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EMPLOYEE “FREE” CHOICE IN THE MIRROR OF LIBERTY, FAIRNESS AND SOCIAL WELFARE

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**EMPLOYEE “FREE” CHOICE IN THE MIRROR OF
LIBERTY, FAIRNESS AND SOCIAL WELFARE**

HARRY G. HUTCHISON*

REVIEW ESSAY:
THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT
BY RICHARD A. EPSTEIN (2009)

ABSTRACT

The publication of Richard Epstein’s book, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT provides an opportunity to reconsider (A) the movement to displace the regime of judge-made law that had previously governed labor relationships, (B) the purpose of the NLRA and (C) the revolutionary implications of the effort to transform the NLRA into a law that places its thumb on the scale in favor of unionization. Describing the central provisions of the Employee Free Choice Act (EFCA), its economic consequences, its constitutional implications, and its connection to the decline of unionism, Epstein offers a balanced portrayal of the EFCA that suggests this statutory initiative diminishes human liberty and compromises the interests of most workers, employers, and the nation as a whole.

Beyond Epstein’s manifestly correct emphasis on the proposal’s unfairness to workers and employers tied to possible union coercion and his assessment of the initiative’s adverse social welfare implications, the case against the EFCA should be expanded in two ways. First, his critique could be enriched by deconstructing progressive presuppositions tied to this initiative and by focusing on the disproportionately adverse consequence of this proposal on marginalized Americans. Such consequences persist in America’s current era. Second, Epstein’s examination would be enhanced by understanding the EFCA as an attempt by highly politicized labor unions to gain additional political revenues for broad social purposes that are unrelated to both collective bargaining objectives and workers’ actual preferences.

INTRODUCTION

While many contemporary American workers have been drawn to the promise of individual autonomy,¹ they also find themselves in a quandary. They are dissatisfied with

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¹A complete description of human rationality grounded in individual autonomy admits a wide array of explanations for the choices that humans make without necessarily succumbing to unconstrained greed or J.

the uncertainty of a world that appears to have fallen apart;² they are waiting, yet they cannot fully articulate what they are waiting for.³ Seeking freedom and liberation on the one hand,⁴ workers confront on the other hand the contention that they and their workplace suffer from too much freedom and too little control.⁵

In the face of such opposing contentions, it is no surprise that the government has taken sides. In fact, government regulation has risen substantially during the past century, reflecting the fact that the state has permeated civil society to such an extent that the two are mostly indistinguishable.⁶ This move has advanced since the latter part of the 19th century and coincides with the rise of the Progressive Era, wherein modern hierarchs, captivated by a “modern spirit” that is deeply impatient with limits, have assumed the perfectibility of man and the conquerability of nature.⁷ Attempting to achieve great things in the face of life’s perpetual disappointments,⁸ law reformers, attracted to a broad interpretation of the commerce clause,⁹ and an expansive understanding of the police power,¹⁰ have sought to implement through ideologies and bureaucratic instruments, a new world order of labor relations—a world without industrial strife and unrest.¹¹ Despite

S. Mill’s antinomian individualism. Rationality, economics, and self-interest, as such, do not necessarily defend J.S. Mill’s claims in *On Liberty*, where . . . flawed conceptions of autonomy and individuality combine with an obsessional enmity to tradition and convention to yield a liberalism in which rationalist hubris, antinomian individualism and a sentimental religion of humanity reinforce and strengthen each other.” JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 260 (1996).

² Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?*, 26 QUINNIPIAC UNIV. L. REV. 799, 800 (2008) [hereinafter, Hutchison, *What Workers Want*].

³ CHANTAL DELSOL, *ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD* xxvii (2003).

⁴ See e.g., Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 WM. & MARY BILL OF RTS J. 1309, 1311-1313 (2006) [hereinafter, Hutchison, *A Clearing in the Forest*].

⁵ See e.g., Thomas C. Kohler, *Labor Law: “Making Life More Human”—Work and the Social Question*, in *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* 163, 180-181 (eds. Michael A. Scaperlanda & Teresa Stanton Collett, 2007).

⁶ JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, & POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD*, 154 (2010).

⁷ Paul Seaton, *Translator’s Preface*, in CHANTAL DELSOL, *UNJUST JUSTICE: AGAINST THE TYRANNY OF INTERNATIONAL LAW* vii (2008).

⁸ Rex G. Carr, *Book Review, RELIGION AND DEMOCRATIC CITIZENSHIP: INQUIRY AND CONVICTION IN THE AMERICAN PUBLIC SQUARE*, J. CALEB CLANTON, 52 J. OF CHURCH AND STATE, 160, 160 (2010).

⁹ U.S. Constitution, Article I, Section 8, Clause 3 (“The Congress shall have Power . . . to regulate Commerce . . . among the several states . . .”)

¹⁰ See e.g., *Muller v. Oregon*, 208 U. S. at 419-423 (holding that women are afflicted with certain physical limitations and accordingly the state pursuant to its police power is justified in restricting the conditions under which they may work).

¹¹ National Labor Relations Act, 49 Stat. 449 (1935), as amended by Pub. L. No. 101, 80th Cong., 1st Sess., 1947, and Pub. L. No. 257, 86th Cong., 1st Sess., 1959; 29 U.S.C. §§ 151-68, F.C. A. 29 §§ 151-68.

an upsurge in government intervention facilitated by a flurry of statutory enactments beginning during President Hoover's administration and continuing throughout the current age, workers must tackle angst that is elevated by allegations of falling or stagnant wages, increasing employment uncertainty, and increasing disparities in nonwhite versus white unemployment rates.¹² Such uncertainty may be linked to a sharp increase in bureaucratic regulation and control that are part of a legal edifice of stunning complexity.¹³

Although the federal government was originally conceived of as an entity with limited and enumerated powers¹⁴ the establishment of a new order of labor relations has been frequently fashioned by the pursuit of progress and exclusion.¹⁵ Advanced through pseudo-science¹⁶ and notions of fairness, labor law reform advocates have claimed the moral high ground of public interest. This move, consistent with progressive presuppositions, has enabled reformers to assert that their programs and policies benefit the disadvantaged citizens they target.¹⁷ An impartial examination of such programs and policies implies that they have often been tainted by the human tendency to use power that is unimpeded by moral restraint for purposes of self-aggrandizing domination and abuse.¹⁸ Taint frequently takes the form of unintended or intentional consequences that place human liberty at risk and further suppress the economic and social prospects of the marginalized among us.

Most reform efforts represent a combination of law and sociology conducive to statutory innovation. During the early part of the twentieth century, this led to the construction of sociological jurisprudence. In turn, this development simultaneously contributed to a jurisprudential trend that surfaced as an intellectual force in

¹² Hutchison, *What Workers Want*, *supra* note ___ at 800.

¹³ *Id.*

¹⁴ ROBERT A. LEVY & WILLIAM MELLOR, *THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM* 37 (Cato Institute ed., 2009).

¹⁵ Harry G. Hutchison, *Waging War on the "Unfit"? From Plessy v. Ferguson to New Deal Labor Law*, 7 STAN. J. OF CIVIL RIGHTS AND CIVIL LIB. (forthcoming) (2010) available at http://ssrn.com/abstract_id=1674048 (at page 33-36 in manuscript) [hereinafter, Hutchison, *Waging War on the "Unfit"?*]. See also, David E. Bernstein and Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONT. PROBLEMS, 177, 177 (2009).

¹⁶ See e.g., *id.* (the exclusion of undesirables acquired new scientific legitimacy).

¹⁷ Hutchison, *Waging War on the "Unfit"?*, *supra* note ___ at 24.

¹⁸ HUNTER, *supra* note ___ at 188.

constitutional law and suggested that the purpose of law is to achieve social aims that cannot be constrained by abstract notions of rights tethered to language of the Constitution.¹⁹ This flight from the notion of individual rights enabled progressives to argue that the Constitution could not constrain the federal government's social and economic aims, and this move reached its apotheosis during President Franklin Roosevelt's administration.

Provoked by the Supreme Court's failure to permit the expansion of state power that he favored, Roosevelt threatened to pack the United States Supreme Court.²⁰ The Roosevelt administration sought public support for its scheme to restructure the economy by offering plans and proposals involving a substantial element of deception.²¹ For example, supporters of the National Industrial Recovery Act (NIRA) hoped that this statute "would rebuild the American economy on the model of Mussolini's fascist Italy, then widely regarded as a successful alternative to laissez-faire capitalism,"²² thus surreptitiously eliminating a number of widely accepted government departments.²³

Consistent with its overall approach of ignoring the contrary views of citizens, the Roosevelt administration, after the demise of the NIRA, pushed to enact the National Labor Relations Act (NLRA) in the absence of strong public support.²⁴ The NLRA marked "the culmination of a systematic effort of the progressive movement that dominated so much of American intellectual life during the first third of the twentieth century,"²⁵ an effort aimed at creating a transformed society. Offering an iconic conception of labor progress, this move was reified by the United States Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.* Accepting the contention that the NLRA, by its terms, regulated labor practices "affecting commerce" and rejecting the distinction between production and commerce, the Court announced that it would no longer define

¹⁹ David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 811 (1998) [hereinafter, Bernstein, *Philip Sober Controlling Philip Drunk*].

²⁰ See e.g., Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY 595, 628 (2003)

²¹ *Id.* at 652.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 657-58.

²⁵ RICHARD A. EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 1* (2009) [hereinafter, EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT*].

the commerce power in terms of the Tenth Amendment's reserved power concepts.²⁶ The Supreme Court thus accepted the NLRA's stated objective of eradicating industrial strife through collective bargaining.²⁷ Departing from the *Lochnerian* tradition of hostility toward class legislation and laws interfering with free labor markets,²⁸ the success of proregulation constitutional arguments was complete by the late 1930s when the Court rejected *Lochner* and declared "that it considered liberty of contract a nonfundamental right."²⁹

The publication of Richard Epstein's book, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT*, provides an opportunity to reconsider (A) the movement to displace the regime of judge-made law that had previously governed labor relationships,³⁰ (B) the purpose of the NLRA, and (C) the revolutionary implications of the effort to transform the NLRA into a law that places its thumb on the scale favoring unionization.³¹ Describing the central provisions of the Employee Free Choice Act, (EFCA), its economic consequences, its constitutional implications, and its connection to the decline of unionism, Epstein offers a balanced portrayal of the EFCA that suggests this statutory initiative is unlikely to be in the interest of most workers, employers, or the nation as a whole. Part I of this essay describes Epstein's inspection of the EFCA, its most important provisions, its institutional structure, and its probable economic consequences. Part II maintains that a more comprehensive review of the EFCA and its inescapable connection to progressive presuppositions indicates that the true enemy of unionization is the American worker and the national interest. This is so for several reasons, including the fact that American workers (adequately informed of labor unions' ongoing participation in the social control of work and the marginalization of workers, as well as union participation in transformational politics financed by union dues revenues) are likely to perceive the EFCA as an ill-considered statutory effort that ought to be rejected by most

²⁶ JOHN E. NOWAK AND RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 185, (2004).

²⁷ *NLRB v. Jones & Laughlin*, 301 U.S. at 33-34.

²⁸ DAVID E. BERNSTEIN, *ONLY ONE PLACE REDRESS: AFRICAN AMERICAN, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 98 (2001) [hereinafter, BERNSTEIN, *ONLY ONE PLACE OF REDRESS*].

²⁹ *Id.* at 7.

³⁰ EPSTEIN, *THE CASE AGAINST THE FREE CHOICE ACT*, *supra* note ____ at 1.

³¹ *Id.* at 2 (describing the NLRA as amended by the Taft-Hartley Act, as respecting employee's collective choice on unionization).

Americans. Properly appreciated, the EFCA joins a long-line of progressive law reform proposals that would enable union hierarchs and their philosophic allies to expand the realm of progressive hegemony and subordinate the social, economic, and liberty interests of workers.

Beyond Epstein's manifestly correct emphasis on the proposal's unfairness to workers and employers tied to possible union coercion and his assessment of the initiative's adverse social welfare implications for the nation, the case against the EFCA should be expanded in two ways. First, his critique could be enriched by deconstructing progressive presuppositions tied to this initiative and by examining the disproportionately adverse consequence of this proposal on marginalized Americans. Such consequences persist in America's current era. Second, Epstein's examination would be enhanced by understanding the EFCA as an attempt by highly politicized labor unions to gain additional political revenue for broad social purposes that are unrelated to both collective bargaining objectives and workers' actual preferences.

PART I: EPSTEIN'S ASSESSMENT OF THE EFCA

A. PROLEGOMENA

Epstein's book and his consequent analysis focus on the EFCA of 2007,³² but since an identical version of the proposal was introduced on March 10, 2009,³³ this essay utilizes the most recent version for citation purposes. In assessing the EFCA, Epstein provides a substantial, albeit incomplete background of the evolution of collective bargaining within the United States. Among other things, he shows how the EFCA would change many of the important provisions of the National Labor Relations Act and how those changes would affect various constituencies.

B. THE EFCA CHANGES EVERYTHING

It is clear that the original language of the NLRA expressed a strong preference for labor organization within the private sector.³⁴ Subsequently, the NLRA was amended by the Taft-Hartley Act. As amended, the NLRA continued to respect employees' collective

³² See e.g., *Id.* at 177-181 (appendix).

³³ Employee Free Choice Act of 2009, H.R. 1409, 11th Cong. (2009).

³⁴ EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT, *supra* note ____ at 2.

choice on unionization but did not favor or promote unionization.³⁵ Rather, the Taft-Hartley Act explicitly stated that employees “shall also have the right to refrain from” engaging in self-organization, joining a union, or pursuing any other concerted activities for the purpose of collective bargaining.³⁶ After providing this background, Epstein makes two important claims:

The two central pillars of the original NLRA have survived to this day. The first was a system of union democracy whereby unions could only obtain the rights of exclusive representation for firms if they could prevail in elections held by secret ballot. If a union was selected, both parties were under an obligation to negotiate in good faith to work toward a collective bargaining agreement. In addition, the legislative history of the NLRA went to great pains to establish a second pillar of free negotiation.³⁷

On the other hand, while purportedly establishing an efficient system to enable employees to form, join, and assist a labor organization³⁸ the EFCA rejects both pillars. This proposal would substantially alter the NLRA by allowing the National Labor Relations Board (NLRB) to certify a labor organization as the collective bargaining representative without ordering a secret ballot election if “no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit.”³⁹ Although the EFCA does not supply guidelines and procedures for the designation by employees of a bargaining representative, it orders the NLRB to do so.⁴⁰

³⁵ *Id.* at 3

³⁶ *Id.*

³⁷ *Id.* at 4. The legislative history states that “[t]he committee wishes to dispel any possible false impression that this bill designed to compel the making of agreements or to permit governmental supervision of their terms. S. Rep. No. 573, 74th Cong. 1st Sess. (1935) (quoted in EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT, *supra* note ___ at 4).

³⁸ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

³⁹ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. 2(a) (2009).

⁴⁰ *Id.*

The EFCA contains three provisions that if enacted, would significantly change the institution of collective bargaining.⁴¹ First, the EFCA would allow labor unions to substitute a card-check system for the current electoral system, while leaving in place the present NLRA provision that allows unions to proceed by filing a representation petition supported by at least 30 percent of employees in an appropriate bargaining unit and then holding a secret ballot election sponsored by the NLRB.⁴² Whether the addition of a card-check system will actually enable the wishes of workers to surface or not, as Epstein explains, this provision would displace elections in virtually all representation cases.⁴³

“[The] EFCA’s second major provision would introduce a system of compulsory interest arbitration leading to a first ‘contract’ of two years duration.”⁴⁴ The term “contract” is deceptive because an actual agreement representing the assent of both parties is not required during this initial period.⁴⁵ This mandatory first “contract” is not limited to wages and benefits but must cover all the issues typically decided by agreement under the current NLRA system.⁴⁶ Epstein thoroughly explicates why this change constitutes a core redefinition of collective bargaining. Indeed, this provision would likely destroy collective bargaining arising out of an organizing contest. Since it is conceptually possible that initial arbitration decrees will lead to interest arbitration extensions, this provision may wipe out collective bargaining for subsequent time periods beyond the initial “contract.”⁴⁷

Finally, the EFCA’s third major change ties in closely with the adoption of the card-check system, and it would substantially increase the penalties imposed on employers for violations of section 8(a) (3) of the NLRA, which prohibits discrimination against employees for union activities.⁴⁸ This provision also requires the NLRB to give priority to charges of unfair labor practices (ULP) that arise in the course of organizing

⁴¹ EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT, *supra*, note ____ at 4.

⁴² *Id.* at 4-5.

⁴³ *Id.* at 5.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*

⁴⁶ *Id.* at 5-6.

⁴⁷ *Id.* at 98-100.

⁴⁸ *Id.* at 6.

campaigns.⁴⁹ These increased penalties for employers will backstop the advantages that unions expect to receive from the addition of the card-check alternative.⁵⁰

Major economic consequences attend to the EFCA's proposed changes, which would radically alter the balance of power between management and labor.⁵¹ This impact will be felt differently by small and large firms, but as Epstein argues, the passage of the EFCA will create huge dislocations in established ways of doing business and will lead to large losses in productivity.⁵² This will result in a substantial social welfare reduction. Since law reform initiatives frequently represent areas of tension in society between the public and self-interested hierarchs, Epstein adroitly shows that unions and their hierarchs gain at the expense of employee liberty and the nation's economic interests.

C. EPSTEIN'S CRITIQUE OF THE EFCA'S PROVISIONS

Demonstrating that the EFCA was poorly drafted,⁵³ filled with troublesome gaps,⁵⁴ and grounded in unwarranted assumptions about the causes of decline in private sector unionization, Epstein illustrates how the proposal seeks to bias law in favor of unions.⁵⁵ Ignoring current labor union campaign advantages,⁵⁶ the proposal changes the calculus of costs and benefits in order to supply additional advantages to labor unions within the parameters of an organizing contest,⁵⁷ and creates a truncated card-check program that

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 89 (the proposal offers no standards for mandatory arbitration, fails to ensure that checked cards are valid particularly those cards collected before passage of the act, and fails to establish any standards before the organization drives begin).

⁵⁴ *Id.* at 70 (the NLRB is charged with developing procedures for establishing the validity of signed authorizations designating bargaining representatives)

⁵⁵ For example, section 2 of the EFCA only allows the card-check system for workers who are not yet organized. In addition, the card-check system cannot be used for purposes of union decertification. *Id.* at 73.

⁵⁶ *Id.* at 42-43 (unions have advantages in timing a campaign, the definition of the bargaining unit enabling them to shrink or expand the bargaining unit to increase their odds of prevailing, the exclusive possession of signed authorization cards, (once a petition is filed with the NLRB, the union receives a list of names and home addresses of all workers); and lastly, unions are not bound by the same rules that govern employer speech meaning that they are free to promise benefits and threaten workers if they refuse to support the union).

⁵⁷ *Id.* at 68-70 (showing how the proposed card-check system of the EFCA provides union gains to card collection while disadvantaging workers who may be trapped or intimidated in signing a card despite the costs of unionization).

exposes workers to union coercion, intimidation, and deception.⁵⁸ “It is hard to imagine any process that is less democratic in either intention or execution than the card-check rule under the EFCA. The only clear winner of this skewed and expedited process is the union leadership, which gains dues and power through the successful certification campaign.”⁵⁹

While the EFCA would reward union-sponsored intimidation and fabrication, it would do little to constrain the impact of employer abuse on the election process, an ostensible purpose motivating the authors of this proposal. This is so because employer abuse is largely imaginary.⁶⁰ Nonetheless, the EFCA envisions a substantial increase in penalties for employer ULPs during organizing campaigns in response to the allegation that illegal employer resistance has fueled union decline.

While employer resistance can take many forms, including moving the plant or office to another location, Epstein punctures the employer hostility thesis. Epstein shows that private sector unionization has declined for reasons that are independent of employer intimidation, which is consistent with conclusive evidence that shows a reduction in union density in most western countries.⁶¹ This is also true of countries that have instituted labor legislation that is far more favorable to unions than that of the United States. For example, Japan, Australia, France, and Great Britain have seen their union density rate fall faster than the United States.⁶² In addition, a critical examination of data on American employees fired during a union-organizing campaign severely undermines the contention that private sector union decline is a largely a function of employer hostility.

Relying on J. Justin Wilson’s analysis,⁶³ Epstein reveals that during a three year-period from 2003 to 2005, 11,342 organizing petitions were filed.⁶⁴ Of the 1,538 NLRB

⁵⁸ *Id.*

⁵⁹ *Id.* at 73.

⁶⁰ *Id.* at 54-67 (showing that employer abuse claims are largely unsubstantiated and that employer unfair labor practices have had little impact on the rate of unionization in the United States).

⁶¹ *Id.* at 14 [table 1] (showing substantial declines in unionization in Canada, Australia, New Zealand, Japan, the European Union, Germany, France, Britain, and the Republic of Ireland and more modest declines in Italy, Canada, and South Korea)

⁶² *Id.*

⁶³ See J. Justin Wilson, *Union Math, Union Myths: An Analysis of Government Data on Employees Fired During Union Organizing Campaigns*, Center for Union Facts, June, 2007, available at

unfair practice cases involving remedial action, however, *only* 303 arose during the course of an organizing campaign, implying that the likelihood of an improper firing by an employer during the course of a union organizing campaign is only 2.7 percent.⁶⁵ The thrust of this analysis is corroborated by other commentators⁶⁶ and indicates that the employer hostility thesis cannot explain union decline. The evidence exposes as false the contention that the existing NLRA system “gives management near-veto power over whether workers can achieve union representation [via] NLRB supervised election.”⁶⁷ Reliance on the employer hostility thesis constitutes a *twee festschrift* in honor of nostalgia and enables union advocates to disregard evidence that traditional labor organizations find it difficult to fully respect the diversity in individual variations in tastes and demand of workers, particularly the demands of women and minorities.⁶⁸ A lack of respect for differences among employees and between workers and union leaders, coupled with the ongoing movement of some workers to embrace expressive individualism,⁶⁹ reveals that labor union advocates have missed the target. Taken as a whole, the facts in combination with evidence that traditional unions are out of step with current economic practices, contribute to an absence of demand for unionization and explain that unions are increasingly irrelevant to the bulk of workers and employers. Many labor sympathizers admit as much.⁷⁰ Unions require solidarity, which denotes the ability of people to cooperate in the absence of legal sanctions.⁷¹ “Since workers live in a cultural milieu wherein Americans see themselves as highly autonomous and mobile, the

www.unionfacts.com/downloads/Union_Math_Union_Myths.pdf. (quoted in EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note ___ at 51).

⁶⁴ EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note ___ at 51.

⁶⁵ *Id.* This calculation reflects the fact that the number of remedial action in organizing campaigns (303) when divided by the number of organizing campaigns (11,342) equal a 2.7 percent.

⁶⁶ See e.g., Keith H. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685, 695-97 (2003) (repudiating the current viability of the employer hostility thesis and showing that employers were much more hostile to labor unions during the 1940s).

⁶⁷ RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 185 (2006) (offering such a claim).

⁶⁸ Molly S. McUsic and Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1348 (1997) (finding evidence that unions have often furthered the interest of their traditional (white male) constituents at the expense of women and minorities).

⁶⁹ See e.g., Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline, in Employee representation in THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING* 41-49 (1998, ed. Samuel Estreicher).

⁷⁰ See e.g., FREEMAN & ROGERS, *supra* note ___ at 185.

⁷¹ Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action* 63 U. CHI. L. REV. 133, 135 (1996).

consequent loss of labor solidarity plays a role in the ongoing decline in union density, as well as a ‘loss of legitimacy for unions as the enablers of group action.’”⁷² Although these factors increasingly contribute to the ongoing reduction in demand for labor unions, they are often conveniently overlooked by union advocates.

A crucial issue afflicting the EFCA is the proposal’s flight from democracy, which is seen in its provisions limiting employee voice in representation campaigns. In contrast to this observation, numerous labor union advocates assert that one of the chief benefits of labor unions is that they enable the voice of employees to be heard within the workplace.⁷³ This contention is amplified by the assertion that “[t]here is a major gap in America between what workers want by way of democratic say at their workplace and what they have.”⁷⁴ Although such sentiments fuel EFCA advocacy, aptly comprehended, it represents a capitulation to irony because the EFCA, as written, would allow union hierarchs to exercise their democratic rights by encouraging workers to join a union, but it would equally prevent dissenting workers from having a voice in the democratic process that the existing representation election system allows.⁷⁵ This is so because the EFCA disrespects the democratic process for currently unorganized workers. Although, the statute clearly purports to empower workers to exercise their ‘free choice,’ it, necessarily and by its own terms, disenfranchises a potentially large fraction of them.”⁷⁶ As such, the language and grammar of the EFCA signifies a fundamental misunderstanding of the central objective of the NLRA by ignoring “the key language in section 7 of the Act that states in addition to the ‘right of self-organization,’ workers ‘shall also have the right to refrain from any or all such activities’ if they choose not to join a union.”⁷⁷

The EFCA’s failure to vindicate employee rights is compounded by virtue of existing levels of union intimidation. Indeed, intimidation would be further incentivized by the EFCA because workers would no longer be able to take refuge in a secret ballot election

⁷² Hutchison, *What Workers Want*, *supra* note ___ at 823.

⁷³ See e.g., Adrienne E. Eaton & Paula B. Voss, *Unions and Contemporary Innovation in Work Organization, Compensation, and Employee Participation in UNIONS AND ECONOMIC COMPETITIVENESS* 173, 174 (Lawrence Mishel & Paula B. Voos eds., 1992).

⁷⁴ FREEMAN & ROGERS, *supra* note ___ at 184.

⁷⁵ EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT*, *supra* note ___ 44.

⁷⁶ *Id.*

⁷⁷ *Id.* See also, NLRA § 7. (5 U.S.C. § 147).

that would enable them to correct or invalidate signatures that labor unions obtain through coercion.⁷⁸ This controversial possibility, suggesting that union hierarchs possess an aristocracy of knowledge with respect to workers' best interests and that this knowledge ought to be imposed on workers without their informed consent, has provoked a sharp response by labor's natural allies:⁷⁹

Recently, former Democratic senator and presidential nominee George McGovern condemned [the]EFCA because of its failure to take into account the obvious: "There are many documented cases where workers have been pressured, harassed, tricked, and intimidated into signing cards that have led to mandatory payment of dues." And he pointedly asked why it is that a protection that Americans think desirable outside of the United States should be dispensed with here. "Some of the most respected Democratic members of Congress . . . have advised workers in developing countries such as Mexico to insist on the secret ballot when voting as to whether or not their workplace should have a union. We should have no less for employees in our country."⁸⁰

The failure to protect employees' liberty interest is further complicated because a successful card-check campaign does not lead to an election contest or even to collective bargaining negotiations. Rather, it promotes "interest" arbitration, whereby union recognition necessarily leads to a guaranteed first "contract" instead of a union election⁸¹ without providing workers with a correlative right to seek union decertification through the same process. This signifies that the EFCA is neither aimed at balancing the playing field, nor intended to vindicate workers' rights. In the context of this proposal, union democracy becomes highly theoretical and highly unlikely.

⁷⁸ EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT, *supra* note __ at 45 & 46.

⁷⁹ *Id.* at 46.

⁸⁰ *Id.* at 46.

⁸¹ *Id.* at 47.

Epstein exposes other core issues, including the fact that the proposal as presently written (1) permits the acceptance of invalid signatures since the EFCA does require unions to have the employee's signature witnessed by a notary public or anyone else, implying that incentives for fraud exists;⁸² (2) enables union collection of cards in a wholly unsupervised manner⁸³ affirming that there is no way a card-check system could replicate the reliability and freedom of expression provided by a secret ballot election;⁸⁴ (3) mandates mandatory arbitration without integrating this approach with the NLRA's existing obligation to bargain in good faith;⁸⁵ (4) skews the collective-bargaining process by discouraging good-faith bargaining;⁸⁶ and (5) authorizes compulsory arbitration without any standards.⁸⁷ Mandatory arbitration constitutes a standardless process that is clearly demonstrated by the EFCA opting for a broad mandate with no details.⁸⁸ Nothing in the statute settles questions over how arbitration panels are to be set up, what the scope of their powers will be or how their decrees on matters of fact and law can be reviewed.⁸⁹ Nor does the EFCA make any effort to indicate the set of relevant criteria for arbitral decrees.⁹⁰ The implementation of a mandatory arbitration mandate instantiates coercive proceeding but neglects to set out rules by which both parties will be bound.⁹¹

The adoption of the card-check scheme, coupled with a mandatory interest arbitration provision if the parties fail to reach a first contract is backstopped by the imposition of increased penalties on employers who violate section 8(a)(3) of the NLRA, which prohibits employers from discriminating against employees

⁸² *Id.* at 76.

⁸³ *Id.* at 67.

⁸⁴ *Id.* at 76.

⁸⁵ *Id.* at 83-84.

⁸⁶ *Id.* at 81-88.

⁸⁷ *Id.* at 88.

⁸⁸ *Id.* at 88.

⁸⁹ *Id.* at 88-89.

⁹⁰ *Id.* at 89.

⁹¹ *Id.* at 88. Further complication arise because the Federal Mediation Conciliation Service (FMCS) receives no guidance in the EFCA about the selection of arbitrators, the proposal offers no guidance on the scope of the arbitration including the topics to be covered, and how the panel will gain information to flesh out the first nonconsensual decree. Among the gaps in the EFCA include the absence of a provision governing successor liability. The imposition of the scheme of compulsory arbitration in labor disputes will increase costs and uncertainty in negotiations. *See generally id* at 88-110.

for union activities.⁹² As previously established, the empirical case supporting this provision is extremely weak, not least because the EFCA fails to “establish any tight relationship between the supposed wrong and the curative legislation.”⁹³ This failure is exacerbated because the proposal neglects to impose a similar penalty increase on unions for any ULPs they might commit.⁹⁴ This lacuna ignores *existing* levels of labor unions’ coercion accompanied by violence⁹⁵ and confirms Epstein’s intuition that strengthening enforcement against employers tilts the scale in the unions’ favor, without any effective mechanism for remedying abuses associated with union authorization cards or petitions.⁹⁶ Epstein lucidly and consistently shows that aggressive action, including constant threats, may assist labor unions in winning recognition and fueling union coffers without doing anything to improve the welfare of the firm’s workers.

D. EPSTEIN’S ANALYSIS OF THE EFCA’S SOCIAL CONSEQUENCES

Among the many strengths of Epstein’s book is his focus on the adverse effects of the EFCA. Still, as the next section explains, the deployment of background historical analysis emphasizing the origins, depths and consequences of progressive ideas and presuppositions may have furthered his argument.⁹⁷ Perceptively, Epstein shows that

⁹² *Id.* at 6.

⁹³ *Id.* at 18.

⁹⁴ *Id.* at 18.

⁹⁵ See e.g., GEORGE C. LEEF, *FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT*, 1-3(2006) (describing the plight of a UPS worker who declined to participate in a 1997 strike called by Teamsters Local 769 and who was subsequently attacked by labor union militants who after severely beating him, stabbed him in the chest with an ice pick several times). To be sure, this illustration occurred outside of an organizing context but the implicit message is unlikely to be lost on workers confronting union militants during an organizing drive. See also, Harry G. Hutchison, *Compulsory Unionism as a Fraternal Conceit?* 7 U.C. DAVIS, BUS. L. J. 125, 131-32 (2006) [hereinafter, Hutchison, *Compulsory Unionism*].

⁹⁶ EPSTEIN, *THE CASE AGAINST THE FREE CHOICE ACT*, *supra* note ____ at 21.

⁹⁷ The issues that Epstein does not discuss includes the fact that progressives were driven by a commitment to social Darwinism, and pursued power and influence at the expense of the “weak” and the “unfit.” This approach is consistent with the fact that progressives were both liberal and conservative, meaning that certain individuals such as white males were worthy of uplift and assistance, while others—women, minorities, immigrants, and defectives were unworthy of assistance. Thus understood, progressive ideas issued forth in numerous statutes that interfered in the market on behalf of “worthy” individuals and groups and further disadvantaged members of groups which were seen as “unworthy,” “unemployable,” or “undesirable.” See generally, Bernstein & Leonard, *supra* note ____ at 177-188. See also, *infra* Part II: B.

employment laws are perceived as the primary regulatory threat facing American firms today—even without the EFCA.⁹⁸ He shows also that “adoption of EFCA will only compound the problem with its twin threats of card check and compulsory arbitration.”⁹⁹ This is so because “legal reforms can never produce social gains by shrinking the size of the pie, which is what always happens when administrative costs go up and productive output goes down.”¹⁰⁰ This foundation supplies a defensible basis to ascertain “how [the] EFCA will affect four groups: unions, employees, employers, and all third parties.”¹⁰¹

First, Epstein explains that unions benefit from the EFCA because union dues fuel union activities, including their organizing efforts and any political action that protects or enhances their economic clout within the workplace. As explicated below, this point deserves amplification because evidence shows that labor unions, and unionism in general, are increasingly (perhaps primarily) focused on taking political action in pursuit of political, social and ideological objectives outside of the parameters of the workplace. Union hierarchs and their philosophical allies often capture ideological and psychological benefits at the expense of the interests of workers, and the general public.¹⁰² In other words the goal of remediating problems within the workplace may no longer be the primary driver of union activism.

Second, turning to the EFCA’s effect on workers, Epstein maintains that ambiguity surrounds this group’s position. With regards to what can workers gain or lose from engaging in union activity,¹⁰³ Epstein concedes that the prevailing/traditional viewpoint is that the NLRA allows unions to exercise some degree of monopoly power, which in turn allows them to raise wages, reduce hours and otherwise improve working conditions.¹⁰⁴ This traditional position is largely correct aside from the cases of workers who are laid off or who otherwise remain unemployed as a result of the presence of a labor union. Still, the traditional view of union power likely overstates union influence given that the

⁹⁸ EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT, *supra* note ___ at 111.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See e.g., Hutchison, *A Clearing in the Forest*, *supra* note __ at 1390-1394 (showing that self-interested benefits accrue union hierarchs and their philosophical allies and ignores workers thrown out of work when unions organize, and showing that organizing increases union dues revenues enabling leaders to achieve political benefits that are not necessarily in workers’ interests).

¹⁰³ EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note __112.

¹⁰⁴ *Id.*

current economy is much more competitive than it was several decades ago due to global trade and improved systems of transportation and communication.¹⁰⁵ Nevertheless monopoly power can result in a wage differential that favors unionized workers. Some estimates place the union wage and benefit advantage at somewhere between 8 percent and 20 percent.¹⁰⁶ But such estimated benefits, while confirming that economic rents are available, do not offer any measure of overall social welfare nor do they indicate how the benefits are distributed.¹⁰⁷ Complexity often surfaces when the individual interests of unionized workers diverge, one from another and this point is readily emphasized by adverting to the distributive benefits attending seniority within a unionized workforce.¹⁰⁸ The increased use of lower wage scales further complicates an analysis of worker benefits, as they disfavor new hires in organized plants that face economic strain.¹⁰⁹

Analysis shows that union monopoly power is a constant threat but not a uniform presence.¹¹⁰ What is clear, however, is that monopoly power can be increased through the legislative process¹¹¹ and the EFCA constitutes an exemplar of such efforts. If the EFCA is enacted, Epstein concludes that it will adversely affect some workers since firms will either contract work out or go out of business entirely if their productivity fails to rise in the face of higher wages.¹¹² Other firms will invest their capital in the nonunion portions of their business, which would again vitiate the economic position of unionized workers.¹¹³ Of course, some firms would remain in business with a unionized workforce and workers who retain their jobs may reap the economic benefit achievable through unionization, which is abetted by the adoption of the EFCA.¹¹⁴ Taken as a whole this picture is one of ambiguity since it remains possible that monopoly wage gains may offset overall productivity losses of the firm to some extent. The depiction of ambiguity

¹⁰⁵ *Id.* at 112-113.

¹⁰⁶ *Id.* at 113.

¹⁰⁷ *Id.* at 114.

¹⁰⁸ *Id.* at 114. It is likely that such age related difference in workers benefits leads to intergenerational conflicts. *Id.*

¹⁰⁹ Herman Rosenfeld, *The North American Auto Industry in Crisis*, THE MONTHLY REVIEW (June 2007) (at page 5 in online edition) available at <http://monthlyreview.org/090608rosenfeld.php> (In the context of the massive market losses of the Detroit Big Three, the union bargained for two-tier wages for new hires in the 2007 agreement, cutting wages for new hires in half.)

¹¹⁰ EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note ___ at 113.

¹¹¹ *Id.*

¹¹² *Id.* at 124.

¹¹³ *Id.*

¹¹⁴ *Id.*

is strengthened because some workers receive uneven financial benefits through unionization or lose their jobs.

Third, in contrast to the ambiguous picture with respect to workers, it is doubtful that the EFCA would provide any positive benefits to employers. Epstein bracingly suggests that a suspension of belief is required in order to seriously consider the proposition that unionization benefits employers wherein a nonunion firm would fret if its rival obtained a competitive advantage through unionization.¹¹⁵ He contests as incredible the assertion that unionization is beneficial to firms and accordingly the EFCA ought to be viewed as an opportunity to advance America's social welfare interests.¹¹⁶ This claim, once unpacked, operates as a form of self-deception and assumes that employers are ignorant of their own business interests when they oppose unions whose innovations, according to labor sympathizers, would enhance productivity and profits.¹¹⁷ This resilient allegation is stubbornly offered despite the fact that firm managers have every incentive to be right in their opposition to unionization while labor sympathizers in economics, law and labor relations have every incentive to be wrong.¹¹⁸ Incentives to be wrong arise when labor union advocates can obtain ideological, political and even economic benefits through their advocacy.¹¹⁹ The existence of such incentives explains why pronoun scholars "buy into an inaccurate parody of labor relation in unregulated firms, which claims that any union presence has to improve relationships in the workplace."¹²⁰ This defenseless abstraction enables labor union advocates to ignore evidence that the existing legal and social techniques available to nonunion firms are sufficient to deal with all issues of internal management thus vitiating the claim that there are any public goods or employment relation problems that labor unions actually solve for employers.¹²¹

Finally, Epstein offers analysis showing that the EFCA's third-party effects are decidedly detrimental to society. Offering an analysis divided into three parts (allocative

¹¹⁵ *Id.* at 125.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 126.

¹¹⁸ *Id.*

¹¹⁹ See e.g., Hutchison, *A Clearing in the Forest*, *supra* note ____ at 1389-1392 (showing that union hierarchs (insiders) and outsiders such as academics operating as ideological allies of labor unions gain benefits through unionization).

¹²⁰ EPSTEIN, *THE CASE AGAINST THE FREE CHOICE ACT*, *supra* note ____ at 135.

¹²¹ *Id.* at 140.

effects, distributional consequences, and disruption and dislocation),¹²² Epstein systematically explains the EFCA's adverse effects. In order to do so, he reasons that the introduction of the original NLRA in 1935 shrank the size of the pie available to employers and employees by imposing external restrictions that prevent the emergence of dynamic competitive markets.¹²³ Although, contemporary society is prepared to accept these losses as a necessary cost of the current social commitment toward unionization, a commitment to the EFCA does not logically ensue from acceptance of the status quo.¹²⁴

The EFCA is more intrusive than the NLRA in virtually all regards, thus intensifying the adverse effects of unionization on the employer/employee relationship.¹²⁵ In addition, such harmful effects cannot be confined to unionized firms that are currently subject to the direct supervision of the NLRB.¹²⁶ Since any firm that employs workers also operates in multiple roles and in a myriad of commercial settings with customers, suppliers, and lenders, these third-party interactions are sometimes subject to direct regulation under the NLRA.¹²⁷ “Whenever labor law prohibits a firm from subcontracting or from altering its current production model using current workers—it not only makes the operation of the regulated firm less efficient than it would otherwise be, but it also imposes losses on potential trading partners who necessarily have fewer options in the market.”¹²⁸ Such epiphenomena ripple throughout the economy, creating social losses for a number of reasons.¹²⁹ Consistent with this pattern, the EFCA is likely to induce social welfare losses in the form of increased unemployment. If the EFCA, in a transparent effort to boost labor regulation, succeeds in raising union density rates by even one percentage point, this should increase unemployment by 0.30 percent. This means that if

¹²² *Id.* at 141.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 142.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Among other things social losses rise because lost opportunities are not entirely offset by the less efficient relationships adopted in their place, because strategies of mitigation can only reduce, not eliminate, the losses. Even in the absence direct prohibitions, a strong labor regime will influence the welfare of both suppliers and customers through the price mechanism meaning that lower output by unionized firms implying that they will purchase fewer complementary goods and services from their suppliers. Social losses further accrete because unionized firms will ship fewer goods or render a smaller level of service to third persons. *See id.*

union density were to return to its 1995 level of 14.9 percent, the U. S. unemployment rate would rise by 0.83-0.99 percentage points.¹³⁰

Examining the distributional consequences of the EFCA, Epstein argues that, to the extent that observers are concerned about increased differentials in wealth in the United States, they should be wary of the passage of this proposal.¹³¹ Conceding that the sources of this differential are not easy to detect, Epstein maintains that much of it has to do with differential opportunities for education and their consequent effects on productivity in America's current information age.¹³² Thus understood, "[t]here is nothing that can be done through unionization to alter that distribution of power, for if the competitive wage falls for persons with little or no education, as it surely has in the past, the monopoly power of unionization starts from a lower base, which makes it unlikely that it could ever offset that decline, especially since the increased supply of nonunion workers poses at least some limitation on the power to raise these wages."¹³³ To be sure, some observers contend that the original NLRA strengthened the position of the middle class, but there is little reason to think that this claim is true.¹³⁴ Instead, increased incomes depend on the overall increase in productivity, which can be attributed to innovation that expands the size of the pie and not to union attempts to alter its division.¹³⁵ If the EFCA does pass, there is no reason to think that its distributional effects will work an improvement on the lot of the middle class, given the fact that labor unions place persistent downward pressure on overall productivity.¹³⁶ Additionally, since union members occupy multiple roles, such as pension fund beneficiaries and consumers, any gains that they may obtain in wages and benefits through the EFCA are likely to be offset by a reduction in share prices of pension fund assets and by rising prices for consumer items.¹³⁷

¹³⁰ *Id.* at 145.

¹³¹ *Id.* at 154.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 154-155.

¹³⁶ *Id.* at 155. Downward pressure on productivity arises for several reasons including the fact that employers in response to the threat of unionization may make socially wasteful decision solely for defensive reason. For instance the location and design of plants are two decisions that are often altered to deflect the threat of unionization. Firms may locate plants in anti-union environments or automate them to reduce dependency on workers or better yet move them overseas. *See id* at 150-51.

¹³⁷ *Id.* at 155.

Lastly, the EFCA will lead to increased disruption and dislocation because it would introduce a large measure of instability that could lead to bitter negotiations and disappointed expectation for the parties.¹³⁸ For instance, since it is possible that mandatory arbitration will continue beyond the initial two-year “first contract” period, it would likely produce one of two things:¹³⁹ if the proposed arbitration arrangement is extended forward in time,¹⁴⁰ it will lead to a contraction of business or bankruptcy, which is itself a source of tension;¹⁴¹ if, however, the arbitration scheme does not move forward beyond the “first contract” period, it is likely that employer resistance will be intensified.¹⁴² Either way labor unrest is likely to rise during the current general downturn in the economy.¹⁴³

In addition, as Epstein explains there is a constitutional dimension to the EFCA that suggests that the presumption of its constitutionality is unwarranted. In fact the statute raises serious considerations based on rights of speech and association particularly with respect to card-check and interest arbitration.¹⁴⁴ It is doubtful that Congress has seriously considered such issues.

Considered as a whole, Epstein’s placement of the EFCA within the pantheon of America labor law is both thought provoking and largely accurate. Moreover, it is likely that only commentators offering arguments denuded of intellectual integrity could contest Epstein’s claim that the EFCA, if enacted, would radically alter the balance of power between management and labor, lead to distributive costs and benefits among workers, negatively impact America’s productivity, and induce some employers to shift capital and other resources overseas. Epstein shows the unfairness of a system that would allow workers and employers to be victimized by union coercion tied to a card-check system that is capable of being manipulated. He demonstrates that the status quo, however imperfect, will outperform any system that adopts card-check rules for union recognition and compulsory arbitration for a two-year “first contract,” augmented by

¹³⁸ *Id*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 98-100 (explaining the process of extending interest arbitration beyond the initial contract period generated by card-check signatures).

¹⁴¹ *Id.* at 156.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 157.

tougher penalties for employer ULPs.¹⁴⁵ The EFCA would vitiate social welfare and lead to disruptions in employment, neither of which is in the public interest, while at the same time compromising human liberty. Such observations lead Epstein to conclude that “[l]egislation often promises grand improvements only to be entrenched before its failures become evident. The correct presumption in all cases is that further legislation, being costly, has to be shown to be good, or otherwise it should be treated as harm.”¹⁴⁶ He rightly argues that the EFCA does not come close to passing the test.¹⁴⁷

Still, Epstein’s analysis could be enhanced in at least two ways. The first is to situate the EFCA within the rich history and *weltanschauung* of the progressive movement, considering both the past and present consequences of progressive thought for marginalized Americans. A recapitulation of progressive assumptions is a necessary predicate for understanding and comprehensively critiquing the EFCA and its likely long-term impact on members of disadvantaged communities. Second, a richer understanding of the EFCA surfaces through a critical examination of unions’ pursuit of additional revenues (union dues) in order to fuel their pursuit of political power. In order to develop a more complete case against the EFCA, Part II fortifies Epstein’s analysis by unpacking progressive presuppositions and errors in logic and judgment as well as labor unions’ aggressive pursuit of union dues revenue.

PART II LIBERTY FAIRNESS AND SOCIAL WELFARE

A. THE PAST AS PROLOGUE TO A TRANSFORMATIONAL FUTURE

Properly situating the EFCA within the rich tapestry of progressive thought is not difficult. Among the best places to start is with the work of Bernstein,¹⁴⁸ Vedder & Gallaway,¹⁴⁹ Pestritto,¹⁵⁰ Moreno,¹⁵¹ and others.¹⁵² Indeed, Professor Epstein has made an

¹⁴⁵ *Id.* at 176.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See e.g., generally* BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note ___ at 1-117.

¹⁴⁹ RICHARD K. VEDDER & LOWELL E. GALLAWAY, OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA (1993).

¹⁵⁰ *See* RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM (2005). *See also*, AMERICAN PROGRESSIVISM: A READER (eds. Ronald J. Pestritto and William J. Atto, 2008).

¹⁵¹ *See* PAUL D. MORENO, BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY, 1-325 (2007).

enormous contribution to the literature himself¹⁵³ by showing how competitive processes were replaced by state-sponsored cartels¹⁵⁴ and how labor law regulation harms many Americans.¹⁵⁵ Essential to any examination of the EFCA is a brief assessment of the goals, objectives, and presuppositions undergirding progressive architecture, which surfaced during the Progressive Era. Equally essential is a brief review of the baleful distributional consequences of New Deal programs, which represented and continue to represent the instantiation of progressive thought.

Progressive reformers went to work between the 1890s and the 1920s, responding to the expanding industrialization that transformed the nation from an agrarian into an industrial economy and the increased immigration and dislocation represented by urbanization and the explosive growth of cities.¹⁵⁶ As elitists, the progressives believed that intellectuals should guide social and economic progress, a belief erected upon two subsidiary faiths: one in the disinterestedness and incorruptibility of the experts who would run the welfare state they envisioned, and one in the idea that expertise could not only serve the social good, but also identify it.¹⁵⁷

Academic economists and their reform allies played a leading role in the expansion of government intervention in the economy, but they were not necessarily one-dimensional.¹⁵⁸ Instead, they were simultaneously conservative and liberal.¹⁵⁹ Many were

¹⁵² See e.g., AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* (2007). See also, JONAH GOLDBERG, *LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING* (2007).

¹⁵³ See e.g., RICHARD EPSTEIN, *HOW PROGRESSIVE REWROTE THE CONSTITUTION* (2006) and Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation* 92 *YALE L. J.* 1357 (1983) (concluding that New Deal legislation is in large measure a mistake and that if possible, it should be scrapped in favor of the adoption of a sensible common law regime).

¹⁵⁴ See *id.* at 52-53 (“Progressives attacked two doctrines that most limited the scope of government power—federalism, on one hand, and the protection of individual liberty and private property, on the other. Although they ultimately prevailed on both fronts, they and their ideas come out second best as an intellectual matter. However grandly their rhetoric spoke about the need for sensible government intervention in response to changed condition, the bottom line, sadly, was always the same: Replace competitive processes, by hook or crook, with state-run cartels.”).

¹⁵⁵ *Id.* at 89-98 (showing how labor regulations harmed women by viewing them as inferior to men, posited a false relationship between increased unionization and increased productivity, which legitimates exclusion and uses terms like stabilization of wages, which then offers a covert enabling those disadvantaged by labor law to bear the full brunt of exogenous shocks).

¹⁵⁶ Bernstein and Leonard, *supra* note __ at 179.

¹⁵⁷ *Id.* at 179-80.

¹⁵⁸ *Id.* at 179.

¹⁵⁹ *Id.*

enthusiastic biologizers who believed that race determined worth.¹⁶⁰ Viewing the working poor and other economically marginal groups with great ambivalence,¹⁶¹ their liberal instincts led them to call for social justice to uplift the poor and disenfranchised, but their conservative instincts led to them pursue subordinating forms of social control.¹⁶² They reconciled this tension by supporting assistance for some while simultaneously seeking to suppress poor people who were seen as threats to the nation's public health, wealth, and social advancement.¹⁶³

At their very inception, progressive ideas were pregnant with future adverse distributional effects for members of certain communities. Relying on scientific advancement for legitimacy, some intellectuals concluded that Darwinian progress was not only possible but inevitable. Progressive law reformers stressed a commitment to societal efficiency and sought to accelerate the nation's preordained advancement; the initiatives they developed were tied to the belief that public opinion should not stand in the way of the transformative sociology offered by social planners.¹⁶⁴ Relying on an appeal to hereditary fitness many progressives sought to rid the labor force of "unfit" workers: immigrants, African Americans, women and other "defectives."¹⁶⁵ This resulted in disfranchisement, segregation and discrimination that stalled black economic progress in the years from 1900-1920¹⁶⁶ and threatened the progress of women.¹⁶⁷ For better or for worse, the Progressive Era marked the nadir of American race relations¹⁶⁸ as well as the apex of claims regarding a scientific basis for female inferiority.

Progressives advanced their ideas and initiatives by coupling blithe self-confidence in their own capacity to solve problems with a dangerous faith in the benevolence of the

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 180.

¹⁶² *Id.* at 179.

¹⁶³ *Id.* at 179-180.

¹⁶⁴ GOLDBERG, *supra* note ___ at 95 (discussing Woodrow Wilson's intellectual development as a prototypical illustration of how German ideas influenced American Progressivism).

¹⁶⁵ *Id.* at 180.

¹⁶⁶ MORENO, *supra* note ___ at 82.

¹⁶⁷ See e.g., *Muller v. Oregon*, 412 U.S., 208 (1908) (upholding regulations limiting hours of work grounded in the progressive presumption that women were inferior beings).

¹⁶⁸ MORENO, *supra* note ___ at 82.

state and its agents.¹⁶⁹ This presupposition nourished a commitment to state hegemony. Believing that the individual ought to serve the state, and presuming that the remedy for the “chaotic individualism” of America “was ‘regeneration’ led by a hero-saint who could overthrow the tired doctrines of liberal democracy in favor of a restored and heroic nation,”¹⁷⁰ intellectuals pursued legal, sociological and scientific theories reifying their presuppositions about the proper treatment of a broad category of individuals labeled as “undesirable” or “unemployable.”¹⁷¹ Labor unions were not immune to such ideas either. Consequentially, “as unionization took hold among skilled workers, inequality among American workers increased.”¹⁷² Between 1900 and 1920, “the earnings gap between skilled and unskilled workers was greater in America than anywhere else in the world.”¹⁷³ As unions grew in power and influence, many large progressive employers predictably reached out to the largest union organization of the time, the American Federation of Labor, in a cartel-like attempt to stabilize industrial relations.¹⁷⁴

Inspired by this emerging *zeitgeist* nourished by unionists and others, and following Hobbes’ lead, members of the political class regarded unconstrained power as a positive thing.¹⁷⁵ This pernicious virus spread exponentially throughout the Progressive Era. Progressive elites responded to the force of Darwinian thought, and the deduction that the state was a natural, organic expression of the will of the people.¹⁷⁶ Hence, they viewed the ever-expanding power of the state as entirely natural.¹⁷⁷ In harmony with this view, the vast majority of progressive intellectuals believed that an increase in state power was akin to an inevitable evolutionary process.¹⁷⁸ Embodying Nietzsche’s will to power,¹⁷⁹ the progressives’ predilection for expanding the scope of state action¹⁸⁰

¹⁶⁹ See e.g., Andrew Scull, *Progressive Dreams, Progressive Nightmares: Social Control in 20th Century America*, 35 STAN. L. REV. 575, 576-577 (1981) (discussing the response of progressive to the plight of the mentally ill and handicapped).

¹⁷⁰ GOLDBERG, *supra* note ___ at 99.

¹⁷¹ Bernstein and Leonard, *supra* note ___ at 179-190.

¹⁷² MORENO, *supra* note ___ at 83.

¹⁷³ MORENO, *supra* note ___ at 83.

¹⁷⁴ *Id.* at 93.

¹⁷⁵ See e.g., GOLDBERG, *supra* note ___ at 84-86 (discussing Woodrow Wilson’s comprehensive conception of power and the state).

¹⁷⁶ *Id.* at 86.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ NIETZSCHE, *BEYOND GOOD AND EVIL*, 259 (trans. Walter Kaufmann, 1989) (Evidently higher cultures arise because anything which is a living and not a dying body is propelled by an incarnate will to power,

exacerbated their capacity to exclude and mistreat individuals and groups who were seen as threats to the nation's advancement.¹⁸¹

Consistent with this vision, the expansionist state could not be constrained by quaint documents such as the Constitution. Perhaps the best representative of this capricious viewpoint was Woodrow Wilson, who did not believe that state power ought to be thwarted by an antiquated eighteenth-century system of checks and balances.¹⁸² Instead of being restricted by old documents, society was urged to embrace a living Darwinian constitution that would enable the nation to obey the laws of Life.¹⁸³ Guided by such revolutionary ideas, “Woodrow Wilson’s first administration in 1913 set off some of the most rapid and profound changes in the history of American labor and race relations.”¹⁸⁴ The Wilson administration was not alone in its effort to change the labor relations paradigm in America. After assuming the reins of government during the Progressive Era, whether at the state¹⁸⁵ or federal level, the progressives sought “to engineer the diminution of both justice and democracy for American blacks—who were enjoying little of either to begin with.”¹⁸⁶ While many progressives actively opposed this maneuver,¹⁸⁷ it would be a mistake to forget that the resegregation of the U.S. Civil Service was brought about under the Progressive regime of Woodrow Wilson¹⁸⁸ or that leading progressives (who were part of the vanguard of reformist thought) were enthusiasts for the application of eugenic remedies in order to protect the “higher elements” from being “swamped” by the black and brown hordes below.”¹⁸⁹

and “it will strive to grow, spread, seize, become predominant...” (quoted in JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, & POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD*, 307 n. 5 (2010)).

¹⁸⁰ Scull, *supra* note ___ at 576-577.

¹⁸¹ Hutchison, *Waging War on the “Unfit”?*, *supra* note ___ at 4.

¹⁸² GOLDBERG, *supra* note ___ at 88.

¹⁸³ *Id.*

¹⁸⁴ Moreno, *supra* note ___ at 117.

¹⁸⁵ See e.g., EPSTEIN, *HOW PROGRESSIVE REWROTE THE CONSTITUTION*, *supra* note ___ at 89-100 (discussing state labor regulations initiated by progressives).

¹⁸⁶ *Id.* at 102-103 (citing Charles Paul Freund).

¹⁸⁷ *Id.* at 103.

¹⁸⁸ *Id.* at 102.

¹⁸⁹ GOLDBERG, *supra* note ___ at 247.

Arising out of such a racially-charged environment and striving to protect the living standards of racially superior groups,¹⁹⁰ progressive assumptions issued forth in law reform initiatives backed by creative judicial interpretations.¹⁹¹ Often advanced with vulpine efficiency, this contagious move deployed contempt as a weapon and reached its inflection point in a pioneering legal regime that was, in important respects, designed to exclude or suppress “immigrants, women, and African Americans.”¹⁹² This capacious form of exclusionary animus set the stage for the construction of government-sponsored labor market cartels. The implementation and enforcement of labor law became an exceptionally effective means of displacing biologically suspect workers.¹⁹³ At times such efforts, frequently led by organized labor, were grounded in the ideology of white supremacy while at other times, the economic benefits of exclusion propelled labor union efforts.¹⁹⁴ Victims of this progressive panegyric were separated by gender,¹⁹⁵ race¹⁹⁶ and hereditary incapacity¹⁹⁷ from the rest of the population consistent with the deduction that “an impressive array of human groups, male Anglo-Saxon heads of household excepted, [were deemed] unworthy of work or ‘unemployable.’”¹⁹⁸ This movement took many

¹⁹⁰ For example, American Federation of Labor president, Samuel Gompers, proclaimed “that ‘Caucasians are not going to let their standard of living be destroyed by Negroes, Chinamen, Japs or any other.’”). MORENO, *supra* note ___ at 1. As the depression worsened, “undesirable jobs traditionally held by blacks became attractive to whites.” Ordinances were enacted prohibiting black labor from engaging in certain occupations and vigilante groups attempted to force employers to discharge black workers. *Id.* at 163.

¹⁹¹ Hutchison, *Waging War on the “Unfit”?*, *supra* note ___ at 4.

¹⁹² EPSTEIN, HOW PROGRESSIVE REWROTE THE CONSTITUTION, *supra* note ___ at 102.

¹⁹³ For example, FDR created the National Recovery Administration (NRA), an institutional outgrowth of National Industrial Recovery Act (NIRA). The NRA granted new collective bargaining powers to unions, including the power to lock blacks out of the labor force. Trade unions took full advantage of the monopoly power granted by the NIRA and displaced disfavored biologically suspect workers. Hutchison, *Employee Free Choice*, *supra* note ___ at 396-400.

¹⁹⁴ *Id.* at 400.

¹⁹⁵ See e.g., *Muller v. Oregon* 208 U.S. 412 (1908) (reifying the constitutionality of a statute limiting only women laundry workers to a maximum of 10 hours a day on ground innate female inferiority). See also, EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note ___ at 90-91 (showing how none other than Louis Brandeis, writing strongly within the Progressive tradition provided detailed sociological studies used to justify a differential in hours for females in comparison with males).

¹⁹⁶ See e.g., GOLDBERG, *supra* note ___ at 247 (showing that the population explosion, and in particular the explosion of the “wrong” populations, were of a piece with Darwinian thought from the outset and accordingly, intellectuals feared that modern technology had removed the natural constraints on population growth among the unfit).

¹⁹⁷ See e.g., *Buck v. Bell* 274 U.S. 200 (1927) (concluding that societal efficiency and progress, which was sufficient to sustain the removal of Carrie Buck’s reproductive capacity because it was claimed she inherited defective genes). See also, PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND *BUCK V. BELL* (2008) (describing the progressive movement’s pursuit of so-called defectives).

¹⁹⁸ Bernstein and Leonard, *supra* note ___ at 180.

forms¹⁹⁹ and responded to the usual stimuli supplied by labor unions, intellectuals and politicians. This campaign was, in many respects, very comprehensive.

Provoked by the economic dislocation caused by the Great Depression and convinced by influential appeals led by labor organizations,²⁰⁰ progressive leaders pressed for action. In the distant past, it was clear that the authority of Congress to impose cartel-like arrangements was limited by the reach of its power under the Commerce Clause.²⁰¹ As Congress expanded its power within a number of arenas in response to economic difficulties, courts increasingly caved to legislative pressure to act.²⁰² Legislators and courts embracing a constantly evolving conception of the Constitution, moved away from a consensus suggesting that federalism required a limited interpretation of the Commerce Clause; this led to the passage of a large number of labor statutes. During the administration of Herbert Hoover and Franklin Roosevelt, the commerce power (representing the federalization of the police power) was frequently invoked, often with the support of powerful labor organizations,²⁰³ in order to transform industrial relations. Specifically, political and legislative action embraced the power of labor and business cartels that took the form of minimum wages in codes of fair competition and the protection of collective bargaining for private sector employees.²⁰⁴

These developments were constituent parts of the National Recovery Administration (NRA), which was an institutional outgrowth of the NIRA. The NRA granted new collective bargaining powers to unions, including the power to lock blacks

¹⁹⁹ For example, in 1931 Congress passed the Davis-Bacon Act, requiring that federal government construction contractors pay the prevailing wage, which marked the realization of construction unions' goal of using their political power to dominate the public construction labor market. As David Bernstein shows, this law was sponsored by racist legislators who sought to prevent African American workers from competing with white labor union members. BERNSTEIN, *ONLY ONE PLACE REDRESS*, *supra* note ____ at 6. Davis-Bacon was followed by the 1932 enactment of the Norris-LaGuardia Act, which "placed sharp limitations on the traditional ability of employers to obtain injunctions during labor disputes." EPSTEIN, *THE CASE AGAINST THE FREE CHOICE ACT*, *supra* note ____ at 2. *See also*, 47 Stat. 70 (1932), as amended, 29 U.S.C. § 201.

²⁰⁰ MORENO, *supra* note ____ at 164.

²⁰¹ EPSTEIN, *HOW PROGRESSIVE REWROTE THE CONSTITUTION*, *supra* note ____ at 53.

²⁰² Arguments supplied by progressives for expanding the scope of federal power can be illustrated. Within the realm of child labor, for example, advocates offered the thin claim that otherwise there would be race to the bottom. *Id.* at 61. Alternatively, Congress attempted to regulate various industries under the guise of ensuring fair competition, which can be seen in connection with the National Industrial Recovery Act. *See id.* at 64-68.

²⁰³ Hutchison, *Waging War on the "Unfit"?* *supra* note ____ at 32.

²⁰⁴ EPSTEIN, *HOW PROGRESSIVE REWROTE THE CONSTITUTION*, *supra* note ____ at 64-68 (discussing the creation of the NIRA).

out of the labor force.²⁰⁵ Eagerly seizing this advantage and operating consistently with the fact that unions are in fact job trusts,²⁰⁶ organized labor embraced the monopoly power granted by the NIRA and displaced disfavored workers.²⁰⁷ The empirical evidence plainly demonstrates that the NIRA's minimum wage provisions destroyed the jobs of half a million blacks in a short period of time,²⁰⁸ which supports the observation that this statute served to redistribute employment and resources from blacks—the most destitute of Americans suffering from the Depression—to the white masses.²⁰⁹ Enhancing this remarkably repugnant record, Congress passed the NLRA, which continued some of the NIRA's policies²¹⁰ and the Fair Labor Standards Act (FLSA), which caused between 30,000 and 50,000 workers, mostly southern blacks, to lose their jobs within two weeks.²¹¹ As a result of the passage of these two laws, hundreds of thousand of African Americans became unemployed.²¹²

As originally drafted the NLRA contained a clause prohibiting organized labor from discriminating against African Americans or excluding them from unions. However, the AFL, consistent with the notion that labor unions are “white jobs trusts,”²¹³ led the successful effort to eliminate the anti-discrimination clause.²¹⁴ Since most New Dealers accepted discrimination against blacks as an inevitable cost of economic recovery, the Roosevelt administration was unruffled by this development.²¹⁵

New Deal legislation that raised the price of labor also increased unemployment and human suffering,²¹⁶ and substantially widened the unemployment gap between blacks and whites.²¹⁷ Today, this unemployment gap, causally related to the statutory creation of

²⁰⁵ GOLDBERG, *LIBERAL FASCISM*, *supra* note ___ at 155-156.

²⁰⁶ MORENO, *supra* note __ at 4.

²⁰⁷ Hutchison, *Employee Free Choice*, *supra* note ___ at 398.

²⁰⁸ *Id.*

²⁰⁹ David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 120 (1993) [hereinafter, Bernstein, *Roots of the 'Underclass'*].

²¹⁰ *See e.g.*, BERNSTEIN, *ONLY ONE PLACE OF REDRESS*, *supra* note __ at 94-99.

²¹¹ Hutchison, *Employee Free Choice*, *supra* note ___ at 398.

²¹² BERNSTEIN, *ONLY ONE PLACE OF REDRESS*, *supra* note __ at 94.

²¹³ MORENO, *supra* note __ at 4.

²¹⁴ BERNSTEIN, *ONLY ONE PLACE OF REDRESS*, *supra* note __ at 94-95.

²¹⁵ *Id.* at 94.

²¹⁶ Hutchison, *What Workers Want* *supra* note __ at 825.

²¹⁷ RICHARD K. VEDDER & LOWELL E. GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA* 272-79 (1993) (showing that racial differences in terms of unemployment rates were essentially nonexistent between 1890-1930 but during the 1930s the federal government's

labor cartels, serves as a stark reminder of the power of government to eviscerate the economic liberty interests of many workers. It was only natural that progressive programs and policies were justified to the wider world by focusing on the beneficiaries of such programs without fairly considering the adverse effects that such policies had on those harmed.²¹⁸ While the economic isolation resulting from progressive policy preferences continues to plague African Americans and others today,²¹⁹ and while few contemporary commentators justify the nasty racism that infected labor law reform initiatives throughout much of American history, the distributional and moral consequences of this subtle and not so subtle war on the “unemployables” form an indispensable backdrop for accurately appreciating the likely adverse consequences associated with the passage of the EFCA. Whether the result of an intentional or an inadvertent policy, remnants of this war on members of marginalized communities remain with us today. Given the EFCA’s inescapable connection with this history, it is likely that this proposal constitutes more of the same.

B. PURSUING REVENUES IN ORDER TO TRANSFORM THE NATION

“Contrary to the classical theory of the state as the provider of public goods—goods that is to say, which in virtue of their indivisibility and non-excludability must be provided to all or none—modern states are above all suppliers of private goods.”²²⁰ This development has shrunk the independence and vitality of institutions, which might otherwise serve as the life-blood of civil society.²²¹ As a consequence the spheres of free

initiatives in the legislative and regulatory environment that were aimed at raising the wages for workers actually widened the unemployment gap between black and white workers and contributed to increased income inequality). The following table captures the widening gap. *See id.* at 272.

Racial Differences in Unemployment Rates

Year	White	Nonwhite
1890-1930 (average)	5.82 %	5.90%
1940	9.50%	10.89%
1950	4.9%	9.0%
1975	7.8%	13.8%
1990	4.7%	10.1%

²¹⁸ EPSTEIN, HOW PROGRESSIVE REWROTE THE CONSTITUTION, *supra* note __ at 72.

²¹⁹ Hutchison, *Employee Free Choice*, *supra* note __ at 371.

²²⁰ GRAY, *supra* note __ at 11.

²²¹ *Id.* at 12.

individual activity and of contractual liberty have waned, while the scope of hierarchical and bureaucratic organizations has waxed.²²² The consequence of the erosion of civil society by an expansionist state has everywhere been an outbreak of a political war of redistribution.²²³ John Gray aptly summarizes this development:

From being an umpire [that] enforces the rules of the game of civil association, the state has become the most potent weapon in an incessant political conflict for resources. Its power is sought, in part because of the vast assets it already owns or controls, but also because no private or corporate asset is safe from invasion or confiscation by the state. From being a device whereby the peaceful coexistence of civil association is assured, the state becomes itself an instrument of predation, the arena within which a legal war of all against all is fought out. The rules of the game of civil association—the laws specifying property rights, contractual liberties and acceptable modes of voluntary association—are now themselves objects of capture.²²⁴

In light of the rich possibilities associated with capture, corporate interests and pressure groups are continuously active in lobbying, colonizing and co-opting regulatory authorities in order to mold regulatory and legal rules to suit their own interests.²²⁵

Given these developments, it would be a mistake to believe that labor unions, one of America's leading lobbying and pressure groups with more than \$17 billion in annual revenues,²²⁶ were simply supporting the EFCA on the basis of the broad public interest. This conclusion is reinforced by noting that unions spend only a fraction—perhaps less than 20 percent—of their dues revenues “on collective bargaining and related

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See LINDA CHAVEZ & DANIEL GRAY, BETRAYAL: HOW UNION BOSSES SHAKE DOWN THEIR MEMBERS AND CORRUPT AMERICAN POLITICS, 12 (2004).

activities.”²²⁷ Correspondingly, labor unions occupy *seven* of the top ten spots on a recent list of America’s leading contributors to political parties.²²⁸

Labor union organizing efforts can have at least two objectives: (A) the broad political, economic and social transformation of society, which provides private benefits to union hierarchs; and (B) the pecuniary gains for workers on the other.²²⁹ Conflating the social good and the public interest on the one hand, with the self-serving preferences of union leaders, on the other, labor unions pursue transformation. Hence they have an incentive to blur the line between the political and social benefits and the economic gains accruing to unionized workers.²³⁰ This gives rise to the possibility that EFCA advocacy is not necessarily driven by an impartial desire or intent to provide disinterested benefits to workers in terms of improved wages and benefits. Instead of acting as trustees of the livelihood of rank and file members, and rather than concentrating their political advocacy on efforts that protect or expand workers’ economic clout within the workplace, labor unions, facing only nominal financial disclosure requirements,²³¹ are often propelled by the objective of acquiring transformational political power. The successful purchase of transformational power supplies ideological benefits to union hierarchs and to their political and philosophic allies. This syllogism manifests itself in evidence that organized labor has lent its political and financial support to highly contested issues such as marijuana decriminalization and efforts to freeze nuclear weapons and expand abortion rights,²³² activities which are not central to the improvement of wages and working conditions for the rank and file.

When union hierarchs advance union funds to finance controversial propositions, this underscores a persistent intra-union conflict that is rooted in the political and social

²²⁷ *Id.* See also, ROBERT P. HUNTER, PAUL S. KERSEY & SHAWN P. MILLER, *THE MICHIGAN UNION ACCOUNTABILITY ACT: A STEP TOWARD ACCOUNTABILITY AND DEMOCRACY IN LABOR ORGANIZATION* 4-15 (2001), available at The Mackinac Center for Public Policy, 140 West Main Street P. O. Box 568 Midland, Michigan 48640. (The United States Supreme Court apparently approved a detailed examination of union financial records that found no basis to disagree with the following: (A) in *Communication Workers of Am. v. Beck*, indicated that 79% of union dues were not chargeable to collective bargaining and related activities and (B) in *Lehnert v. Ferris*, the union spent 90% of its dues revenue on nonrepresentational activities.).

²²⁸ Jill Lawrence, *USATODAY*, July 27, 2005 at p. 4A.

²²⁹ Hutchison, *A Clearing in the Forest*, *supra* note ____ at 1392.

²³⁰ *Id.* at 1395.

²³¹ See e.g. HUNTER, KERSEY & MILLER, *supra* note ____ at 3.

²³² See e.g., Chavez & Gray, *supra* note ____ at 18.

ambitions of union leaders in opposition to the objectives of workers,²³³ who are intent on pursuing self-interested economic benefits. Tension surfaces when labor hierarchs conceive of union members and members' dues as powerful instruments for achieving their own aims. Given this conflict, given the fact labor unions only spend a fraction of revenues on collective bargaining related activities, and given the appeal of individualism and other values that hinder union solidarity, rational workers, after engaging in a cost-benefit calculation, will often resist union-organizing efforts. Although many workers and virtually all employers have incentives to resist unionization, hierarchs (as public choice analysis shows), guided by their own rational self-interests have the opposite incentive. This claim is bolstered by evidence of "the autocracy, entrenchment and corruption of some union leaders."²³⁴ Similarly the evidence shows that "union elections provide members with little real control over leaders,"²³⁵ suggesting that unions are often "inherently undemocratic."²³⁶

Against this backdrop, as I have shown elsewhere,²³⁷ unions have embarked on an aggressive strategy of tying their politics to union organizing. A commitment to the intertwining of organizing efforts and political power²³⁸ provides a powerful explanation for union support of the EFCA, which if passed, will provide additional opportunities to enrich union coffers. Gary Becker shows that "[p]olitical influence is not simply fixed by the political process, but can be expanded by expenditures of time and money on campaign contributions, political advertising, and in other ways that exert political pressure."²³⁹ "Groups, like individual human beings, are not animated simply by pecuniary gain. They are also animated by ideological and social objectives that provide both self-interested and nonexcludable benefits."²⁴⁰ Consistent with this description, union leaders insist that "the only way to start winning [political] elections [is] to

²³³ Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1317.

²³⁴ Stewart J. Schwab, *Union Raids, Union Democracy and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 368 (footnotes omitted).

²³⁵ *Id.* at 369.

²³⁶ *Id.* at 370.

²³⁷ See generally, Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1309-1401.

²³⁸ *Id.* at 1317-1318.

²³⁹ Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. OF ECON. 371, 372 (1983).

²⁴⁰ Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1318.

organize.”²⁴¹ Since successful organizing campaigns provide labor leaders with additional dues revenue to fund their own private objectives, it is likely that leaders and their political allies have self-interested reasons for proposing and supporting the EFCA.

While labor union advocates see unions as communal institutions that must thrive in order to create a society imbued with the values of social and economic justice and industrial and social peace,²⁴² crumbling worker solidarity impairs union capacity to fashion a durable community.²⁴³ As a consequence, union density rates have fallen sharply from their peak during the 1940s and 1950s, a period when organized labor enjoyed substantial political power. Reacting to this development, union activists and their ideological allies have become despondent.²⁴⁴ They rightly see the present state of the labor movement as the crystallizing apogee of their discontent.²⁴⁵ As a result, union hierarchs and their ideological allies, as John Gray explains, have additional reasons to redouble their efforts to achieve their goals through politics. If workers are unwilling to join a labor organization, if they are unwilling to voluntarily fund labor union hierarchs’ political preferences and if they refuse to freely enlist in the war for social justice, the EFCA offers the prospect of worker coercion coupled with mandatory arbitration resulting in a “first contract.” In the process, contractual liberties shrink. Whether or not card-check signatures, which justify recognition, are obtained through fabrication or intimidation, this process yields additional revenues while subordinating the individual worker’s interest. This deduction is consistent with the observation that Nietzsche was mostly right: while the will to power has always been present, American democracy, which is increasingly plagued by pressure groups, operates within a political culture—a framework of meaning—that sanctions a will to domination, if not abuse.²⁴⁶

Since politics abets dominance, the EFCA, constitutes an ideal vehicle to advance the political goals and objectives of union hierarchs. This predatory process further undermines the union democracy aspirations of workers in two ways. First, as we have seen, the EFCA, through its card-check scheme gives priority to certifying a labor

²⁴¹ Jill Lawrence, USATODAY, July 27, 2005 at p. 4A.

²⁴² Hutchison, *Compulsory Unionism*, *supra* note ___ at 164.

²⁴³ See e.g., Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1319-1322.

²⁴⁴ Hutchison, *Compulsory Unionism*, *supra* note ___ at 166.

²⁴⁵ *Id.*

²⁴⁶ HUNTER, *supra* note ___ at 109.

organization as the collective bargaining representation without ordering a secret ballot election and without correspondingly allowing workers to decertify an existing labor organization. Second, while the original NLRA was designed to avoid compelling the parties to come to an agreement or permitting government supervision of its terms,²⁴⁷ the EFCA's mandatory arbitration provision enables arbitrators to impose a "contract" without the agreement of the parties.²⁴⁸ In addition, since no ratification procedure of the alleged contract is specified within the proposal, no ratification by rank and file members of the union is required.²⁴⁹

The EFCA's capability to undermine union democracy can be further emphasized by recalling that unions expend a large fraction of their revenues for non-collective bargaining purposes, reflecting the fact that expenditures for political and related purposes continue to rise on a per member basis while membership declines.²⁵⁰ This pattern implies that unions persistently pursue financial revenues in order to vigorously participate in America's political contest for economic, social, and ideological resources rather than to concentrate on the narrow economic interests of their members. Taken together, this implies that at most, collective bargaining for the benefit of workers is a secondary objective of union organizing campaigns, which belies public interest claims made on behalf of the EFCA.

C. FASHIONING A MORE COMPREHENSIVE CRITIQUE OF THE EFCA

Among the many strengths of Richard Epstein's critique of the EFCA is the persistent clarity of his analysis. He briefly and correctly places the EFCA within America's labor law pantheon as part of an evolutionary move aimed at displacing judge-made law, a process of law reform that commenced almost a century ago.²⁵¹ On a parallel

²⁴⁷ See S. Rep. No. 573, 74th Cong. 1st Sess. (1935) (quoted in EPSTEIN, *THE CASE AGAINST THE FREE CHOICE ACT*, *supra* note ___ at 4).

²⁴⁸ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. 2(h) (3) (2009).

²⁴⁹ *Id.*

²⁵⁰ Rep. Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 350 (1998).

²⁵¹ EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT*, *supra* note ___ at 1-2. (During the Progressive Era, the federal government began to grant special privileges to labor unions. This move commenced with a statute insulating unions from the application of antitrust laws and culminated in the passage of the laws conferring special privileges on labor unions for purposes of collective bargaining and

track, progressives sought to increase the level of government intervention through either a broad understanding of the police power or an expansive interpretation of the commerce power as part of an intense ideological effort that led to the passage of numerous federal and state statutes regulating labor. The NLRA was the centerpiece of this transformational process.

While the NLRA, as originally enacted, expressed a strong preference for labor organizations, most contemporary workers have rejected this policy preference, conducing to a sharp decline in private sector unionization. Provoked by this decline, labor advocates have offered a raft of proposals designed to restore unions to prominence.²⁵² The EFCA is simply one of many such efforts, which are justified on the grounds that “private sector labor law ... has shrunk in its reach and its significance and is clearly ailing”²⁵³ thus impairing “workers efforts to advance their own shared interest through self-organization[,] ... pressure, negotiation, and agreement with employers ...”²⁵⁴ This observation fuels the contention that there is a gap between the desire for and the supply of collective representation in the workplace,²⁵⁵ and that this lacuna is caused by employer abuse. Explaining why this thesis is unsustainable, Epstein’s inspection of the EFCA offers a corrective showing that the employer abuse allegation is grounded in presumption that cannot be sustained. As Epstein deftly explains, employee and employer resistance to unionization can be both rational and defensible.²⁵⁶ And he is not alone.²⁵⁷ Hence, it appears that reliance on the employer abuse thesis to explain declining unionization represents the triumph of ideology over empirical evidence. Continued

in limiting employers’ right to obtain injunctions during labor disputes during the mid-1920s and early 1930s.).

²⁵² See e.g., Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approaches to Union Growth*, 50 NEW YORK L. SCH. L. REV. 337, 337-353 (proposals include the following: new and better organizing efforts; the deployment of corporate campaigns; bargaining to organize whereby a union seeks to expand recognition within a corporation once some of its employees are organized; the deployment of union lobbying advantages whereby firms seeking to expand in an area gain the trust of unions by agreeing not to oppose unions in exchange for the coercive transfer of public resources benefiting the firm; the use of public procurement and contracting power to force employers to cave to union organizing attempts; and through the advocacy and enactment of state and local laws that change the environment to assist labor union organizing efforts).

²⁵³ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 1528.

²⁵⁶ EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT, *supra* note ___ at 125.

²⁵⁷ See e.g. Hylton, *supra* note __ at 695-97 (repudiating the current viability of the employer hostility thesis and showing that employers were much more hostile to labor unions during the 1940s).

reliance on this thesis appears to be a form of self-deception that sustains union suzerainty and worker subordination.

On the other hand, resistance can enhance social welfare. Turning to these considerations, Epstein reasons that the decisive criticism of progressive initiatives does not depend upon any exaggerated sense of individualism; instead, its very decisiveness depends upon an overall programmatic critique that considers how contested policy initiatives affect the full range of relevant parties.²⁵⁸ This means that the only programs that should survive are those that produce some net social improvement.²⁵⁹ On this score, the EFCA is clearly deficient. Taken together, Epstein's crisp analysis destabilizes the legitimacy of attempts to strengthen unionism through legislation.

Equally clear is Epstein's argument that it is difficult to offer a comprehensive critique of the EFCA without undertaking a close examination of some of the defects of America's current labor law system and the fact that the EFCA only exaggerates these flaws.²⁶⁰ Taking up this challenge, this article shows that the EFCA's own flaws stem from its entrenched hierarchical assumptions, which are tied to the inevitability of progress demanding that certain workers be excluded or otherwise subordinated in order for the nation to advance. Prescinding from the pursuit of equal rights for all workers—males, females, and members of various ethnic groups—labor unions were established during the Progressive Era in order to gain benefits at the expense of others, particularly members of biologically-suspect classes.²⁶¹ When empowered by the state through the passage of legislation creating labor cartels, this policy preference produced a net social loss, while constraining human liberty. At times, labor union policy was grounded in notions of biological superiority; at other times, it was premised on the economic advantages of exclusion. In either case, labor union pursuit of monopoly power in combination with the racial animosity unleashed by the political and intellectual class during the Progressive Era provided a sturdy foundation for New Deal labor law reform. Reform produced rather toxic fruit: the persistent exclusion of large numbers of Americans from the workforce.

²⁵⁸ EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note __ at 73.

²⁵⁹ *Id.*

²⁶⁰ EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT, *supra* note __ at 175.

²⁶¹ *See e.g.*, Moreno, *supra* note __ at 81-136 (describing the situation involving blacks and labor unions during the Progressive Era).

In addition to the social cost and welfare losses imposed by FDR's policies during the 1930s and 1940s, members of marginalized groups continue to suffer adverse repercussions from New Deal policies and subordinating assumptions rooted in labor law statutes today.²⁶² Consistent with this conclusion, the widening unemployment gap between black and white Americans that commenced during the Great Depression, in response to the progressive statutory innovation, has grown stronger and more resilient in present-day America.²⁶³ Minimum wage laws in the United States, like similar efforts in apartheid-era South Africa, continue to disproportionately deprive members of marginalized groups of employment.²⁶⁴ Following the passage of the 1965 Civil Rights Act, and operating through the collective bargaining process, labor unions have played a crucial role in institutionalizing a variety of discriminatory practices.²⁶⁵ Remarkably, this narrative proceeds logically with the deduction that biology entitles white workers to more desirable job classifications that inhere with white employment privilege.²⁶⁶

This record reinforces Epstein's claim that the implementation of the EFCA produces union benefits that are unevenly distributed among workers. In addition to the distributive difference noted by Epstein, which is a function of seniority within a unionized workforce, a thorough assessment of the adverse distributive effects that are a function of race, ethnicity, and the individual's placement with the union hierarchy would further strengthen Epstein's case and further undermine arguments favoring the EFCA. Since New Deal Labor law has led to persistent adverse consequences for marginalized Americans, this record should serve as the canary in the coal mine by suggesting that Americans ought to be wary of the EFCA's claimed benefits. To be fair, no EFCA advocates have explicitly embellished their support of this proposal with the remarkable

²⁶² GOLDBERG, *supra* note ___ at 268-69 (“[The] relevant repercussions of Progressive Era ideas have escaped the light of scrutiny. The architects of the New, the Fair Deal, and the Great Society all inherited and built upon the progressive welfare state. And they did this in explicit terms, citing such prominent race builders as Theodore Roosevelt and Woodrow Wilson as their inspirations. Obviously, the deliberate racist intent in many of these policies was not shared by subsequent generations of liberals. But that didn't erase the racial content of the policies themselves. The Davis-Bacon Act still hurts low-wage blacks, for example. FDR's labor and agricultural policies threw millions of blacks out of work and off their land.”).

²⁶³ Hutchison, *Racial Exclusion in the Mirror*, *supra* note ___ at 13.

²⁶⁴ See generally, Harry Hutchison, *Toward A Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy and Hierarchy*, 34 HARV. J. ON LEG. 93, 93-134 (1997).

²⁶⁵ HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK AND THE LAW* 5 (1985).

²⁶⁶ *Id.*

language and grammar of racial animus that characterized the Progressive Era, propelling the enactment of laws such as the Davis-Bacon Act²⁶⁷ and operating as part of the framework of union privilege (an outgrowth of New Deal legislation).

Nonetheless, we should not forget the recent comments of a Democratic congressman, who successfully supported financial regulatory reform on grounds that it benefits the racially superior among us as opposed to the “unfit” and biologically-suspect minorities and “defectives.”²⁶⁸ Given the public expression of such sentiments rooted in hierarchy and subordination, it is possible to infer that those attitudes are merely the tip of the exclusionary iceberg infecting other legislation, including the EFCA. Equally clear, the tacit acceptance of such sentiments within the domain of labor law serves to redistribute benefits from workers and employers to union leaders and their allies.

III. CONCLUSION

No longer captivated by the belief that unions should be seen simply as limited organizations designed to further self-government by workers oriented toward their own narrow economic interest, contemporary union leaders and their allies now believe that unions ought be conceived of as a robust engine of collective insurgency against globalization, and class-based injustice.²⁶⁹ This shifting meta-narrative, posited as an ontology of necessity and embraced as a compelling faith, is catalyzed by a reduction in worker solidarity. No longer able to capture the hearts and mind of workers,²⁷⁰ and no longer animated by workers’ narrow interests, organized labor (the beneficiary of government intervention in the past) has, once again, turned toward politics in order to achieve the broad goals of political, social, and economic transformation today.

²⁶⁷ Bernstein and Leonard, *supra* note ___ at 192 (showing how the law honors the progressive legacy of Robert Bacon, the law’s co-author, who denied anti-African American animus, but made clear his discomfort with “defective” workers taking jobs that “belonged” to white union men).

²⁶⁸ *Rep. Paul Kanjorski says his plan helps ‘good American people,’ not ‘minorities’ or ‘defective’ people*, Los Angeles Times, June 25, 2010, available at <http://latimesblogs.latimes.com/washington/2010/06/democrat-paul-kanjorski-defective-a...> (accessed 6/29/2010).

²⁶⁹ See e.g., Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 UNIV. OF MICH. J. OF LAW REFORM, 447, 448-449 (describing this development).

²⁷⁰ Hutchison, *Compulsory Unionism As a Fraternal Conceit?*, *supra* note ___ at 164.

The possibility of achieving goals and objectives, which cannot otherwise be obtained through a voluntary, freely chosen process, unleashes incentives that motivate interest groups and their leaders to capture the coercive power of the state. The demand by pressure groups for ever-expanding government intervention is an understandable outgrowth of the fact that the state has permeated civil society to such an extent that the two are mostly indistinguishable.²⁷¹ Implicit in the demand by pressure groups is the conclusion that, as the government becomes more scientific and accepts the possibility that it can manipulate human action, government itself becomes a hierarchy of bureaucratic managers and experts, whose arbitrary power is justified by the claim that they possess knowledge resources and competencies that most citizens do not.²⁷² Although human liberty is always at risk in the face of the demand for government intervention in society, the purchase of government power serves private ends. The EFCA constitutes a clear example of this ruinous process that has consumed and is consuming western democracies.

Richard Epstein's book, *THE CASE AGAINST THE FREE CHOICE ACT*, constitutes a public service illustrating the pitfalls of state-sponsored cartels and their debilitating public policy implications. His analysis exposes the Employee Free Choice Act as a disingenuous proposal that, rather than promising an increase in human liberty that is manifested in the rights of the rank and file to freely choose labor representation, instead represents the opposite. While the EFCA and its misleading title recall the FDR administration's reliance on deception in order to pass unpopular measures without public support, Epstein's book serves the public interest, and provides a public good without misleading its readers. His book offers a sharp contrast to the proclivity of modern mass democracies, which have increasingly succumbed to the temptation to supply private goods for powerful constituencies. Nevertheless, Epstein's analysis could be enriched by exposing the permanent defects in the labor reform agenda: defects that originated more than a century ago. His critique could also be enhanced by exhibiting far greater skepticism regarding the EFCA's attempt to enshrine organized labor's pursuit of

²⁷¹ HUNTER, *supra* note __ at 154.

²⁷² ALASDAIR MACINTYRE, *AFTER VIRTUE* 85 (1984).

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additional dues revenue in order to fund its insistent search for political, economic, and social transformation.