arenas where neutral third parties can choose up 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 a 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.⁵ I regard these

⁴ Richard A. Epstein, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT* (Hoover Press 2009). 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?* Manhattan Institute, Civil Justice Forum 45, March 2009, http://www.manhattan-institute.org/html/cjf_45.htm; Richard A. Epstein, *The Employee No Choice Act*, CHIEF EXECUTIVE MAGAZINE, 36 November/December 2008; Richard A. Epstein, *The Ominous Employee Free Choice Act*, REGULATION 48, (Spring 2009).

⁵ George McGovern, *My Party Should Respect Union Ballots*, Wall St. J., Aug. 8, 2008 at A13.

developments as both welcome and long overdue. EFCA represents a potential catastrophic federal intervention in labor markets, which is far worse than the 1935 National Labor Relations Act, which, to urge the unthinkable, should be repealed in favor of a return to the common law system of labor relations that prevailed prior to the New Deal.⁶

Needless to say that this opinion 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, in favor of all or some of EFCA's major innovations. The purpose of this article is to review and comment 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 1935,⁷ by the repeal of the Taft-Hartley Act of 1947.⁸ Front and center are the questions of how to allow guarantee unions to things: the right to organize, and the ability to win first contracts. These 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 other key issues associated with labor relations, such as the operation of the grievance process, of the use of the strike and the lockout as economic weapons in labor disputes..

In the end, their effort to transform established law has proved a bridge too far. The Democratic and union 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 the labor union and among its many academic backers. It is therefore

⁶ Richard A. Epstein, A Common Law for Labor Relations: A Critique of the New Deal Legislation, 92 Yale L.J. 1357 (1983), for the basic position, and Richard A. Epstein, Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler, 92 Yale L.J. 1435 (1983). GET THAT ARTICLE AND CITE IT. My abiding antipathy to the NLRA dates back to my student days, Note, Individual Control over Personal Grievances Under *Vaca v. Sipes*, 77 Yale L.J. 559 (1968).

⁷ citation

⁸

important to give close attention to the arguments for a bill that 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 is made for the legislation. On this issue, there is no middle ground: EFCA should never be enacted into law.

EFCA itself consists of three separate provisions. The first two, which are best considered together have as their object the exclusion or reduction of employer influence in the union organization process. The first departure for current law modifies the rules governing employer unfair labor practices (ULPs) during organization campaigns, which in effect is describing as “Strengthened Enforcement.”⁹ This section increases the penalties for unfair labor practices imposed against employers during an organization drive without touching the penalties for unfair labor practices by labor unions. The second provision, which EFCA goes by the soothing name of “Streamlining Union Certification, allows, at the option of “either the union or any group of employees,”¹⁰ the routine substitution of the card-check for the NLRB supervised secret election that now represents the preferred approach under the Act That card check procedure effectively allows for unions to undertake organization campaigns in relative secrecy, and thus neutralizes, without prohibiting, much of the employer’s voice 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 the Federal Mediation and Conciliation Service (FMCS), if the parties fail to come to an agreement after a negotiation process that lasts, all stages included, 130 days.¹¹ 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 the Appendix. The cumulative effect of these three provisions would lead to

⁹ EFCA § 4.

¹⁰ Id. § 2.

¹¹ Id. § 3,

a massive shift in the balance of power between labor and management, and, I fear, to new levels of mutual animosity in an area where political relations between the two sides are already frayed.

The question is how to evaluate these three proposals. In doing so I propose to take the analysis in two steps. In the first step I look at two sets arguments that have been made to strengthen the union position in organizing drives. The first of these was written in 1993 by Craig Becker, which has now come into prominence in connection with the determined Republican opposition to his nomination, in his article, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*.¹² A more recent effort that builds on the Becker work is an recent article of Professor Benjamin Sachs, who explicitly addresses EFCA in his analysis of the organizational process.¹³ Thereafter I turn to a recent defense of the system of mandatory arbitration offered by Professors Catherine Fisk and Adam Pulver¹⁴

I. Three Radical Critiques of Labor Law

A. Becker and Employee Autonomy Becker's critique of modern labor 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,¹⁵ which deplored the Supreme Court for its ostrich-like behavior in cases like *Lochner v. New York*.¹⁶ To Becker, as for 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 world held by the defenders of laissez-faire.¹⁷ Becker's leitmotif was that him Pound basic orientation should carry through to understanding and interpreting American labor

¹² Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 496 (1993).

¹³ Benjamin Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 Harv. 655 (2010)[hereinafter Sachs, *Enabling Employee Choice*].

¹⁴ Catherine Fisk & Adam Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 La. L. Rev. 47 (2009) [hereinafter Fiske & Pulver]

¹⁵ Roscoe Pound, *Liberty of Contract*, 18 YALE L. J. 454 (1909).

¹⁶ 198 U.S. 45 (1905).

¹⁷ Pound, *Liberty of Contract* at 487, cited in Becker at 602 .

law. In his view, its halcyon period was in the heady days 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, their views about union elections in the first place.¹⁸ He goes on to make the further case that this was indeed the right set of legal relationships, on the ground that the internal affairs and operation of the union were of no concern to an employer. And he further notes the close connection between this effort to exclude the employer from worker deliberations during this initial period, by noting that in the early years a union did not have to be chosen solely through a secret ballot election, but could be designed via a card check, which had this advantage: "Membership cards could be solicited without employers knowing that their employees were organizing."¹⁹ 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 has 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."²⁰ Unless this view is taken 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."²¹

I believe that Becker is correct in his claim that as a matter of first principle any selection of a union should be 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

¹⁸ Becker, at 507-509.

¹⁹ Becker at 535.

²⁰ Id at 586

²¹ Id at 603.

the Wagner Act who wanted to insulate the union deliberations from any management influence. : “[S]uppose 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?”²² 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. Use the strong theory of individual autonomy for internal workers affairs. But reject 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 fatal objection to using this homely international example over to the NLRA is that it does not take into account the other major 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 that by parity of reasoning labor groups could exert no influence in the way in which employers chose to govern their businesses or in the policies that they choose to pursue in relationship to labor. In particular, those principles would allow the employer not to deal with any union representatives at all, and to insist that any worker agree that during the term of employment that they do not 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 another. But no worker could in a regime of strong autonomy have his cake and eat it too, by forcing the employer to hire even though a union member or supporter.

A second precondition for the Becker synthesis is that under this basic autonomy model, the union could not bind those workers who decided to stay out of

²²Id. at 531 (quoting National Labor Relations Board: Hearings 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).

membership. Any accurate rendition of the principle of freedom of association does not allow for majorities in some stated-determined bargaining unit to bind other individuals who are by a combination of administrative decision and majority vote shepherded into their ranks against their will, such that their own prior contracts can be abrogated over their objection once the union obtains a majority of votes within the union.²³

In order to avoid this conclusion, the NLRA, in line with the view of Pound and others, adopts the dubious rhetoric 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.²⁴ As Becker himself notes, Senator Robert Wagner constantly appeal 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”²⁵ 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.²⁶

²³ See, *J.I. Case v. NLRB*, 321 U.S. 332 (1944).

²⁴ “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 U.S.C. § 151.

²⁵ Becker at 496, quoting 79 Cong. Rec. 7565 (1935), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 2321 (1949).

²⁶ See, e.g., Archibald Cox, *Rights under a Labor Agreement*, 69 HARV. L. REV. 601 (1956), which argued 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 Richard A. Epstein *Individual Control of Grievances under Vaca v. Sipes*, 77 YALE L. J. 559, 563-64, 577-78 (1968), attacking both Cox’s account of freedom of association and White’s rule in *Vaca*. I stand by that article today.

It does not work that way. The traditional principle of freedom of association, both actual and full, bears no relationship to that which is invoked under the labor act. As Justice Brennan wrote in *Roberts v. United States Jaycees* “Freedom of association therefore plainly presupposes a freedom not to associate.”²⁷ That principle thus negates any duty to bargain on an employer. Any agreement between workers can bind only themselves, but cannot increase their rights against third persons, employers included. If an employer can refuse to bargain with individual workers, it can certainly 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.

It is thus misguided for defenders of the NLRA to appeal to the principle of freedom of association given that the statute is intended to create monopoly power, not eliminate it. Indeed, given that position, the antidiscrimination norm 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 exploitation in *Steele v. Louisville & Nashville R.R.*²⁸ only have to grapple with the implications of that duty in race cases for over a decade to come.²⁹

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 that claim of freedom of association becomes defensible. Thus in ordinary cases, any group that decides to organize is subject to the constraints of the antitrust law to the extent that it seeks to dominate one side of the market. Put otherwise, the collective refusal to deal counts as a per se

²⁷ *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)(noting tension between the principle of freedom of association with a general antidiscrimination law).

²⁸ 323 U.S. 192 (1954).

²⁹ See, e.g., *Conley v. Gibson*, 355 U.S. 41 (1957), which had to clean up fair representation cases under *Steele*.

violation of the antitrust laws,³⁰ just as it did before the passage of the modern labor statutes. The point is not one of historical speculation. In the 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.³¹ Chief Justice Fuller held that the same principles that governed boycotts in ordinary commerce applied to labor unions.³² Nor was his concern based on formal principles in blithe disregard to facts on the ground. That secondary boycott had real teeth insofar as it had led seventy of eighty-two hatters in the United States to capitulate to the union demands.³³

As a matter of antitrust law, there is no serious argument that the decision is correct. The progressive forces, however, quickly overturn *Loewe v. Lawlor* in 1914 by passing by section 6 of the Clayton Act,³⁴ which largely immunized the efforts of unions to organize workers,³⁵ at least insofar as they did not collaborate with

³⁰ *Fashion Originators' Guild of America v. FTC*, 312 U.S. 668 (1941)(applying per se rule notwithstanding the Guild's purpose to stop production of knock-off garments).

³¹ *Loewe v. Lawlor*, 208 U. S. 274 (1908).

³² *Id* at 294-296 ,

³³ *Id.* at 305.

³⁴ § 6 Antitrust laws not applicable to labor organizations

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 conduct 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."

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 20 also barred criminal prosecutions in light of the Norris-LaGuardia 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 & Nathaniel Greene, THE LABOR INJUNCTION* 220 (1930), written just before the passage of the Norris-LaGuardia Act, which noted that the legislation "explicitly applies only to the authority of United States courts 'to issue any restrained order or injunction.'"

³⁵ See Clayton Act, § 6 and § 20.

unionized firms to drive nonunionized firms out of business.³⁶ That section can only be regarded as ad hoc boon to labor unions, which fundamentally alters the background conditions, under which the claim for strong union autonomy should be examined.

Next, of course, the freedom of association is a principle that requires acceptance by unanimous decision not by majority vote. To be sure, all the workers in a given workplace could give their assent to have their membership in a union 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. Indeed, under the logic of freedom of association, 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.

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 can confer them additional rights against C. I cannot agree with my best friend that a third person will sell to us his house for \$10. 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 me and my friend 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 of course 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.³⁷

³⁶ 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 nonunion firms to sign union contracts. For discussion, see RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, 87-88 (Cato Institute 2006).

³⁷ NLRA, § 157 (§ 7) 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

Union defenders like to ground these extraordinary statutory privileges as a commendable form of realism the face of the overwhelming employer, a position that is belied by the dangerous success of the secondary boycott of the Danbury Hatters. 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 statutory position. But as to facts or data to support any conclusion unions are systematically overmatched in the current situation, Becker (like Pound before him) offers no probative evidence at all.³⁸ Of course, it is easy to collect, as Professor Sachs subsequently does, irrefutable evidence that somewhere over 96 percent of employers oppose union organization drives.³⁹ Or to demonstrate in aggregate employers spend annually close to one billion dollars in defensive efforts to ward off these union drives, when one includes about \$200 million external payments to third parties and the rest in the company time of managers and supervisors.⁴⁰

Who would expect otherwise? Does *anyone* think that unionization makes the unionized firm better off?⁴¹ In all likelihood, these estimates are far too *low*. First, they do not include the costs that the United States incurs in overseeing these complex process. Second, even with respect to private expenditures, both direct and indirect, they only include those that kick in once a union drive is in the offing. But astute employer and its internal legal team will never wait until that stage to make

or other mutual aid or protection, and shall also have the right to refrain from any or all such activities [subject to a closed shop exceptions]. . . .

³⁸ Benjamin Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 Harv. 655, 680-681(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 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).

³⁹ Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing* 10 tbl. 3 (Econ. Policy Inst., EPI Briefing Paper No. 235, 2009).

⁴⁰ See John Logan, *Consultants, Lawyers, and the ‘Union Free’ Movement in the USA Since the 1970s*, 33 INDUS. REL. J. 197, 198 (2002).

⁴¹The point is pushed by Richard Freeman & James 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, *EFCA*, at 125-132.

their influence felt on company decisions. In a world that lets allows yellow dog contracts, employers have little need to take defensive actions. But once those sensible, procompetitive contracts are made illegal, the employer, fearing the loss of both management prerogatives and overall productivity, is well-advised to choose plant locations, design their 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 with nonunion issues. But no prudent employer would ever broadcast these elements, lest it bring the wrath of reformers, unions and the NLRB down on his shoulders. Employers take this step because they are consequent of the seriousness that the labor threat imposes 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.

At this juncture, the purpose is not to demand repeal of established labor law. It is only 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 Taft-Hartley law were perceived as countervailing responses to the advantages the unions received under the original Wagner Act. Here are a couple of examples.

Secondary boycotts. Consider the position of the secondary boycott that was legitimated under the Clayton Act. The power of these boycotts are only increased if they 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 direct remedies against the employer, the pressure of secondary boycotts could prove too great. The Taft-Hartley law thus included an elaborate statutory provision that limited their scope in section 8(b)(4) which sought to control their influence. The boycotts that might be tenable when

unions had little power against their primary employer proved much more ominous when those rights were in place.⁴²

Labor Injunctions. To progressives, the labor injunction against organizing activities was one of the great abuses of the pre-1932 period, which was rectified by the Norris-LaGuardia Act, which greatly narrowed its use in all labor disputes by abolishing its use, for example, to enforce yellow dog contracts. But the question arises whether that hostile attitude toward injunctions makes sense in connection with a collective bargaining agreement in which the union agrees to a clause that prohibits “no cessation or stoppage of work, lockout, picketing or boycotts.” In *Boys Market, Inc. v. Retail Clerks Union, Local 770*⁴³ Justice William Brennan held that the injunction should issue in these circumstances. He knew full well that under state courts could issue injunctions in labor disputes because they were not covered by Norris-LaGuardia.⁴⁴ He was thus most uneasy about any law that encouraged unions to remove state court suits for injunctive relief to federal court.⁴⁵ Yet his larger reason for allowing the injunction paralleled all the arguments that that courts had adopted prior to Norris-LaGuardia

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.⁴⁶

⁴² See, e.g., for discussion, Bernard Meltzer & Stanley Henderson, *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 539 (3rd ed. 1985). The same point is made in Fisk & Pulver, at 64.

⁴³ 398 U.S. 235 (1970), overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1970).

⁴⁴ See, e.g., *McCarroll v. Los Angeles*, 315 P.2d 322 (Cal. 1958), cert. denied 355 U.S. 932 (1958).

⁴⁵ *Boys Market*, 398 U.S. at 245-246.

⁴⁶ *Id.* at 248.

His is 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.

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,⁴⁷ 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.⁴⁸

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.⁴⁹ But look at the question from the other side. How, one might ask, does Section 8(c) meet the normal constitutional standard 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 both political opposition and bodily harm, which give rise to widely divergent response at common law. So why can’t an employer take reprisals by firing workers who don’t want to work on terms that the employer finds acceptable? Because it would gut the Act, pure and simple.

The same is true for the benefit side of this statutory equation. Outside the area of labor law, offering benefits is generally the preferred way to get things done.

⁴⁷ See, *Gissel*, 395 U.S. at 617.

⁴⁸ 29 U.S.C. § 158(c).

⁴⁹ Becker at 544-554, explicitly attacking the dicta in the Justice Jackson’s concurring opinion in *Thomas v. Collins*, 323 U.S. 516, 545-48 (1945).

But in the context of collective bargaining agreements, offering benefits to workers cannot be allowed if the statutory scheme is to survive. Thus suppose that at the outset a union organizational drive the employer offers to match term for term the best union offer, so long as workers did not join the union. That strategy is too potent because no union will ever initiate an organization drive if it knows that the employer has this ironclad counterstrategy. So the survival of collective bargaining process depends on backing off of traditional free speech accounts.

The key question is how far. 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 common law rules, the position is tenable so long as the employer can flat out refuse 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 it be powerless to speak on its own behalf about an institution with whom it is obliged to bargain if the outcome of the election goes against it? Silence in the face of a duty to bargain has the same effect of a secondary boycott when there is a duty to bargain. It shifts the advantage too far to one side and allow unions to make claims that undecided workers could have little chance to examine. Right now employers get that 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 if not tainted by an implicit threat. Given the changes in the background rules, the speech rules should stay exactly where they are. In its own way, the current law makes the appropriate adjustments given the initial commitment to collective bargaining.

Sachs and Default Rules. The 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. He does not address the compulsory arbitration piece of the puzzle. Sachs does not think that EFCA offers the solution to the current defects, although he would certainly embrace its passage. Instead 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 given unit. And like Becker, the words “statutory monopoly” never appear in an article that totals 37,915 words. Rather he 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.”⁵⁰ This state is only half right. The evocative word “sovereignty” would apply only if the union does not take 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 over its operations, a partial lien on its assets, and thus a part ownership in the business. Given that level of power it is hard to conclude as he does that this “impact” on employers “does not entitle employers to an affirmative right to intervene in that [unionization] process.” The impact in this case is not just that of a competitor. It is someone with positive claim on firm assets.

In essence, Sachs’s claim 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 disappear with its duty to bargain with the union. At that point its right to speak about union elections are not zero. They are just the same as any random outsider who wishes to comment on union affairs. 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. Consistent with that objective, Sachs’s 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

⁵⁰ Sachs, at 661.

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.”⁵¹ Note that the choice of the word “workers” is consciously 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 Organizing and the Teamsters to the effect that secrecy is a premium virtue.⁵²

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 which allows a majority, or even a supermajority, of cards to settle the question of union organization could freeze out these workers from a process that still has some faint aspiration of full participation for all persons within the unit in the deliberative process that leads to unionization in the first place. But all that is only a fig leaf. The processes chosen have no neutral valence to them.

Consistent with his basic orientation, Sachs proposes two separate strategies to reformulate the structure of American law, which deal respectively with what he calls the initial *default* position, and the *alteration* rules that might be adopted to flip the default to the opposite position. Thus under the current law the nonunion position is regarded as the default, and a success organization drive by the union is needed to flip the presumption to a unionized state. Sachs has serious reservations on both counts. He think that the law has settled on the wrong 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 this two points in order.

The Default Position. In order to make the case that the default position should be set in favor of unionization, Sachs relies on three works. One is the well known article by his now Harvard colleague Cass Sunstein, Human Behavior and the Law of Work, which argues that the common law baseline rules should be rejected

⁵¹ Id. at 657.

⁵² Sachs, at 665.

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 National Labor Relations Act.⁵³ In addition, he also turns to more recent writing by two Harvard colleagues writing on the fields of statutory interpretation and corporate governance. In speaking of the former, Einer Elhauge argues that in those cases in which there is radical uncertainty as to the meaning of the statute, a court should adopt that interpretation that maximizes the likelihood that it will be corrected by subsequent legislative action. The theory here is that since right and wrong is in this select class of cases, the best one can do is make a decision that invites rectification if the original error was wrong. Let me take these cases up in order.

Sunstein and Prepolitical Baselines. One common theme raised by defenders of the modern labor law is that there is no reason why modern legislatures should accept what Paul Weiler calls “the tacit legal assumption that the ‘natural’ status for a workplace is nonunion.”⁵⁴ 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.”⁵⁵ To Sunstein the place to start is with the recognition that both the analytical and behavioral foundations of the common law rests on the assumption that employers receive what he terms “waivable employer rights.” These are rights that the common law confers on the employer, which the employer could then decide to purchase if they were at greater value to him. Yet on that score the endowment effect, whereby people value what they own more than they do not, could easily interfere with the transaction by creating sticky default rules.⁵⁶ He takes issue with my views, by noting that “What Epstein does not sufficiently acknowledge is the extent to which a number of rights are conferred on the

⁵³ Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205 (2001)]

⁵⁴ Paul Weiler, *Governing the Workplace*

⁵⁵ Cass Sunstein, *Human Behavior and the Law of Work*, 87 Va. L. Rev. 205, 208 (2001).

⁵⁶ Sunstein, *Human Behavior*, 87 Va. L. Rev. 221.

employer by the common law; any suggestion that the common law reflects "laissez-faire," or promotes "voluntary interactions," should be prefaced with this point."⁵⁷ The stark models of rational economic calculators should give way to a more complex model that stresses the imperfections in human intelligence on all matters from the asymmetrical attitude to gains and losses, to ignorance of the legal rules, to excessive optimism, and improper discounting.⁵⁸

The 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. The initial contract must to create some sort of initial 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 which the employer could then buy away. Conventional default rules do not serve in that function at all. They are gap fillers when parties have incomplete 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 *prior to any actual agreement* to all prospective employees, either you come on my terms or you do not work at all. There is no duty to make an initial contract on the default. In this conventional sense, the law could set the legal default any way it wants , but so long as the yellow dog contract were allowed, the parties could move in that direction. No one has to buy any thing 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.

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

⁵⁷ Id. at 209 note 10.

⁵⁸ Id at 206

if he could afford to pay. That seems to be what he is saying, when he writes: “It [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.” This 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?

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 that 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. It has everything to do with contractual invalidity of contract provisions that are against public policy. At this point, it is also illegal once the employment relationship is done to attempt to interfere with the statutory machinery 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 the contract provides you with, 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.”⁵⁹ No one thinks that. The task of getting a set of individual baselines that will reduce the voluntary transaction costs needed to reach that system that has on average the highest output, which is a competitive market, which as noted drives the antitrust law as well as the common law.

So once we recognize that nature is not the source of the common law baseline, what next? That piercing insight does not exonerate the attackers of the common law rules from the duty to explain why their baseline is superior to the one

⁵⁹ Sunstein, *Human Behavior*, 87 VA. L. REV. at 209.

that they dislike. They too much give case to a normative baseline from which the pro union position can work. That is a task that they have *never* attempted to do. The difficulties are fatal. Start with the cognitive difficulties. Once we know that people are subject to biases and to the ability of assimilate information, the last thing that we need is a unique and convoluted labor law whose many features they 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 than just having an offer of a job at a stated salary. The simpler the legal system, and the greater the number of choices, the better the information. To so-called union baseline only makes things worse for imperfect minds.

But, just for the sake of argument, assume that the common law baseline is wrong, and that some unionized alternative should be put in its place. Again the question is, what next? At a minimum that baseline must have the same degree of universality that is found under the common law rules, so that it explains how parties should proceed in each an 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 what ever terms and conditions they see fit. They are not obligated to fit themselves into some predetermined category of employer/employee, but could easily choose to work as partners or as independent contractors. Their intention, as expressed in public language controls. The rule works to cover everything from the small two-person business to large and complicated corporations. Each set of contracts builds on those that works. 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 case rests on two fundamental propositions. The first is that the voluntary trade between the parties produces mutual gain. The second is that the greater level of wealth for both parties increases 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*, is a nontrivial binding constraint against unions.

So just what baseline is proposed in its place? I cannot conceive of any profusion 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 not possible for any one 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 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 whether they would like to join that union? And must that poll be held multiple times, as new workers are added and current employees leave? It is not necessary to insist that the ordinary contractual regime is natural, God-given or, in some mysterious sense, prepolitical. It is enough to show that it is blessed with a versatility and simplicity that no ad hoc prounion baseline could hope to achieve. Sachs does well not to push to pin down the new default position. You can't beat one well-established baseline with a philosophical objection to the possibility of forming 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. No alternative baseline that meets this standard has ever been articulated, let alone implemented. And none will.

Elhauge and Self Correction. In his treatment of statutory construction, Einer Elhauge thinks less of cognitive biases and more the public choice dynamics that deal with the correction of judicial decisions that could in principle misstate the proper interpretation of a given point of law. Wholly apart from its application to labor law, I think that this theoretical effort to manipulate default terms is tenuous in its own terms. Statutes are often passed as parts of elaborate compromises, which may be construed by courts years after their initial promulgation. The question of finding the easiest path toward legislative correction thus requires the conscientious court to first determine *which* legislature should set the baseline for this analysis. Does one look the legislature that passed the law, even if it is no longer in office? The one that is now in office, even if an election is drawing nigh? Or some future legislature whose composition is unknown? Should it matter if the prospects for altering interpretation X in one house are better than those of altering interpretation not-X, only for the position to be reversed in the other.

There is, alas, no principled way to answer any of these questions of implementation, even assuming that the second legislature will confine itself to self-correction, rather than more legislative adventurism. Even on that simplifying assumption. Courts have to get information about questions, which will generate uncertainty at least as great as that which surrounds the proper interpretation of a disputed provision. Matters become even more difficult because it is quite likely in many settings that no matter what the judicial decision, the losing side would be unable to muster the political forces to reverse the decision. Bare majorities do not cut it in legislative settings. Let the Congress or state legislature be divided 55/45, and nothing will happen if there is a de facto supermajority requirement of 60 percent in order to get the program through. The default test thus comes up empty.

Worse still, Elhauge's general approach runs the serious risk of corrupting the judicial process. There is no reason to create an legal environment where it pays judges to feign a level of uncertainty about a statutory provision in order to apply this dubious methodology. The errors here are two. First, most statutes actually contain information that points, at least weakly to one interpretation or another. A result-oriented judge should find it child's play to magnify the scope of the uncertainty in order to open the path wide to the public choice inquiry that maps well into his or her preferences on the desirable policy outcome. There is no protection against this abuse from either side of any knotty question. The only way to avoid these difficulties is to resort back to the usual combination of text, structure and context to get these things right. It is not my place to talk about these issues here, but it is instructive to note that Sachs at no point gives an instance of how this method could work even in its home domain of statutory construction. And it is equally instructive that no judge has ever *overtly* adopted this as the mode of interpreting the statute.

Bebchuk, Hamandi, and Corporate Governance. The same point can be said about the theory of Bebchuk and Hamandi to construe governance rules in ways that cut against management, given its superior control over the processes. The initial task is to manufacture the area of textual uncertainty, which is more difficult here than it is with statutes, given the management team that drafts these

provisions typically do not have to engage in the kind of last-minute compromises that are an inseparable part of the legislative process. Nor is it clear that all disputes involve management/shareholder conflicts. Thus a dividend issue may pit the preferred shareholders against the common shareholders, or the bondholders against the shareholders, so that the political economy story has little salience. And, as is the case with political calculations made in the guise of statutory interpretation, it hardly makes sense to encourage judges to magnify the scope of uncertain to increase their power to decide as they see fit. The far superior approach is to respect business expectations and intentions in order to give people the confidence that the deals they make will be honored by the courts that enforce them. It is telling that no court to my knowledge has openly avowed the use of these techniques. To do so would be a fatal concession of the illegitimacy of the overall process.

From Interpretation to Institutions. In dealing with all three writers on whom Sachs relies, it is critical to note the vast gulf that separates questions of contract interpretation from questions of institutional design. The default position at stake does not involve the proper default norm for contract, statutory or charter interpretation raised by Sunstein, Elhauge and Bebchuk/Hamadani respectively. Rather it involves the more ambitious task of creating a set 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. In dealing with this question, Sachs is unhappy with that state of affairs, even if he is unable to indicate what pro-union default position should displace the current common law position that allows an employer to hire (and fire) those workers on an at will basis—a position that I have long defended.⁶⁰ At this point, the issue becomes what it always was, not one of default rules that are intended to realize the intention of the parties. It is a question of default rules that are intended to drive outcomes to a preferred position that one party desires and the other

⁶⁰ See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

opposes, namely the increase of union penetration in the workforce. Setting that alternative baseline by statute is a dead loser. It is not just the theoretical attacks on its inefficiency. It lies in the utter inability of its supporters to define that baseline with sufficient precision that they could apply it. So the defenders of EFCA and labor law reform move onto the second point. If the statutory rules are where they are, what alteration in their content improves the employees chances of success.

Alteration Sachs's second line of defense of EFCA and similar reforms thus focus on the less ambitious but still vital task of easing the costs of transition from a nonunionized 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 card check. The former is more obtainable to Sachs. The latter is more desirable. The impetus for entering both 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 nonunion default."⁶¹ But this presupposes that we know who has the advantage in the dealing with these elections. But the calculus is tricky.⁶² 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. But in this asymmetrical conflict, the union have 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 advantages of short term employer weaknesses or workers unrest. It is not bound by the 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 matter. A look at actual elections show that both sides have their fair share of successes, with the unions winning somewhat fewer elections in somewhat larger units.⁶³

⁶¹ Sachs, at 656.

⁶² See Richard A. Epstein, EFCA 42-43, for the union advantages.

⁶³Id. at 54-67.

It is an open question of how much any change in campaign rules can alter the labor landscape now that there are no huge 1930 style assembly lines left to organize. But it is worth while analyzing these two positions anyhow. The first common device is an expedited election that gives an employer something under two weeks after the campaign is announced to make out its case, instead of the nearly six weeks that is allowed for an election campaign today. The sole reason for speeding up the election is to prevent the influence of employer speech from removing the advantage of surprise that a union has 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 they 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 the full information that does not, which is hard to square with any effort to insured informed worker choice. The argument in effect becomes that *all* persuasive speech should be regarded as improper threats rather than sound arguments.⁶⁴ 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 of its allows the union campaign to proceed by stealth. Once again the point here is to force the issue before the 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 adopting either or both of these strategies to overcome the coordination problem that workers have in getting a union in place against the implacable opposition of the employer.⁶⁵ But the actual reasons are more complex than that.⁶⁶ The first point is that the union which runs the organizational campaign has no problems of its internal organization. They are not subject to any of the limitations imposed on employer speech under section 8(c), but can promise the

⁶⁴ Id. at 48-53.

⁶⁵ See, Sachs 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.

⁶⁶ For a fuller discussion see Epstein, EFCA 22-34.

moon with impunity. And just as employers can resort to tactics that might involve unfair labor practices, so unions can 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 pickets (who are not workers at the plant) to protest working conditions in efforts to drive away customers. They can file complaints, often anonymous with regulators that bring snap inspections against workers. 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 via house calls through intimidation. In these cases, the longish wait to an election is in the union (but not the worker) interest because it allows these pressure techniques to exert a cumulative toll. It is in part for this reason why the union wants the *option* for the early election, but not the duty to abide by one.

Most ironically, disorganized workers work to the interest of a union in a card check as the disorganized sentiments of the antiunion workers are thereby held in 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. At this point, enough swing votes could put matters back the opposite way. In sum, both parts of the campaign are wrong. The alternative baseline is unworkable, easing the path to organization unsound.

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.⁶⁷ It is rarely stated that the unions are too reluctant to moderate their demands, even though it always takes two to make an impasse. The source of these drawn-out negotiations, moreover, lies in the NLRA's basic commitment to a collective bargaining regime that leaves an employer no one to negotiate with but the union, which can only bargain with an employer with respect to its employees.

⁶⁷ Fisk & Pulver, at 56-58.

This bilateral monopoly structure invites holdout and bluff 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.⁶⁸ 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 loss. But 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 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, which face little or no competitive pressures from public employers, who were often under state law commands to bargain under compulsory arbitration regimes. As noted earlier, their ranks have swelled until they exceed in absolute terms the number of union members in the private sector. These regimes usually offer a laundry list of relevant factors that includes a range of information the looks to comparable wage, benefit and conditions data in comparable markets, and asks ominously about “the financial ability of the unit of government to meet these costs.”⁶⁹ The richer you are, the more we can demand, a form of wage discrimination that is consistent with monopoly power. Not surprisingly, the resort to these factors has led to a constant wage and benefits increases to keep up with other places to the point where now where the salary premiums and pension packages have ruined public finances, as unionized workers in the public sector compromise over 40 percent of the workforce.

⁶⁸ See, for discussion of the competitive landscape, Lee E. Ohanian, *The Impact of the Employee Free Choice Act on the U.S. Economy*, AEI (2010).

⁶⁹ Fisk & Pulver, at 66.

For union supporters, unfortunately, the debate takes place on myopic terms. From their point of view, a forced first contract regime is superior to a 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 confidence. 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 force the firm to make adjustments in its labor practices whose consequences will 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 simultaneously by creating a competitive market.

That possibility does not enter into the discussion. Rather the argument that Fisk and Pulver 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. After all, there is no reason 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 in connection with public employees, as under the Taylor Act in New York,⁷⁰ and 15 other states.⁷¹ 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?

⁷⁰ N.Y. Civ. Serv. Law § 209 (McKinney 2000 & Supp. 2008).

⁷¹ Fisk & Pulver at 50-51

For many good reasons it turns out. In critiquing their case, we can quickly dismiss any reliance on schemes of arbitration that are put into place by contract. At this point, the terms of the contract will provide safeguards against runaway arbitrators who cannot 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 which neither side has agreed.

The real question then 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 is 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.⁷²

The clear pressure in the public area 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

⁷² Steven Malanga, *The Beholden State How public-sector unions broke California*, Manhattan Institute. Fine others

\$60,000 per worker, a figure with fighting over.⁷³ 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 in any 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 easily hand out awards for other people to pay.

The unions may well be willing to take these risks because they will suffer only small fraction of the losses if the firm goes insolvent, but will keep all the gains from a lucrative 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 Paterson and the public unions in New York.⁷⁴ All the pension reductions come from workers not yet hired. The private sector unions are also less than perfect. The colossal miscalculations of UAW in getting a hugely favorable 1979 collective bargaining agreements presaged its implosion over a generation later. These are numbers worthy of note. The UAW had 1,500,000 members in 1979, which had dropped to 431,00 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.⁷⁵ Those 1,000,000+ jobs disappeared, without 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 the evidence with the UAW is 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 sure occur with mandatory arbitration. There are no dots to connect in the relevant graph:

⁷³ David Lee & Alex Mas, "Long-Run Impacts of Unions on Firms: New Evidence from financial markets, 1961-1999, <http://papers.ssrn.com/sol3/results.cfm?RequestTimeout=50000000> cited in Ohanian at 15.

⁷⁴

⁷⁵ World Socialist Web Site, April 1 2010
<http://www.wsws.org/articles/2010/apr2010/uawm-a01.shtml>

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. But gains from settlement no matter no matter what the legal regime from the reduction of uncertainty and administrative costs. 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 to happen.

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. It is never used to negotiate long term contracts. Nor is it used to deal with contracts that have many moving parts simultaneously. 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 employers pension benefit system.⁷⁶ The theoretical objection is that if the terms are considered separately, the interactions between them are necessarily ignored. That point is probably two even with two related terms, but it is surely true with the thousands of different issues that have to be resolved in getting a collective bargaining agreement which has to

⁷⁶ Id. at

cover such hot button issues as contracting out work, health care benefits, discipline, seniority and other issues. Splitting the difference won't work in an environment where no arbitrators have the detailed knowledge of firm specific practices.

Public arbitrators have no idea of how to deal with such issues as mergers and contracting out because these are not features of the public setting. And they do not realize how the pressures of innovation could require radical innovations in workplace deployment to keep competitive. Renegotiation with the usual collateral concessions for waiving contract rights is too little or too late. Public arbitrators have no idea of how to deal with such issues as mergers and contracting out because these are not features of the public setting. And they do not realize how the pressures of innovation could require radical innovations in workplace deployment to keep competitive. Yet as Fisk and Pulver note with apparent approval that arbitrators (in a field they have never worked) tend to show a bias toward the status quo,⁷⁷ which is the kiss of death in competitive industries. In so doing they underrate the need for rapid adaptive responses needed given 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 conflict of interest within unions matter, for senior workers are better to withstand the downturn than recent members, and both are likely to do better those individuals who have yet to join unions. It is for that reason that two-tier pricing in many industry always works to the benefit of incumbent workers against outsiders.⁷⁸ 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 which are not negotiated are more likely to be further from the ideal than those which 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 works from

⁷⁷ Fisk & Pulver, 75-76

⁷⁸ See Epstein, EFCA at .

dismissal creates the far greater risk that the entire edifice will come tumbling down. That problem does not disappear when one looks more closely at the operational features of EFCA.

II. 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 astute. Let me end with 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. The 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 are most notable. First, this provision grants a priority of enforcement resources to these 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” commits these unfair labor practices.

Under this provision, few employers will escape as a matter of law the epithet willful, which in turn gives rise to countless occasions in which the NLRB can find multiple separate employer violations during any recognition campaign. The intense nature of the sanctions virtually guarantees that a NLRB finding of even one violation carries with it the overwhelming probability that it will simultaneously find dozens or perhaps hundreds of other violations, each subject to the maximum

fine. 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.”

That language, which is vague and unformed, has a further defect in that it gives no notice as to the number of violations. But the possibilities are legion. Read literally, it looks as though each violation covers “the charging party.” Written in the singular, this expression suggests that a single violation could, and perhaps even must, involve the employer coercion directed against a single worker. From that it follows that if multiple workers were held to be subject to untoward prejudice or antiunion animus, each such offense would generate a 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 risk. Nor does EFCA add mitigating circumstances into the mix, or explicitly provide for judicial review of the fines levied, which might, but need not be read in, in order to avoid serious due process objections unless the normal NLRA rule allow challenges to fines that are not supported by “substantial evidence.”⁷⁹

To my mind this simple reality raises the serious question of whether the want of any appeal outside the board is a the imposition of a fine without due process of law. To be sure, an appeal need not on all occasions be required under Due Process. But in this instance, the case seems to be otherwise, for the Board is an inherently political body which in the Obama administration is now staffed with three democrats and two republicans. Those fixed party loyalties should count as a red flag for the radical increase in sanctions. A judicial appeal allows some body in

⁷⁹ National Labor Relations Act, 49 Stat, 449 (1935), *as amended*, 29 U.S.C. § 160(3). For discussion of what all this means, see *Universal Camera*, see 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 (2 Cir. 1951)(rejecting unfair labor practice finding under the new and higher statutory standard). Both Second Circuit decisions were written by Learned Hand. The Supreme Court case was written by Justice Felix Frankfurter.)

which the party lines are not so sharply drawn to look at the arrangement, and to clarify the outcomes in these cases, as well as to supplying some judicial involvement in the interpretation of statutory provisions that otherwise will remain in the exclusive competence of the Board.

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 “any group of employees or any individual or labor union 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. In addition, there is nothing in the statute which indicates the time period in which the cards 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 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 that there is 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 the 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.

Compulsory arbitration. The procedures of compulsory arbitration also raise serious questions. The initial provision requires that the employer commence collective bargaining within 10 days of receiving notification of the card check selection. 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 week end) it becomes necessary to hire representation and to organize all the document disclosure that is required for bargaining under EFCA. A large union has

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

The parties then have 90 days to seek out a collective bargaining period, regardless of the size of the unit or the complexity of the transaction. 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 FMCS, a political branch of the Department of Labor, 'promptly' get involved in the case. 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."

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 procedures that are to be used before the arbitration board, give any criteria by which the arbitration should take place, put any limitation on the time by which the final determination should be made, or even make it clear whether the two period runs from union recognition, the onset of arbitration, or the final resolution. The best guess is that the decision only binds going forward, which leaves open the question of what provisions govern during the interim period. Indeed there is nothing in EFCA that precludes the contract from stating that at the end of the two year period, the parties are bound to extend it

another two years. That seems unlikely, but there are evident difficulties in any legal regime that then returns to the usual system of collective bargaining negotiations, which are apt to prove especially tough, as the both the employer and the union can object to using the old agreement as the basis for the renewal, given the coercive nature of its origins.

III. An Economic Overview of EFCA

All these elements were at play in the automobile industry which has bled workers in recent years. The compulsory arbitration on the heels of a card check is likely to produce very pronounced declines in employment levels, which is the last thing that is needed today.

Now do we know. One way is to just look at the job growth in nonunionized firms in the auto or retail industries 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. For the nonunion Target the numbers were 174,000 in 1993 to 366,000 in 2007. The Safeway increase is about 90 percent, that of Target around 110 percent. Not such a big deal. But then note that of the 95,000 new Safeway 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 who 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, that the price increases will prove most devastating to total number of employees.⁸⁰ The only question is the size of these effects, and the evidence suggests that it is high. 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

⁸⁰ Ohanian, *supra* at 22.

rates will drop substantially, depending on the fraction of workers unionized, and the market premiums that they can obtain. Thus his data reads as follows:

Table 1 -- 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 to high. Indeed the 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.⁸¹ Those figures, however, are tricky to interpret, because they only address those firms that were able to survive with union representation, not those which fell by the wayside because they could not meet those premiums, or which 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 this work stand alone, Anne Farrar-Layne attacked the same question from a different point of view by asking the extent to which in the Canadian context compulsory unionization (closer to what EFCA portends) , my analysis predicts 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.”⁸² That conclusion can be, and has been, attacked for being too extreme. But there is no conceivable way the data could be interpreted to suggest that somehow EFCA will

⁸¹ See, e.g., David Card, *The Effect of Unions on the Structure of Wages: A Longitudinal Analysis*, 64 *Econometrica*, No. 4 pp (1996).

⁸² Anne Layne-Farrar, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications* 4 (2009).

improve the employment figures. 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. So why no reconsider the repeal of the NLRA. After all, unions represent only 7.2 percent of the private workforce. Ordinary competitive forces seem to work well for the other 92.8 percent. Try it.

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 50 years. In some real sense this concerted political campaign is quixotic because the liberalization of product markets both at home and abroad reduce 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 enterprise in which unions can lodge powerful sanctions against an employer that opposes its organization drive, which ends in recognition through card check. That card check can be obtained without the full participation of all workers in discussion, let alone a secret ballot election. Once that 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 gives them against their union representatives: the election and the contract ratification. The huge change in power allows the union to impose terms of firms that in the best of circumstances impede their operation, reduce their ability to expand, or drive them from the marketplace altogether.

Labor supporters say trust us with this power, we shall now abuse it. But the institutional constraints built into EFCA are so weak that the doomsday scenario is all too likely to occur. Higher rates of unionization mean fewer jobs, and lower levels of production. EFCA turns that screw several notches. None of its overall consequences will work for the benefit of employers or union members, no matter how much power they confer 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 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.

Readers with comments should address them to:

Richard A. Epstein
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
repstein@uchicago.edu

Chicago Working Papers in Law and Economics (Second Series)

For a listing of papers 1–450 please go to Working Papers at <http://www.law.uchicago.edu/Lawecon/index.html>

451. Tom Ginsburg, Public Choice and Constitutional Design (January 2009)
452. Richard Epstein, The Case against the Employee Free Choice Act (January 2009)
453. Adam B. Cox, Immigration Law's Organizing Principles (February 2009)
454. Philip J. Cook, Jens Ludwig, and Adam M. Samaha, Gun Control after *Heller*: Threats and Sideshows from a Social Welfare Perspective (February 2009)
455. Lior Jacob Strahilevitz, The Right to Abandon (February 2009)
456. M. Todd Henderson, The Nanny Corporation and the Market for Paternalism (February 2009)
457. Lee Anne Fennell, Commons, Anticommons, Semicommons (February 2009)
458. Richard A. Epstein and M. Todd Henderson, Marking to Market: Can Accounting Rules Shake the Foundations of Capitalism? (April 2009)
459. Eric A. Posner and Luigi Zingales, The Housing Crisis and Bankruptcy Reform: The Prepackaged Chapter 13 Approach (April 2009)
460. Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate (April 2009)
461. Adam B. Cox and Eric A. Posner, The Rights of Migrants (April 2009)
462. Randal C. Picker, The Google Book Search Settlement: A New Orphan-Works Monopoly? (April 2009, revised July 2009)
463. Randal C. Picker, The Mediated Book (May 2009)
464. Anupam Chander, Corporate Law's Distributive Design (June 2009)
465. Anupam Chander, Trade 2.0 (June 2009)
466. Lee Epstein, William M. Landes, and Richard A. Posner, Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument (June 2009)
467. Eric A. Posner, Kathryn Spier, and Adrian Vermeule, Divide and Conquer (June 2009)
468. John Bronsteen, Christopher J. Buccafusco, and Jonathan S. Masur, Welfare as Happiness (June 2009)
469. Richard A. Epstein and Amanda M. Rose, The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow (June 2009)
470. Douglas G. Baird and Robert K. Rasmussen, Anti-Bankruptcy (June 2009)
471. Bernard E. Harcourt, Alon Harel, Ken Levy, Michael M. O'Hear, and Alice Ristroph, Randomization in Criminal Justice: A Criminal Law Conversation (June 2009)
472. Bernard E. Harcourt, Neoliberal Penalty: A Brief Genealogy (June 2009)
473. Lee Anne Fennell, Willpower and Legal Policy (June 2009)
474. Richard A. Epstein, How to Undermine Tax Increment Financing: The Lessons of *ProLogis v. City of Chicago* (June 2009)
475. Randal C. Picker, Online Advertising, Identity and Privacy (June 2009)
476. M. Todd Henderson, Credit Derivatives Are Not "Insurance" (July 2009)
477. Lee Anne Fennell and Julie Roin, Controlling Residential Stakes (July 2009)
478. Douglas G. Baird, The Holmesian Bad Man's First Critic (August 2009)
479. Douglas G. Baird, The Bankruptcy Exchange (August 2009)
480. Jonathan Masur and Eric A. Posner, Against Feasibility Analysis (August 2009)
481. Lee Anne Fennell, The Unbounded Home, Property Values beyond Property Lines (August 2009)
482. Bernard E. Harcourt, Henry Louis Gates and Racial Profiling: What's the Problem? (September 2009)
483. Stephen J. Choi, Mitu Gulati, Mirya Holman, and Eric A. Posner, Judging Women (September 2009)
484. Omri Ben-Shahar, One-Way Contracts: Consumer Protection without Law (October 2009)
485. Ariel Porat, Expanding Liability for Negligence *Per Se* (October 2009)

486. Ariel Porat and Alex Stein, Liability for Future Harm (October 2009)
487. Anup Malani and Ramanan Laxminrayan, Incentives for Surveillance of Infectious Disease Outbreaks (October 2009)
488. Anup Malani, Oliver Bembom and Mark van der Laan, Accounting for Differences among Patients in the FDA Approval Process (October 2009)
489. David Gilo and Ariel Porat, Viewing Unconscionability through a Market Lens (October 2009)
490. David Weisbach, Instrument Choice Is Instrument Design (October 2009)
491. M. Todd Henderson, Justifying *Jones* (November 2009)
492. Eric A. Posner, *ProCD v. Zeidenberg* and Cognitive Overload in Contractual Bargaining (November 2009)
493. Randal C. Picker, Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement (November 2009)
494. Richard A. Epstein, Against Permittitis: Why Volunteer Organizations Should Regulate the Use of Cancer Drugs (November 2009)
495. Richard A. Epstein, Heller's Gridlock Economy in Perspective: Why There Is Too Little, Not Too Much, Private Property (November 2009)
496. Richard A. Epstein, *NRA v. City of Chicago*: Does the Second Amendment Bind Frank Easterbrook? (November 2009)
497. Randal C. Picker, Easterbrook on Copyright (November 2009)
498. Omri Ben-Shahar, Pre-Closing Liability (November 2009)
499. Randal C. Picker, Assessing Competition Issues in the Amended Google Book Search Settlement (November 2009)
500. Saul Levmore, Ambiguous Statutes (November 2009)
501. Saul Levmore, Interest Groups and the Problem with Incrementalism (November 2009)
502. Tom Ginsburg, The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration (December 2009)
503. Nuno Garoupa and Tom Ginsburg, Reputation, Information and the Organization of the Judiciary (December 2009)
504. Eric A. Posner and Alan O. Sykes, Economic Foundations of the Law of the Sea (December 2009)
505. Jacob E. Gersen and Anne Joseph O'Connell, Hiding in Plain Sight? Timing and Transparency in the Administrative State (December 2009)
506. Richard A. Epstein, Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill is Unconstitutional (December 2009)
507. Tom Ginsburg and Eric A. Posner, Subconstitutionalism (January 2010)
508. Stephen J. Choi, Mitu Gulati, and Eric A. Posner, What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals (January 2010)
509. Joseph Isenbergh, The Future of Taxation (January 2010)
510. Lee Epstein, William M. Landes, and Richard A. Posner, Why (and When) Judges Dissent: A Theoretical and Empirical Analysis (January 2010)
511. Tom Ginsburg, James Melton, and Zachary Elkiins, The Endurance of National Constitutions (February 2010)
512. Omri Ben-Shahar and Anu Bradford, The Economics of Climate Enforcement (February 2010)
513. Neta-li E. Gottlieb, Free to Air? Legal Protection for TV Program Formats (February 2010)
514. Omri Ben-Shahar and Eric A. Posner, The Right to Withdraw in Contract Law (March 2010)
515. Richard A. Epstein, Inside the Coasean Firm: Competence as a Random Variable (March 2010)
516. Omri Ben-Shahar and Carl E. Schneider, The Failure of Mandated Disclosure (March 2010)
517. Kenneth W. Dam, The Subprime Crisis and Financial Regulation: International and Comparative Perspectives (March 2010)
518. Lee Anne Fennell, Unbundling Risk (April 2010)
519. Stephen J. Choi, Mitu Gulati, and Eric A. Posner, Judicial Ability and Securities Class Actions (April 2010)

- 520. Jonathan S. Masur and Jonathan Remy Nash, The Institutional Dynamics of Transition Relief (April 2010)
- 521. M. Todd Henderson, Implicit Compensation, May 2010
- 522. Lee Anne Fennell, Possession Puzzles, June 2010
- 523. Randal C. Picker, Organizing Competition and Cooperation after *American Needle*, June 2010
- 524. Richard A. Epstein, What Is So Special about Intangible Property? The Case for intelligent Carryovers, August 2010
- 525. Jonathan S. Masur and Eric A. Posner, Climate Regulation and the Limits of Cost-Benefit Analysis, August 2010
- 526. Richard A. Epstein, Carbon Dioxide: Our Newest Pollutant, August 2010
- 527. Richard A. Epstein and F. Scott Kieff, Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents, August 2010
- 528. Richard A. Epstein, One Bridge Too Far: Why the Employee Free Choice Act Has, and Should, Fail, August 2010