PENN STATE
LAW REVIEW

The Employee Free Choice Act's Interest Arbitration Provision: In Whose Best Interest?

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I. INTRODUCTION

The subject of robust labor law reform usually generates little interest with lawmakers. Before 2008, only once in the last 30 years has major labor law reform captured the attention of Congress.[1] Yet, in 2009, labor law returned to the congressional forefront with the Employee Free Choice Act (EFCA).[2] Generally, the proposed legislation made it easier for unions to organize workers, imposes first contracts with employers through mandatory interest arbitration, and increases penalties for employers that violate labor organizing laws.[3]

The bill is strongly supported by organized labor and opposed in equal measure by employers.[4] Both labor and management have aggressively lobbied Congress on the issue.[5] In announcing his initial

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1. *See* 1 JOHN E. HIGGINS, JR. ET AL., THE DEVELOPING LABOR LAW 71-73 (5th ed. 2006).

2. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009); Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009).

3. *See generally* RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 9-10 (2009), *available at* http://www.uschamber.com/assets/wfi/090203_epstein.pdf; DAVID MADLAND & KARLA WALTER, THE EMPLOYEE FREE CHOICE ACT 101: A PRIMER AND REBUTTAL 1-11 (2009), *available at* http://www.americanprogressaction.org/issues/2009/03/pdf/efca_101.pdf.

4. *See* Steven Greenhouse, *After Push for Obama, Unions Seek New Rules*, N.Y. TIMES, Nov. 9, 2008, at A33.

5. *See id.*; *see also* Steven Greenhouse, *Fierce Lobbying Greets Bill to Help Workers Unionize*, N.Y. TIMES, Mar. 11, 2009, at B3.

opposition to the bill in the spring of 2009, Senator Arlen Specter said that EFCA was the "most heavily lobbied issue I can recall."[6]

Despite the importance of this legislation to both labor and management, some EFCA provisions have received scant attention. A section of the bill that practically eliminates secret ballot elections and allows unions to organize with the "card check" method has attracted considerable debate.[7] Much less has been written about arguably the most important aspect of the legislation—a provision that would mandate binding government interest arbitration in private sector first contracts when the parties cannot reach a traditional negotiated settlement.[8] Few scholars have explored how this arbitration would work in practice and whether this type of arbitration is desirable as an alternative to the present system.[9]

This Comment will explore these issues in greater detail. Part II will review the history of collective bargaining in the United States, the central provisions of the National Labor Relations Act (NLRA)[10] that EFCA would impact, and the Supreme Court's traditional interpretation of these provisions. Part III will examine the union critique of the NLRA, how EFCA supposedly cures these defects, and management's response. Part IV traces the concept of interest arbitration and the different types of interest arbitration currently used. Part V analyzes why—beyond public reasons—unions are seeking interest arbitration. Part VI argues that interest arbitration is not necessary because it is contrary to traditional collective bargaining, would unfairly tilt the labor relations playing field in organized labor's direction, and unions themselves should be forced to undertake internal reforms before implementing such a drastic remedy. Part VII will discuss practical concerns with interest arbitration and competing views on how the

6. Press Release, Senator Arlen Specter, Senator Specter Speaks on Employee Free Choice Act/Card Check (March 24, 2009), *available at* http://specter.senate.gov (type "Employee Free Choice Act" in keyword search; then click on result "Senator Specter Speaks on Employee Free Choice Act/Card Check").

7. *See, e.g.*, Raja Raghunath, *Stacking the Deck: Privileging Employer Free Choice Over Industrial Democracy in the Card-Check Debate*, 87 NEB. L. REV. 329, 330-36, 367-70 (2008); Bruce A. Miller & Ada A. Verloren, *Workers Free Choice: An Unrealized Promise*, 54 WAYNE L. REV. 869, 870-76 (2008).

8. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 3 (2009); Employee Free Choice Act of 2009, S. 560, 111th Cong. § 3 (2009); *see also* EPSTEIN, *supra* note 3, at 51 (calling interest arbitration the "most radical transformation in American labor law.").

9. The most comprehensive articles written on this subject are David Broderdorf, *Overcoming The First Contract Hurdle: Finding a Role for Mandatory Interest Arbitration in the Private Sector*, 23 LAB. LAW. 323 (2008) and Catherine Fiske & Adam Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47 (2009) [hereinafter Fiske].

10. 29 U.S.C. §§ 151-169 (2006).

process would actually work in the private sector. Part VIII will offer some concluding thoughts.

II. A BRIEF HISTORY OF LABOR RELATIONS IN AMERICA

A. Early Labor Relations Law

The earliest battles in America between labor and management are marked by clear victories for employers and outright judicial hostility towards the right of workers to organize. In the early 19th century, workers who organized were often prosecuted under state criminal conspiracy laws.[11] These prosecutions subsided after workers were acquitted in *Commonwealth v. Hunt.*[12] In that case, the Massachusetts Supreme Court found that in order for workers to be prosecuted under criminal conspiracy doctrines, the workers must either have an illegal purpose or resort to illegal means.[13] Still, judicial decisions varied wildly after *Hunt* and "the economic sophistication and bias of an individual judge were often pivotal."[14]

Even with the lack of judicial protection, organized labor activity increased after the Civil War, spurred by the industrial revolution.[15] To combat the growing influence of unions, employers used judicial injunctions to end strikes and the judiciary often complied with management's request.[16] The judiciary also dealt labor a stunning blow when the Supreme Court held that the Sherman Antitrust Act was applicable to labor unions as well as corporations.[17]

These judicial defeats and increasing labor disruptions prompted Congress and the Executive Branch to act. Congress passed, and presidents signed, a string of pro-labor union bills through the late 19th and early 20th centuries including: the Erdman Act,[18] which provided for the resolution of railroad labor disputes; the Clayton Antitrust Act,[19] which limited antitrust laws' applicability to union activity; the Railway Labor Act,[20] which expanded the Erdman Act and provided support for

11. *See* 1 HIGGINS ET AL., *supra* note 1, at 4.
12. Commonwealth v. Hunt, 45 Mass. 111 (1842).
13. *See id.* at 126.
14. *See* 1 HIGGINS ET AL., *supra* note 1, at 6.
15. *See* DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW 4-5 (2nd ed. 2005).
16. *See id.* at 6.
17. *See generally* Loewe v. Lawlor, 208 U.S. 274 (1908).
18. Erdman Act, 30 Stat. 424 (1898) (invalidated by Adair v. U.S., 208 U.S. 161 (1908)).
19. Clayton Antitrust Act, 38 Stat. 737 (1914) (codified throughout 15 U.S.C. §§ 12-27 (2006) and 29 U.S.C. §§ 52-53 (2006)).
20. Railway Labor Act, 45 U.S.C. §§ 151-164 (2006). In an important act of foreshadowing, the Supreme Court upheld the Railway Labor Act, writing, "[T]he

collective bargaining on the railways; and the Norris-LaGuardia Act,[21] which prohibited federal courts from issuing labor injunctions.

B. The National Labor Relations Act

In 1935, Congress passed the National Labor Relations Act,[22] a wide-ranging and comprehensive piece of labor legislation that even 70 years later is universally regarded as the seminal moment in American labor relations.[23] The bill was led through Congress by New York Senator Robert Wagner and, to this day, is dubbed by labor lawyers as the "Wagner Act."[24]

The NLRA's most important provision can be found in Section 7,[25] which explicitly provides for the right to organize and bargain collectively.[26] In order to enforce Section 7, the NLRA established the National Labor Relations Board (NLRB), a quasi-judicial tribunal and administrative agency.[27] The Board was empowered to issue unfair labor practices against management and eventually unions for violations of the law.[28]

Generally, EFCA's greatest impact is on Section 9(e)[29] and 8(d)[30] of the NLRA. Section 9(e) pertains to the union certification process and requirement for government supervised secret ballot elections if 30 percent or more of employees petition the employer for union representation.[31] Section 8(d) mandates the duty to bargain, stating that both the union and employer must "meet at reasonable times and confer

legality of collective action on the part of employees to safeguard their proper interest is not to be disputed." Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548, 570 (1930).

21. Norris-LaGuardia Act, 29 U.S.C. §§ 101-115.

22. 29 U.S.C. §§ 151-169.

23. *See* 1 HIGGINS ET AL., *supra* note 1, at 29-34 ("[T]he Act was the starting point for contemporary American labor law.").

24. Wagner himself can be either largely thanked or blamed for the passage of the NLRA. Despite its progressive inclinations, the Roosevelt White House was neutral through much of the debate and several high-ranking administration officials even opposed the bill. *See* Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 203-04 (1960).

25. 29 U.S.C. § 157.

26. *Id*.

27. *Id.* §§ 153-156.

28. *Id*.

29. *Id*. § 159(e).

30. *Id*. § 158(d).

31. *Id*. § 159(e). If the employees present a majority of signed authorization cards to the employer, the employer retains the option to immediately recognize the union. *See* 1 HIGGINS ET AL., *supra* note 1, at 559-61. In practice, this is rarely done and employers almost always insist on a secret ballot election, unless they are pressured to agree to card check through a corporate campaign. *See infra* pp. 37-43.

in good faith with respect to wages, hours, and other terms and conditions of employment. . . . [B]ut such obligation does not compel either party to agree to a proposal or require the making of a concession."[32]

The problem of how to solve stalled contract negotiations and the extent to which the government can intervene, which EFCA's interest arbitration provision addresses, was a significant consideration in the original NLRA debate.[33] Some Senators feared that the duty to bargain in the NLRA combined with the new NLRB would give the federal government the power to impose contract terms.[34] However, Senator Walsh made it profoundly clear that the original NLRA was not delegating this broad power to the federal government, stating:

> Let me say that the bill requires no employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees. Nothing in this bill allows the Federal Government or any agency to fix wages, to regulate rates of pay, to limit hours of work, or to effect or govern working conditions in any establishment or place of employment.[35]

C. The Supreme Court Interprets the NLRA

In an early Supreme Court case that addressed Section 8(d), *NLRB v. American National Insurance Co.*,[36] the Court held that Section 8(d) did not permit the NLRB to require contract concessions.[37] Despite this legislative history and judicial interpretation, some controversy ensued as to whether or not the NLRB retained power to set contract terms. The key case to eventually decide this issue was *H.K. Porter Co. v. NLRB*.[38] In that case, a company and union were involved in protracted negotiations over a contract provision that would automatically deduct union dues from employee paychecks.[39] The company repeatedly

32. 29 U.S.C. § 158(d). The original NLRA only contained a provision that employers must "bargain collectively with the representatives of his employees" on pay, wages, hours of employment, and other conditions of employment. *See* 1 HIGGINS ET AL., *supra* note 1, at 823. In the 1947 Taft-Hartley amendments to the NLRA, the duty for both parties to bargain in good faith was made explicitly clear in Section 8(d). *See id.* at 825.

33. *See* 1 HIGGINS ET AL., *supra* note 1, at 823-24.

34. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 103-05 (1970) (citing 79 Cong. Rec. S. 7659 (1935)).

35. *Id.*

36. NLRB v. Am. Nat. Ins. Co., 343 U.S. 395 (1952).

37. *See id.* at 402.

38. *H.K. Porter Co.*, 397 U.S. at 99.

39. *See id.* at 100.

refused this request.[40] The NLRB sided with the union and issued an order granting a contract clause for the check-off of union dues.[41] In a 5-2 decision, the Supreme Court reversed in favor of the employer.[42] The Court held that the object of the NLRA "was not to allow government regulation of the terms and conditions of employment."[43] The Court, citing Senator Walsh approvingly,[44] disavowed any government ability to set contract terms, holding that, "But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement."[45]

The decision in *H.K. Porter* relied on another important labor law case, *NLRB v. Jones & Laughlin Steel Corp.*,[46] which directly challenged the constitutionality of the NLRA.[47] The Supreme Court ruled that the NLRA was constitutional, at least in part because it "does not compel agreements between employers and employees."[48]

The Court in *H.K. Porter* ultimately concluded that employers and unions are free to rely on economic strength to secure what they could not obtain through bargaining and that it would fall upon Congress to change the NLRA to allow government to compel contract terms.[49] Other cases since *H.K. Porter* have relied on this important precedence and similarly limited the NLRB's powers to write a contract,[50] with the United States Court of Appeals for the District of Columbia Circuit even claiming that the holding from *H.K. Porter* is now an "elementary principle of law under the NLRA."[51]

40. *See id.*
41. *See id.* at 101-03.
42. *See id.* at 109.
43. *Id.* at 103.
44. *Id.* at 104.
45. *Id.* at 103-04.
46. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
47. *See id.* at 25.
48. *Id.* at 45.
49. *See H.K. Porter*, 397 U.S. at 109. It can be argued that EFCA is the legislative change that the Court spoke of in *H.K. Porter*.
50. *See, e.g.*, Ex-Cell-O Corp., 185 NLRB 107 (1970). In *Ex-Cell-O*, the employer challenged the conduct of the election and refused to bargain with the union. *See id.* at 107-08. The trial examiner initially ordered the company to compensate its employees for damages incurred as a result of the employer's refusal to bargain. *See id.* at 108. The employer argued that the amount of employee loss was speculative and the remedy amounted to writing a contract between the employer and union. *Id.* Relying heavily on *H.K. Porter*, the NLRB agreed with the employer, holding that the remedy would force the employer "willy-nilly . . . to accede to terms never mutually established by the parties." *Id.* at 109-10.
51. Hyatt Mgmt. Corp. v. NLRB, 817 F.2d 140, 143 (D.C. Cir. 1987).

The end result of *H.K. Porter* is that the NLRB is powerless to compel contract terms in the private sector through Section 8(d). If the employer and union cannot reach an agreement, either side has the right to resort to economic warfare, such as the employee's right to strike[52] or the employer's right to lockout[53] and hire replacement workers.[54] In cases where the employer and union are still unable to reach a final contract, then a bargaining impasse can be declared.[55] The Board has described impasse as the point when "further bargaining would be futile. . . . Both parties must believe that they are at the end of their rope."[56] Once impasse is reached, the employer can unilaterally implement its last, final offer provided that any unilateral changes were included in the final offer to the union and the impasse was reached in the course of good faith bargaining. Furthermore, the employer may only implement an offer in a manner that does not disparage the collective bargaining process and collective bargaining representative.[57] If this implemented proposal is still not acceptable to the union and its members, they are free to strike and cannot be fired for striking.[58] Strikes or other forms of economic pressure can effectively break an impasse and lead to a resumption of bargaining.[59] Overall, this process relies heavily on the parties themselves to seek agreement and leaves open a variety of economic tools to achieve that goal. Government is simultaneously relegated to a "referee" role, with no power to write contract terms.

52. *See* 29 U.S.C. § 163 (2006).

53. *See generally* Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965).

54. *See generally* NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938).

55. *See* 1 HIGGINS ET AL., *supra* note 1, at 988; Ellen J. Dannin, *Legislative Intent and Impasse Resolution Under the National Labor Relations Act: Does Law Matter?*, 15 HOFSTRA LAB. & EMP. L.J. 11, 26-27 (1997).

56. A.M.F. Bowling Co., 314 NLRB 969, 978 (1994).

57. *See* Dannin, *supra* note 55, at 25-27.

58. *See* 1 HIGGINS ET AL., *supra* note 1, at 1003-04; Hi-Way Billboards, Inc., 206 NLRB 1, 3 (1973) ("Once a genuine impasse is reached, the parties can concurrently exert economic pressure on each other: the union can call for a strike. . . ."); HARRY C. KATZ ET AL., AN INTRODUCTION: COLLECTIVE BARGAINING & INDUSTRIAL RELATIONS 460 (3rd ed. 2005) (defining impasse as "the point in negotiations where no compromise appears achievable and a strike or lockout is imminent"); RAY ET AL., *supra* note 15, at 217 ("Employers cannot violate employee rights by threatening to discharge employees who strike, by discharging employees who strike. . . .").

59. *See* 1 HIGGINS ET AL., *supra* note 1, at 1003-04.

III. THE CURRENT STATE OF LABOR RELATIONS AND EFCA'S ANSWERS

A. EFCA: A Primer

EFCA tries to solve what labor views as Section 8(d)'s deficiency and other related problems facing unions in organizing workers. EFCA has three principal components.[60] First, the bill would allow for unions to bypass the Section 9(e) secret ballot election process and form unions on the basis of signed authorization cards.[61] This is commonly referred to as the "card check" organizing method.[62] If 50 percent plus one of the bargaining unit sign an authorization card, then the union would become the representative of the workers.[63]

With regard to the aforementioned contract negotiation problem under Section 8(d), EFCA would change the current impasse procedure in first contracts and institute mandatory interest arbitration.[64] Management and labor would be compelled to negotiate within ten days of the union's certification.[65] If after 90 days an agreement has not been reached and the parties do not mutually agree to an extension, either party may ask the Federal Mediation and Conciliation Service (FMCS) to mediate the dispute.[66] If after another 30 days, the parties, with FMCS mediating, still cannot reach a contract agreement, FMCS shall refer the dispute to an arbitration board.[67] This arbitration board will issue a binding contract that remains in effect for two years.[68] The final aspect of EFCA would greatly increase penalties on employers for violating the NLRA, but does not increase penalties on unions for NLRA violations.[69]

60. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009); Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009).

61. *See* H.R. 1409 § 2; S. 560 § 2.

62. For a discussion of using signed authorization cards to organize workers, see generally PETER J. HURTGEN & CHARLES COHEN, MAKING YOUR VOTE COUNT: THE CASE FOR PRESERVING CONFIDENTIALITY IN EMPLOYEE UNION REPRESENTATION DECISIONS (2007).

63. *See* H.R. 1409 § 2(a)(6); S. 560 § 2(a)(6).

64. *See* H.R. 1409 § 3; S. 560 § 3.

65. *See* H.R. 1409 § 3; S. 560 § 3.

66. *See* H.R. 1409 § 3; S. 560 § 3.

67. *See* H.R. 1409 § 3; S. 560 § 3.

68. *See* H.R. 1409 § 3; S. 560 § 3.

69. *See* H.R. 1409 § 4; S. 560 § 4.

B. Organized Labor's Arguments in Favor of EFCA

Labor considers passing EFCA its chief legislative priority.[70] Labor claims that the traditional NLRA is broken and does not protect unions from both organizing workers and later negotiating effective first contracts.[71] Unions blame this lack of legal protections for the dramatic decline in their membership.[72] In 1954, approximately 34 percent of eligible private sector workers belonged to a union whereas today that number stands at 7.2 percent.[73] Unions specifically claim that the NLRA process allows for recalcitrant employers to illegally oppose unions, fire pro-union workers, hire unsavory anti-union consultants, and unlawfully stymie the negotiating process.[74] In a study that analyzed first contract negotiations, researchers at the MIT Institute for Work and Employment Research found that only 56 percent of workers ever received a first contract and only 38 percent were able to obtain a first contract within the first year of being certified.[75] A further study concluded that during these initial contract negotiations, "employers engaged in a broad range of hard or bad-faith bargaining behaviors."[76] At least one former NLRB attorney has concluded that the employer's ability to stall first contracts, reach impasse, and implement its final-offer is a cloud over the negotiating process and has "affected every bargaining relationship she witnessed" while an NLRB employee.[77]

70. *See* Greenhouse, *supra* note 4, at A33 ("Labor's No.1 priority is a piece of legislation called the Employee Free Choice Act. . . .").

71. *See Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the H. Subcomm. on Health, Employment, Labor and Pensions*, 110th Cong. 3, 7 (2007) (statement of Nancy Schiffer, Associate General Counsel, AFL-CIO).

72. *See id.; see also* EPSTEIN, *supra* note 3, at 15-16.

73. *See* Press Release, Bureau of Labor Statistics, Union Members Summary 2009 (Jan. 22, 2010), *available at* http://www.bls.gov/news.release/union2.nr0.htm.

74. *See* Schiffer, *supra* note 71, at 1-10; *see also* Kate Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW (Sheldon Freidman et al. eds., 1994). Bronfenbrenner is a former SEIU organizer and her studies have been questioned by management on methodological and ethical grounds. *See* UNITED STATES CHAMBER OF COMMERCE, UNION STUDIES ON EMPLOYER COERCION LACK CREDIBILITY AND INTEGRITY (2009), *available at* http://www.uschamber.com/publications/reports/unionrhetoric.

75. *See* JOHN-PAUL FERGUSON & THOMAS KOCHAN, SEQUENTIAL FAILURES IN WORKERS' RIGHT TO ORGANIZE, 1, 1 (2008), *available at* http://www.americanrightsatwork.org/dmdocuments/sequential_failures_in_workers_right_to_organize_3_25_2008.pdf; *see also* John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 61 INDUS. & LAB. REL. REV. 3, 3-21 (2008).

76. *See* Bronfenbrenner, *supra* note 74, at 83.

77. Dannin, *supra* note 55, at 29 n.90.

C. Employer Counter-Arguments

Employers dispute all of these contentions.[78] First, employers claim that it is simplistic to attribute the decline in union membership solely to management's anti-union animus.[79] Epstein cites a litany of other factors for labor's decline including: the expansion of free trade; more intensive global competition for employees; the reduced appeal of unions to younger workers; better wages and working conditions for nonunion employees; ineffective union organizing; rigidity of unions themselves; and the fundamental switch in political economy away from a corporatist economic model.[80] As for the problems with first contract negotiations, employers point out that negotiating a first contract is a cumbersome process and can take months even when all sides are bargaining in good faith.[81] Additionally, "hard-nosed" negotiations can be perfectly legitimate, as "employers may be engaging in good faith bargaining . . . from a position of solid economic strength. Such a setup is part and parcel of what free collective bargaining is all about."[82]

Turning to the specific solutions proposed by EFCA, employers contend that the secret ballot process is fair and works well, evidenced by the fact that unions won about 67 percent of elections in the most recent year.[83] On mandating interest arbitration in first contracts, employers claim that interest arbitration would endanger businesses because government bureaucrats unfamiliar with the economics of a specific employer would have the power to set private sector employment contracts.[84] Furthermore, employers argue that interest arbitration is unnecessary in the private sector because unions have the ability to strike and practice other forms of economic warfare.[85] Interest arbitration was envisioned as an alternative to the right to strike in the public sector.[86] Finally, returning to *H.K. Porter*, employers argue that

78. *See generally* EPSTEIN, *supra* note 3; UNITED STATES CHAMBER OF COMMERCE, THE EMPLOYEE FREE CHOICE ACT: PIERCING THE RHETORIC (2009), *available at* http://www.uschamber.com/publications/reports/0906efca.htm.

79. *See* EPSTEIN, *supra* note 3, at 15-16.

80. *See id.*

81. *See* PIERCING THE RHETORIC, *supra* note 78, at 24-26.

82. Broderdorf, *supra* note 9, at 333.

83. *See* PIERCING THE RHETORIC, *supra* note 78, at 18.

84. *See Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the H. Subcomm. on Health, Employment, Labor and Pensions*, 110th Cong. 3, 7 (2007) (statement of Charles I. Cohen, Former NLRB Board Member).

85. *See* PIERCING THE RHETORIC, *supra* note 78, at 22 ("The type of interest arbitration called for by EFCA was not designed for our private sector free enterprise system. It was originally developed for the public sector because the playing field was uneven. . . . In the public sector, unions typically do not have the right to strike.").

86. *See id.*

the basis of the American collective bargaining system is the ability of parties freely to reach an agreement, not to have a contract imposed by the federal government.[87]

IV. INTEREST ARBITRATION: AN OVERVIEW

While both union and management have powerful arguments in favor of and opposed to interest arbitration, the process of interest arbitration itself deserves explanation.

Interest arbitration is a form of arbitration in which the employment contract is established by a final and binding decision of an arbitrator or arbitration panel.[88] Interest arbitration is the writing of a contract, contrasted with grievance arbitration, which is the interpretation of a previously written contract.[89] Commentators compare interest arbitration to a legislative process, whereas grievance arbitration is akin to a judicial process.[90]

A. Conventional and Final-Offer Interest Arbitration

Several factors can impact an interest arbitration system. The first major variable is the amount of latitude given to arbitrators in the contract writing process. In one form of interest arbitration, commonly called conventional interest arbitration, the arbitrator has an almost unlimited ability to write contract terms.[91] Each side presents offers and the arbitrator can pick either offer or develop his or her own unique solution.[92] This form of interest arbitration is usually criticized for the "chilling effect" it can have on the parties.[93] The "chilling effect" predicts that since each side is aware that the arbitrator can craft an

87. *See id.* at 20, 23.

88. *See* Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153 (1987); *see also* FRANK ELKOURI ET AL., HOW ARBITRATION WORKS 131-41 (Martin M. Volz & Edward P. Gogin eds., Bureau of National Affairs 1998).

89. *See* FRANK ELKOURI ET AL., *supra* note 88, at 131, 135, 137. For more on grievance arbitration, *see generally* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Co., 363 U.S. 593 (1960). These cases comprise the "Steelworkers Trilogy" and guide grievance arbitration in labor relations.

90. *See, e.g.*, FRANK ELKOURI ET AL., *supra* note 88, at 134, 137.

91. *See* Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT'L ARB. 383, 387 (1999); *see also* HARRY C. KATZ ET AL., *supra* note 58, at 230.

92. *See* HARRY C. KATZ ET AL., *supra* note 58, at 230.

93. *See* J. Joseph Loewenberg, *Interest Arbitration: Past, Present and Future*, *in* LABOR ARBITRATION UNDER FIRE 111, 117-18 (James L. Stern & Joyce M. Najita eds., 1997); Meth, *supra* note 91, at 387.

award, neither party has an incentive to bargain reasonably from the start.[94] Both sides are likely to stake out extreme positions and let the arbitrator split the middle.[95]

The competing version of interest arbitration is final-offer arbitration (FOA).[96] In FOA, the arbitrator is limited to choosing the final offer presented by one of the parties.[97] The goal of FOA is to encourage good faith bargaining by motivating both sides to offer reasonable positions.[98] If one side stakes out an extreme position, it will incur a significant risk that the arbitrator will adopt its adversary's offer.[99] The possibility of losing entirely is the antidote to the poisonous chilling effect.[100] In many situations, both parties want to avoid an actual FOA hearing.[101] At least one commentator has called an FOA hearing "the hydrogen bomb poised above the bargaining table whose very terror should assure its non-use."[102]

B. The Number of Issues Arbitrators Can Consider

In addition to the latitude afforded arbitrators, the number of issues decided can also vary. In "issue by issue" arbitration, the arbitrator makes a decision on each issue individually.[103] For example, the arbitrator could select the union's position on health care, but the company's position on wages and pensions. Issue by issue is more consistent with conventional arbitration.[104] The competing system is total-package, in which the arbitrator must choose one party's entire offer.[105] Combining total package and final offer maximizes the risk to both parties.[106] In that situation, an arbitrator will award one side everything it wants while leaving the other side with nothing.

94. *See* Loewenberg, *supra* note 93, at 118.
95. *See* Meth, *supra* note 91, at 387.
96. *See* HARRY C. KATZ ET AL., *supra* note 58, at 230; Meth, *supra* note 91, at 384-85.
97. *See* HARRY C. KATZ ET AL., *supra* note 58, at 230; Meth *supra* note 91, at 387-89.
98. *See* Meth, *supra* note 91, at 387.
99. *See id.* For example, in an interest arbitration dispute in Eugene, Oregon, the interest arbitrator sided with the city government *solely* because the union insisted upon an unreasonable manning requirement. *See* Gary Long & Peter Feuille, *Final-Offer Arbitration: Sudden Death in Eugene*, 27 INDUS. & LAB. REL. REV. 186, 193 (1974).
100. *See* Meth, *supra* note 91, at 387-88 (FOA acts as a "psychological, economic, and political incentive for the parties to reach their own agreement.").
101. *See* Long & Feuille, *supra* note 99, at 202 ("[A] successful final-offer procedure is one that is not used.").
102. Meth, *supra* note 91, at 388.
103. *See id.* at 394.
104. *See id*.
105. *See* Meth, *supra* note 91, at 394-95.
106. *See id.*

C. Interest Arbitration in the Private Sector

Interest arbitration is rarely used in the private sector[107] and has traditionally been met with deep suspicion from labor academics, unions, and management.[108] R.W. Fleming, the former President of the University of Michigan and a member of the National Academy of Arbitrators, said that interest arbitration is historically considered "unsound, unwise, and possibly un-American."[109] On the union side, George Meany, the long-time president of the AFL-CIO, lambasted interest arbitration in the private sector, claiming, "Compulsory arbitration . . . just will not work because it is an abrogation of freedom."[110] Interest arbitration is usually eschewed in the private sector since employees retain the right to strike,[111] but it is widely used in the public sector where the right to strike is restricted or limited.[112] Today, more than fifteen states have passed interest arbitration statues.[113] States vary widely in the forms of arbitration used, be it conventional, final offer, issue by issue, or total-package.[114]

107. *See* HARRY C. KATZ ET AL., *supra* note 58, at 229.

108. *See* R.W. Fleming, *Interest Arbitration Revisited*, 26 PROC. NAT'L ACAD. ARB. 1 (1973), *available at* http://www.naarb.org/proceedings/pdfs/1973-1.pdf; Letter from R. Theodore Clark, Senior Partner, Seyfarth Shaw, to Senator Edward M. Kennedy, Senator Michael B. Enzi, Rep. George Miller & Rep. Howard P. McKeon (Feb. 13, 2009), *available at* http://www.uschamber.com/issues/letters/2009/090213efca.htm (including historical quotes from labor union leaders opposed to interest arbitration in the private sector and arguments from management on why interest arbitration is not necessary in the private sector).

109. Fleming, *supra* note 108, at 1. While Fleming was describing this historic view, his paper actually supported an expanded use of interest arbitration, though not through a government mandate. *See id.* Fleming argued, "The essence of what I have to say today is that it is time to rethink our position on interest arbitration, though I would prefer that experimentation take place in a voluntary, nongovernmental context." *Id.*

110. Clark, *supra* note 108, at 10.

111. *See* Anderson & Krause, *supra* note 88, at 155 (describing interest arbitration as the alternative to the strike and writing that "the success of collective bargaining requires only one of these alternatives."); HARRY C. KATZ ET. AL., *supra* note 58, at 229 ("The NLRA gives labor and management the right to strike over impasse and thereby avoids the use of interest arbitration."); Loewenberg, *supra* note 93, at 111 (describing interest arbitration as a "substitute" for strikes and lockouts). *See generally* Carl Stevens, *Is Compulsory Arbitration Compatible With Bargaining?*, INDUS. REL., Feb. 1966, at 38.

112. *See* FRANK ELKOURI ET AL., *supra* note 88, at 100-24; HARRY C. KATZ ET AL., *supra* note 58, at 230; *see generally* Robert G. Howlett, *Interest Arbitration in the Public Sector*, 60 CHI.-KENT L. REV. 815 (1984).

113. *See* Fiske, *supra* note 9, at 51.

114. *See* FRANK ELKOURI ET AL., *supra* note 88, at 108-09.

1. Major League Baseball

The only significant private sector industry that uses interest arbitration regularly is major league baseball.[115] Baseball players with three to six years of experience are eligible to file for salary arbitration.[116] The arbitrator must select either the player's or the club's final salary offer.[117] The arbitrators are strictly limited in the criteria they can use in formulating their decision.[118] The decision cannot be appealed and the arbitrator's decision is binding for one year.[119] Still, despite its historic use, salary arbitration is highly limited in baseball. As Epstein succinctly points out, baseball salary arbitration does not cover the union's master agreement with club owners and only covers one issue: salary.[120] Even here, baseball has simplified the process because the arbitrator can only select a single number—what the team or player offers—and nothing else.[121]

2. The Steel and Tobacco Industries

The only other significant instances of interest arbitration in the private sector can be found in the steel and tobacco industries.[122] In the 1970s, the steel industry and labor unions agreed to an "Experimental Negotiating Agreement" (ENA) calling for interest arbitration if contract negotiations broke down.[123] Labor and management reached agreements in both 1974 and 1977 without using interest arbitration, possibly out of fear of the interest arbitration procedure.[124] Yet the ENA expired in the 1980s and industry and unions have not agreed to a similar provision.[125] Years later, Philips Morris voluntarily agreed to interest arbitration with

115. *See generally* ROGER I. ABRAMS, THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION 142-66 (2000) (recounting first-hand experience as baseball arbitrator); John Fizel, *Baseball Arbitration After 20 Years*, DISP. RESOL. J., June 1994, at 42, 42-47.

116. *See* Fizel, *supra* note 115, at 43.

117. *See* ABRAMS, *supra* note 115, at 146-47. Fizel also notes that the arbitrators are encouraged to make a decision within 24 hours and no written explanations are given. *See* Fizel, *supra* note 115, at 43.

118. The only criteria that the arbitrator may consider are: player performance during the past year, length and consistency of player's career, salaries of comparable players, and the team's on-field success and attendance. *See* Fizel, *supra* note 115, at 43.

119. *See* ABRAMS, *supra* note 115, at 147.

120. EPSTEIN, *supra* note 3, at 65-66.

121. *See* ABRAMS, *supra* note 115, at 146-47.

122. *See* Broderdorf, *supra* note 9, at 329-30.

123. *See id.* at 330.

124. *See id.*

125. *See id.* Epstein claims that the "[ENA] system did not work, and it was ultimately abandoned, only to be followed by the near-demise of the entire U.S. Steel industry." *See* EPSTEIN, *supra* note 3, at 65.

its unions.[126] A 1989 journal article[127] indicated that interest arbitration was working as intended, but no studies of this arrangement have since been published. Thus, our collective knowledge about interest arbitration is based upon the public sector and sporadic, highly limited experiments in the private sector.

V. WHY LABOR UNIONS SEEK INTEREST ARBITRATION

EFCA now seeks to inject interest arbitration into the private sector in an unprecedented way.[128] The threshold question of any analysis of EFCA's interest arbitration provision is *why* labor leaders, who previously opposed interest arbitration as recently as only ten years ago,[129] now favor it. Declining membership is part of the answer but does not fully explain the embrace of interest arbitration by labor unions.

A. The Importance of the Election Year and Certification Year Bars

In order to answer this question, it is necessary to briefly review two critical labor law "bars": the election-year bar[130] and the certification year bar.[131] Under the election-year bar, a new representation election cannot be conducted in any bargaining unit for 12 months after an initial election.[132] Likewise, under the certification bar, when a union wins an initial election and is certified as the bargaining representative, no new petitions can be filed for 12 months.[133]

Once the bars expire, employers can challenge the union's status as the representative of the workers by either withdrawing majority status entirely[134] or filing a petition for a new election.[135] On their own, employees can also challenge the union by filing a decertification

126. *See* Broderdorf, *supra* note 9, at 330.

127. Dennis Liberson, *Labor Relations: Long-Term Agreements Work at Philip Morris*, PERSONNEL J., Dec. 1989, at 36, 36.

128. *See* EPSTEIN, *supra* note 3, at 17 (stating that "Without question, this dramatic switch in the current law enjoys no precedent in the private sector. . . .").

129. Kenneth B. Cooper, *Interest Arbitration in the Airline Industry, Friend or Foe of Collective Bargaining? in Industry Specific Arbitration Issues: The Airline Industry*, 55 PROC. NAT'L ACAD. ARB. 132 (2002) (arguing against interest arbitration).

130. *See* 29 U.S.C. § 159(c)(3) (2006).

131. *See* Brooks v. NLRB, 348 U.S. 96, 98 (1954).

132. *See* 29 U.S.C. § 159(c)(3).

133. *See Brooks*, 348 U.S. at 98; *see also* 1 HIGGINS ET AL., *supra* note 1, at 556 ("[T]he Board has required that in the absence of unusual circumstances, a certified union's majority status must be honored for 1 year; and a petition filed during the 1-year period will ordinarily be barred.").

134. *See generally* Allentown Mack Sales & Serv. Inc. v. NLRB, 522 U.S. 359 (1998). *But see* Levitz Furniture, 333 NLRB 717 (2001).

135. *See* 29 U.S.C. § 159(c)(1)(B).

petition claiming that the union no longer represents the workers.[136] The board will then conduct an election if it finds that a question of representation exists and the petition is supported by a substantial number of employees.[137]

As a result, labor unions are pressured to negotiate a first contract. After the bars expire, their status as the majority representative can easily be challenged.[138] The likelihood of being challenged is even greater if the union has not achieved a successful first contract negotiation.[139] For example, the situation could easily arise where a union wins a representation election by promising to improve wages, benefits, and working conditions, but, during the first contract negotiation, the union cannot actually secure improvements in the very aspects of work that it promised to change.[140] At that juncture, employees might question the wisdom of unionizing in the first place and express their dissatisfaction to the employer. Employees could also take matters into their own hands and file a decertification petition. In either scenario, the union will likely lose this new bargaining unit.

B. The Decline of Labor's Ability to Convince Workers to Strike

In order to prevent this from happening, unions traditionally pursued economic weapons against an employer to compel contract terms, principally through the statutory right to strike.[141] If contract negotiations were proceeding poorly, the union could summon workers

136. *See* 29 U.S.C. § 159(c)(1)(A)(ii); RAY ET AL., *supra* note 15, at 208.

137. *See* RAY ET AL., *supra* note 15, at 208.

138. *See* William B. Gould, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations in the United States*, 43 U.S.F. L. REV. 291, 327 (2008) (Unions that fail to successfully negotiate a contract "will have declining support within the bargaining unit.").

139. Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616, 1641 (1995) (If employers "can avoid the execution of bargaining agreements during the certification year, they can often defeat the newly certified union.").

140. *See, e.g.*, *The Employee Free Choice Act: Restoring Economic Opportunity for Working Families S. Comm. on Health, Education, Labor and Pensions*, 110th Cong. 14,15 (2007) (statement of Peter Hurtgen, Former NLRB Chair and FMCS Director) ("Newly certified unions often bear a heavy burden to make good on promises made to employees to gain recognition. . . . [W]hen these promises come up against reality at the bargaining table, it is often very difficult to reach agreement. . . .").

141. *See* 29 U.S.C. § 163 ("Nothing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right."); *see also* RAY ET AL., *supra* note 15, at 211 ("The right to strike is statutorily protected and is considered a key element of a labor relations system designed to encourage productive and peaceful collective bargaining.").

to walk off the job, march the picket line, and hurt the company's financial position.

Today, unions no longer consider the strike as a viable tool of pressure. This reason is usually not included in the list of labor's justifications for EFCA,[142] because unions are reluctant to publicly admit that they lack economic weapons to force employers to submit to their demands. Still, this weakness is a contributing factor in the drive for interest arbitration. According to the Bureau of Labor Statistics (BLS), unions engaged in only 15 strikes of employers with 1000 or more workers in 2008.[143] On average, unions have engaged in only 25 work stoppages with employers of 1000 or more workers since 1995.[144] Even when labor can muster the support to strike, the actual number of days that workers walk the picket lines is small.[145] Only one strike in 2008 with an employer of 1000 or more workers lasted more than 50 days and nine of the 15 strikes were over in only ten days.[146] This contrasts with labor's historic success at striking. As late as 1974, unions engaged in 424 strikes of employers with 1000 or more workers.[147] At the height of organized labor after World War II, the sheer number of workers that labor could summon to strike was astounding.[148] During the first six months of 1946, strikes involved almost three million workers, and, by the end of that year, as many as 4.6 million workers walked the picket lines.[149] In the 1950s, 60s, and 70s, major strikes erupted at well-known companies and throughout industries, such as General Motors, U.S. Steel, Kohler, Southern Telephone, General Electric, ports, railroads, coal mines, and even the postal service.[150]

The watershed moment often cited as the beginning of the end of labor's ability to strike was President Reagan's decision in 1981 to fire approximately 11,000 striking air traffic controllers from the Professional Air Traffic Controllers Organization (PATCO).[151] The

142. The author could not locate any news stories where labor advocated EFCA passage based upon its inability to strike effectively.

143. Press Release, Bureau of Labor Statistics, Major Work Stoppages in 2008 (Feb. 11, 2009), *available at* http://www.bls.gov/news.release/wkstp.nr0.htm.

144. Press Release, Bureau of Labor Statistics, Major Work Stoppages in 2008, Table 1 (Feb. 11, 2009), *available at* http://www.bls.gov/news.release/wkstp.t01.htm.

145. *See* Press Release, *supra* note 143.

146. *See id.*

147. *See* Press Release Table 1, *supra* note 144.

148. *See* JAROL B. MANHEIM, THE DEATH OF A THOUSAND CUTS: CORPORATE CAMPAIGNS AND THE ATTACK ON THE CORPORATION 34 (2001).

149. *See id.*

150. *See id.*

151. *See id.* ("[I]t was the use of this [strike] weapon in the public sector that brought about the abrupt end of the second era of 20th-century labor relations."); *see also* William Serrin, *Reagan Stance on PATCO Causes Union Anxiety,* N.Y. TIMES, Oct. 21, 1981, at

PATCO disaster was followed two years later by mining giant Phelps Dodge locking out and replacing its striking workers.[152]

While unions cannot strike as effectively as before, it is important to note that they still possess the right to strike. In her article arguing in favor of interest arbitration, Fiske writes of the "unavailability of strikes."[153] This characterization is inaccurate. The right to strike is still available to unions, but unions simply cannot use strikes effectively because employees rationally prefer not to strike. The inability of unions to *convince* workers to strike is the true problem facing labor unions. Interest arbitration is a policy response to that problem—not the problem of strikes being "unavailable."

Even with the ability to strike diminishing, unions initially did not clamor for interest arbitration. For instance, in 2001, several Republican senators, including Senators John McCain and Trent Lott, introduced legislation that would mandate final-offer interest arbitration in the airline industry.[154] The Airline Pilots Association, the major union representing pilots, aggressively opposed the legislation, claiming:

> We consider the McCain-Lott bill anathema to free collective bargaining. The proposed McCain-Lott bill is repugnant to the concept of collective bargaining. It undermines worker rights in the most fundamental ways, by removing airline employees right to take collective action in the form of a strike and vote on what will be their union contract. . . . There is no legitimate public policy reason to mandate arbitration. . . .[155]

While the McCain-Lott legislation called for final-offer arbitration,[156] a provision not currently in EFCA, the aggressive remarks from the Airline Pilots Association representative can lead to the

A24 (quoting a Ford Foundation labor expert as saying, "When the unions come out of the shock of what has happened, they are going to have to gird themselves for a very different kind of effort."); William Serrin, *A Union Chief Muses on Labor and the Controllers*, N.Y. TIMES, Sept. 1, 1981, at A12 ("[I]f the Reagan administration succeeds in decertifying the air traffic controllers union, it will be a watershed moment for the nation's labor movement, not only for 18 million public employees, but also for unionized workers in the private sector.").

152. *See generally* JONATHAN D. ROSENBLUM, COOPER CRUCIBLE (2nd. ed. 1998).

153. Fiske, *supra* note 9, at 60.

154. *See* Cooper, *supra* note 129, at 141-42. The bill was never reported out of committee. *See* Broderdorf, *supra* note 9, at 341. It should also be noted that the airline interest arbitration bill was the *sole* example that the author could find of legislatively mandated interest arbitration in the private sector prior to EFCA.

155. Copper, *supra* note 129, at 143-44. Ironically, the same arguments advanced by labor to oppose the McCain-Lott airline interest arbitration bill are now often used by management and their advocates to oppose EFCA's interest arbitration provision. *See generally* PIERCING THE RHETORIC, *supra* note 78, at 18-28.

156. Cooper, *supra* note 129, at 144-45.

inference that the union was probably opposed to any form of interest arbitration.[157] At least initially, even in the midst of a membership decline and an inability to convince workers to strike, labor unions were not in favor of interest arbitration and continued to rely on economic pressure to achieve their goals.

C. The Rise of the Corporate Campaign

While much has been made of labor's weaknesses and the disappearance of strikes, labor is not entirely helpless. Instead, unions deserve credit for devising a new economic weapon—the corporate campaign—which has terrified and devastated companies and partially replaced the strike.[158] A corporate campaign is described as a:

> long-term and wide-ranging program of economic, political, legal, and psychological warfare, usually, but not exclusively, initiated by a union or organized labor in general. It is directed against a corporation that has opposed unionization, declined to accept contract terms a union deems critical, or some other way refused to yield on some issue of great importance to the organization launching the campaign.[159]

During a corporate campaign, labor uses a variety of tactics to tarnish a company's public image and force the company to acquiesce to its demands, usually for union recognition or better contract terms. As prominent labor leader Bruce Raynor put it, "We're not businessmen and at the end of the day they are. If you're willing to cost them enough, they'll give in."[160] The type of tactics that labor unions use in the course of a corporate campaign include: introducing shareholder resolutions designed to weaken the independence of management or directors; encouraging ministers to give sermons critical of company or executives; attacking the CEO by distributing literature to his or her neighbors; alleging or implying sexual liaisons among executives; filing frivolous unfair labor practice claims; recruiting celebrities or prominent politicians to pressure management; establishing anti-company Web

157. *See id.* at 143-44.

158. *See generally* MANHEIM THOUSAND CUTS, *supra* note 148, at xiii; *see also* JAROL MANHEIM, UNION TRENDS IN CORPORATE CAMPAIGNS 7 (2005); JAROL MANHEIM, POWER FAILURE, POWER SURGE: UNION PENSION FUND ACTIVISM AND THE PUBLICLY HELD CORPORATION 36-38 (2005); JAROL MANHEIM, LABOR PAINS: CORPORATE CAMPAIGNS IN THE HEALTHCARE INDUSTRY 1 (2003); RON KIPLING, THE NEW OTANI HOTEL & GARDEN: A CORPORATE CAMPAIGN CASE STUDY 1 (1998).

159. MANHEIM THOUSAND CUTS, *supra* note 148, at xiii; *see also* MANHEIM UNION TRENDS, *supra* note 158, at 7; MANHEIM POWER FAILURE, *supra* note 158, at 36-38; MANHEIM LABOR PAINS, *supra* note 158, at 1; KIPLING, *supra* note 158, at 1.

160. MANHEIM UNION TRENDS, *supra* note 158, at 15.

sites; commissioning, preparing, and distributing white papers attacking the company; and challenging the zoning or permitting of any new facilities sought by the company.[161] This list is merely representative, not exhaustive, and many other examples of creative union corporate campaign techniques can be found.[162]

The easiest way to understand a corporate campaign is to consider the most well-known corporate campaign target: Wal-Mart. For most of its existence, the retailer was not involved in hot-button labor or political issues.[163] Yet as the corporation, which is famously non-union, evolved and moved into the grocery business in the midwest and northeast, its business model threatened traditionally unionized grocery stores in those areas.[164] Unable to penetrate Wal-Mart through traditional organizing methods, labor unions instead turned to the corporate campaign.[165] Labor accused Wal-Mart of nearly every type of corporate misconduct possible, pressured the company on Capitol Hill, and made life miserable for Wal-Mart executives.[166] While the attacks might appear to be unrelated, the reality is that nearly all of the anti-Wal-Mart fervor of the last five years was driven by a systematic and organized campaign by labor unions to force Wal-Mart into a more union-friendly posture.[167] Wal-Mart is not alone. Dozens of other companies have faced labor's wrath through this tool, including Comcast, Cintas, Albertson's, American Airlines, AT&T, Bridgestone-Firestone, Beverly Enterprises, Coca-Cola, Catholic Healthcare West, Food Lion, Hilton Hotels, K-Mart, Marriot, MGM Grand, New Otani Hotel, Smithfield Foods, Nike, and UPS.[168]

161. *Id.* at 16-17. Another example of a corporate campaign tactic was sending postcards to maternity patients of a healthcare system warning that their babies may be born on soiled or bloody linens because of a threatened laundry strike. The healthcare system successfully sued the union for libel damages and was awarded seventeen million dollars in a jury trial. *See* Sutter Health v. Unite Here, No. S-cv-17938, 2006 WL 2571305, at *1 (Cal. Super. Ct. July 21, 2006).

162. *See generally* MANHEIM UNION TRENDS, *supra* note 158, at 16-17; MANHEIM LABOR PAINS, *supra* note 158, at 23-29; KIPLING, *supra* note 158, at 18-32.

163. *See generally* RICHARD VEDDER & WENDELL COX, THE WAL-MART REVOLUTION 44-66 (2006) (detailing history of Wal-Mart during which the retailer was not involved in any significant public policy controversies).

164. *See* Ryan Ellis, *Unions Use Smear Tactics in Corporate Campaigns*, HUMANEVENTS.COM, Apr. 23, 2007, http://www.humanevents.com/article.php?id=20366 (last visited Jan. 25, 2010).

165. *See id.*

166. *See id.*; *see also* Steven Greenhouse, *Opponents of Wal-Mart to Coordinate Efforts*, N.Y. TIMES, Apr. 3, 2005, § 1, at 20.

167. *See generally* Ellis, *supra* note 164.

168. *See* MANHEIM THOUSAND CUTS, *supra* note 148, at 341-46; MANHEIM POWER SURGE, *supra* note 158, at 28-29.

While the corporate campaign has served as a strike substitute and the principal economic weapon of labor in the last 20 years, two problems have arisen with its use. First and foremost, success can vary. For example, unions claimed major victories when janitorial companies agreed to card check organizing in Miami[169] and Houston[170] after corporate campaigns by the Service Employees International Union. However, other corporate campaign targets have resisted and successfully weathered the union storm.[171] The second problem is that corporate campaigns are time-consuming and expensive.[172] A successful corporate campaign takes months, and possibly even years, of planning by union organizers and requires a significant financial investment.[173] Unions hope that the investment will lead to a pay-off in the end through new dues-paying members or more advantageous contracts, but there are no guarantees. Thus, labor unions need a new way to advance their contract and organizing goals. In turn, while previously rebuffing interest arbitration,[174] labor unions have now embraced it as an effective remedy.[175] In pressing for interest arbitration in first contracts, unions essentially are asking for the government to do for them what they are unable to do for themselves—force companies into accepting their contract demands.

VI. THE THREE FLAWS OF LABOR'S SOLUTION

Three major problems, however, arise with this solution. First, the courts traditionally have favored economic weapons, not government

169. *See* Steven Greenhouse, *Walkout Ends at University of Miami as Janitors' Pact Is Reached*, N.Y. TIMES, May 2, 2006, at A15.

170. *See* Steven Greenhouse, *Cleaning Companies in Accord With Striking Janitors*, N.Y. TIMES, Nov. 21, 2006, at A18.

171. While Wal-Mart has adopted a more conciliatory tone towards its critics, the company is still union-free. *See* Kris Maher, *Union Intensifies Efforts to Organize Workers at Wal-Mart*, WALL ST. J., Apr. 17, 2009, at A4; *see also* Michael Barbaro, *Wal-Mart's Detractors Come In From The Cold*, N.Y. TIMES, June 5, 2008, at C1 ("But after waging an aggressive public relations campaign against Wal-Mart for three years, the company's full-time, union-backed critics, who once vowed never to give up, are putting down their cudgels."); Stephanie Rosenbloom & Michael Barbaro, *Smiles All Around at Wal-Mart's Annual Meeting*, N.Y. TIMES, June 7, 2008, at C2 ("The chain has won over many long-term critics with a series of prominent reforms."). Another company that has successfully fought a corporate campaign is Cintas, a mostly non-union industrial laundry company based in Cincinnati. *See* HURTGEN & COHEN, MAKING YOUR VOTE COUNT, *supra* note 62, at 58.

172. *See* MANHEIM UNION TRENDS, *supra* note 158, at 15, 36.

173. *See id*.

174. *See* Cooper, *supra* note 129, at 141-42; Clark, *supra* note 108, at 10.

175. Steven Greenhouse, *Union Head Would Back Bill Without Card Check*, N.Y. TIMES, Sept. 5, 2009, at B3.

intervention, in American collective bargaining.[176] Second, EFCA would fundamentally alter the relatively level playing field of U.S. labor relations in organized labor's favor.[177] Finally, before implementing such a radical change, unions should first pursue internal reforms.[178] I will review each of these weaknesses in greater detail.

A. Interest Arbitration Is Incompatible with American Collective Bargaining

Requiring interest arbitration is a drastic remedy.[179] Since the passage of the National Labor Relations Act, courts have encouraged unions and corporations to use economic weapons in furtherance of their goals.[180] In *National Labor Relations Board v. Insurance Agents International Union*, the Supreme Court unequivocally defended the use of economic weapons in a labor dispute.[181] In siding with the employees' right to engage in economic warfare against the company, the Court held that "the use of economic pressure . . . is . . . not at all inconsistent with the duty of bargaining in good faith."[182] The Court further wrote:

> The presence of economic weapons in reserve and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . .
>
> [T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act. . . .[183]

The courts have endorsed economic weapons for both labor and management by approving defensive[184] and offensive lockouts[185] for

176. *See infra* pp. 44-49.
177. *See infra* pp. 50-56.
178. *See infra* pp. 57-61.
179. *See* EPSTEIN, *supra* note 3, at 17.
180. *See* NLRB v. Brown, 380 U.S. 278 (1965) (endorsing defensive lockouts); Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1960) (endorsing offensive lockouts); NLRB v. Ins. Agents Int'l Union, 361 U.S. 477 (1960) (generally protecting the right to use economic pressure); Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (holding that union does not have to give normal time and notice requirements for unfair labor practice strike); NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333 (1938) (endorsing management's right to hire replacement workers during strike); 29 U.S.C. § 163 (2006) (protecting the right to strike).
181. *See Ins. Agents Int'l Union*, 361 U.S. at 489-91, 494-95, 497-98.
182. *Id.* at 490-91.
183. *Id.* at 489, 495.

employers, the right of employers to hire replacement workers,[186] and, more recently, judicial endorsement of extremely aggressive corporate campaign techniques by unions.[187] Furthermore, so-called "Machinists" preemption in labor law is premised on the notion that certain economic weapons by both labor and management are neither protected nor prohibited by the NLRA and thus are preempted from state regulation.[188] States are unable to regulate in these areas and unions and employers must "draw on the strength of their bargaining skills and economic weapons without interference from government."[189] In this way, the concept of interest arbitration is inconsistent with our traditionally *American* notion of collective bargaining.

In her article broadly defending EFCA's interest arbitration provision, Fiske downplays the concern that EFCA's interest arbitration provision would be a radical change.[190] She claims that interest arbitration is a "time-tested process."[191] She then argues that arbitration is commonplace in society, since "arbitrators in fact decide a huge number of the most financially and socially significant issues across the whole spectrum of private sector employment."[192] She cites arbitrators being used in situations such as employment discrimination cases, screen credit fights in Hollywood, and disputes in professional sports.[193]

However, these general arbitration examples are misleading because they are simply not instances of government mandated interest arbitration. In the examples that Fiske cites, both sides *voluntarily* agree to arbitration, either as part of the contract or as a way to resolve a

184. *See Brown*, 380 U.S. at 280; *see also* Quaker State Oil Refining Co., 121 NLRB 334 (1958); NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linens), 353 U.S. 87 (1957).

185. *See American Ship Building Co.*, 380 U.S. at 310-11.

186. NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 347 (1938)

187. *See* Cintas Corp. v. UNITE HERE, 601 F. Supp. 2d 571, 576-80 (S.D.N.Y. 2009).

188. *See* Int'l Ass'n Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976).

189. *See* RAY ET AL., *supra* note 15, at 312. This preference probably finds broader grounding in our capitalist economic system, which generally encourages the private sector and disfavors excessive governmental intervention into business affairs. To be sure, capitalism is not absolute, and since the New Deal era, laws that restrict capitalism have been found to be constitutional so long as they affect interstate commerce and are rationally related to a government interest. *See, e.g.*, Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); *but see* U.S. v. Lopez, 514 U.S. 549 (1995).

190. Fiske, *supra* note 9, at 50-53.

191. *Id.* at 50.

192. *Id.* at 52.

193. *Id.* at 53.

contract dispute.[194] These examples of voluntary arbitration are consistent with the traditional way that arbitration is handled in the labor-management context, with the leading treatise on arbitration finding that "arbitration has been and still is a product of *private* contract between labor and management."[195] The lack of compulsory interest arbitration can also be evidenced when, on page two of this 1233 page volume, the authors make clear that while "submissions of disputes may be made compulsory by law . . . the use of the term arbitration in this book refers to voluntary arbitration."[196] Fiske's examples are fundamentally different from EFCA's interest arbitration provision because Congress has not dictated that Hollywood must use arbitration to resolve screen credit battles, nor has Congress legislated that employers and employees must first use arbitration before pursuing litigation. Just because some parties have voluntarily found arbitration to be a more convenient forum for conflict resolution and have freely decided to use that forum does not necessarily mean that Congress should mandate its use. Business executives frequently report that some of their biggest deals were made on the golf course.[197] This does not mean that Congress should require every business executive to play golf. Fiske's article also ignores the legislative history of the NLRA, which clearly supports the view that Congress did not believe that the government was empowered to compel a *single* contract term.[198]

Furthermore, her assertion that interest arbitration is "time-tested" depends upon the definition of time. As she later admits, "interest arbitration is not common in the American private sector."[199] As reviewed earlier, interest arbitration's use is almost entirely confined to the public sector and even then we have only a track record of about forty years[200]—which might or might not make it "time-tested."

Clearly, the point remains that congressionally-mandated interest arbitration as promulgated by EFCA is a revolutionary change in labor law.

194. *See* FRANK ELKOURI ET AL., *supra* note 88, at 317 ("Arbitration may be initiated either (1) by a submission, or (2) by a demand or notice invoking a collective agreement arbitration clause.").

195. FRANK ELKOURI ET AL., *supra* note 88, at 28 (emphasis added).

196. FRANK ELKOURI ET AL., *supra* note 88, at 2.

197. *See* Veronica Byrd, *Study of Executives and Links; In Golf and Business, Similar Strokes Seen*, N.Y. TIMES, July 13, 1993, at D5 (reporting that in a new survey more than one-third of business executives said that their biggest deals were made on the golf course).

198. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 103-05 (1970) (citing 79 Cong**.** Rec. S. 7659 (1935)) ("Let me say that the bill requires no employer to sign any contract, to make any agreement, to reach any understanding. . . .")

199. Fiske, *supra* note 9, at 50.

200. *See* Howlett, *supra* note 112, at 815-20.

B. Interest Arbitration Would Fundamentally Alter the Union-Management Landscape in Labor's Favor

In addition to being a dramatic change, interest arbitration would swing the contract pendulum toward unions in a way not envisioned by original labor legislation.[201] If interest arbitration becomes law, unions will have few incentives to negotiate with employers.[202] Instead, labor would have every incentive to let the 130 days run and then turn everything over to the arbitration panel. It would be highly unlikely that the arbitrator would award them anything less than what they would get in a traditional negotiation, especially if the traditional negotiation does not even produce a contract. A strong possibility exists that the arbitrator could award them fantastic contract terms.[203] For example, an arbitrator recently imposed a 33 percent wage increase for workers at a Wal-Mart tire shop in a binding arbitration proceeding in Canada.[204] The danger of interest arbitration tilting the playing field in this manner was persuasively made by former NLRB Chairman, and usual union ally, William Gould. In a law review article on EFCA, Gould wrote that EFCA:

> [A]s presently written, will entice unions to seek arbitration awards which resemble or replicate the best collective bargaining agreements or master agreements which they have previously negotiated. This will mean that there is less incentive for the union to bargain and that the tables will be quickly turned as the potential for union obduracy supplants that of the employer.[205]

Fiske takes issue with the argument that interest arbitration will automatically favor unions or discriminate against employers.[206] While conceding that "arbitration would strengthen nascent unions in the first contract scenario,"[207] she then argues that fears about arbitrators are "entirely speculative" and that "there is no factual basis for believing that arbitrators chosen to resolve bargaining disputes will not understand the company's business."[208] Her charge, however, is ironic given that her own arguments suffer from the same fallacy. Every argument about

201. *See* PIERCING THE RHETORIC, *supra* note 78, at 22-23.
202. *See* Gould, *supra* note 138, at 328.
203. *See* Miles Moore, *Wal-Mart Canada Closes Unionized Tire/Lube Outfit*, TIRE BUS., Oct. 27, 2008, at 4.
204. *See id*.
205. Gould, *supra* note 138, at 328.
206. *See* Fiske, *supra* note 9, at 75-76.
207. *Id.* at 64.
208. *Id.* at 75.

interest arbitration in the private sector is speculative because the system mandated by EFCA has never been widely attempted. Nobody truly knows how it will work. Although, given everything we know about interest arbitration, it does not seem outlandish that employers fear the consequences of unelected government bureaucrats coming into their businesses and writing labor contracts for their newly unionized businesses.

Fiske then attacks scholars like Epstein and employer organizations like the U.S. Chamber of Commerce for stoking the fear that arbitrators will favor unions, claiming that both Epstein and the Chamber of Commerce are hostile "to collective bargaining more generally."[209] Creating this straw man conveniently ignores the fact that Gould—whom she favorably cites throughout her paper and clearly does not have an anti-union bent—has flatly stated that EFCA's interest arbitration provision will give unions a strong incentive for obdurate behavior.[210]

Additionally, the evidence that Fiske cites of arbitration working fairly and not favoring unions[211] relies on the public sector interest arbitration experience. No evidence exists that the unique circumstances of the public sector will automatically transfer to the private sector. The limited experience with Canadian arbitrators and Wal-Mart was not encouraging for either the company or the workers involved as the arbitrator's extreme award led to the closure of the tire shop.[212]

At least one prominent voice with significant experience in both public sector interest arbitration and private sector contract negotiations, Peter Hurtgen, does not share Fiske's optimism. Hurtgen, who was appointed by President Clinton to the NLRB, served as its chair and eventually as Director of FMCS as well, has negotiated hundreds of contracts in both sectors.[213] He criticized the suggestion that simply because interest arbitration has functioned in the public sector, it will produce negotiated agreements in the private sector.[214] Hurtgen told the Senate Committee on Health, Education, Labor, and Pensions that in his public sector arbitration negotiations, "More often than not, the parties bargained simply to set the issue for the arbitrator . . . the process led to hearing[s,] . . . not agreements.[215]

Beyond this point, Fiske then argues that the current state of labor relations, and especially first contract negotiations, is not a balanced

209. *Id.* at 81.
210. Gould, *supra* note 138, at 328.
211. *See* Fiske, *supra* note 9, at 65-74.
212. *See* Moore, *supra* note 203, at 4.
213. *See* Hurtgen, *supra* note 140, at 15-16.
214. *See id.*
215. *Id.* at 16.

playing field anyway. Fiske claims that the NLRB does not effectively remedy bad-faith bargaining violations by employers because of "crabbed"[216] interpretations from "conservative courts and boards."[217] This ad-hominem allegation is unfounded when one considers that Democratic presidents have controlled appointments to the NLRB for more than half of its existence,[218] and the Supreme Court case[219] that reaffirmed the notion that the government cannot set private contract terms was decided in 1970—hardly the conservative apex of the Court. While Fiske is right that scholars frequently criticize these decisions,[220] it is equally possible that labor scholars are not interpreting the law correctly. The NLRB and courts (all experts in the law themselves), for 70 years now, and across Republican and Democratic appointments, have favored a competing interpretation.

Moving past this ad-hominem attack and considering the substance of Fiske's charge—that the Board does not use its full remedial power to deter bad-faith negotiations—the union retains the right to file an unfair labor practice charge against an employer for bad-faith negotiations.[221] A successful charge will usually result in a board order to negotiate in good-faith.[222] This is admittedly not the most aggressive remedy possible, but labor remedies are unique because of the circumstances of labor relations. As discussed earlier, the union retains a wide array of economic weapons at its disposal, including the right to strike.[223] A similar right to engage in economic warfare is usually not found in other legal settings. The core of her argument essentially becomes that the law should be tilted in labor's favor because unions cannot convince workers to strike. Again, this is not the traditional interpretation of the NLRA from either the Board or courts, which favors economic weapons and has tried to fashion a fair playing field without the state "putting its thumb on the scale."[224]

Finally, Fiske repeats the claim that employers have an unfair advantage because they can unilaterally implement their final proposals

216. Fiske, *supra* note 9, at 59.
217. *Id.* at 57.
218. The author calculates that Democratic Presidents have controlled appointments to the NLRB for thirty-nine years while Republican Presidents have controlled NLRB appointments for only thirty-six years. For a listing of presidential administrations since the passage of the NLRA in 1935, see About the White House: The Presidents, http://www.whitehouse.gov/about/presidents (last visited Jan. 26, 2010).
219. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).
220. *See, e.g.*, Fiske, *supra* note 9, at 59.
221. 29 U.S.C. § 158 (2006).
222. *See* Fiske, *supra* note 9, at 56.
223. *See* 29 U.S.C. § 163.
224. *See* RAY ET AL., *supra* note 15, at 312.

after impasse is reached.[225] This argument apparently insinuates that management can implement whatever it desires. In reality, management can only implement a proposal that it has already offered to the union in the negotiating process.[226] It is possible for these proposals to contain better terms and conditions than the employees previously enjoyed because "unrealistically harsh or extreme proposals can serve as evidence that the party offering them lacks a serious intent to adjust differences,"[227] easily leading to a bad-faith bargaining charge.[228] For example, the Board found a proposal implemented at impasse that gave management complete discretion over wage increases without any participation by the union was "so inherently destructive of the fundamental principles of collective bargaining that it could not be sustained."[229] Thus, while labor unions might not be pleased with an implemented proposal, such a proposal could actually represent an improvement in the working conditions of employees. At a minimum, such proposals will not vest "exclusive control in the employer"[230] because such behavior can form the basis of a bad-faith bargaining charge.[231]

Furthermore, even if employer proposals are unfair, interest arbitration would be a drastic solution to this problem. More modest remedies are appropriate. For example, Congress could require that the same terms and conditions of employment that previously governed the workplace before unionization are implemented at impasse. This would ensure that neither labor nor management would gain an unfair advantage as the parties continue to negotiate. The United States Court of Appeals for the District of Columbia Circuit suggested this solution in a 1997 case, pointing out that "The Board could have adopted, for example, a rule requiring the status quo to remain in effect until either the union or the employer was willing to resume negotiations. Stagnancy might pressure both the union and employer to bend."[232]

Moreover, if Fiske is correct in her suggestion that the ability to implement is a major employer advantage, she nonetheless fails to mention the many advantages labor unions enjoy throughout the entire organizing process. In addition to the right to strike and not be fired for doing so,[233] both Hurtgen and Charles Cohen, another Clinton appointee

225. *See* Fiske, *supra* note 9, at 55-59.
226. *See* Dannin, supra note 55, at 25-27.
227. Liquor Industry Bargaining Group, 333 NLRB 1219, 1220 (2001).
228. 29 U.S.C. § 158.
229. McClatchy Newspapers, Inc., 321 NLRB 1386, 1391 (1996).
230. *Liquor Industry*, 333 NLRB at 1220.
231. 29 U.S.C. § 158.
232. McClatchy Newspapers, Inc. v. NLRB, 131 F.3d 1026, 1032 (D.C. Cir. 1997).
233. 29 U.S.C. § 163; RAY ET AL., *supra* note 15, at 217.

to the NLRB, cite several other key union advantages including: the ability to control whether and when a union election petition is filed; the ability to define precisely what workers will be included in the possible bargaining unit; the ability to visit workers at home to convince them to vote for the union; and the ability to make almost unfettered promises to workers to persuade them to unionize.[234]

Overall, since the Taft-Hartley Act of 1947, the NLRB and the courts have tried to create a balanced playing field in labor relations.[235] Both management and unions have advantages and disadvantages in the process.[236] Despite Fiske's arguments to the contrary, interest arbitration would decidedly change this playing field in labor's favor. It makes little sense to remove this balance and shift first contract negotiations in this manner.[237]

C. The Need for Internal Union Reform

What is striking about labor is that despite seeing its market share decline, unions still largely function the same way they did 50 years ago.[238] Andy Stern, former President of the Service Employee International Union and often considered the intellectual leader of today's labor movement, has best captured this sentiment, arguing, "Our movement is going out of existence, and yet too many labor leaders go and shake their heads and say they'll do something, and then they go back and do the same thing the next day."[239]

A full critique of the internal reforms unions could pursue to reverse their membership decline is well beyond the scope of this Comment. Still, it should be noted that labor continues to concentrate a large amount of its manpower and finances on the political process.[240] Eight of the top ten Political Action Committee donors to the Democratic Party were labor unions in the 2007-2008 election cycle.[241] Yet, according to

234. *See* Hurtgen, *supra* note 140, at 10; Cohen, *supra* note 84, at 12 ("Far from being unfair to unions, the NLRB's election process offers unions many unique advantages.").

235. *See, e.g.*, 29 U.S.C. § 157 ("Employees shall have the right self-organization . . . and shall also have the right to refrain from any or all of such activities. . . ."); RAY ET AL., *supra* note 15, at 312.

236. *See* Hurtgen, *supra* note 140, at 10; Cohen, *supra* note 84, at 12.

237. *See* PIERCING THE RHETORIC, *supra* note 78, at 22-23 ("Imposing mandatory interest arbitration on private sector employers would skew the once-leveled playing field of collective bargaining in the union's favor.").

238. *See* Matt Bai, *The New Boss*, N.Y. TIMES, Jan. 30, 2005, § 6, at 38.

239. *Id.*

240. *See* MANHEIM POWER SURGE, *supra* note 158, at 23-29.

241. *See* Center for Responsive Politics, Top 20 PAC Contributors to Democratic Candidates 2007-2008, http://www.opensecrets.org/pacs/toppacs.php?Type=C&cycle=2008&Pty=D (last visited Nov. 16, 2009). Labor's total contributions to Democrats totaled over sixty million dollars with ninety-two percent of their overall contributions

non-partisan exit polls, 39 percent of union households voted for the Republican Presidential candidate, John McCain.[242] Since 1976, approximately 38 percent of union households have voted for the Republican candidate in any given year.[243] Furthermore, public opinion research suggests that large majorities believe that unions are too politically active.[244] The Harris Poll asked this question in 1993 and 2005 and found that 70 and 67 percent of respondents respectively agreed that unions are too involved in political activities.[245] While it is probably impossible—and unwise—for labor to retreat from politics entirely, in its quest for new relevance and a broader appeal to non-union workers, labor's heavy involvement in politics might be exacerbating its larger problems.

Recent public opinion polls also show a broad public dissatisfaction with labor unions that could be hurting their recruitment efforts. A 2009 Gallup poll found that unions are largely unpopular with the American public with only 48 percent of the country approving of labor unions and 42 percent, a plurality of respondents, hoping that unions have less influence in the future.[246] Even union members themselves are not especially pleased with the labor movement, with 61 percent of union households rating labor negatively in the Harris survey.[247]

While labor unions and their allies in academia blame the National Labor Relations Board,[248] Republican politicians,[249] companies like Wal-Mart,[250] anti-union consultants and lawyers,[251] the courts,[252] and nearly every other major or minor player in labor relations for their membership

landing in Democratic coffers. *See* Center for Responsive Politics, Labor PAC Contributions to Federal Candidates, 2008, http://www.opensecrets.org/pacs/sector.php?cycle=2008&txt=P01 (last visited Jan. 31, 2010).

242. *See* CNN 2008 National Exit Polls, http://www.cnn.com/ELECTION/2008/results/polls/#val=USP00p3 (last visited Nov. 15, 2009).

243. *See* New York Times Exit Polls 1976-2004, http://graphics7.nytimes.com/images/2004/11/06/weekinreview/nwr_ELECTORATE_041107.gif (last visited Nov. 15, 2009).

244. HARRIS POLL, NEGATIVE ATTITUDE TO LABOR UNIONS SHOW LITTLE CHANGE IN PAST DECADE (2005), *available at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=598.

245. *Id.*

246. GALLUP POLL, LABOR UNIONS SEE SHARP SLIDE IN U.S. PUBLIC SUPPORT (2009), *available at* http://www.gallup.com/poll/12744/labor-unions-sharp-slide-public-support.aspx.

247. *See* HARRIS POLL, *supra* note 244.

248. *See, e.g.*, Steven Greenhouse, *Critics Say Labor Board Favors Business*, N.Y. TIMES, Dec. 14, 2007, at A33.

249. *See, e.g.*, Greenhouse, *supra* note 4, at A33.

250. *See, e.g.*, Greenhouse, *supra* note 166, § 1, at 20.

251. *See, e.g.*, Steven Greenhouse, *How Do You Drive Out a Union? South Carolina Factory Provides a Textbook Case*, N.Y. TIMES, Dec. 14. 2004, at A30.

252. *See, e.g.*, Fiske, *supra* note 9, at 59.

woes, with the notable exception of Stern,[253] unions never seem to blame themselves for any of their problems. In fairness, unions should probably take responsibility as well for failing to adapt their strategies to today's workforce and for pursuing political agendas that likely offend would-be union members. Before drastic government intervention, unions instead should first be expected to undertake some internal reforms. It might be that a new vision of labor unions that addresses these problems—a vision which is currently unimagined by today's labor leaders[254]—could both co-exist with the historic NLRA framework and boost labor union membership at the same time.

VII. INTEREST ARBITRATION: FUTURE PROSPECTS AND PRACTICAL CONCERNS

A. Labor's Unwavering Support

While interest arbitration is problematic, organized labor is steadfast in its support.[255] Even with labor's strong backing, the prospect of any part of EFCA being enacted, including interest arbitration, is unclear. The bill was introduced in both the House and Senate in 2009,[256] but the legislation stalled during the health care debate and neither chamber formally passed the bill.[257] Labor leaders were optimistic that the bill would be passed in 2010,[258] but moderate and conservative Democrats were reluctant to support the legislation in a midterm election year.[259] The interest arbitration part of the bill seems to be the provision that labor leaders crave the most.[260] Labor has shown some willingness to

253. *See* Bai, *supra* note 238, § 6, at 38.

254. While Stern has often positioned himself as this new leader, many of his policies seem to echo the same positions that have failed labor for fifty years. *See* Matthew Kiminski, *The Weekend Interview: Andy Stern*, WALL ST. J., Dec. 6, 2008, at A9.

255. *See* Greenhouse, *supra* note 175, at B3.

256. *See* Sean Higgins, *Card Check Bill Support Down From Last Time*, INVESTORS BUS. DAILY, Mar. 11, 2009, at A01.

257. For current status, see http://thomas.loc.gov (type "Employee Free Choice Act" into "Search Bill Summary and Status" box; then click on H.R. 1409 and S. 560; last major action for both bills was report to appropriate subcommittees). *See also* Jeanne Cummings, *For Labor, There's Always Next Year,* POLITICO, Dec. 15, 2009, *available at* http://www.politico.com/stories/1209/30598.html.

258. Mark Schoeff, *Labor Leader Predicts Free Choice Act Passage by April*, WORKFORCE MANAGEMENT, Jan. 11, 2010, *available at* http://www.workforce.com/section/00/article/26/92/38.php (last visited Jan. 26, 2010).

259. *See* Cummings, *supra* note 257 ("Backers of [EFCA] are hoping it will re-emerge. . . . But . . . it's unclear whether Sen. Tom Harkin (D-Iowa) has been able to hash out language acceptable to the moderates and conservatives . . . a task made all the more difficult by the looming midterm elections.").

260. *See* Greenhouse, *supra* note 175, at B3.

compromise on the card check provision,[261] but has held firm in its insistence for interest arbitration.[262]

Even though the bill failed to pass in 2010, it is likely that labor will not abandon interest arbitration. In fact, labor has proven resilient with EFCA up until this point. The bill was first introduced in 2003,[263] at a time when Republicans controlled both the House and Senate after the 2002 midterm elections and a conservative policy direction was assured.[264] The bill was reintroduced in 2005,[265] after Republicans were re-elected to majorities in Congress and President Bush was re-elected to the White House.[266] If labor was willing to introduce the bill and fight for the bill under those less than ideal circumstances,[267] then a strong possibility exists that labor will continue to press for the bill's passage in the future, perhaps when the political climate has changed again. Even if the entire bill is never passed, the interest arbitration portion could be separated from the main bill and presented as a stand-alone piece of legislation[268] or enacted through the NLRB rule-making procedure.[269]

261. *See id.*

262. *Id.*

263. *See* http://thomas.loc.gov (follow "Committee Reports" link; follow "110th Congress link"; then type "Employee Free Choice Act"; click on "House Report 110-023"; go to section on "108th Congress").

264. *See, e.g.*, Alison Mitchell, *The 2002 Elections: The Overview; Victorious Republicans Preparing A Drive for Bush Agenda and Judgeship Nominees*, N.Y. TIMES, Nov. 7, 2002, at A1 ("Republicans began setting plans yesterday to push forward a domestic agenda . . . as they savored a sweep of the midterm elections that gave them complete control of the Capitol.").

265. *See* http://thomas.loc.gov (follow "Committee Reports" link; follow "110th Congress link"; then type "Employee Free Choice Act"; click on "House Report 110-023"; go to section on "109th Congress").

266. *See, e.g.*, David Kirkpatrick, *The 2004 Elections: Issues—Conservatives; Some Backers of Bush Say They Anticipate a 'Revolution'*, N.Y. TIMES, Nov. 7, 2007, at P1 ("Exulting in their electoral victories, President Bush's conservative supporters immediately turned to staking out mandates for an ambitious agenda of long-cherished goals. . . .").

267. *See* David Weigel, *Union Rules*, REASON, June 2008, *available at* http://reason.com/archives/2008/05/07/union-rules (quoting AFL-CIO organizing director Stewart Acuff as stating that "When we started working on this legislation five years ago . . . people in Washington said it would never be taken seriously, never pass the laugh test.").

268. This specific scenario seems like a strong possibility. From a public relations perspective, card check was always a hard sell given that it would take away the right of workers to vote via secret ballot, an easily understood and essentially American concept. On the other hand, interest arbitration is difficult for the average citizen to understand and does not inspire the same sort of nostalgia that a secret ballot does.

269. The NLRB has traditionally eschewed the same rule-making that other administrative agencies have embraced. *See* Mark H. Greenwald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L. J. 274 (1991). But in November 2009, the National Mediation Board (NMB)—a separate administrative agency that governs airline and railway labor disputes—announced a significant rule-making change

While business groups might be relieved that EFCA and interest arbitration were not passed in 2009, interest arbitration is far from dead. If the legislation is advanced either in Congress or through the rule-making process, then the focus will turn from the pros and cons of interest arbitration generally to how a specific interest arbitration system should work.

B. EFCA Lacks Details on How Arbitration Would Operate

Unfortunately, the current text of EFCA gives little guidance on how interest arbitration would actually operate.

1. FMCS Is Not Familiar with Interest Arbitration

The bill entrusts complete discretion to the Federal Mediation and Conciliation Service (FMCS) to formulate regulations.[270] This structure stands in stark contrast to the other areas where interest arbitration is used such as Major League Baseball, where specific rules mandate how arbitrators are selected, criteria that should be used, and the type of arbitration system that will be employed.[271] EFCA's interest arbitration provision contains none of these directives.[272] For this reason alone, at least two noteworthy labor lawyers have questioned whether interest arbitration could pass constitutional scrutiny under the non-delegation doctrine.[273]

The reliance on FMCS is even more peculiar when one considers that FMCS has little experience in interest arbitration.[274] FMCS

that would allow for easier union organizing. *See Proposal Aims to Ease Unionizing at Airlines and Railroads*, N.Y. TIMES, Nov. 3, 2009, at B9. While the NLRB and NMB are completely separate agencies, speculation abounds that the NLRB might follow the NMB's lead and engage in rule-making that could allow for easier union organizing or other union-friendly positions—such as interest arbitration. The NLRB is currently controlled by Democratic board members. *See* NLRB Board Members, http://www.nlrb.gov/abous_us/overview/board/index.aspx.

270. *See* Employee Free Choice Act of 2009, H.R. 1409 § 3, 111th Cong. (2009); Employee Free Choice Act of 2009, S. 560 § 3, 111th Cong. (2009).

271. *See generally* ABRAMS, *supra* note 115, at 142-66.

272. *See* Employee Free Choice Act of 2009, H.R. 1409 § 3, 111th Cong. (2009); Employee Free Choice Act of 2009, S. 560 § 3, 111th Cong. (2009).

273. *See* Philip B. Rosen & Richard I. Greenberg, *Constitutional Viability of the Employee Free Choice Act's Interest Arbitration Provision*, 26 HOFSTRA LAB. & EMP. L.J. 33, 59-60 (2008). *But see* Fiske, *supra* note 9, at 82-93.

274. *See* FEDERAL MEDIATION AND CONCILIATION SERVICE, ARBITRATION STATISTICS 2008 (2008), *available at* http://www.fmcs.gov/internet/itemDetail.asp?categoryID=196&itemID=21837.

primarily serves as a *voluntary* mediator in labor disputes.[275] FMCS statistics prove this point.[276] In fiscal year 2008, FMCS was involved in a mere 21 mediations of new or reopened contract terms.[277] During that same time period, FMCS mediated 2046 contract interpretations or applications.[278]

Fiske claims that FMCS is well-suited for this interest arbitration role and that "the FMCS reports that it is actively involved in attempting to mediate first contract bargaining relationships."[279] Her sole citation for this assertion is Gould's law review article.[280] However, Gould provides no supporting reference for this claim.[281] This argument, then, is nothing more than an unsupported assertion. The more persuasive evidence is the official FMCS data, which clearly demonstrate that FMCS has little prior interest arbitration experience.[282]

Because of the lack of direction from the legislation itself, and FMCS's unfamiliarity with interest arbitration, significant policy voids will exist if interest arbitration is enacted. The most complete idea of how to fill these gaps has come from David Broderdorf, a management attorney at Morgan Lewis & Bockius.[283] Broderdorf specifically urges three components to an interest arbitration system: first, he argues for a conventional arbitration system in lieu of final-offer arbitration; next, he would mandate specific criteria to be used by interest arbitrators in guiding their decisions; finally, he states that interest arbitration should only be used for situations involving bad-faith bargaining by the parties.[284] Overall, Broderdorf makes a thought-provoking and well-reasoned argument for his vision of interest arbitration. Fiske's article responds to several of Broderdorf's points. I will review each of his three components and Fiske's criticisms when applicable.

275. *See* Federal Mediation and Conciliation Service, Frequently Asked Questions About FMCS, http://www.fmcs.gov/internet/faq.asp?categoryID=22 (last visited Nov. 16, 2009) ("Collective bargaining mediation is a voluntary process. . . .").

276. FEDERAL MEDIATION AND CONCILIATION ARBITRATION STATISTICS, *supra* note 274.

277. *Id.*

278. *Id.* 2008 was fairly typical of FMCS data historically on this issue. In looking at the 2006 statistics, Broderdorf found that out of 2473 topics mediated by FMCS, only 16 involved new or reopened contract terms. *See* Broderdorf, *supra* note 9, at 329. He concluded, "As one can see from the 2006 numbers, interest arbitration makes up a very small percentage of the total use of FMCS arbitration services." *Id.*

279. Fiske, *supra* note 9, at 52.

280. *See id.*

281. *See* Gould, *supra* note 138, at 326.

282. *See* FEDERAL MEDIATION AND CONCILIATION ARBITRATION STATISTICS, *supra* note 274.

283. Broderdorf, *supra* note 9, at n.a1.

284. *See* Broderdorf, *supra* note 9, at 325, 345.

C. EFCA's Logistical Concerns

1. Conventional or FOA Arbitration

Broderdorf argues in favor of conventional arbitration and against final-offer arbitration, on the grounds that arbitrators would be too limited in awarding acceptable terms in a final-offer system.[285] He claims that this would be an unacceptable development because the "paramount goal here [is] arriving at an acceptable first contract that solves problems rather than selects winners."[286] Fiske counter-argues that final-offer arbitration should be used because "FOA has an even greater tendency than conventional interest arbitration to promote good faith negotiations. . . ."[287]

The goal of American collective bargaining is a negotiated settlement by the parties themselves.[288] The arbitration system that produces this result is the one that should be employed. As the social science literature already reviewed suggests, without some risk of the arbitration turning out badly, neither side will come to the table with serious offers.[289] A lack of serious offers means that a negotiated settlement by the two parties would be unlikely and the arbitrator would write the contract—the exact result that collective bargaining hopes to avoid. Fiske correctly cites to successful final-offer experiences in New Jersey and experimental designs which show that FOA promotes a "more even balance of power."[290] Fiske does not discuss other critical real-world examples which also support this position, especially when contrasted with conventional arbitration. For example, after the state of Michigan changed from a conventional arbitration system to a final-offer system in 1969, the number of cases actually reaching arbitration significantly declined, providing evidence for the theory that the parties were seeking to negotiate their own awards.[291] A similar experience occurred in the state of Oregon after it converted to FOA.[292] In the final two years of conventional arbitration, 1993 and 1994, 44 cases

285. *See* Broderdorf, *supra* note 9, at 345.
286. *Id.*
287. Fiske, *supra* note 9, at 75.
288. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970) ("The object of [the NLRA] was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions.").
289. *See, e.g.*, Loewenberg, *supra* note 93, at 117-18; Meth, *supra* note 91, at 387; Stevens, *supra* note 111, at 48.
290. Fiske, *supra* note 9, at 72-74.
291. *See* Howlett, *supra* note 112, at 827-28.
292. *See* Ronald L. Miller, *High Risk Final Offer Interest Arbitration in Oregon*, 28 J. COLLECTIVE NEGOTIATIONS 265 (1999).

eventually made it to arbitration.[293] In the two years after FOA, that number was more than cut in half to 21.[294] Within Oregon, the city of Eugene was the first municipality in the nation to use a final-offer arbitration system.[295] In a 1977 study that analyzed the first six years of the Eugene system, the parties negotiated their own agreements approximately two-thirds of the time.[296] Arbitration was not invoked at all in the later years of the study, leading one researcher to conclude, "The Eugene experience suggests that over time the city's procedure has become more rather than less effective in preserving the parties' incentives to reach their own agreements. . . ."[297] Finally, in 1972, the state of Wisconsin amended its public sector labor relations statue to provide for final-offer arbitration, replacing a previous system of fact-finding.[298] In the initial years after FOA was implemented, arbitrators were issuing awards on average in only nine percent of the cases where they were eligible to do so.[299] In about two-thirds of the cases the parties directly negotiated the awards themselves.[300] For the remaining instances, the parties reached an agreement during an intermediary mediation stage before the arbitrator issued an award.[301] It should be noted that a later study analyzing the 1974-1976 time period found that 14 percent of negotiations resulted in an arbitrated award, a small but noticeable increase over previous years.[302] The author of that study postulated that arbitration might have been used more often during that time period because of "a more difficult economic environment for bargaining."[303]

293. *Id.* at 276.
294. *Id.*
295. *See* Long and Feuille, *supra* note 97, at 187. The Eugene system was slightly different from others already reviewed, in that both parties submitted two final offers, with a total of four offers on the table. *See id*. at 192. The offers may constitute a complete proposed contract (total-package) or may be limited to issues still in dispute (issue by issue). *See id.* The Eugene system allowed for negotiations to continue even after the final offers were submitted. *See id.* The parties could reach an agreement at any time prior to the arbitrator's decision being rendered. *See id.*
296. *See* Peter Feuille, *Final-Offer Arbitration and Negotiating Incentives*, 32 ARB. J. 203, 208 (1977).
297. *Id.* at 209.
298. *See* James L. Stern, *Final-Offer Arbitration—Initial Experience in Wisconsin*, MONTHLY LAB. REV., Sept. 1974, at 39, 39. While the parties retained the option of invoking conventional arbitration, it was only used once, providing strong evidence that both sides preferred final-offer. *See id.*
299. *Id.* at 40.
300. *Id.*
301. *Id.*
302. *See* Feuille, *supra* note 296, at 210-11.
303. *Id.* at 211.

Overall, the evidence from these states and municipalities tends to support the hypothesis that final-offer arbitration provides the right mixture of risk and reward to compel the parties to reach agreement without using arbitration.[304] The evidence above suggests that the fear of a bad settlement under final-offer can bring the parties together and reach their own independent agreement. Fiske's argument for final-offer arbitration is preferable over Broderdorf's for conventional arbitration.

However, Fiske essentially argues that the case is closed.[305] Her analysis of this section is entitled "Interest Arbitration Will Work"[306]—period. While the case is strong that FOA is better than conventional arbitration, the limited amount of real-world economic data presently available on this issue does not make an overwhelming or complete case. The biggest flaw with all of this data is that it comes from the public sector, which has a completely different purpose and value system than the private sector. For instance, the private sector is driven by profits and providing employment opportunities, whereas the public sector provides services at a cost to taxpayers. If an arbitrator in the public sector comes up with an unacceptable award, the state or municipality can raise taxes. If that same arbitrator comes up with an unacceptable award in the private sector, the company will likely go out of business and jobs will be lost.

At the very least, it remains unclear which arbitration system would truly work best in the private sector.[307] While the final-offer arbitration idea has significant merit, it would be unwise to institute it nation-wide based upon the limited case studies reviewed above or experimental designs from labor law academics.[308]

2. Interest Arbitration Criteria

Beyond the question of final versus conventional arbitration is what type of criteria arbitrators should use in reaching their decisions. Broderdorf proposes that arbitrators use the following criteria: the stipulation of the parties; the consumer price index (CPI); the comparison of corresponding wages, benefits, and terms and conditions of employment within the firm and with comparable firms or industries in geographic areas with similar economic conditions; the financial condition of the employer and its ability to incur changes in labor costs;

304. *See, e.g.*, Howlett, *supra* note 112, at 827-28; Long and Feuille, *supra* note 99, at 187; Stern, *supra* note 298, at 40.

305. *See generally* Fiske, *supra* note 9, at 65-74.

306. *See id.* at 65.

307. The author will readily concede that Broderdorf might be right and conventional arbitration is the more appropriate arbitration system.

308. Fiske, *supra* note 9, at 74.

and industry best practices in labor relationships for fostering labor-management partnership, including joint initiatives to improve employee engagement, satisfaction, productivity, and overall business success.[309] Fiske does not argue strongly for any specific criteria, instead relying on commonly used criteria from the public sector.[310] But like Broderdorf, she favorably cites a broad catch-all category of "any other factors that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment."[311]

The first four criteria that Broderdorf proposes are not problematic. However, the final criteria from Broderdorf and Fiske's broad catch-all category give arbitrators too much freedom to craft a contract. What is an "industry best practice" that "fosters [a] labor-management relationship" or "any other factor that [is] normally or traditionally taken into consideration" can vary from arbitrator to arbitrator, based upon their respective background, familiarity with the industry or unions involved, and subjective judgments about the broader role of labor unions and employers. Any criteria used must strictly limit the arbitrator's ability in crafting an award. No need exists for a broad "catch-all" category that would give arbitrators unfettered power. Such "catch-all" categories have also been problematic in other employment related legislation, most notably the Employment Retirement Income Security Act (ERISA).[312] The civil enforcement provision of ERISA allows for "a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision . . . or to obtain other appropriate equitable relief."[313] Even though this "catch-all" would at first seem to afford generous relief, the Supreme Court has struggled with the breadth to afford this provision and what types of relief should be available to petitioners.[314] Given this experience, a strong likelihood exists that the courts and FMCS would struggle with how to interpret a "catch-all" provision.[315]

It is also worth noting that even if strict criteria are part of the final legislation, arbitrators might ignore them anyway. A study of arbitrators in Wisconsin found that 15 out of 22 arbitrators said that statutorily

309. Broderdorf, *supra* note 9, at 345-47.
310. *See* Fiske, *supra* note 9, at 66.
311. *Id*.
312. 29 U.S.C. § 1001 (2006).
313. 29 U.S.C. § 1132.
314. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (limiting equitable relief to equitable restitution); Mertens v. Hewitt Assoc., 508 U.S. 248 (1993) (limiting relief under ERISA to equitable relief because "equitable relief must mean something less than all relief").
315. This assumes that EFCA allows for judicial review of arbitrator awards. As EFCA presently stands, no judicial review provision is incorporated into the law.

defined criteria would not impact their decision-making.[316] An arbitrator explained this result by saying "A common law has developed in interest arbitration and the same criteria would be used with or without them stated in the statue."[317] Criteria might actually be unimportant when arbitrators are just going to do whatever they desire according to this vague idea of "interest arbitration common law." While Fiske does not find this problematic,[318] this common law of arbitration affords arbitrators enormous discretion and there is no guarantee, as the earlier Wal-Mart tire shop demonstrates,[319] that arbitrators will always employ it wisely. The prospect of rogue arbitrators ignoring legislatively enacted criteria is even stronger evidence that the entire interest arbitration venture is misguided.

3. Limiting Interest Arbitration to Bad-Faith Bargaining

Broderdorf's final suggestion is that interest arbitration should only be used for situations involving bad-faith bargaining by the parties.[320] Bad-faith bargaining is a violation of Section 8(a)(5)[321] of the NLRA and can result in an unfair labor practice charge against the employer. Fiske argues against this provision, claiming that only using interest arbitration in bad-faith circumstances will be ineffective because employers will still have an incentive to engage in bad-faith bargaining.[322] She believes that the legal proceedings necessary to prove a bad-faith bargaining charge are too lengthy.[323]

While limiting interest arbitration to bad-faith bargaining seems like a reasonable requirement and could punish employers that violate labor laws, the difference between "bad-faith" bargaining and "good-faith" bargaining is tenuous. The board employs a "totality of the circumstances" test to differentiate between the two.[324] As Broderdorf concedes, many times when labor unions complain of "bad-faith"

316. *See* Gregory G. Dell'Omo, *Wage Disputes in Interest Arbitration: Arbitrators Weigh the Criteria*, ARB. J., June 1989, at 4, 11. These 22 arbitrators were the most widely used in Wisconsin, deciding approximately 82 percent of all arbitrations in the state between 1979 and 1985. *See id.* at 5 n.5.

317. *See id.* at 11. Reassuringly, the study found that the "common law" criteria that arbitrators follow are rather conventional. *See id.* at 8. The criteria used by the arbitrators were internal wage settlement patterns, followed by external comparability, and then cost of living as a "tie breaker." *See id.*

318. *See* Fiske, *supra* note 9, at 66 n.92.

319. *See* Moore, *supra* note 203, at 4.

320. *See* Broderdorf, *supra* note 9, at 333-35.

321. 29 U.S.C. § 157 (2006).

322. *See* Fiske, *supra* note 9, at 79-80.

323. *See id.*

324. *See, e.g.*, NLRB v. Advanced Bus. Forms Corp., 474 F.2d 457, 466 (2d Cir. 1973).

bargaining, the situation is not "bad-faith" bargaining at all but instead a company simply negotiating from a position of bargaining strength.[325] Whether bargaining is in good faith or bad faith is highly subjective. If all that triggers interest arbitration is a charge of bad-faith bargaining, unions might resort to this tactic even when the employer is only engaging in good-faith bargaining. FMCS and possibly the courts will be in the unenviable position of judging whether every negotiation is in good-faith or bad-faith. Thus, while this suggestion seems straightforward, limiting interest arbitration to bad-faith bargaining might not completely solve the problem that it seeks to address.

Fiske is correct that proving a bad-faith bargaining charge can take time, which could dissuade unions from pursuing this avenue. But if all bad-faith bargaining charges were quickly adjudicated outside of the normal NLRB timetable, unions would have an even greater incentive to excessively file bad-faith bargaining charges.[326] In the same vein, Fiske's alternative of allowing interest arbitration in every circumstance is even worse, because, as Broderdorf notes, it would "artificially enhance a union's power by guaranteeing a contract not earned through traditional negotiations."[327] This essentially tilts the playing field in labor's favor, which poses a serious problem as previously discussed.[328]

At the very least, interest arbitration should be limited to bad faith bargaining. However, even then, unions would have a strong incentive to abuse the bad faith/good faith distinction, a possibility which again demonstrates the shortcomings of interest arbitration.

VIII. CONCLUSION

The Employee Free Choice Act and interest arbitration are hotly contested, emotional issues. While I am clearly skeptical of many of labor's arguments in favor of interest arbitration, my larger concern is two-fold: first, that Congress is passing legislation that will tremendously impact the private sector based upon indirect comparisons with the public sector; and second, that Congress has not properly considered all of the complicated issues that surround the type of interest arbitration that EFCA envisions. If Congress wanted to seriously change

325. *See* Broderdorf, *supra* note 9, at 333 ("Second, of the roughly 32 percent of newly organized employees that do not achieve a first contract, a portion of those corresponding employers may be engaging in good faith bargaining. . . .").

326. While Fiske complains of delays from the NLRB and the courts, a careful review of the facts and circumstances of each specific case is actually a desirable virtue in legal proceedings, as is the right to appeal to a higher court for judicial review. *See* Fiske, *supra* note 9, at 79-80.

327. Broderdorf, *supra* note 9, at 334.

328. *See supra* pp. 50-56.

contract negotiations for the better, it would consider many of these hard details in much greater depth. But the congressional hearings on EFCA have not explored most of the issues presented in this Comment and other law review articles cited, such as whether FMCS should use conventional or FOA arbitration. Indeed, Epstein has correctly noted that a "conspiracy of silence" seems to publicly exist amongst those in favor of interest arbitration.[329] The lack of robust debate has led to a sentiment by many in management that Congress is not sincerely interested in improving labor relations but is passing this legislation for one reason: organized labor asked and organized labor largely funds Democratic political campaigns.[330] Such a large-scale change in the private sector should not be implemented because of political cronyism. To the contrary, Congress should more fully explore all of the facets of interest arbitration including the wide-ranging impact that interest arbitration would have on companies and labor unions, and whether indirect comparisons with the public sector truly predict interest arbitration's effect in the private sector. Congress should only implement interest arbitration after it has more carefully considered all of these issues. The American worker, caught in the cross-hairs between labor and management on this issue and whose well-being should ultimately decide the outcome of this debate, deserves nothing less.

329. *See* Epstein, *supra* note 3, at 17. While Fiske's contribution strongly defends interest arbitration and might break this silence, her article was not published until late 2009, six years after interest arbitration was first proposed. *See generally* Fiske, *supra* note 9, at 47. Her article is also the only major law review article defending EFCA's specific interest arbitration provision that the author could locate.

330. This strategy might also be unwise for the Democratic Party, as they risk offending centrist and pro-business Democrats.