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THE EMPLOYEE FREE CHOICE ACT: Free Choice or No Choice for Workers

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Executive Summary

The National Labor Relations Act of 1935 marked a major departure from common law principles, which were modified but not rejected with the passage of the Taft-Hartley Act in 1947. Since that time, the legal regime governing labor relations has been relatively stable. Today, the looming presence of the Employee Free Choice Act of 2009 (EFCA) threatens to alter that balance radically. The EFCA seeks in a few short paragraphs to erect a labor regime whose untested provisions and coercive power will add countless business casualties to our already suffering economy.

Labor unions claim that the unfairness of our labor law has led to a decline of union membership in the private sector from a high of 35 percent in the mid-1950s to about 8 percent today. The stable labor law regime is not the source of that decline, which is attributable to other factors:

1. *Globalization*. The general liberalization of trade over the last sixty years has undercut the price structure of unionized firms facing foreign competition. Workers will not join unions that cannot deliver supra-competitive wages.
2. *Labor mobility*. Increased job switching in the United States has compromised the position of unions. Workers who do not expect lifetime employment will not invest heavily in union activity.
3. *Internal governance conflicts*. Under intense competitive pressures, senior union workers used two-tier wage systems that have undermined the loyalty of younger workers.

Management's unfair labor practices are not a significant reason for unions' decline. Unions win a majority of elections but typically in units of 100 or fewer workers. These new workers cannot replace the hundreds of thousands of jobs lost through attrition when unionized firms cannot compete successfully in an open economy.

Nonetheless, unions hope through the EFCA to ramp up their organization by seeking higher penalties against management that campaign in opposition. Far more significant are the "card check" certification procedure that bypasses the secret-ballot election; and a new and undefined compulsory arbitration system that would allow government arbitrators appointed by the Federal Mediation and Conciliation Service in the Department of Labor.

Card check. Under current law, a union that gets 30 percent of the workers to sign cards can demand a union election by secret ballot (almost always within sixty days). Under the EFCA, a union that collects cards from a majority of workers is recognized—no questions asked. Without the protection of a secret ballot, workers are exposed to union intimidation. Yet the EFCA provides no supervision on how unions collect, keep, or use signed authorization cards. And by design, the EFCA does *not* allow a card check to displace an existing union. Nor may the employer use the card-check procedure to decertify a sitting union. It is a one-way ratchet.

Compulsory arbitration. Under existing labor law, union-management contracts necessarily result from detailed and complex negotiations. Under the EFCA, if a contract is not reached after ninety days of negotiation and thirty days of mediation, the dispute is referred to a panel of arbitrators selected under yet unwritten procedures to be crafted by the Federal Mediation and Conciliation Service. The EFCA places no limits on the arbitration panel's discretion, and its decision would be binding—without any substantive judicial review—for two years.

As constructed, the "free choice" act excludes workers from two areas vital to their welfare: union selection and contract ratification. Its compulsory arbitration structure introduces a partial but large-scale, covert government takeover of the private sector. As America faces imploded financial markets and the highest structural unemployment in a generation, the EFCA is a misguided law that it cannot afford.

About the Author

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Professor Epstein is known for his research and writing in a broad range of constitutional, economic, historical, and philosophical subjects. He has written many influential and popular books; he edited the *Journal of Legal Studies* (1981–91) and the *Journal of Law and Economics* (1991–2001); he is the editor of *Cases and Materials in the Law of Torts* (8th ed. 2004); and he has written a one-volume treatise, *Torts* (1999). In 2005, Professor Epstein was named by *Legal Affairs* magazine as one of the twenty leading legal thinkers in the United States.

Professor Epstein received a B.A. degree in philosophy summa cum laude from Columbia in 1964. He received a B.A. degree in law with first-class honors from Oxford University in 1966 and an LL.B. degree, cum laude, from the Yale Law School in 1968.

Note

This white paper is adapted from an October 21, 2008, speech delivered at the Manhattan Institute, where Professor Epstein was a visiting scholar in autumn 2008. Audience questions and Professor Epstein's responses at that forum have been preserved.

In this revised and expanded version of the original lecture, Professor Epstein has updated his remarks to reflect developments that took place after the talk was initially delivered. It should also be noted that the earlier bill has been reintroduced into the Senate on March 10, 2009 as H.R. 1409. Professor Epstein would like to thank Kayvan Noroozi of the University of Chicago Law School, class of 2009, for his helpful editorial assistance on an earlier draft of the paper.

Foreword

Our nation faces a financial implosion, a deep and worsening recession, and government deficits unprecedented in peacetime. Into this economic morass comes the Employee Free Choice Act (EFCA), a piece of holdover legislation from the last Congress that was reintroduced on March 10. As University of Chicago law professor Richard Epstein explains in this paper, the EFCA would force more firms into bankruptcy and dramatically discourage entrepreneurship, a perverse outcome that "is not part of anyone's economic stimulus package."

The extent to which the EFCA is a radical departure from existing labor law is little understood. Unfortunately, the public discourse has focused on the "card check" provision of the legislation without an adequate grasp of the EFCA's provision for compulsory arbitration. In essence, the proposed law would place all elements of employment contracts—wages, hours, vacation time, health benefits, promotions, work assignments, termination decisions, even corporate mergers—under the thumb of government appointees in the Department of Labor, for at least the two years specified in the statute.

The EFCA is fundamentally unfair. As Professor Epstein notes, the EFCA's title itself is an ironic misnomer: the legislation would effectively *eliminate* choices that employees are guaranteed under existing labor law—namely, the right to certify a union through secret-ballot elections as well as the right to ratify or reject employment contracts.

In addition, the procedural gaps in the EFCA are staggering: it offers no rules for determining who will serve as an arbitrator, no rules delimiting the arbitrators' powers, and no possibility for appeal from arbitrators' judgments. Moreover, as Professor Epstein explains:

> Nothing about the EFCA coordinates the decisions of different arbitrators to ensure that they issue consistent decrees. And nothing requires them to take into account the systemwide dislocation of their decrees. The risk, therefore, is that a few union arbitral decrees will exert an influence that goes far beyond the card-check units to cover other workers who have chosen to remain nonunionized.

The system of labor-management relations proposed in the EFCA is unprecedented. Other countries have card-check procedures (and consequent "economic sclerosis") but not compulsory arbitration. Public employees have compulsory-arbitration procedures, but as Professor Epstein observes, "those public contracts are not efficient, to say the least—not for their service assignments or for the generous pensions (full pensions after twenty years of service) that threaten the solvency of the system." Moreover, private companies, without the power of taxation, face a far more complex competitive dynamic:

> [B]usinesses either adapt and expand, or they die. They must worry about the introduction of new product lines and about acquisitions, mergers, takeovers, and successor liability. There is absolutely no precedent in the public sector on how to respond to these common challenges. No set of arbitrators, unversed in the details of any of the businesses that are unionized, could begin to grasp which contracts would allow the firm to survive and which would drive it under.

Even without compulsory arbitration, we would expect the EFCA to have an adverse effect on employment. Professor Epstein cites research indicating that each percentage increase in unionization leads to a 0.35 percent increase in unemployment. The EFCA would thus cause unemployment to increase by as much as 3 percentage points in the first couple of years, even without accounting for the unknowable but negative employment impact of the arbitration provision.

At a time when our economy faces its direst prospects in at least a generation, the EFCA is peculiarly unwise. As Professor Epstein observes, "the persons most likely to be hurt by these prospective changes are ordinary working men and women who are struggling to keep their toehold in the middle class." Let's hope that our legislative leaders heed his words of caution.

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The Employee Free Choice Act: Free Choice or No Choice for Workers

Richard A. Epstein

LABOR DISCOURSE TODAY

Let me open with this sobering thought: these are not happy times for those of us who espouse to classical liberal ideals. It is quite clear from the recent presidential election that all the political tides are moving in the opposite direction. Mine is, at most, a feeble effort to hold back the hinged finger of fate by raising practical and theoretical arguments that go against the dominant ethos. I hope my effort will work, but I am not quite sure what the outcome will be.

My assigned topic for this lecture is the Employee Free Choice Act (EFCA), a short statute that is set out in full in the Appendix. The EFCA is, to large extent, a misnomer. But I think it's a mistake to start off by trying to analyze, positively or negatively, any particular statute. It is much more productive to set out a framework of analysis, which, in this instance, should allow people to understand something about the evolution of labor law in the United States. It is then possible to see clearly just how far the EFCA deviates from sound principles of labor relations.

Most people, when they encounter the subject of labor relations, take it as a self-evident truth that we should begin with the National Labor Relations Act of 1935 (NLRA),[1] as amended by the Taft-Hartley Act of 1947.[2] These two landmark statutes, taken together, set out the basic framework of American labor law as it has operated for over sixty years in the United States. Most observers believe, and I agree,

that the judicial changes in this legislation over that period have been minor.

To bring home this point, I often start with an image of this labor legislation by analogy to a football field. Imagining that the ball is initially placed in the middle of the field on the fifty-yard line, we can gauge how far the courts have moved the law, in both distance and direction. If you performed this exercise with the Civil Rights Act of 1964,[3] the courts have moved the ball in one direction, into the "red zone"—between the twenty-yard line and the goal line—from the huge expansions in coverage under the law.[4] If you performed the same exercise with respect to the labor law, you will find that the ball is still located in the middle of the field, between the two forty-yard lines. Whatever the huge social and economic changes in the role of unions, few, if any, of them can be laid on the doorstep of the court.

But the NLRA and Taft-Hartley Acts did, in fact, usher in an enormous change in the organization of American labor relations. I think that these changes were unambiguously for the worse. So I'm going to step back to an earlier age to discuss the common law of labor relationships, in order to set the stage for my critique of the modern law as it now stands, and *a fortiori* of the changes that the EFCA would make if enacted.

THE COMMON LAW OF LABOR RELATIONS

The first point to understand about the common law of labor relationships is that there was no common law of labor relationships, as such. Essentially, the relevant common law rules governing employment relations were notoriously impersonal in the sense that they did not single out labor relationships for any special treatment. Thus, the common law had rules that governed the relationships between two parties to a contract, which spoke about the position of promisors, promisees, and so forth. These parties were A and B, and the governing rules consciously did not take into account the abundant differences with respect to their wealth or social status. The ultimate question is whether this much-debunked flight to abstraction produces better or worse rules than a self-conscious effort to create a law of labor relations as such.

And just what are the common law's general and impersonal principles, which must be understood before they are criticized? The first principle, most critically, is an endorsement of voluntary exchange in all productive endeavors. These exchanges could arise in two different ways. In some cases, such as partnerships, the roles of the parties are symmetrical, so that it is difficult to see how they could be skewed for the advantage of one side at the expense of the other. But the situation is somewhat more difficult in asymmetrical situations, where the roles of employers differ from those of employees, buyers differ from sellers, and lenders differ from borrowers. The same logic of gain through exchange applies to these relationships as well, but here the default terms must necessarily reflect the difference in initial positions. But it hardly follows from this brute fact that the agreements are somehow inefficient or that law cannot set up default terms that grease the wheels of commerce, or that specific terms for compensation and work should be imposed by the state. The only real risk with voluntary arrangements in these markets is that of monopolization, which of course requires cooperation between parties on the same side of the market, where workers historically were at least as able to organize as firms. For this issue, there are real antitrust concerns that manifested themselves in the early common law rules against contracts in restraint of trade and in some bellwether legislation as the Sherman Act of 1890[5] and the Clayton Act of 1914,[6] about which I shall have more to say shortly.

That said, in an ordinary wage transaction, the terms and conditions of employment would be regarded as a matter for private negotiation. Most critically, each side had the absolute right to refuse to deal with the other side: if they could not come together with some kind of accommodation, both sides were free, and even obliged, to go their separate ways.

The theory behind this rule recognized that an employer might exercise its right to fire, perhaps even arbitrarily, to maintain its economic position. Yet at

the same time, the power to fire an employee at will was offset because the worker had the same right to quit to protect his position. The basic assumption was that the interaction of these two threat positions would create strong pressures for the parties to negotiate relatively efficient contracts on the simple ground that arbitrary terminations don't generate gains for either side. Only cooperation can achieve that result.

I believe that this common law approach is stunningly correct. Just because the legal system is completely impersonal in how it fashions its basic assumptions, it doesn't follow that the parties have to be completely impersonal in how they fashion their private arrangements. Without any prompting from the judges, they can take into account such vital matters as workplace safety and deferred compensation by agreement. Generally speaking, they will try to come up with some combination of terms and conditions that will save costs for both parties. Once that efficient point is reached, they can adjust the wage term to figure out how to split the surplus between them. And if they do their sums right, productivity will increase, which in turn will give rise to increased raises because the quit threat becomes more credible if other employers are prepared to pay the competitive wage. As John Kennedy liked to say, a rising tide raises all ships.[7]

The historical record more or less bears this account out. The actual progress of labor contracts, wage levels, and so forth in the pre-1937 period, with the huge (government-driven) exception of the Depression, shows these consistent trends. Wages moved upward, and hours moved consistently down. This simple model of joint gains through exchange works as well here as in any other area.

Building this particular system involves several other features that are worthy of notice. One of them, of course, is the role of the antitrust constraint in organizing the system. This constraint was recognized from the outset of labor relations law, and rightly so. Most critically, the strictures against monopoly were applied evenhandedly to both sides. Employers could not get together to form some kind of a hiring cartel in order to reduce the cost of wages. The principle is hardly novel. It represents, essentially, a prohibition against horizontal restrictions on trade.

Historically, these rules were applied to the other side of the market as well—that is, to labor unions. This use of antitrust law to prevent cartelization by both employers and employees represents the second key general and impersonal principle of common law labor relations. The most famous of these early cases was the Danbury Hatters case, *Loewe v. Lawlor*,[8] in which a labor strike—a secondary boycott—was held under standard principles to be a collective refusal to deal and therefore a *per se* violation of the antitrust law. By the time the case had worked its way through the courts, the individual participants in the boycott were themselves held jointly liable for the collective wrong in wrecking the target firm, and judgment liens were placed on their property.[9] Many people today shrink away from this result. But I think that the judicial response was perfectly appropriate.

The common law's third key institutional arrangement is still more controversial. I use "yellow dog contract" as a simple term of description, but to most people in the labor movement it was a term of manifest opprobrium. Its meaning is lost today. When I ask my students what the yellow dog contract is, most of them stare at me vacantly. They know it sounds like something terrible. And so it was regarded by unions, especially in the mines. Thus the United Mine Workers had this to say about the contract:

> This agreement has been well named. It is yellow dog for sure. It reduces to the level of a yellow dog any man that signs it, for he signs away every right he possesses under the Constitution and laws of the land and makes himself the truckling, helpless slave of the employer.[10]

It is useful to deflate the rhetoric. Essentially, what these contracts provide is that if you wish to work for a particular firm, you have to agree not to join the union during the period in which you are employed by the firm. The sensible purpose behind the provision was to assure the undivided loyalty of the individual worker to the firm. And the key point was

not that the employer could not fire that worker, or that the worker could not quit, because both those options were always available. Rather, the key advantage for the employer was that it was now in a position to enjoin the union from inducing a breach of contract if it tried to get people to secretly join the union while they remained on the job. This agreement, it must be stressed, has advantages both ways. The worker can exact some premium for accepting the condition. The firm has a greater expectation of stability. And society writ large gets the benefit of more competitive labor markets.

THE END OF THE COMMON LAW ERA

These key elements—the contract at will, the antitrust laws, and yellow dog contracts—were to the reformers of the New Deal period the poster children of all that was wrong with the world. It was therefore no surprise that the Progressives sought actively to undermine these rules. Historically, it is instructive to see how the transformation took place.

The first transformative step came in the Clayton Act of 1914,[11] which declared with a great deal of passion that labor and agriculture were not articles or commodities to be bought and sold in the marketplace. Since they were not commodities, labor unions, "instituted for the purposes of mutual help," were exempt from the antitrust laws. That is, the act marked a self-conscious reversal of the previous policy, which let collective action by workers be subject to the Sherman Act.

By 1920, there was a question as to whether unions could combine with firms in order to attack third persons. The answer offered in the key case of *Duplex Printing Press Co. v. Deering*[12] was no. And that rule basically remains today. But collective refusals to deal by labor unions on their own do remain exempt from the antitrust laws.

The next element in the old synthesis that fell by the wayside was the yellow dog contract. The Norris-LaGuardia Act of 1932,[13] a Hoover piece of legislation, decreed that these contracts were against public policy and therefore unenforceable. Employers concerned about dual loyalties were no longer able to contract with their workers not to join a union.

Only three years later, with Roosevelt in office, Congress passed the National Labor Relations Act of 1935.[14] The passage of this statute marked the clear consensus that labor unions could not flourish in an environment that stopped with neutralizing the antitrust laws and banning the yellow dog contract. What was needed was an additional mechanism to ensure that employers had a duty to deal with unions. To decide which union was the appropriate bargaining unit with which an employer had to negotiate, the NLRA provided, quite explicitly, for a system of representation elections. If the union won that election, the employer had to negotiate with it in good faith to attempt to reach some kind of contract. All workers inside the union were bound by the union agreement once it was ratified by a majority of workers. Any previous contract arrangements that some union workers had with the employer were displaced, and the agreement bound all workers who had dissented from the selection of the union. But the act itself did make this key judgment: neither side was required to make concessions to the other. So long as there was no unfair labor practice, the want of agreement did not expose either side to liability. There was no system of compulsory arbitration to final "contract" terms.

The Progressive model behind the NLRA reflected a deep belief that democratic elections were the best way to secure justice in the workplace. This new system marked a conscious deviation from the earlier common law view that required the consent of employer and employee to make an agreement. Before the passage of the NLRA, those workers who did not agree with their employer were, of course, free to go elsewhere, but there was no way that any group of workers could bind dissidents to their program. The change effected by the NLRA is profound because it marked—as did so much legislation in the Progressive tradition—the conversion of a competitive labor market into a monopolized market. In fact, the new environment created by the NLRA was, in a sense, worse than many other such reforms because the statute created, by design, a bilateral monopoly.[15]

This structure meant, in effect, that the employer had only one union with which it could conclude any business. Once appointed as a bargaining agent for a particular firm, the union for its part had to target this firm for the benefit of its members. The inability for either side to opt out created constant bargaining over wages and all the other terms and conditions of employment. Bluffing and bluster are part of the lengthy progress of negotiation. All sorts of disruptions—strikes by workers, lockouts by firms—could follow when the parties' bargaining led to an impasse. Today, it is not infrequent that unions that have won elections to organize workers have been unable to reach a first contract with the employer, because the employer wants no part of a unionized arrangement.

I think it is very clear that major inefficiencies are built in to the current institutional arrangement under the National Labor Relations Act. The chief problem is that when the law allows workers to organize but doesn't give employers the option to go elsewhere, employers see in unions an unambiguous reduction in the value of their firms. At this point, the way that people behave when they feel threatened and attacked is common knowledge: they resist, sometimes by lawful means, and sometimes by unlawful means. It is possible to see both these behaviors happening simultaneously at any time.

The problem, however, is perfectly reciprocal. Just as the firm feels threatened, the union sees a strong need to get monopoly wages for its workers to justify its victory in a union election. Unions, too, will often resort to very strong tactics in organization and negotiation—sometimes lawful, and sometimes not. There's no virtue in this particular war; there is simply an effort by each side, by means both fair and foul, to divide the potential gains in this complex bilateral monopoly arrangement.

THE SOURCES OF UNION DECLINE

In analyzing our labor law regime, it is only natural to ask: Who tends to win the contest between management and labor in the long run? What we know is that labor seems to have lost fairly seriously even though the system gives labor all sorts of preferences relative to the common law rule. Union membership in the private sector has declined from about 35 percent in the mid-1950s to a little over 8 percent today.[16] Why should that turn out to be the case? On one point, we can be sure: it is not because the statute or its administration has changed. Rather, it is because the dynamics of the marketplace have moved in ways that are uncongenial to labor organizations not only in the United States but worldwide.

Globalization. Let me mention a few of the forces that have transformed labor markets. The first of these is globalization. Basically, one element of a strong union movement lies in its ability to keep out imports from overseas. Without that protection, the union cannot maintain its monopoly wage structure. With tariffs and other trade barriers, the employer can capture monopoly gains for its goods and services, and the union can negotiate for a share of that surplus. Any general liberalization of trade means that the flow of foreign goods into this country can undercut the price structure of unionized firms.

The most vivid illustration of globalization's impact on unions is the collapse of the American automobile industry in the face of the onslaught of foreign competition.[17] There are some learned disputes about the exact wage differential between the unionized and nonunion firms;[18] it may not be quite the thirty-dollar hourly differential in worker pay that is widely reported,[19] but no one doubts that Toyota and Nissan have huge advantages over GM and Chrysler. That gap is simply not sustainable.

Unfortunately for union workers, union contracts preclude the quick wage flexibility that is needed to bring domestic producers back into competition with their foreign rivals. Without that necessary wage flexibility, the carnage is self-evident. The unionized automobile producers have lost more than half a million workers in the last seven or eight years,[20] all to attrition and the closing down of plants. The current impasse will increase those numbers, with or without the bailout, the first steps of which were approved by the Bush administration in December 2008.[21] Those steps surely failed, and the more recent

developments have resulted in additional billions of dollars poured into the GM bailout, where the only real question is whether the firm will collapse before the additional infusions are able to reverse the firm's fortunes at a time when automobile sales are everywhere in sharp decline. The union structure always creates an implicit conflict between older and younger workers. Globalization shows that the younger generation comes out the losers.

Labor Mobility. A second reason for the decline of unions involves the increased level of labor mobility. Job patterns today are very different from what they were in earlier periods. Gone are the days when workers at Ford's Riva Ridge plant thought that they could start work in 1932 and retire from the same plant in 1962 or 1972. Today, the level of labor turnover is far higher. People routinely go back to school and retool for new careers and professions, which compromises the position of all unions.

Here's why: for unions to succeed, they have to secure front-end investments in order to recover long-term gains. That strategy becomes extremely difficult to implement when labor mobility creates a free-rider problem. Quite simply, the workers who have to bear the organization costs today will not be able to hang around to reap the benefits down the road. As rational agents, therefore, they will cut back on these investments, which makes the task of unionization more difficult than it would otherwise be. This structural feature does not depend on the organizational talents of key union leaders. It simply means that able union workers will plant fewer seeds because they will not be around to reap the harvest years later.

Internal Conflicts of Interest. A third reason for union decline reveals itself only over time. Quite simply, like all other collective organizations, unions can succumb to their internal conflicts of interest. The most evident sign of this danger is the two-tier labor contract. Older, established workers receive the high wages worthy of their monopoly position. The company responds that it cannot afford to keep this wage structure generally. The union agrees with the global assessment, but it cannot persuade its existing members to accept deep cuts. So the deal that the parties reach lowers wages for the *new* workers, who, after all, do not have any monopoly power over the firm. Today's workers, in effect, sell out the next generation for their own convenience. But in the long run, the next generation of workers who are hired will not be as loyal to the union as the earlier members were. The long-term consequence is a weakened union structure.

In general, unionization has yet another cost that is harder to pinpoint. Unionization changes the mentality and outlook of the management team. Innovation and marketing take a backseat to the toughness that is required to negotiate union contracts, which threaten to capture a large portion of potential gains from innovation. And the management that hunkers down on labor relations may well be less adept in operating in a market environment that is far more fluid. The constant need to monitor labor contracts in the face of institutional inflexibility induces management to hire "tough guys with an attitude," with a suspicious mentality whose basic instinct is to say no to new ideas. In its own way, the choice of institutional structure undercuts the dynamics of the entrepreneurial firm.

It is important to note one item that I did not place on the list of reasons for unions' decline: the role of management's unfair labor practices in snuffing out unionization efforts. Number one, most of the union losses come from attrition of workers in existing units. Jobs are lost because the unionized firms cannot compete in an open economy, as the experience in the automobile industry shows. Equally instructive is the situation on the organization side. Here union supporters are often careless insofar as they do not distinguish those management practices that are illegal from those that are effective.[22] The whole point of an election campaign is to sway employees with arguments.

Nor does the overall picture change if we look at the relevant statistics. The number of workers who participate in union elections every year is about 200,000. Unions win about half those elections.[23] Management can do nothing to forestall an election if the union is able to collect cards from 30 percent

of the workers. The number of elections is shrinking because unions have concluded that their chances of success are not great enough to justify more effort in this regard. Indeed, in many cases, the preferred union strategy is to engage in various public events, such as picketing and protests, to persuade employers to allow representation to be secured by card check. In those cases, moreover, where the union is able to organize, it's not clear that the unions actually get contracts. And even when they do win contracts, it's not clear whether those businesses expand or contract. What is clear is that the inflow is not sufficient to offset the losses, which in the automotive industry alone totaled over 500,000 jobs, before the recent convulsions.[24] If you look at a study of unionized and nonunionized firms in the same industry, the growth is always far greater in the nonunionized than in the unionized sector.

When it comes to unions, it is not only the wage differential that matters; it is also the unionized firms' relative lack of flexibility in the workplace. The anecdotes about particular union elections do not matter in the long run. What matters is the unyielding underlying economics. As nonunionized firms expand in the marketplace for all these reasons, we observe a decline of unions. If union penetration in the private sector was 35 percent in 1955, it has fallen to an 8 percent penetration a half a century later. It is only public unions, which are a completely different kettle of fish, that have kept the ranks of union population up, chiefly through legislative orders that require public entities to bargain with them or submit to card checks that make recognition campaigns easier.

THE EMPLOYEE FREE CHOICE ACT

What do unions want to do about the current state of affairs? The first thing they want to do is maintain the illusion that employer unfair labor practices are the cause of the decline in the union movement. In making this one-sided claim, they ignore all the tough-guy tactics that some unions use in various cases to organize, and they concentrate exclusively on the other side of the equation. With this background, let's turn to the specifics of the EFCA.

Employer Unfair Labor Practices. The least controversial—although misguided—provision in the EFCA is the one that boosts the fines and sanctions on employers who are found to resist unfairly the organization efforts of unions. The EFCA also provides that these cases be given a first priority inside the National Labor Relations Board (NLRB). There is no analogous provision that would equally subject the unfair labor practices of unions to similar sanctions. The obvious effect of these provisions, even if nothing else changed, would be an increased reluctance of employers to resist unionization campaigns. That change, in turn, would make employers increasingly willing to sign so-called neutrality agreements, whereby the employer agrees to remain silent during an organization campaign. The impact of such neutrality would be heightened under the new statutory regime, which, as we will see, permits such campaigns to be decided not by a secret-ballot election but by a card-check system, in which the union will become the bargaining agent if it presents the right number of signed authorization cards to the NLRB official in charge of the case.

The Card Check. The newly heightened penalties for employers engaging in unfair labor practices is only the opening salvo in the EFCA's three-pronged attack on traditional employment law. The much more controversial provisions in the EFCA are the card-check and the compulsory arbitration provisions. It is, moreover, the synergy between these two provisions that threatens to transform American labor law.

Right now, in order for a union to gain recognition, it must begin with a card check of sorts. More specifically, ordinarily the union must get 30 percent of the workers in a "designated bargaining unit"—itself a term of art—to sign cards. Those cards then set the stage for a union election, which usually takes place shortly thereafter. Some 95 percent of elections take place within sixty days after the requisite cards are presented.

During that election period, the employer can bring out the heavy artillery. Employers can call the workers in for special sessions—they have to pay them, of course, for the time—and tell them, by way of prediction but never by way of threat, exactly what is likely to happen

to them if they decide to unionize. And they have a strong message to present. More than one employer could point to some plant across the river that had 5,000 workers before employees unionized in 1999 and now is virtually about to go under. The employer can steer clear of unfair labor practices by predicting that it will not be able to remain in business—at least at the present levels—if the union wins the election, even if it takes every measure to avoid the same fate. After all, there is another plant down the river, or outside the country, which has not been unionized. It can easily woo away customers with better products sold at lower prices.

Union representatives bitterly resent these campaigns. They do not even care whether they are legal or illegal under current law. What really troubles them is that these campaigns are effective in altering the sentiments of workers. I think that it is far better to regard such employer tactics as, in essence, part of a full-information operation: let both sides speak their piece so that the workers can decide.

In fact, the current labor law rules give the union an advantage, both over the employer and in relation to the old rules of the common law system. Unions are free to make predictions, threats, and promises to their heart's content, so long as they do not threaten the use of force. But the employer's rights are fewer than they were at common law, where it could routinely make any threat to commit any lawful act, including shutting down a plant or moving it to a new location. And, of course, firms could have always *promised* workers benefits if they stayed out of unions. But a promise of higher wages or increased vacations in the face of a union campaign is now regarded as "coercive" speech and thus lies outside the scope of First Amendment protection. Everything about union law is at odds and angles with respect to the general law, and freedom of speech is no exception.

The card-check procedure that unions seek today no longer serves as a prelude to a secret-ballot election. Under the EFCA, card check serves as a prelude to compulsory arbitration. Under the proposed regime, the percentage of cards needed goes up to 50 percent plus one. But the payoff is far greater: automatic recognition. The entire process is rife with potential for serious complications and abuse.

The first problem is the so-called snapshot problem. Envision a situation in which the union asks a worker eight times if he wants to join the union or to sign the card. Seven times the worker says no, and one time the worker says yes. The only time that matters under the new system is the time that the worker says yes. It does not matter whether it was the first time or the last time or any time between. The other seven times that the worker said no simply do not matter. The blunt truth is that the worker will not be allowed to revoke the card after it has been signed. So once the card is in, the worker is bound for some period, which is left unspecified under the act but likely to be about six months. It's as though, for example, the law staged an election in which voters could commit to one party but not to the other. Any card-like commitment not to join a union is of no effect.

Workers commonly sign cards under the current system because they know that they can vote the other way in the secret-ballot election. Hence it often happens that unions cannot convert a majority of signed cards into an electoral victory. The explanation is that workers, who may be approached at all times of day and night, are afraid of union intimidation. They will sign the card because they still have the protection of the secret ballot under NLRB elections. The EFCA takes away that safeguard.

Worse still is that the EFCA provides no supervision for the way in which unions gather their signed authorization cards. The union can get a card anywhere, any time. The only challenge to the signed card after the fact that enjoys any chance of success is a charge of forgery—the worker did not sign the card. In principle, an employer might like to challenge a signed card on grounds of fraud or misrepresentation. But we know from the history of public unions in places like Illinois that this theoretical ground for rejecting a card has no chance of success. I know of no case in which the employer was able to meet the heavy burden of proof needed to invalidate the card.

Of course, when the union is selected, the card check no longer matters. As with general elections, the union stays in power even if the workers who signed the cards are gone within a week or two after the union was designated. Under current law, the first contract generally raises a bar against a reelection for another three years, or the duration of the contract, whichever is shorter. The EFCA lets the first contract imposed through arbitration last for two years. To understand why this fixity is especially dangerous for small businesses, imagine a firm that has only twenty employees when the union is designated. If the firm now wants to expand to 200 employees, the other 180 workers are bound to a union contract over which they had no say.

My fear is that the risks of card checks will not go unnoticed by entrepreneurs. Once they understand their exposure to the card check, they will become bearish on forming new businesses. Just when a firm is seeking to get its credit line in order, to decide on its product mix, and to put its management team together, the union comes knocking and labor issues move to the head of the queue. Who needs it?

An additional risk of the card check is that the union can collect the cards in secret, for the EFCA imposes no obligation to broadcast that the campaign has begun in earnest. It is therefore permissible for the union to turn quietly to those workers in the plant whom it thinks are sympathetic to its goals. It then gets them to sign on the sly. Once the cards are collected, the union can figure out the bargaining unit that maximizes its power and present its request for recognition to the NLRB. The entire process can take place without a single word of public debate. It is not only the employer who does not speak. It is also workers who are denied a chance to participate in collective deliberation of the sort that is consistent with the model of union democracy that drove the original Wagner Act.

Moreover, the EFCA itself contains an ironic confirmation of the power of the card check. The act sets out only two circumstances in which the card check is off limits. The EFCA does not allow a card check to displace an existing union. For that, the NLRB has to run the traditional election. Nor may the employer use the card-check procedure to decertify a sitting union. For that, too, the law continues to require a secret-ballot election. Essentially, the EFCA creates a one-way ratchet whose sole object is to maximize the gains to union-organizing campaigns.

Compulsory Arbitration. What happens when the union gets the needed cards? It's quite an astonishing process. Anyone who has ever looked at a collective bargaining agreement knows that they are organized against a backdrop of massive distrust between the sides. To counter the risks of breach, both sides set out the terms of the agreement in extreme detail. Negotiation of such a contract is a tedious and complex process. Typical collective bargaining agreements can be several inches thick because no one wants to trust the good faith of the other side on such mundane matters as personal sick leave and vacation pay, let alone such big-ticket items as pensions and health-care coverage. So these contracts become extremely ornate, and they are multidimensional. Often, the parties trade off the menu of health plans with the amount of vacation pay and so forth. There are no short cuts to success.

The way bargaining works under the EFCA will be quite different. The dominant constraint is that there is no exit. The EFCA allows ten days before negotiations are supposed to begin—that's all the time that is allowed to cover all the preliminary negotiations of the sequence of meetings, the exchange of information, and numerous other tasks that in large negotiations take far longer. Next, there are ninety days before a mediator is appointed. After thirty days of mediation, the case goes to compulsory arbitration. Who is going to be the arbitrator? We do not know from the statute, which only states that a panel of arbitrators shall be appointed in accordance with rules that shall be set out by the secretary of labor or, more precisely, by the person who is in charge of the Federal Mediation and Conciliation Service (FMCS).

Yet nothing in the EFCA determines whether each side picks one arbitrator and the two arbitrators then settle on a third, or whether each side picks one

arbitrator and a government official in FMCS supplies the third arbitrator. It is a serious risk in an Obama administration that a firm could face a panel chosen by someone formerly from the Service Employees International Union (SEIU) who is appointed to a key position on labor negotiations.

Union representatives counter that it is always possible for firms to avoid the risks of arbitration by reaching an agreement earlier in the process. But the firm that has to bargain in the shadow of the law gains only modest respite from this tactic. The union that knows the landscape will not take little in settlement if it thinks that it has much to gain through arbitration. It therefore will push as hard in negotiations as it will before the arbitrator. If there is a strong pro-union arbitration panel, the firm will, at best, get highly disadvantageous terms either way. The firm's bargaining position depends entirely on the composition of the arbitration panel, and the EFCA critically fails to address this question or to protect against bias.

Is there any other form of relief for an employer? Not really, except for going out of business; the EFCA contains no provisions to deal with bankruptcy. The EFCA allows neither side judicial review on any aspect of the first contract negotiation. The employer's only review is limited to formal procedural matters, such as whether the negotiations took place for more than ninety days. The substantive terms imposed by the arbitrator are not subject to review for arbitrary and capricious misbehavior. The arbitral decree is final on the merits.

So why do we put such faith in arbitration? The union defenders note, with a great deal of confidence, that this form of interest arbitration is already used in the public sector for schools and other kinds of unions. What, they ask, is the big deal? Well, there are two big deals, each of which requires a sentence or two of comment.

First, any analyst has to be confident not only that arbitrators can impose agreements but also that these agreements make sense economically. So if neutral observers think that the New York City union arbitrations lead to efficient and sensible teacher, sanitation, or police contracts, they might be willing to extend the practice. But those public contracts are not efficient, to say the least—not for their service assignments or for the generous pensions (full pensions after twenty years of service) that threaten the solvency of the system. Public union contracts are hardly a model for labor contracts against firms that lack the power of taxation.

Second, the union contracts in the public sector do not have to cope with the realities of a dynamic marketplace. No one would ever attempt to reorganize the New York City school system or its transportation network if burdened with the city's existing union contracts and the restrictive practices that they embody. Yet businesses either adapt and expand, or they die. They must worry about the introduction of new product lines and about acquisitions, mergers, takeovers, and successor liability. There is absolutely no precedent in the public sector on how to respond to these common challenges. No set of arbitrators, unversed in the details of any of the businesses that are unionized, could begin to grasp which contracts would allow the firm to survive and which would drive it under. And these firms cannot rely on the generosity or self-restraint of unions to keep them from going over the brink. The calculations are too complex to be done with any accuracy. Witness the ability of the UAW to kill the goose that lay the golden egg in the auto industry.

Consider a few explosive issues, such as job security. I see nothing in the EFCA indicating that the arbitrator cannot impose a term saying that the firm cannot fire any workers, regardless of financial conditions, for the first two years. Next, what about subcontracting out to efficient third parties, including overseas firms? The arbitrator can block all such initiatives that affect union workers. It looks as though anything that is a mandatory subject of bargaining is subject to arbitral decision. That list of terms and conditions of employment is not infinitely elastic, but it is very large. The standard management rights clause in all labor contracts is a subject of mandatory bargaining. As such, the arbitrator can reject it in any or all cases. Again, this outcome would not be subject to judicial review. Likewise, if the contract goes against the workers,

they cannot reject it. The "free choice" act essentially excludes workers themselves from the two areas where their participation is most critical under the NLRA: union selection and contract ratification.

THE SUMMING UP

It is time to put the EFCA's whole package together so that it can be studied in light of the general theory of the firm. Step one is the successful card-check campaign. Once the union signs up 50 percent of the workers in some designated unit, it has a lien on a very substantial chunk of firm assets by virtue of the compulsory arbitration procedures. The closest parallel here is the Railway Labor Act of 1926 (RLA),[25] which provided that work rules could be changed only with the mutual agreement of labor and management. In effect, that long-term contract gave workers a lien on the assets of the firm, which had to be bought out by management. And so it was that the airlines (covered by the act since 1936) could escape their labor obligations only by giving their unions a piece of the business. The power of the union here depends on the extent of its leverage. Under current law, a union cannot force a firm to agree to compulsory arbitration after the expiration of the current agreement. That conclusion holds even if the initial contract provides that arbitration is required for the next period. If that conclusion is carried over, as it should be, to the "first contract" under the EFCA, the period of mandatory agreements should last only two years. But the new statute does not explicitly say that the first contract cannot require compulsory arbitration in the second period, so it is possible that once the firm is shackled in the yoke, bankruptcy and liquidation afford the only releases.

It should be apparent that I have nothing kind to say about the proposed statute. People ask if this makes me anti-union; I suppose, in some sense, the answer to that question is yes. But I think that's the wrong way to phrase the situation, for it misses the true question, which is why a set of legal institutions discharges the social task of figuring out a legal regime that will maximize the joint surplus of employers *and* employees through their cooperative ventures. Unions, of course, may benefit most of their workers. But they do nothing for those unrepresented workers who are shut out of the system. For the overall assessment that takes into account all workers, and all firms, both present and future, it turns out that there is nothing that beats open competition. What is true for product and financial markets applies as well to the labor cases.

The implications of this position are clear. The NLRA, to the extent that it deviates from a competitive model by trying to create this top-heavy democratic model in its place, was a mistake. But it's the kind of mistake with which we have learned to live through adaptive behavior, and a mistake whose force has been blunted over the years by the confluence of events to which I referred: globalization, labor mobility, and internal governance conflicts. There is, however, no similar comfort level for dealing with a new double-barreled regime that sports a card check leading to compulsory arbitration. The learning curve will have to be steep if we are to avoid as a nation more structural unemployment in a world that since October 2008 has witnessed an implosion in financial markets that threatens to sweep ever more broadly. There are enough firms in or near bankruptcy for all sorts of reasons. We do not need to impose a labor regime whose novelty and coercive power will only expand the roster of failed firms. The possibility of a quick trip into Chapter 11 is not part of anyone's economic stimulus package.

The prospects for established firms are scarcely better. Take any large retailer with a thousand stores, and ask what happens if different unions represent workers in different trades in the outlet or the same outlets in different stores. Nothing about the EFCA coordinates the decisions of different arbitrators to ensure that they issue consistent decrees. And nothing requires them to take into account the systemwide dislocation of their decrees. The risk, therefore, is that a few union arbitral decrees will exert an influence that goes far beyond the card-check units to cover other workers who have chosen to remain nonunionized. What happens next is anyone's guess.

We do not need a mastery of the particulars to explain the risks that we court if the EFCA becomes law. I regard this law as a kind of large-scale, covert

socialization, or government takeover, of the private sector. By mimicking the compulsory arbitration of the public sector, we introduce a version of civil service employment for industry. How this element will transform business, no one can say for sure. The best result is to inter the EFCA for the duration in order to avoid further mischief in labor relations.

I hope that I have achieved my initial objective, which is to make all of you, regardless of your position on the political spectrum, uncomfortable about the EFCA. But we have to face the grim realities, given that a majority of Democrats, including President Obama, have signed on to this program. Unfortunately, the public debate has chiefly centered on the card-check provision and has thus glossed over the synergistic risks when it is married to a program of compulsory arbitration.

The risks go further. The modern conception of the labor contract is that of an agreement that cries out for legislative interference. On that score, we need to see the EFCA in connection with a raft of other new provisions that will also place additional pressure on labor markets: an expanded family-leave program, a more aggressive disability regime, and the more vigorous enforcement of the employment discrimination laws. The heart of commerce cannot beat forever when it is burdened with multiple restrictions. Let the costs of regulation exceed the anticipated gains from trade, and the labor relation closes down.

The persons most likely to be hurt by these prospective changes are ordinary working men and women who are struggling to keep their toehold in the middle class. Lawyers like myself are likely to do quite well sorting out the well-intentioned turmoil created by those modern intellectuals and politicians who somehow cannot accept that voluntary contracts, and only voluntary contracts, generate gains from trade. The worrisome issue of our time is whether such gains will be smothered in yet another layer of misguided government regulations.

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QUESTIONS AND ANSWERS

Globalization

QUESTION: Surely the creators of this act cannot just will away globalization, which is now a fact of life. Or am I wrong?

PROFESSOR EPSTEIN: No. Globalization is a fact of life, but you have to understand where it exerts its greatest influence. Globalization may make this program of aggressive unionization fail with respect to manufacturing, unless we get high tariffs. But imagine yourself in one of the following trades where globalization is a second-order effect: a restaurant, hotel, retail outlet, or reception office in a large hospital. In those cases, where you have to have people who are on the ground, the substitutions away from union labor are going to be limited.

If everyone else is subject to the same restrictions, the competitive advantage of being nonunion will be great. But that competitive advantage is short term, for every firm is going to prove vulnerable. There are at least enough short-term rents in this fluid environment that unions like the SEIU will project their ability to gain 1 or 2 million members over the next couple of years.

Globalization does not ensure that these groups cannot succeed, at least in the short run. Rather, the correct argument is that when they do succeed, it will result in a general comparative disadvantage for labor in the United States relative to everywhere else. So if American hoteliers trying to compete in the world markets to get folks to come to their hotels face a wage structure that is no longer competitive with that in Cape Town or Bangkok, such American businesses will start to lose out on that growing slice of the market. Unfortunately, the happy warriors who are behind the EFCA do not believe that indirect or unforeseen consequences are things to worry about.

Instead, the objective of the EFCA's proponents is to obtain what they see as the just result in income distribution in the short run. They hope, vainly, that all the production issues will take care of themselves.

Since they are still infused with the Progressive mindset, they really don't believe, in general, that unions have ever had an adverse effect on productivity. Stated otherwise, they start from the highly influential Freeman and Medoff tradition,[26] which finds certain efficiency advantages in unionization. That academic cover lets them proceed as though they can have their cake and eat it, too.

European Card Check

QUESTION: Did you mention that this card-check system is in place in Europe?

PROFESSOR EPSTEIN: The card check is used in some places outside the United States. It's also used in some places inside the United States. And several Canadian provinces experimented with various permutations of card check and compulsory arbitration for different periods of time. The empirical difficulties in measuring their consequences are not trivial, but the best estimates of which I am aware are by Anne Layne-Farrar at the Law and Economics Consulting Group (LECG), where I am an affiliate. The bottom line of Layne-Farrar's work is that for each 1 percent increase in unionization, we can expect a 0.35 percent increase in unemployment.[27]

In the public sector, both these elements are in use. What is interesting about the public-sector arrangements is that in order to deal with the openness of potential terms, the governing statutes usually contain fairly detailed lists that indicate which factors the arbitrator has to consider in figuring out the wage and other contract provisions. These arbitrators also have previous contracts to update. No one starts from scratch. But as I said, these precedents count for naught in dynamic industries where no precedents are available. Most critically, the heterogeneity among firms in the same line of business is absolutely enormous. And one thing that is vital to preserve in dealing with private enterprises is their diversity. Let FreshDirect work by one model and Peapod by another. Even if both deliver groceries to people, each of them has a completely different strategy as to how to run the back end of its business. The last thing that any labor arbitrator should be able to say is: "Well, you know that Peapod does it this way. Okay, Web Van, you now have to follow suit." I am frightened that if arbitrators talk to one another, they could dictate a single management strategy for all firms in the same industry.

We already follow that pattern in the public sector, and what happens is evident. There is essentially very little competition between unionized school districts in rival areas because they are all subject to the parallel legal regimes imposed through the same process of arbitration. To avoid this, I think that we have to take a leaf from Calvin Coolidge on municipal unions. To secure competitive governments at the local level, we must remove state mandates that require every local government to recognize unions for all forms of public works. If anything, they should be able to stipulate that they will *not* deal with unions, so as to introduce a healthy measure of competition across local government lines.

I do not take any comfort from the EFCA by looking to Europe, with its own form of economic sclerosis. Nor do I accept the common accusation of people who have never been in business that anyone who has earned an MBA is a dolt. The older Fabian socialists like Sidney and Beatrice Webb thought that firms captured some unearned increment from labor, without adding anything of value. They were comfortable with taxing these economic "rents" as a recipe for social equalization of incomes. But the success of American capitalism rests on the high returns to innovation. We want firms to be able to go from zero to sixty miles an hour in three seconds. We want two guys in a basement to end up with a tidy business called Hewlett-Packard. As best I can tell, the current debate on the labor side simply does not consider any of these issues.

Management Rights

QUESTION: It sounds as though the whole world of labor management is changing. I used to negotiate contracts for the employer side. I want to know how things will be changed. For example, on the employer side, if there were provisions in the contract that we could not live with, or could not economically deal

with, we just wouldn't sign the contract. We would not agree. We always insisted on provisions or on a management rights clause so that we always had our rights in terms of management. The union could not get into that area of things.

PROFESSOR EPSTEIN: Essentially, management rights are a mandatory term of bargaining. Under the EFCA, therefore, it is subject to arbitration under rules to be determined later. That's the current proposal. It is really tough, because there is no guarantee that those common clauses will become the templates, and it is very easy to imagine an arbitrator saying that the purpose of the EFCA is to rid us from the shackles of employer domination under our current retroactive or retrograde system. If so, the EFCA becomes a mandate for us to start with new and creative solutions, so all these clauses disappear. We really do not know, and the outcome will all depend on as yet unknown administrative rules, which inevitably will be subject to enormous amounts of judicial deference under the *Chevron* Doctrine.[28] So in the EFCA, you are buying a pig in a very large poke.

Obama Administration

QUESTION: As a Democrat, I hope that some of them will come to their senses. But at this point, it's basically a feeding frenzy on this issue, and they are very adamant. What's the chance of your making these arguments to Paul Volcker, Bob Rubin, and Larry Summers?

PROFESSOR EPSTEIN: The chance of making these arguments to those men is negligible because they are not likely to be the ones to decide this question. The Obama program, as best I can figure out, is organized into task forces with respect to different areas. These people are the ones to talk about in dealing with the bond market, convertible debentures, or anything having to do with inflation, bailouts, and so forth. But labor issues are not going to be in their portfolio. They are likely to be in the portfolio of people like Hilda Solis, Obama's designated secretary of labor, who has a long record as a staunch union backer. Other people will be drawn, I suppose, from the Obama transition team on labor, which features a long list of distinguished persons in the labor movement. Indeed, that cast is so large that no one knows which of them will have the dominant hand.

But owing to Obama's strong level of union support, I fear that his labor team will be to the left of his general economic team. That Obama's labor associations have been largely unknown is a sign of how skillful a campaigner he was during the recent election, for he did not raise these labor issues, sensing perhaps that they would not prove popular with the public at large. Even some of the Democrats who are solidly behind Obama on matters of taxation or foreign affairs or energy are quite opposed to him on this statute. My hope is that American businesses will push very hard to stop this law. Indeed, the Chamber of Commerce has become quite active on this issue, but it is hard to get individual firms to speak out against the act. Remember, the union gets to pick whom it's going to organize first, and it can target its vocal opponents. Lone academics do not have that particular vulnerability.

Corruption

QUESTION: Could you say a few words about corruption? I grew up in a family that had many contacts in unions, and around the dinner table it was common knowledge that all the union people were corrupt, including the top people in the Teamsters Union. And might it be that the problems that you're talking about are actually solved by various payoffs and accommodations, so in reality, it's not as bad as you think?

PROFESSOR EPSTEIN: I think that it's wishful thinking to turn the EFCA into a referendum on corruption. The coercion problem and the corruption problem were, in fact, very serious problems when you and I grew up in the 1950s. Landrum-Griffith,[29] which was passed in 1959, but which I did not mention in my talk, has made something of a dent on this issue. In addition, unions understand that if they actually steal from their members, they face a loss of popular support.

So while corruption may be an endemic problem, it's also a low-level problem. I do not think that it's going

to be particularly important. It is a serious criminal offense for an employer to try to buy off a union organizer with a bribe, saying, "Please take a dive in the next election." And note that all elections are not eliminated by the EFCA. A union could still ask for one in the organization phase, although most people are hard-pressed to imagine any circumstance in which it would choose to do so. But it is instructive to note that secret-ballot elections are preserved in two circumstances: decertification and disputes between two unions. When the unions are at risk, they will not allow the card check to be used against them. In these settings, the opportunity for corruption still remains. Nonetheless, I do not think that many employers or union leaders are going to want to run that risk, no matter what the setting.

I think that the following is the better model to work with. It's less inflammatory and more accurate to assume—even if it is false—that every union is a perfect fiduciary for every worker whom it ceases to organize. Even on that assumption, the EFCA is a complete disaster. I see no reason to go off into very difficult empirical questions as to the degree, distribution, and frequency of corruption. It is far better to take the exact opposite approach by insisting that it is unwise for the law to create incentives for people to behave in counterproductive ways. The EFCA will create a social surplus destruction machine in which both employers and employees will be left worse off in consequence of the legal regime that it will introduce.

Here is what happens if corruption becomes the centerpiece of the discussion. Your opponents will try to bait you by asking whether you believe that unions are really corrupt. If you say yes, they'll give you statistics as to why that claim is false. Now you are in a factual swamp from which you cannot escape. So take the other tack that says unions are honest agents with the wrong incentives. You can then talk about the conflict-of-interest problems because everyone understands the unfairness in a two-tier wage situation, even if they do not quite understand its particular origins.

People also understand the sources of union decline. They do not believe that it is simply a function of management intransigence. No one believes that the job banks program at GM was a management innovation. It was well understood, before its eventual demise, that it had to be introduced at the behest of unions that needed to keep a broad base even if it meant paying people in job banks programs full wages to sit in a room and shoot paper clips into wastebaskets with rubber bands when everyone knows that their jobs are not coming back.

It does not take a genius to know that this arrangement makes no sense. So as for the question of why this contract comes to pass, the explanation is that a union is always an inefficient monopolist in a way that a corporation is not. The corporate monopolist has shareholders, not workers. All it has to do is maximize profits by changing prices and quantity to maximize total revenue, and the distributional problem will take care of itself, given its ownership structure. Every shareholder gets a *pro rata* share of the gain. But with labor, you cannot reach this result. If the efficient solution says that you need only eighty workers out of a hundred, it is hard to leave the twenty who are fired out in the cold. They need to share in the gains, which is what the job banks program tried to do. But with time, the whole scheme had to collapse as it did. So once people understand that the internal structure of a union complicates its fiduciary duty, they will see that the only way it can level the playing field is to continue with inefficient modes of production.

It is interesting to look at Freeman and Medoff in light of this analysis. They praise the sort of equalization of wages across plants and job categories that unionization brings about, not realizing that it has negative allocative consequences, by creating shortages in some job categories and surpluses in others. And they do not talk about two-tier wage structures because they are the tip-off as to how unions can lead to weak institutional structures. What you would really like is to create a union, give it shares, and have the shareholders claim the residual rents from efficient production. Then give those shares to people you could fire at will. But the moment you adopt that capitalist model, you have simply abandoned the whole premise that unionization can work across generations.

Constitutional Issues

QUESTION: If you were charged a year or two from now after this indefensible proposal went through as an act, and the thought was to find some form of constitutional issue that this is a violation of, could you find something?

PROFESSOR EPSTEIN: Yes, I could. The effectiveness of such a constitutional challenge, of course, would depend critically under whose framework the analysis takes place. Much of what I have written is completely unfashionable. My first position is that any conscious government deviation from the competitive equilibrium is a taking, for which compensation is required.

This position is not all that novel. It was clearly articulated by Justice Harlan in *Adair v. United States*[30] in 1908, and it was defended very ably by Justice Pitney in *Coppage v. Kansas*[31] in 1914. So my position has powerful antecedents because these labor regulations cannot fall within the account of the police power as a type of health or safety regulation. Rather, they were what was termed "labor" statutes, which we would describe as legislation that created state monopolies without just cause. One way to read liberty under the Fourteenth Amendment is as a form of protection against state monopoly.

That position, of course, was decisively rejected in the aftermath of the New Deal constitutional revolution. It is therefore not possible to mount under current law any constitutional critique against the NLRA. But the EFCA is a whole new ballgame because through compulsory interest arbitration, it essentially denies firms the exit right that they enjoyed under the earlier regime. So the intellectual task now is to find some way to stress that feature of the EFCA that is most vulnerable to constitutional attack. The easier target, without question, is the compulsory arbitration provision that follows the successful card-check campaign.

Here is how I would phrase the argument. Under present law, the constitutional cases that deal with the taking of real estate rest on a hopelessly artificial but fiercely defended distinction between restrictions on how an owner can use his land—think of zoning restrictions—and the efforts of the government to *occupy* or *order occupation of* his property. The payoff from this distinction runs as follows: the courts supply a very low level of scrutiny for land-use restrictions but impose a very high level of scrutiny on forced occupations.

Take this distinction over to labor law, and here is how the situation shakes out. The NLRA reads like a land-use restriction. It does not force an employer to take a union into the business. It just restricts the options that the owner has in how he runs the business, much like a zoning law restricts the kinds of options one has for building. Under current Supreme Court law, it would be impossible to challenge such restrictions even for real property. But the EFCA looks more like a private occupation of the firm, given that the employer cannot resist occupation by the union. Indeed, given the statute's compulsory arbitration provision, the employer is duty bound to hire employees even at a *net loss* to the firm.

So consider this analogy: suppose I say that you now must buy goods from me and that you must pay me a hundred dollars. The goods are worth forty dollars in the open market. Is this not a taking of sixty dollars from you, even though it's couched in the language of an exchange? Think back to what we said about management teams that would never yield on their prerogatives. These contracts unambiguously leave one side worse off, even if they do not (as in the long run they may not) leave the other side better off. The arbitrators are forcing workers on the firm. This forcible imposition is an action that calls for strict scrutiny, and given the feeble justifications for this intrusion, under this analysis, the EFCA should be struck down.

I think that this argument is correct, but that does not mean it's going to win, because we have already witnessed similar types of coercion upheld under the Railway Labor Act At this point, the argument becomes more subtle because it is now necessary to distinguish between the two situations. I think that this challenge can be met by looking back to the 1926 justification for the RLA. Any disruption in service for network industries has drastic effects: the industries shut down, and the world cannot move. It is this brute fact that

explains why common-carrier obligations have long been imposed on these businesses[32]—their ability to exclude puts them in too powerful a position, given the dearth of real alternatives. The common-carrier rationale that applies to railways does not apply to hotels and other kinds of businesses. That said, this argument would admittedly be tricky because the underlying law is so poorly thought out—but it is correct as a matter of principle.

The second line of attack on compulsory arbitration follows more conventional lines that still resonate today. The simple argument is that the insistence of the vague procedures for the political selection of arbitrators, without any opportunity for appeal to a neutral party, counts as an open invitation to bias in violation of the most elementary norms of procedural due process. The employer in these cases is forced to play a game that is stacked against it. The union faces no such risk because it can always avoid the arbitration route by resorting to the secret-ballot election. This radical difference in position fails to meet the standards of fair play. It could be portrayed as a Salem witch trial, without any exit option. I think that this argument is also correct.

The next question is: Who raises this argument, and when? Under current Supreme Court law, the employer would have to wait until the end of arbitration, when the record is closed. Quite simply, in this area, the Supreme Court has rejected all efforts for remedies before the fact, which are routinely granted under the First Amendment, with its fear of prior restraint. But in this instance, any refusal to entertain a facial challenge to the EFCA will cause real dislocation. It cannot be the law that some arbitrations meet constitutional standards while others do not. The chaos that would result from case-by-case litigation is too much to bear. The facial challenge here rests on features of the EFCA's procedures that are sure to have an impact on all cases. The matter should be decided before one faces hundreds, if not thousands, of settlements and arbitrations under a wholly flawed procedure that could take months before the first case reaches the appellate courts. I would urge the court to look at the facial challenges, which do not present any obstacles to review. It would be dangerous for a court to use any principles of ripeness to forestall a facial challenge in these cases.

Ideally, it would be appropriate for some court to issue a temporary injunction against the implementation of the EFCA until, first, its regulations are issued, and second, until one test case has passed on its constitutionality. My hope is that the gravity of the situation under the act will spark a serious consideration of these constitutional challenges on their merits. Intellectually, this case is compelling. How the courts will decide it is very much an open question. But the only chance of success depends on a bold and unflinching condemnation of a statute that I hope never sees the light of day.

APPENDIX

THE EMPLOYEE FREE CHOICE ACT OF 2009[33]

IN THE SENATE OF THE UNITED STATES
March 10, 2009

AN ACT
To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Employee Free Choice Act of 2009.'

SECTION 2. STREAMLINING UNION CERTIFICATION.

(a) In General—Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:

(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include—

(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and

(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.

SECTION 3. FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS.

Section 8 of the National Labor Relations Act (29 U.S.C. 158) is amended by adding at the end the following:

(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:

(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.

SECTION 4. STRENGTHENING ENFORCEMENT.

(a) Injunctions Against Unfair Labor Practices During Organizing Drives—

(1) IN GENERAL—Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)) is amended—

(1) Whenever it is charged—

(A) that any employer—

(i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;

(ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8; or

(iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7;

while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or

(B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B) or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.

(b) Remedies for Violations—

(1) BACKPAY—Section 10(c) of the National Labor Relations Act (29 U.S.C. 160(c)) is amended by striking '*And provided further*,' and inserting '*Provided further*, That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages: *Provided further*.'

(2) CIVIL PENALTIES—Section 12 of the National Labor Relations Act (29 U.S.C. 162) is amended—

(A) by striking 'Any' and inserting '(a) Any'; and

(B) by adding at the end the following:

(b) Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed $20,000 for each violation. In determining the amount of any penalty under this section, the Board shall 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.

1. Also called the Wagner Act, the NLRA, 49 Stat. 449 (1935), is codified at 29 U.S.C. §§ 151–69.

2. Officially known as the Labor-Management Relations Act, Taft-Hartley, 61 Stat. 136 (1947), is codified at 29 U.S.C. §§ 141–97.

3. 78 Stat. 241 (1964).

4. See, for my critique, Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, Mass.: Harvard University Press, 1992).

5. 26 Stat. 209 (1890), codified 15 U.S.C. §§ 1–7.

6. 38 Stat. 730 (1914), codified 15 U.S.C. §§ 12–27.

7. See John F. Kennedy, "Remarks in Heber Springs, Arkansas, at the Dedication of Greers Ferry Dam" (October 3, 1963), available at http://www.presidency.ucsb.edu/ws/index.php?pid=9455.

8. 208 U.S. 274 (1908).

9. *Lawlor v. Loewe*, 235 U.S. 522 (1915).

10. The comment was made by the editor of the *United Mine Workers Journal*, as quoted in Joel I. Seidman, *The Yellow Dog Contract* (Baltimore: Johns Hopkins University Press, 1932), 11.

11. 38 Stat. 730 § 6 (1914), codified 15 U.S.C. § 17.

12. 254 U.S. 443 (1921).

13. 47 Stat. 70 (1932), codified 29 U.S.C. §§ 101–15.

14. 49 Stat. 449 (1935).

15. The peculiar difficulties faced by bilateral monopolies have long been understood. See, e.g., Alfred Marshall, *Principles of Economics* (1890; Amherst, N.Y.: Prometheus, 1997), 309 ("If two absolute monopolies are complementary, so that neither can turn its products to any good account, without the other's aid, there is no means of determining where the price of the ultimate product will be fixed").

16. These figures reflect private-sector unionization only. See Steven Greenhouse, "Sharp Decline in Union Membership in '06," *New York Times*, January 26, 2007 (citing Bureau of Labor Statistics).

17. It should be noted that the distinction between "domestic" and "foreign" companies exists even though the foreign companies typically have American plants. Most of the foreign companies, including those in the

automobile industry, realize that they are politically at risk if they do not have American plants that hire American workers. To meet this threat, they open up plants in the United States, which they are able to keep union-free by pointing out to their own workers the economic vulnerability of their unionized rivals.

18. See, e.g., Jonathan Cohn, "Assembly Line," *The New Republic*, November 21, 2008.

19. See David Kiley, "UAW's Gettelfinger More Pragmatic than He Appears," *Business Week*, July 23, 2007.

20. According to the Bureau of Labor Statistics, domestic automobile industry employment fell from 1,286,100 in December 2000 to 781,500 in December 2008. See http://www.bls.gov/bls/auto.htm.

21. See David E. Sanger et al., "Bush Aids Detroit, but Hard Choices Wait for Obama," *New York Times*, December 19, 2008.

22. "Strengthening America's Middle Class Through the Employee Free Choice Act," hearing on S. 1041 before the Senate Comm. on Health, Education, Labor and Pensions, n. 8 (2007) (statement of Cynthia Estlund, Catherine A. Rein Professor of Law, New York University School of Law), available at http://help.senate.gov/Hearings/2007_03_27_a/Estlund.pdf.

23. The number of union elections held, and workers organized, has been declining. In 2007, unions won 60.1 percent of union elections and organized 57,908 workers, according to the National Labor Relations Board.

24. See *supra*, n. 18.

25. 44 Stat. 577 (1926), as amended, codified 45 U.S.C. §§ 151–88.

26. See Richard B. Freeman and James L. Medoff, *What Do Unions Do?* (New York: Basic Books, 1984).

27. See Anne Layne-Farrar, "An Empirical Assessment of the Employee Free Choice Act: The Economic Implications" (March 3, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353305.

28. *Chevron, Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984).

29. See the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959), codified as amended, 29 U.S.C. §§ 401–531.

30. 208 U.S. 161 (1908).

31. 236 U.S. 1 (1914).

32. The first purpose articulated in the RLA was: "To avoid any interruption to commerce or to the operation of any carrier engaged therein," Railway Labor Act, ch. 347, § 2, 44 Stat. 577 (1926).

33. Certain language, reflecting solely conforming amendments, has been omitted.

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The Center for Legal Policy (CLP) works to advance the principled, long-term reform of our nation's civil justice system by offering incisive, rigorous, and sound analysis of the system's problems as well as effective practical solutions. For over twenty years, CLP has provided the intellectual underpinnings for various reform efforts.

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