First Contract Arbitration and the Employee Free Choice Act

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I. INTRODUCTION

One of the most significant failures of the law governing unions and collective bargaining is the catastrophic underenforcement of the statutory right of employees to bargain. About half of all newly certified or recognized unions are not able to persuade the employer to agree to a collective bargaining agreement.[1] While both the employer and the union could in theory be blamed for the failure to reach an agreement, in practice the incentives are much greater for the employer to stall negotiations (and thus defeat the union) rather than for the union to refuse to accept an agreement (and thus ensure its survival for the term of the contract). Refusing to bargain for a first contract is a powerful weapon in the arsenal of employers determined to remain union free, as it prevents a nascent union from ever getting off the ground. While employers can and do thwart the statutory rights of employees simply by refusing ever to agree to a contract, the National Labor Relations Board (NLRB or "Board") lacks the power to remedy even the most egregious cases of refusal to bargain in good faith, except to order the recalcitrant party to bargain more.[2]

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1. *See* John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. REL. REV. 3, 5 (2008) (between 1999 and 2004, of 8,155 newly certified unions, forty-four percent failed to secure a first contract within a year of certification); Kate Bronfenbrenner, *No Holds Barred: the Intensification of Employer Opposition to Organizing* 22, 22 fig. B (Economic Policy Institute Briefing Paper No. 235, 2009), *available at* http://www.epi.org/publications/entry/bp235/ (based on a survey of NLRB elections from 1999–2003, fifty-two percent of newly certified unions have not secured a contract one year after election, thirty-seven percent have no contract after two years, thirty percent have no contract after three years, and twenty-five percent have no contract more than three years post-election).

2. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

One provision of the proposed Employee Free Choice Act (EFCA)[3] would deal with this problem by requiring timely bargaining, mediation, and, if the employer and union cannot agree, arbitration of the bargaining dispute.[4] It is an important reform in a critically dysfunctional aspect of federal labor law, and it will be a serious improvement over the status quo. While political and media conversations surrounding EFCA have largely focused on the so-called "card check provision,"[5] the provision for first contract arbitration is just as important to the protection of the right to unionize. And, as of this writing, Congress appears more likely to enact the first contract arbitration provision than the card check provision.[6]

This Article argues that some form of mandatory interest arbitration for first contract disputes is an appropriate means of stabilizing employee-management relations given the extraordinary difficulties that unions currently experience in negotiating first contracts, the weakness of current NLRB and economic remedies, and the rippling effects of these difficulties on nascent unions. Part II of this Article explains the need for interest arbitration given current trends in labor relations. Part III demonstrates that interest arbitration would increase the incentive for employers to negotiate in good faith and make reasonable proposals without placing themselves at a systemic disadvantage. This would be particularly true if arbitrators used the final offer method, which requires the arbitrator to choose one of the parties' final offers rather than to split the difference between the two positions.[7] Mandatory interest arbitration would encourage the collective bargaining process that the drafters of the National Labor Relations Act (NLRA) initially had in mind. Furthermore, none of the criticisms of the first contract arbitration provision of

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3. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009) (introduced Mar. 10, 2009) [hereinafter EFCA]. Except as specifically noted, all assertions in this Article about EFCA refer to the March 2009 version of the bill. News accounts of the Senate negotiations during the summer and fall of 2009 indicate that the bill may be modified before it is enacted and thus the section numbers and the specific provisions in it may change.

4. *Id.* § 3.

5. *See, e.g.*, Sabrina L. Schaeffer, *Employee Free Choice Act Means Union Intimidation in Plain English*, U.S. NEWS & WORLD REP., June 4, 2009; Brian Worth, *Labor's Card-Check Ruse*, WASH. POST May 19, 2009, at A19, http://www.usnews.com/articles/opinion/2009/06/04/employee-free-choice-act-means-union-intimidation-in-plain-english.html.

6. *See* Alec MacGillis, Specter Unveils Revised EFCA Bill, WASH. POST, Sept. 15, 2009, http://voices.washingtonpost.com/capitol-briefing/2009/09/specter_unveils_prospective_de.html.

7. *See infra* text accompanying notes 117–43.

EFCA have merit. Empirical studies of interest arbitration show that it will facilitate rather than hamper bargaining,[8] and it will remove the incentive to engage in illegal surface bargaining. Finally, Part IV illustrates that a statutory requirement of first contract arbitration is well within Congress' power and does not represent an unconstitutional delegation of legislative authority as alleged by some critics.[9]

II. WHY INTEREST ARBITRATION IS NECESSARY UNDER THE NLRA

Section 3 of EFCA proposes to give real meaning to a provision of the NLRA that has become almost a dead letter: the duty to bargain in good faith to a first contract.[10] Section 3 of EFCA would amend Section 8(d) of the NLRA to do three things, two of which are extremely modest. The first would require the employer to meet to bargain within ten days after receiving a request for bargaining from the newly recognized union, but the time for the initial bargaining could be extended by agreement of the parties.[11] This provision would end the common practice of stalling the commencement of bargaining for as long as possible after certification.[12] The second provision would provide for

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8. *See infra* note 128.

9. *See, infra* text accompanying notes 186–211; *see, e.g.*, Richard A. Epstein, *The Case against the Employee Free Choice Act* 98 (John M. Olin L. & Econ. Working Paper, No. 452 (2d Series), 2009), *available at* http://ssrn.com/abstract=1337185 [hereinafter Epstein, *Case against EFCA*].

10. Section 8(a)(5) and Section 8(b)(3) of the NLRA require the employer and the union, respectively, to bargain, and Section 8(d) defines that duty as being to bargain in good faith. 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d) (2006). Section 3 of EFCA would amend Section 8(d).

11. EFCA § 3 (2009) ("Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.").

12. *See, e.g.*, Hardesty Co. v. Teamsters Local Union 373 (Mid-Continent Concrete), 336 N.L.R.B. 258, 260–61 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002) ("The Respondent's negotiating style was to put forward a harsh bargaining proposal, stand by the proposal, then as the negotiations dragged on, concede no more than the status quo, and stall the negotiations by refusing or delaying its response to any additional proposals . . . . Additionally, as the negotiations progressed, the Respondent, in a uniform manner, appeared to slow down and drag out the negotiations."); Flying Food Group, Inc., 345 N.L.R.B. 101 (2004); Unbelievable, Inc.,, 318 N.L.R.B. 857, *enforced in part*, 118 F.3d 795 (D.C. Cir. 1997). On the strategic use of delay in negotiating with a newly certified union, see Bruce Howard Meizlish, *Surface Bargaining: A Problem in Need of a Remedy*, 1985 DET. COLL. L. REV. 721 (1985).

mediation, conducted by the staff of the Federal Mediation and Conciliation Service (FMCS), upon the request of either party if the parties have not reached agreement after ninety days of bargaining.[13] Mediation of disputes in contract negotiation by the FMCS has a long history and is common throughout the private sector.[14] The third provision of EFCA states that after thirty days of mediation, or such further time as the parties request:

> If . . . the [FMCS] is not able to bring the parties to agreement by conciliation, the [FMCS] shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the [FMCS]. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.[15]

There is no serious dispute about the propriety of requiring timely bargaining and mediation if three months of bargaining produces no agreement. Most criticism of Section 3 of EFCA focuses on the provision for interest arbitration.

Interest arbitration is nothing new: it is a time-tested process in which the terms and conditions of employment are established by a final and binding decision of an arbitrator or an arbitration panel.[16] Unlike grievance arbitration, a process that seeks to interpret and apply the rules of an existing contract to determine whether a breach has occurred, interest arbitration is designed to develop the contractual rules that will govern the relationship going forward.[17] Although interest arbitration is not common in the American private sector,[18] it is widely used to resolve bargaining disputes for

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13. EFCA § 3 (2009) ("If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.").

14. The FMCS has mediated negotiating disputes since its creation by the Taft–Hartley Act in 1947. 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197 (2006)).

15. EFCA § 3 (2009).

16. Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 153 (1987).

17. *Id.*

18. David Broderdorf, *Overcoming the First Contract Hurdle: Finding a Role for Mandatory Interest Arbitration in the Private Sector*, 23 LAB. LAW.

public sector employees. In New York, for example, the Taylor Law authorizes the State's Public Employment Relations Board to begin interest arbitration proceedings when a public agency and a union have reached an impasse in collective bargaining.[19] More than fifteen other states have similar provisions for at least some public employees.[20] Some states require interest arbitration in the case of impasse,[21] others allow the state employee relations agency to initiate interest arbitration,[22] and some merely allow either party to request interest arbitration.[23] Nearly all of these states either bar[24] or limit[25] strikes in situations where interest arbitration exists as an option.

EFCA is not the first proposal to introduce mandatory interest arbitration for the resolution of impasses in private sector disputes. In 2001, Republican Senators Lott and McCain included such a provision in their proposed Airline Labor Dispute Resolution Act.[26]

323, 324, 329–31 (2008). *See also infra* Section III.A (discussing instances of private sector interest arbitration).

19. N.Y. CIV. SERV. LAW § 209 (McKinney 2000 & Supp. 2008).

20. *See, e.g.*, ALASKA STAT. ANN. § 23.40.200(g)(1) (West 2007); CONN. GEN. STAT. ANN. § 7-473c (West 2008); CONN. GEN. STAT. ANN. § 10-153f (West 2008); HAW. REV. STAT. ANN. § 89-11 (LexisNexis 2007); IOWA CODE ANN. § 20.22 (West 2001); ME. REV. STAT. ANN. tit. 26, § 979-D(4) (2007); MICH. COMP. LAWS ANN. § 423.273 (West 2001); MINN. STAT. ANN. § 179A.16 (West 2006 & Supp. 2008); MONT. CODE ANN. §39-34-101 (2007); NEV. REV. STAT. § 288.200–.220 (2007); N.J. STAT. ANN. § 34:13A-16 (West 2000 & Supp. 2008); OR. REV. STAT. ANN. § 243.742 (West 2003 & Supp. 2009); 43 PA. CONS. STAT. ANN. § 217.4 (West 1992 & Supp. 2008); R.I. GEN. LAWS § 36-11-9 (1997); VT. STAT. ANN. tit. 21, § 1733 (2007); WASH. REV. CODE ANN. § 41.56.450 (West 2006); WIS. STAT. ANN. § 111.70(4)(cm)(5)–(6) (West 2002 & 2008).

21. *See, e.g.*, R.I. GEN. LAWS § 36-11-9 (1997); WASH. REV. CODE ANN. § 41.56.450 (West 2006).

22. *See, e.g.*, N.J. STAT. ANN. 34:13A-16 (West 2000 & Supp. 2008).

23. *See, e.g.*, VT. STAT. ANN. tit. 21, § 1733 (2007).

24. *See, e.g.*, N.Y. CIV. SERV. LAW § 210 (McKinney 2000 & Supp. 2008); CONN. GEN. STAT. ANN. § 7-475 (West 2008); CONN. GEN. STAT. ANN. § 10-153e(a) (West 2002 & Supp. 2008); HAW. REV. STAT. ANN. § 89-12 (LexisNexis 2007); IOWA CODE ANN. § 20.12 (West 2001 & Supp. 2008); ME. REV. STAT. ANN. tit. 26, § 979-C(2)(C) (2007); MICH. COMP. LAWS ANN. § 423.202 (West 2001); MINN. STAT. ANN. § 179A.19 (West 2006); MONT. CODE ANN. § 39-34-105 (2007); NEV. REV. STAT. § 288.230 (2007); N.J. STAT. ANN. § 34:13A-14(a) (West 2000 & Supp. 2008); OR. REV. STAT. ANN. § 243.726 (West 2003); 43 PA. CONS. STAT. ANN. § 215.2 (West 1992 & Supp. 2008); R.I. GEN LAWS § 36-11-6 (1997); WASH. REV. CODE ANN. § 41.56.490 (West 2006); WIS. STAT. ANN. § 111.70(4)(L) (West 2002 & Supp. 2008).

25. *See, e.g.*, VT. STAT. ANN. tit. 21, § 1730 (2007); ALASKA STAT. ANN. § 230.40.200(g)(2) (West 2007).

26. S. 1327, 107th Cong. (2001).

In 1994, the Dunlop Commission proposed the creation of a tripartite "First Contract Advisory Board," which would review disputes between unions and employers and have the authority to order "binding arbitration for the relatively few disputes that warrant it."[27] In 1970, President Nixon proposed a form of mandatory interest arbitration for "national emergency disputes" in the transportation industry.[28] At the time of the enactment of the NLRA, some proposed that interest arbitration should be incorporated into the statutory framework.[29] Though interest arbitration is not common in the private sector, the FMCS reports that it is actively involved in attempting to mediate first contract bargaining relationships.[30] Hence, the agency is familiar with the problem of impasse in first contracts. It simply lacks any real power to address it. The idea that mandatory interest arbitration may provide a solution to bargaining impasses is thus hardly radical.

Although critics of EFCA have suggested that it is unprecedented to use arbitration to decide major aspects of the employment relationship,[31] arbitrators in fact decide a huge number of the most financially and socially significant issues across the whole spectrum of private sector employment. As is well known, the business community has successfully invested millions of dollars in litigation and legislative advocacy surrounding compulsory arbitration in the employment and consumer context, trumpeting the wisdom of arbitrators and the adequacy of the arbitral forum as a dispute resolution mechanism to decide, both in individual cases and in huge class actions, when employees can be fired, what constitutes illegal workplace

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27. U.S. DEP'TS. OF LABOR & COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 23 (1994) [hereinafter DUNLOP COMMISSION REPORT].

28. *See* Gary Long & Peter Feuille, *Final-Offer Arbitration: "Sudden Death" in Eugene*, 27 INDUS. & LAB. REL. REV. 186, 192 (1974).

29. Ellen Dannin & Gangaram Singh, *Creating a Law Reform Laboratory: Empirical Research and Labor Law Reform*, 51 WAYNE L. REV. 1, 16 (2005) (citing Testimony of Francis J. Hass, *in* I LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 147–48 (1935)).

30. *See* William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 326 (2009).

31. *See, e.g.*, Richard A. Epstein, *The Ominous Employee Free Choice Act*, REG., Spring 2009, at 48, 49, 52 [hereinafter Epstein, *Ominous EFCA*] (characterizing the arbitration provision of EFCA as a "dramatic departure" from previous labor law, as being "no ordinary statute," and as ushering in a new era in labor law).

harassment or discrimination, whether an employer's pay and pension practices are legal, and whether people have been injured by fraud, malpractice, and almost every other form of harm that can befall an employee or consumer.[32] Arbitrators decide who gets screen credit in Hollywood.[33] Arbitrators have played a major role since the enactment of the NLRA in giving import to the vague provisions of collective bargaining agreements—it was arbitration that gave concrete and detailed meaning to the widespread idea that employees should be discharged only for cause.[34] Arbitration is used to resolve negotiating disputes in professional sports, and arbitral decisions have made significant changes in the economics and labor relations of the sporting industry, including creating free agency and policing collusion among teams regarding free agents.[35]

While opponents of EFCA insist that arbitration is a huge departure from the normal method of resolving workplace negotiating disputes, it is already ubiquitous. Therefore, providing

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32. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); Circuit City Store, Inc. v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). Arbitrators also routinely handle jurisdictional disputes between unions, complex financial issues in stock-related disputes, and class and collective actions in employment and consumer disputes, all at the urging of the Chamber of Commerce. *See, e.g.*, Institute for Legal Reform, Issue Resource Center: Arbitration/ ADR, http://www.instituteforlegalreform.com/component/ilr_issues/29/item/ADR.html (last visited Oct. 29, 2009) (website of U.S. Chamber of Commerce-affiliate, promoting arbitration in consumer and employment contexts and highlighting legislative and media efforts).

33. WRITERS GUILD OF AMERICA, SCREEN CREDITS MANUAL (2002); WRITERS GUILD OF AMERICA TELEVISION CREDITS MANUAL (2002). The Writers Guild credits manuals are available at www.wga.org/content/default.aspx?id=1029. They may also be obtained by writing to the Writers Guild of America—West, 7000 West Third Street, Los Angeles, CA 90068. For an account of some credit arbitrations, see Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49 (2006).

34. *See generally* John E. Dunsford, *The Role and Function of the Labor Arbitrator*, 30 ST. LOUIS U. L.J. 109, 112–13 (1985) (arbitrator's options in handling a case are practically unlimited, and once an arbitrator's reputation and docket have grown, the parties are presumed to have agreed to adopt his past performance as the standard to govern their dispute); Edgar A. Jones, *"His Own Brand of Industrial Justice": The Stalking Horse of Judicial Review of Labor Arbitration*, 30 UCLA L. REV. 881, 885 (1983) (when a contract uses a term as broad and vague as "just cause" it is impossible to differentiate between the contract and the arbitrator's own views of justice).

35. *See* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001) (describing the role of arbitration in attempting to eliminate collusion in the free agent market); *In re* Arbitration of Messersmith, 66 Lab. Arb. Rep. (BNA) 101 (1975) (arbitrator Peter Seitz determined that the reserve clause did not bind pitcher Andy Messersmith to play for the Dodgers indefinitely). *See* WALTER T. CHAMPION, FUNDAMENTALS OF SPORTS LAW § 18:4 (2008).

arbitration for the first contract of a newly certified union would fix a glaring hole in the law and establish a familiar and widely-respected process for dispute resolution.

A. The Problem of First Contract Negotiation

First contracts create particularly complicated bargaining situations because the parties have less information about each other's bargaining behavior than in more established relationships. Accordingly, they "are less able to perceive or predict accurately the subjective costs and benefits associated with either agreement or disagreement."[36] Unions face the added difficulties of navigating the immature relationship between leadership and the rank and file membership and pacifying more hostile employers who are more likely to "bust the union" because they are not used to having to negotiate the terms and conditions of employment.

Intervention in first contract impasse is particularly necessary since the parties' relationship is still "embryonic and fragile."[37] The difficulties involved in first contract negotiations have effects beyond the first contract because they set the tone for the ongoing union-management relationship. Employers generally know "that if they can avoid the execution of bargaining agreements during the certification year, they can often defeat the newly certified union."[38] As former NLRB Chair William Gould notes, a union that is "unable to conclude a collective bargaining agreement, will have declining support within the bargaining unit, because in the United States, the collective bargaining agreement and protections contained in it are the sine qua non for effective representation."[39] Moreover, "even those [unions] that achieve a first contract may not alter the anti-union strategies utilized by management to deny workers positive outcomes of collective bargaining."[40] That is, management has very strong incentives to violate the duty to bargain in good faith because it can defeat the union entirely. Even if the union survives, management's intransigence can intimidate the employees and their union into making concessions on important contract terms that become part of the status quo and are

36. William N. Cooke, *The Failure to Negotiate First Contracts: Determinants & Policy Implications*, 38 INDUS. & LAB. REL. REV. 163, 165 (1985).

37. Gould, *supra* note 30, at 325 (2008).

38. 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).

39. Gould, *supra* note 30, at 327.

40. Broderdorf, *supra* note 18, at 332.

harder to change in later rounds of negotiation. Thus, the rewards for failure to bargain in good faith are the greatest at the initial contract stage.

To take a well-known recent example, the employees of Mid-Continent Concrete voted to unionize in early 1995.[41] The company commenced contract negotiations by proposing to cut wages, health insurance, and paid overtime, as well as eliminate the employees' 401(k) plan.[42] As the bargaining dragged on for a year, the company's later offers were even less favorable to the employees than its initial offer.[43] Finally, towards the end of a year of fruitless negotiations, certain company officials candidly admitted that they intended to drag out the bargaining for an entire year and then seek to decertify the union once the employees realized that the union had been unable to produce any results in negotiation.[44] Based on this evidence, the NLRB found that the employer had violated its duty to bargain in good faith.[45] The only remedy it could order, however, was more bargaining.[46] It issued its order in 2001, and the court of appeals finally enforced the Board's order in 2002.[47] So, seven years after the employees voted to unionize, and after years of litigation, it was finally determined that the employer had illegally refused to bargain, and it was ordered to do so. As explained below, the duty to bargain is largely insignificant because the NLRB and the courts have decided that they cannot award meaningful remedies for violations of this duty. The problem is most acute in the case of first contracts. Mandatory interest arbitration is the only device that will protect the employees' statutory right to collective representation in the workplace.

B. The Weakness of NLRB Remedies

One of the most acute regulatory failures of federal labor relations is in the area of bad faith bargaining. The current structure of the NLRA and the weak remedies it provides play a large role in unions' problems in finalizing first contracts. Mandatory interest arbitration has the potential to counter some of these issues.

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41. Hardesty Co. v. Teamsters Local Union 373, 336 N.L.R.B. 258, 264 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002).
42. *Id.* at 265–66.
43. *Id.*
44. *Id.* at 261–62.
45. *Id.* at 260–61.
46. *Id.*
47. NLRB v. Hardesty Co., 308 F.3d 859 (8th Cir. 2002).

Although Section 8(a)(5) of the NLRA imposes a duty to bargain in good faith, the United States Supreme Court long ago decided that the Board lacks the authority to force a recalcitrant—even an illegally recalcitrant—party to reach agreement.[48] Nor will the Board impose monetary remedies to compensate for an employer's illegal refusal to bargain, even when it is quite clear what monetary harm occurred.[49] All it will do is order the party that bargained in bad faith to bargain more and to do so in good faith.[50] "Because the order can do little more than compel the employer to make cosmetic changes in its negotiating stance in order to bring itself into bare compliance with the law, chances are slim that the union will be able to win a first contract with the backing of such an order alone."[51] An employer determined to resist the lawful right of its employees to unionize and bargain collectively can thwart their rights simply by refusing to enter into a collective bargaining agreement. Eventually, after the employer drags out the negotiations for years and makes plain its refusal to enter into an agreement with the union, the employees or the union give up. The employer can then withdraw recognition and remain union-free.

Even where impasse is reached in good faith, the default setting favors employers. Employers are empowered, after bargaining to impasse, to unilaterally implement the terms made in their final offer to the union.[52] Thus, unless the union can make a credible strike threat, the employer has no incentive to reach agreement with the union because it knows that ultimately it can get what it wants just by bargaining to impasse. If the law were otherwise, and employers were prohibited from unilaterally implementing their preferred terms at impasse, or if the law required the employer to implement the union's preferred terms at impasse, the employer would not have the incentive to delay and would have a stronger motivation to bargain.

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48. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970); *see also* NLRB. v. Am. Ins. Co., 343 U.S. 395, 404 (1952) ("[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.").

49. Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970).

50. *See, e.g.*, HUNSICKER, KANE & WALTHER, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES (2d ed. 1986).

51. Paul C. Weiler, *Striking New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 361 (1984).

52. NLRB v. Katz, 369 U.S. 736 (1962).

The idea that weaknesses in the NLRA are largely responsible for the failure to achieve first contracts is not new.[53] Conservative courts and boards have consistently interpreted the NLRA narrowly in a manner that has increased the evidentiary burden for establishing a failure to negotiate in good faith and decreased the ability of unions to enforce the statute's substantive provisions. In *H. K. Porter Co. v. NLRB*, the Supreme Court held that, under the NLRA, the NLRB has no authority "to compel agreement when the parties themselves are unable to agree," even where an employer is engaged in a variety of bad faith negotiation tactics over an eight-year period.[54] In fact, where an employer has failed to engage in good faith bargaining, both the NLRB and various courts have suggested that the only remedy the NLRB can provide is to order good faith bargaining.[55] During the Nixon Administration, the NLRB determined, in a narrowly-divided case, that it lacked the power to remedy an employer's refusal to bargain by compelling the employer to do anything other than bargain more.[56]

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53. *See, e.g.*, Cooke, *supra* note 36 at 164 ("[M]uch of labor's difficulty in securing first contracts is attributable to weaknesses in the National Labor Relations Act.").

54. 397 U.S. 99, 108 (1970). *See also* Broderdorf, *supra* note 18, at 332.

55. *See, e.g.*, Hyatt Mgmt. v. NLRB, 817 F.2d 140, 141 (D.C. Cir. 1987); Ex-Cell-O Corp., 185 N.L.R.B. 107, 108 (1970). *But see* TNT USA, Inc. v. NLRB, 208 F.3d 362, 364 (2d Cir. 2000) (allowing NLRB to give effect to a specific agreement "that the parties *would have* signed . . . absent bad faith"). *See also* Broderdorf, *supra* note 18, at 332 ("Unilateral changes, surface bargaining, and stalling tactics are only remedied with an order to bargain." (citing Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 75 (Sheldon Friedman et al. eds., 1994))).

56. In *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), the Board split three-two on the question of whether the NLRB could issue compensatory remedies for failures to bargain in good faith. *See also* Tiidee Prods., Inc., 194 N.L.R.B. 1234 (1972), *enforced*, 502 F.2d 349 (D.C. Cir. 1974) (declining to award monetary damages to make employees whole even in case of employer's "clear and fragrant" violation of law, but awarding union and NLRB litigation expenses); Unbelievable, Inc. v. NLRB, 118 F.3d 795 (D.C. Cir. 1997) (NLRB lacks authority to award attorneys' fees even in case of "egregious and deliberate surface bargaining" designed to frustrate agreement and provoke a strike because the company manager wanted a strike so he could replace the employees and get rid of the union), *enforcing in part*, Unbelievable, Inc., 318 N.L.R.B. 857 (1995). As scholars have pointed out, ample data based on the employer's contracts at other unionized plants enabled relatively precise calculation of the economic harms caused to employees by the employer's illegal conduct, and state labor boards do issue compensatory remedies in failure to bargain cases. *See, e.g.*, George Arakelian Farms, Inc. v. Agric. Labor Relations Bd., 783 P.2d 749 (Cal. 1989).

The lack of effective remedies means that an employer has every incentive to stall bargaining for several years, which will in turn erode support for the union.[57] Even obtaining an order to bargain in good faith can take years.[58] This delay effectively reduces "the cost to the employer of disagreeing with the union's demand that a contract be signed" while increasing the cost to union leadership as more organizing expenses are incurred.[59]

Employers have seized upon the flaws in the remedial structure of the NLRA to thwart employees' right to unionize. The evidence shows that the failure of the NLRB and the courts to develop remedies for bad faith bargaining has dramatically undermined the policy of the NLRA to support the mutual determination of wages and working conditions through collective bargaining. During the last decade, *nearly half* of all newly certified unions failed to reach a collective bargaining agreement.[60] This means that half of all workers who exercise their right to select union representation never get to take advantage of this right by engaging in its intended purpose: collective representation in the determination of wages and working conditions. The problem has only gotten worse in the last decade: as recently as the early 1990s, only approximately one-third, instead of one-half, of newly unionized employees failed to secure a first contract.[61]

There is a consensus among scholars, members of the NLRB, and judges sympathetic to labor that the weaknesses of the remedies for illegal failures to bargain frustrate the union-protective purposes of the law.[62] Former Attorney General and Harvard Law professor Archibald Cox described the problem in 1958: "As long as there are unions weak enough to be talked to

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57. Cooke, *supra* note 36, at 164.

58. Craver, *supra* note 38, at 1635 ("It may take a year or more for the Labor Board to issue remedial bargaining orders in these cases, and losing employers can avoid bargaining for an additional year while the Labor Board petitions for court of appeals enforcement orders.").

59. Cooke, *supra* note 36, at 167.

60. John-Paul Ferguson, *supra* note 1, at 16.

61. DUNLOP COMMISSION REPORT, *supra* note 27.

62. The literature on Board remedies is voluminous. Samples of some of the leading works relevant to bargaining remedies are cited elsewhere in this Article. *See, e.g.*, *Weiler*, *supra* note 51; Craver, *supra* note 38; Cooke, *supra* note 36, and sources cited *infra* note 63. On the difficulties in asserting whether particular Board doctrines are consistent with statutory purposes, because the NLRA as amended over the decades embodies multiple and arguably inconsistent purposes on the question of how vigorously to protect the right to join (or not join) a labor union, see Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2033–36 (2009).

death, there will be employers who are tempted to engage in the forms of bargaining without the substance. The concept of 'good faith' was brought into the law of collective bargaining as a solution to this problem."[63] A law that protects the freedom to select a bargaining representative is undermined by the failure to prevent illegal anti-union conduct after that representative is certified; employers determined to prevent unionization can bargain endlessly without ever reaching agreement. But neither the NLRB nor the courts have been willing to impose injunctive or monetary remedies to stop the unlawful behavior or to compensate employees for the harm they suffer as a consequence of an employer's refusal to bargain. While this crabbed interpretation of the scope of the NLRB's regulatory authority is not compelled by the statutory language,[64] decades of scholarly criticism have proved fruitless.[65]

C. Arbitration Is Desirable When Work Stoppages Are Not

Unless the government is prepared to impose all terms of employment and resolve all workplace disputes directly through legislation or litigation, there are two options for resolving them: the parties can use economic force (strikes, lockouts, going out of business, or quitting a job), or a neutral third-party can resolve the dispute. In the public sector, as noted above, because economic weapons are prohibited in many jurisdictions, arbitration is used to resolve both negotiating disputes and individual disputes once the parties have a contract. In the private sector, the general rule is that economic weapons resolve negotiating disputes and arbitration

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63. Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1412–13 (1958). *See, e.g.*, DUNLOP COMMISSION REPORT, *supra* note 27; Charles J. Morris, *The Role of the NLRB and the Courts in the Collective Bargaining Process: A Fresh Look at the Conventional Wisdom and Unconventional Remedies*, 30 VAND. L. REV. 661 (1977); Theodore St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039 (1968).

64. Section 8(d) of the NLRA, added as part of the Taft–Hartley Act, defines the duty to bargain in general terms with the proviso that "such obligation does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (2006). Scholars, courts, and NLRB members have debated for decades whether this language compels the conclusion that no remedy can be imposed that would have the effect of preventing a strong employer from, as one scholar put it, "talking a union to death." *See* Cox, *supra* note 49, at 1412–13.

65. *See, e.g.*, Cox, *supra* note 63. R. W. Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988 (1961); Weiler, *supra* note 51; Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419 (1992).

resolves disputes arising under contracts. But, in fact, as explained below, the use of economic weapons is prohibited in a wide array of circumstances. In many of those, arbitration or some form of third-party dispute resolution is preferred. EFCA reflects a policy judgment that the resort to economic weapons by *either* party is disfavored in first contract scenarios, particularly given the difficulty of strikes by newly certified unions—arbitration is a preferable way of resolving negotiating disputes. This policy judgment is both entirely justified in the current legal and economic climate and consistent with the overall philosophy of labor law.

1. The Unavailability of Strikes

Both prior to and since the enactment of the NLRA, workers have retained a form of self-help remedy: the strike. However, changes in business and the law have greatly diminished the utility of strikes as a means to achieve concessions. In light of technological advances and the global economy, employers no longer fear strikes of American workers like they did in the early twentieth century. Particularly in times of high unemployment and economic turmoil like the present, employer fear is at its lowest, and American workers, reluctant to lose a paycheck for even a brief period of time, recognize that there are great risks related to striking, both for the union as an organization and for the individual employees in the bargaining unit.

In arguing that the current situation regarding first contracts is not problematic, Richard Epstein illustrates how employers seem to view strikes as just another economic risk in bargaining, rather than the super-threat they once were.[66] If first contract negotiations lead to a strike or a lock-out, he contends, that is merely the result of an employer's calculus as to "how much it thinks it will lose in operating flexibility, wages and competitive position under a collective bargaining contract."[67] In other words, a strike over a first contract is merely the result of an employer's (rational) decision that a strike is less costly than signing *any* collective bargaining agreement. This would appear to be bad faith bargaining since an employer cannot decide that it will refuse to sign *any* contract with a union simply because it does not believe in collective bargaining or respect the employees' choice of

66. Epstein, *Case against EFCA*, *supra* note 9, at 51.
67. *Id.*

representative.[68] Unfortunately, at least one court of appeals has implicitly endorsed Epstein's argument that a complete refusal to bargain can somehow be "good-faith" bargaining if the employer has a "good reason." In *Chevron v. NLRB*, the Fifth Circuit Court of Appeals held that the NLRB could not punish an employer for bad faith bargaining simply because "the employer's position is inherently unreasonable, or unfair, or impracticable, or unsound."[69] The court concluded that "[d]eep conviction, firmly held and from which no withdrawal will be made, may be . . . both the right of the citizen and essential to our economic legal system . . . of free collective bargaining."[70] In other words, the *Chevron* court found the duty to bargain in good faith does not require bargaining at all.

Employers know, though, that the threat of strike is particularly weak, and thus the risk associated with inflexible bargaining is low in first contract negotiations, where, statistically, workers are particularly unlikely to strike. Since workers are more skeptical as to the benefits of collective bargaining and representation, they will be less likely to conclude that the risks associated with a strike outweigh the potential benefits.[71] The union's likely low levels of solidarity further diminish workers' bargaining power, as each member has little reason to trust his fellow workers.[72] This combination contributes to a vicious cycle. Workers fail to strike, hoping the employer will come around and negotiate in good faith. At the same time, the employer looks to the willingness of workers to actually strike if an agreement is not reached as a key factor in determining whether or not to bargain in good faith.[73]

2. Arbitration Is Widely Used When Strikes Are Undesirable

There are many circumstances already recognized in American law in which one party or the other has the labor market power to use self-help, but for policy reasons legislatures have restricted the use of that power and forced the parties to use third-party dispute

68. *See also* Broderdorf, *supra* note 8, at 332 ("For the one-third of newly organized employees that do not achieve a first contract, bad faith or dilatory bargaining may be to blame for a portion.").

69. Chevron Oil Co. v. NLRB, 442 F.2d 1067, 1072–73 (5th Cir. 1971). In the underlying dispute, "[d]uring the course of the negotiations the Company granted non-Union employees certain wage increases and improved benefits that it denied Union-represented employees." The company also rejected all of the "Union's proffered concessions and proposals." *See also* Epstein, *Case against* EFCA, *supra* note 9, at 16 (arguing that a failure to bargain is often rational).

70. *Chevron,* 442 F.2d at 1072.

71. Cooke, *supra* note 36, at 165.

72. *Id.* at 165.

73. *Id.* at 168.

resolution instead. The enactment of mandatory first contract arbitration recognizes that in the case of a newly certified union, the weaker party is likely to prefer arbitration to economic weapons.

First, third-party dispute resolution is the favored policy when work stoppages are deemed "to imperil the national health or safety."[74] Under the so-called "National Emergency" provisions of the Labor Management Relations Act (LMRA), enacted when the post-war strike wave persuaded the Republican-controlled Congress that strikes were not a desirable form of dispute resolution, the President is empowered to enjoin strikes and to seek third-party resolution of any dispute "affecting an entire industry or a substantial part thereof" engaged in interstate commerce.[75] This provision was recently utilized when a bargaining dispute shut down the West Coast ports in 2002. As a lockout dragged on while the union refused to accede to the employer's bargaining demands, the line of ships waiting to dock stretched for miles into the Pacific Ocean.[76] Companies then complained bitterly about the harm that resolving bargaining disputes through economic force inflicted upon the U.S. economy, and President Bush sought and obtained an injunction against the labor dispute, triggering third-party involvement in negotiating a settlement.[77] The argument then favored by the Chamber of Commerce was that the use of economic force to resolve negotiating disputes endangered the health of the economy by disrupting the flow of commerce and endangered national security by tying up the principal arteries of commerce.[78] In enjoining both the lockout and any future strike in that dispute, the United States District Court for the Northern District of California found that:

> [C]ontinuation of the closure of West Coast ports will endanger the national economy and labor force . . . . Continuation of the closure would harm the national economy still recovering from recession . . . . In our complex economy, where large industries must compete in a global marketplace and small businesses must

74. 29 U.S.C. § 176 (2006).

75. *Id.*

76. United States v. Pac. Mar. Ass'n, 229 F. Supp. 2d 1008, 1010 n.1 (N.D. Cal. 2002).

77. *See generally id.*

78. *See* Carolyn Lochhead, *Bush Feels Push to End Lockout*, S. F. CHRON., Oct. 4, 2002, at A1; Press Release, U.S. Chamber of Commerce, U.S. Chamber Urges Negotiated West Coast Port Settlement (Nov. 18 2002), http://www.uschamber.com/press/releases/2002/november/02-197.htm.

> continuously sustain sales to survive, a prolonged bottleneck in the vital transportation chain will critically disrupt the interdependence of domestic producers, retailers and consumers.[79]

Courts have regularly enjoined strike activity in a variety of situations where arbitration existed as an alternative option. In the context of a collective bargaining agreement containing a no-strike clause, the Supreme Court in *Boys Markets, Inc. v. Retail Clerks Union Local 770* extolled "the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices" and required that federal courts enjoin strikes in violation of no-strike clauses over arbitrable issues and order the parties to arbitrate.[80] In a later case, involving the famously militant United Mine Workers (UMW), who could, and did, effectively use the power of the strike to secure better working conditions both during the term of a collective bargaining agreement and during contract negotiations, the mining companies insisted that strikes should be prohibited because the arbitration clause of their contract provided a better method of resolving disputes.[81] The Supreme Court agreed, stating that strikes could be enjoined even if the contract did not contain a no-strike clause on the theory that an arbitration clause should be deemed to prohibit strikes unless the parties clearly agreed that the use of economic weapons was preserved.[82] Several years after the strike that led to that decision, Tom Geoghegan, a former lawyer for the UMW, described why the mining companies preferred arbitration:

> The Court reasoned that we don't need strikes anymore and everything could be decided by a neutral arbitrator . . . . So if miners were worried about a safety problem, they couldn't go on strike, at least during the contract. They had to arbitrate like civilized people.
>
> The problem is, it's not so civilized down there. The *Boys Market* case changed the balance of power between the UMW and the companies. Previously, the companies could only bring damage suits (which for quickie "twenty-four-hour strikes" were pointless), but now they could get TROs [temporary restraining orders], with immediate fines. Now

79. *Id.* at 1010–12.
80. Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 252 (1970).
81. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974).
82. *Id.*

> they could sit on grievances for years. They could change the safety rules, or fire militants, and know that the union couldn't strike, or do anything except wait and wait and wait.[83]

As Geoghegan points out, mandatory arbitration changes the balance of power, both during the term of a contract and during negotiations for a new contract, and it tends to weaken the position of the party that could most effectively use economic force while correspondingly strengthening the party that cannot.[84] During the West Coast ports stoppage of 2002 and the mine workers disputes of the 1960s and 1970s, the use of arbitration strengthened the power of management. Today, arbitration would strengthen nascent unions in the first contract scenario. This is not in and of itself problematic, though, as labor law is full of instances in which Congress, the NLRB, or the courts have decided that economic weapons should be prohibited because they give too much power to one side and enable that side to cause collateral damage to consumers and the economy by interrupting the normal operation of product and labor markets. It is for this reason that Congress prohibited secondary boycotts,[85] that courts have prohibited sit-down strikes[86] and barred employees engaged in workplace protest from making disloyal or especially offensive comments about their employer,[87] and that the NLRB has prohibited slow-downs[88] and strikes at times that pose a risk of significant harm to the employer[89] and protected employees who honor a picket line at another workplace.[90]

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83. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 31(1991).

84. *Id.*

85. 29 U.S.C. § 303 (repealed 1974).

86. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

87. NLRB v. Local Union No. 1229, 346 U.S. 464, 477 (1953) (employees negotiating for a new collective bargaining agreement cannot disparage the quality of the employer's services unless the criticism is clearly tied to criticism of working conditions); New River Indus., Inc. v. NLRB, 945 F.2d 1290, 1294 (4th Cir. 1991) (same); Endicott Interconnect Tech. v. NLRB, 453 F.3d 532 (D.C. Cir. 2006) (same).

88. *In re* Elk Lumber Co., 91 N.L.R.B. 333 (1950).

89. Int'l Protective Servs., Inc., 339 N.L.R.B. 701 (2003) (employees of government contractor hired to guard federal building in Alaska cannot strike during the months of March and April because the Oklahoma City federal building was bombed during April several years before and a strike during April might be risky if a future act of terrorism were timed to occur on the anniversary of a prior attack).

90. *See* Elec. Data Sys. Corp., 331 N.L.R.B. 343 (2000); Bus. Servs. By Manpower, Inc., 272 N.L.R.B. 827 (1984) (refusal to cross picket line is

The addition of interest arbitration during first contract arbitration will simply be one of many instances in the private sector in which labor law determines that the use of economic weapons to resolve negotiating disputes is unduly harmful to business, to workers, and to the economy. It will substitute arbitration for economic weapons when bargaining disputes threaten to undermine the most basic right protected by the NLRA: the right to choose to be represented by a union in negotiating the terms and conditions of employment.

III. INTEREST ARBITRATION WILL WORK

There are three ways that disputes over working conditions can be resolved, and all are used in our economy in various circumstances. One is by the government dictating conditions. The federal Fair Labor Standards Act, enacted in 1938 as part of an economic stimulus to address unemployment and low wages during the Depression, sets minimum terms of employment.[91] A second method of settling terms is by allowing whichever party has greater economic or political force to extract whatever bargain it can get. This is the approach used both under the current law governing union relationships and when there is no union. In the non-union sector, most terms of employment are not negotiated. Some terms are negotiated individually (often salary), some are set unilaterally by the employer for the entire workforce without opportunity for negotiation (usually benefits), and some are set unilaterally by the employer but are subject to individual modification (such as criteria for promotion). Some terms are relatively easy to negotiate for (salary), and others are details that parties typically avoid explicitly discussing (grounds for discipline and discharge) such that they tend to be set unilaterally by the employer. Some terms are rarely discussed (work rules). In unionized workplaces, of course, all these terms are negotiated, although many terms are standard (just cause for discipline and discharge, grievance arbitration, and management rights clauses are common across agreements and are phrased similarly). The third way in which disputes over working conditions are resolved is by allowing some third party to assist the negotiators in agreeing to terms. This is the approach that has long been used to resolve negotiating disputes in the public sector and in several private

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protected), *enforcement denied*, 784 F.2d 442 (2d Cir. 1986) (refusal to cross picket line unprotected).

91. 29 U.S.C. §§ 201–219 (2006).

sector organizations, perhaps most notably in Major League Baseball salary negotiations. Critics of EFCA's interest arbitration provision nonetheless argue that compulsory interest arbitration will not only fail to eliminate the problems associated with first contract impasses but also will cause a variety of negative outcomes in the greater bargaining relationship. These fears are unsupported by either economic theory or data from prior uses of interest arbitration. Third-party neutral involvement in the resolution of bargaining disputes has a long and illustrious history in American labor relations, and for good reason.

Interest arbitration typically occurs, as it would under EFCA, when the parties have failed to reach an agreement after bargaining unsuccessfully for an extended period of time. By that point they have both put forward proposals on every term that is conventionally covered in a collective bargaining agreement. Often, the parties have agreed to a variety of terms, with only some disputed terms remaining. The parties usually have gathered information regarding wages, benefits and working conditions in comparable work settings, cost of living data, and data regarding the employer's financial situation. Interest arbitrators then examine this information and produce a decision that sets the terms of the contract. In most public sector interest arbitration, arbitrators, by practice or by statute, consider a well-settled list of factors: the stipulations of the parties; the "interests and welfare of the public and the financial ability of the unit of government to meet these costs;" comparable wages, benefits, hours, and conditions of employment of government employees performing similar work in similar communities and in the private sector; the cost of living; the employees' current compensation; recent changes in circumstances regarding any of the foregoing; and any other factors that "are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment . . . in the public service or in private employment."[92]

92. The language quoted in the text, and the list of factors, are identical in the Illinois, Michigan, and Wisconsin statutory provisions governing interest arbitration for police and firefighters. 5 ILL. COMP. STAT. ANN. 315/14(h) (West 2005 & Supp. 2009); MICH. COMP. LAWS ANN. § 423.239 (West 2001); WIS. STAT. ANN. § 111.77(6) (West 2002). In some states, such as Pennsylvania, there have at times been no statutorily prescribed factors. But in the judgment of arbitrators familiar with the system, this makes no difference because arbitrators tend to consider all the same factors anyway. *See* A. Scott Buchheit, *Arbitration Forums Revisited: Interest Arbitration*, 42 PROC. NAT'L ACAD. ARB. 171, 172, 175–76 (1990), *available at* http://www.naarb.org/proceedings/pdfs/1990-171.pdf. *See also* Gregory G. Dell'omo, *Wage Disputes in Interest Arbitration: Arbitrators Weigh the Criteria*, 44 ARB. J., June 1989, at 4 (two-thirds of

A. Interest Arbitration Will Provide Incentives to Bargain; It Will Not Remove the Incentives to Bargain

1. Theoretical Underpinnings

One can evaluate the success of interest arbitration in one of two ways: by examining the effect of the *availability* of compulsory arbitration on bargaining outcomes or by examining the outcomes of the *use* of compulsory arbitration.[93] Since there is no reason to think an FMCS arbitrator will be biased towards employers or unions, commentators have largely focused on the effects the availability of arbitration will have on pre-arbitration bargaining.

"The object of interest arbitration is to provide an incentive for the parties to negotiate their own agreement, rather than risk an unfavorable outcome at arbitration."[94] Richard Epstein has nevertheless argued that when faced with an "obstructionist" party, the other side will simply "run out the clock" and let the matter go to arbitration 130 days into negotiations.[95] A variation on the same criticism is that arbitration creates an incentive for each side to make unrealistic demands in the hopes that the arbitrator will split the difference.[96] This is simply a way of rephrasing an old criticism of interest arbitration, which is that it produces a "chilling effect" on bargaining.[97] Other commentators have claimed that interest

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arbitrators surveyed in Wisconsin said it makes no difference in their awards whether or not there are statutory criteria).

93. John Thomas Delaney, *Strikes, Arbitration, and Teacher Salaries: A Behavioral Analysis*, 36 INDUS. & LAB. REL. REV. 431, 432 (1983).

94. Paul L. Burgess & Daniel R. Marburger, *Do Negotiated and Arbitrated Salaries Differ Under Final-Offer Arbitration?*, 46 INDUS. & LAB. REL. REV. 548, 548 (1993).

95. Epstein, *Case against EFCA*, *supra* note 9, at 51.

96. Steven J. Brams & Samuel Merrill III, *Binding versus Final-Offer Arbitration: A Combination is Best*, 32 MGMT. SCI. 1346, 1347 (1986). *See also* Vincent P. Crawford, *On Compulsory-Arbitration Schemes*, 87 J. POL. ECON. 131, 132 (1979).

97. *See, e.g.*, Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J. L. REF. 313, 331 (1993). Anne Layne-Farrar makes a similar argument, claiming that obstruction itself will be encouraged, noting:

> If a union expects a more favorable arrangement through arbitration than it is currently being offered by the employer, union organizers would have a strong incentive to refuse all terms proffered by the firm, no matter whether they are reasonable or not. And likewise for the employer: if company representatives anticipate favorable treatment from the arbitrator, they will reject all offers from the union, regardless of their merit.

arbitration has a "narcotic effect" on bargaining because it "creates dependency in the parties participating in it and weans them away from real collective bargaining."[98] The "narcotic effect" argument has no applicability to EFCA since the statute provides only for *first* contract arbitration.[99] After that, the parties must bargain to their own agreement.

Research does not support the argument that interest arbitration necessarily produces a chilling effect on bargaining.[100] Both empirical data of actual results and logic suggest that, in the circumstances of first contracts, interest arbitration will actually encourage parties to bargain because the outcome of arbitration is an unknown, as discussed in detail below. Neither party knows with certainty what the results of interest arbitration would be, and even a non-obstructionist party cannot guarantee that the contract terms it would reach through negotiation would be less beneficial than those selected by an arbitrator. While parties will no longer focus on the difference between the costs of a potential strike or lockout and those of negotiating in good faith, they will still be forced to calculate the risk of getting a less beneficial outcome in interest arbitration than the offer on the table in negotiation. This is hardly a radical change in how negotiation strategies are devised, as it merely replaces one unknown but easily ascertained variable (likelihood of and cost of strike) with one that provides the employer with more uncertainty (likelihood of and cost of an arbitrator award less favorable than that which would result from good faith bargaining). Anne Layne-Farrar suggests that the fact that the availability of interest arbitration will "change the calculus" involved in negotiations is itself a flaw of EFCA,[101] but changing the calculus is the point of the interest arbitration provision, and, indeed, all of the provisions of EFCA.

The uncertainty of interest arbitration would encourage parties to bargain closer together and avoid impasses. In fact, by

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Anne Layne-Farrar, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications* 8 (Law & Econ. Consulting Group, 2009), *available at* http://ssrn.com/abstract=1353305.

98. Dannin & Singh, *supra* note 29, at 44 (citing HARRY KATZ & THOMAS KOCHAN, AN INTRODUCTION TO COLLECTIVE BARGAINING & INDUSTRIAL RELATIONS 346 (1992)). *See also* Malin, *Public Employees' Right to Strike*, *supra* note 97, at 331–32; John M. Magenau, *The Impact of Alternative Impasse Procedures on Bargaining: A Laboratory Experiment*, 36 INDUS. & LAB. REL. REV. 361, 361–62 (1983).

99. *See* EFCA § 3.

100. *See* Part II.A.2.

101. Layne-Farrar, *supra* note 97, at 8.

eliminating employers' incentives to reach impasse and providing an additional reason to reach agreement, "[i]mpasses of any duration could become relatively rare."[102] Researchers have found that the mere presentation of a dispute to an arbitrator encourages parties to make their offers "around" the expected arbitration award, moderating their positions, since arbitrators will "judge extreme offers to be unreasonable and put less weight on such factors."[103] As one scholar put it, "Interest arbitration may be seen as the engine that drives settlement [or] as the grease that allows the wheels of collective bargaining to turn. [I]nterest arbitration is really bear grease: it's so bad, you don't want to touch it, so you do anything to avoid it."[104] When faced with the prospect of interest arbitration, employers are more likely to make concessions, often "up to the point at which their final offer equals the expected arbitration award plus at least some portion of the direct cost of using the procedure."[105] Some employers who oppose interest arbitration at a greater rate than unions may also make concessions simply to avoid arbitrating certain issues.[106] While interest arbitration may thus place more pressure to negotiate on employers than on unions, this is largely a function of the fact that, particularly in the first contract scenario, there is currently a strong incentive for the employer not to bargain and to reach impasse and a corresponding strong incentive for unions to bargain to agreement and to avoid impasse. Since there is no guarantee an arbitrator will provide a more beneficial outcome, mandatory interest arbitration would likely have little or no effect on unions' incentives to bargain.

2. Case Studies

This theoretical analysis is supported by an examination of the use of interest arbitration over the past thirty years. In fact, examining the use of public sector interest arbitration in New York City, Arvid Anderson and Loren Krause found that interest

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102. Ellen Dannin, *From Dictator Game to Ultimatum Game . . . and Back Again: the Judicial Impasse Amendments*, 6 U. PA. J. LAB. & EMP. L. 241, 293 (2004).

103. Max H. Bazerman & Henry S. Farber, *Arbitrator Decision Making: When are Final Offers Important?*, 39 INDUS. & LAB. REL. REV. 76, 78 (1985) (citing Henry S. Farber, *Splitting-the-Difference in Interest Arbitration*, 35 INDUS. & LAB. REL. REV. 70 (1981)).

104. Robert M. Ackerman, *Arbitration Forums Revisited: Interest Arbitration*, 42 PROC. NAT'L ACAD. ARB. 186 (1990).

105. Delaney, *supra* note 93, at 433.

106. *Id.* at 433.

arbitration actually served as "an alternative to the strike that similarly stimulates bargaining" because it "enables the labor participants to retain the leverage necessary to bargain effectively in negotiating a contract. At the same time, the harmful effects of a strike are avoided."[107] Analyzing data from 1972–1986, they found that, contrary to critical predictions that the option of final binding arbitration would decrease the incentive to negotiate and thus lead to a massive increase in impasses, only eight percent of municipal contract negotiations resulted in interest arbitration.[108] They also noted that the accompanying ban on strikes was violated only three times in that time period, though ten strikes had occurred in the four years preceding the implementation of the City's interest arbitration procedures.[109]

One of the rare instances in which American private sector employers and employees agreed to utilize binding interest arbitration was a brief period in the 1970s and 1980s when the steel industry and its unions entered into an "Experimental Negotiating Agreement" (ENA) after a series of harmful wide-scale strikes.[110] The ENA included a provision for binding interest arbitration in the case of impasse. The provision was never activated, however, because "the parties reached agreements in 1974 and 1977 without using interest arbitration; each side feared the contractual outcome if the situation was turned over to an interest arbitrator."[111] The provision was not included in future agreements.[112]

Other agreements between private employers and employees to implement binding interest arbitration at impasse have had similarly positive results. In the 1980s, Philip Morris USA and its unions agreed to a system where negotiation issues not resolved within thirty days of contractual expiration would be submitted to a tripartite arbitration panel.[113] Over the course of the provision's life, less than ten percent of negotiations resulted in interest arbitration.[114] More importantly, though, the interest arbitration provision led to decreased "reliance on economic pressure and

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107. Anderson & Krause, *supra* note 16, at 156, 179.

108. *Id.* at 176.

109. *Id.* at 177.

110. Broderdorf, *supra* note 18, at 330 (citing ADR IN THE WORKPLACE 503–04 (Laura J. Cooper et al. eds., 2nd ed. 2005)).

111. *Id.*

112. *Id.*

113. *Id.* at 330 (citing Dennis H. Liberson, *Labor Relations: Long-Term Agreements Work at Philip Morris*, PERSONNEL J., Dec. 1989, at 36).

114. *Id.* (citing Dennis H. Liberson, *Labor Relations: Long-Term Agreements Work at Philip Morris*, PERSONNEL J., Dec. 1989, at 38).

'traditional table pounding and threats,'" and "increased information sharing, more dialogue, and mutual problem-solving approaches to negotiation."[115]

3. Final-Offer Arbitration: A Potential Procedure for Implementation

For those who are genuinely concerned that mandatory arbitration will lead to either extreme or lazy bargaining positions, one potential option would be the use of "final-offer arbitration" (FOA) by FMCS, pursuant to its authority to implement EFCA. As of this writing, news reports on the ongoing negotiations over EFCA have indicated that the latest version of the Senate bill proposes to direct the FMCS to use FOA (which the Senators call "last best offer arbitration").[116]

In FOA, first proposed by Carl Stevens in 1966,[117] the arbitrator must choose between the final offers of the parties and cannot come up with his own compromise contract. FOA was developed specifically in response to the criticism of conventional arbitration that arbitrators tended to split the difference between the last offers of the parties,[118] and that such behavior chills bargaining and promotes excessive reliance on the arbitrator to reach an agreement.[119]

As with conventional interest arbitration, the purpose of FOA is to "use the arbitrator's power to impose settlements to induce agents to reach their own agreements, without requiring that the arbitrator actually impose a settlement."[120] But "[b]ecause the arbitrator must choose one of the two submitted offers under FOA, each party is likely to submit a more concessionary offer in order to increase the probability that its offer will be chosen."[121]

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115. *Id.*

116. *See* MacGillis, *supra* note 6.

117. Carl M. Stevens, *Is Compulsory Arbitration Compatible with Bargaining?*, 5 INDUS. REL. 38 (1965).

118. *Id. See also* Crawford, *supra* note 96, at 132.

119. Bazerman & Farber, *supra* note 103, at 76–77. *See also* Burgess & Marburger, *supra* note 94, at 549; Dannin & Singh, *supra* note 29, at 44 n.57 (citing *In re* Interest Arbitration between the State of Or. Dep't of Admin. Svcs. on behalf of Dep't of Corr. Sec.y Employees & Am. Fed. of State, County & Mun. Employees, IA-07-01, http://corrections.oregonafscme.com/arbitrationgrievances/2001arbitration.htm ("Last best offer by total package combats the so-called 'narcotic' effect of conventional arbitration by denying an arbitrator any flexibility to create a compromise between the parties' positions.")).

120. Crawford, *supra* note 96, at 132.

121. Burgess & Marburger, *supra* note 94, at 549. *See also* Ellen J. Dannin, *Collective Bargaining, Impasse and Implementation of Final Offers: Have We*

It has been noted that the earliest recorded use of FOA was at the trial of Socrates in ancient Athens, where the jury "was not permitted to compromise between the punishment suggested by the prosecution (death) and the punishment recommended by the defense (a fine)."[122] Most famously in modern times, FOA has been used to resolve salary disputes. This method has been in place in Major League Baseball since 1974.[123] As with other forms of interest arbitration, players negotiate their salaries with team management first before they may choose to resort to FOA.[124] Furthermore, like conventional interest arbitration, the *availability* of FOA has itself increased players' bargaining power in pre-arbitration negotiation, regardless of whether the issue ever reached an arbitrator.[125] The use of FOA in MLB salary negotiations has been found to create an incentive for players to make more moderate offers, as those "players who proceed to arbitration fare worse financially than those who settle."[126] Most recently, FOA was included in the airline dispute resolution legislation introduced in the Senate in 2001.[127]

The availability of salary FOA has been successful in reducing impasse in other settings as well. Analyzing mandatory FOA of wages of New Jersey firefighters and police officers over an eighteen-year period, Orley Ashenfelter and Gordon Dahl found that employer victory rates have converged towards fifty percent over time, suggesting there is no innate benefit to either employers or unions in FOA.[128] On an average over the period, unions

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Created a Right Unaccompanied by Fulfillment, 19 U. TOL. L. REV. 41, 71 (1987) ("Certainly if one is required to explain the rational basis for a proposal, one is more likely to advance proposals which have some rationality.").

122. Orley Ashenfelter et al., *An Experimental Comparison of Dispute Rates in Alternative Arbitration Systems*, 60 ECONOMETRICA 1407, 1408 (1992).

123. Burgess & Marburger, *supra* note 94, at 550–51. For a more detailed description of FOA in Major League Baseball, see Spencer B. Gordon, *Final Offer Arbitration in the New Era of Major League Baseball*, 6 J. AM. ARB. 153, 160–65 (2007); Amy Farmer et. al., *The Causes of Bargaining Failure: Evidence From Major League Baseball*, 47 J. L. & ECON. 543, 550–51 (2004).

124. Burgess & Marburger, *supra* note 94, at 551.

125. *Id.* (citing Paul L. Burgess & Daniel R. Marburger, *Bargaining Power & Major League Baseball*, *in* DIAMONDS ARE FOREVER: THE BUSINESS OF BASEBALL 50 (Paul Sommers ed., 1992) (finding eligibility to engage in MLB FOA itself results in fifty-eight to eighty-nine percent salary increase)).

126. Farmer et. al., *supra* note 123, at 545, 563.

127. *See* Airline Labor Dispute Resolution Act of 2001, S. 1327, 107th Cong. (2001).

128. Orley Ashenfelter & Gordon B. Dahl, *Strategic Bargaining Behavior, Self-Serving Biases, and the Role of Expert Agents: An Empirical Study of*

prevailed in approximately sixty percent of scenarios.[129] At the same time, "the difference between the parties' offers has tended to decrease over time," indicating FOA may have the effect of parties taking more moderate positions.[130] An experimental study by DeNisi and Dworkin found similar results, as the availability of FOA induced both simulated management and union representatives to make far more reasonable initial offers than in traditional bargaining.[131] That study also found that FOA has the potential to improve relationships between workers and management, particularly when the parties involved in the negotiation have a good understanding of the process.[132] Numerous studies have shown that the availability of FOA as opposed to conventional arbitration produces higher rates of negotiated settlements.[133]

Anecdotal evidence from experienced arbitrators suggests that FOA in the public sector tends to produce a significant number of voluntary settlements by the parties before the arbitrator has the chance to issue an award, as well as what arbitrators consider reasonable positions. One arbitrator reports, based on his experience with FOA in New Jersey:

> Because it is final offer arbitration, parties listen seriously to what the arbitrator has to say. As a result, if a party comes to the arbitration hearing with an unreasonable position, it will almost always alter that position prior to the close of the hearing out of fear that if it does not, the other party's offer will be selected and it will be the "loser" in the

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Final-Offer Arbitration 2 (Princeton Law & Public Affairs, Working Paper No. 04-009, 2003), *available at* http://ssrn.com/abstract=559188.

129. *Id.* at 6.

130. Ashenfelter and Dahl attribute some of these changes to the increased use of third-party agents, predominantly by employers, as they have "moderated self-serving expectations, and thus increased employer wage offers and their win rates." *Id.* at 4. Over the time period studied, the percentage of parties that hired third-party agents rose from thirty to approximately seventy-five percent. *Id.* at 7.

131. Angelo S. DeNisi & James B. Dworkin, *Final-Offer Arbitration and the Naive Negotiator*, 35 INDUS. & LAB. REL. REV. 78, 83–84 (1981).

132. *Id.* at 86–87.

133. Henry S. Farber & Max H. Bazerman, *Divergent Expectations as a Cause of Disagreement in Bargaining: Evidence From a Comparison of Arbitration Schemes*, 104 Q. J. ECON. 99, 100–01 (1989) (collecting studies). *See also* A.V. Subbarao, *The Impact of Binding Interest Arbitration on Negotiation and Process Outcome: An Experimental Study*, 22 J. CONFLICT RESOL. 79, 98 (1978) (finding FOA to lead to concessions by both unions and employers).

proceeding. As a result, a high percentage of settlement is achieved through the arbitration process.[134]

While most FOA has focused on disputes over single issues, usually salary, there have been other applications that address a wider range of disagreements in contract negotiation. Arbitration of an entire contract, where the arbitrator chooses between the total proposal of each party, is referred to as "total package" FOA.[135] "Issue by issue" FOA, on the other hand, allows arbitrators to construct a reasonable settlement by selecting different aspects from each of the parties' final offers on individual issues.[136] The arbitrator "may, for example, combine the union's wage proposal with management's proposal for fringe benefits if this combination seems more equitable to him than any other."[137]

Professors Dannin and Singh studied total package FOA as part of a simulation of collective bargaining that examined the responses of representative "employers" and "unions" to three potential legal regimes: (1) the current NLRA regime, which allows an employer to implement its own final offer at impasse; (2) total package FOA; and (3) mandatory agreement, with the option to strike or lockout employees as a bargaining tool, but with no option to permanently replace workers.[138] They found that both the employers and union representatives viewed FOA as "promot[ing] a more even balance of power."[139] Union representatives also reported the mere availability of FOA was influential in shaping their negotiation strategies.[140] But perhaps the most important finding was that both union and employer representatives reported a large degree of satisfaction with the FOA regime, whereas each of the other two systems was satisfactory to only one side.[141] Employers' main criticism was that they would prefer issue-by-issue FOA as opposed to total package FOA.[142]

The principal criticism of total package FOA is that it creates an incentive for the parties to prepare an otherwise reasonable package while including one unreasonable provision in the hope that this unreasonable item will be included in the final proposal because the arbitrator will conclude that, despite the unreasonable

134. Buchheit, *supra* note 92, at 173–74.
135. *See, e.g.*, Broderdorf, *supra* note 18, at 340.
136. Crawford, *supra* note 96, at 150–51.
137. *Id.* at 151.
138. Dannin & Singh, *supra* note 29, at 13–14.
139. *Id.* at 28.
140. *Id.* at 29.
141. *Id.* at 31–32.
142. *Id.* at 34.

provision, the overall reasonable package makes the most sense. The simple expedient to address this is to allow the arbitrator to remove one item from the final package. Any party who attempts to evade this restriction by including two unreasonable proposals would face the risk that the arbitrator will spot the strategy and therefore deem the package as a whole less desirable than the other party's proposal.[143]

Given that the availability of FOA has an even greater tendency than conventional interest arbitration to promote good faith negotiation and concessions from both parties, it would be a particularly sound procedure for the FCMS to adopt in effectuating the interest arbitration provision of EFCA.

B. Interest Arbitration Can Produce a Sensible Contract

Opponents of EFCA's interest arbitration provision contend that labor contracts are too complex for arbitrators to handle,[144] but there is no empirical basis for the assertion. Interest arbitration has been used for decades in the public sector and has produced perfectly adequate contracts across a variety of trades and professions.

The thrust of the Epstein-Chamber of Commerce position is that the arbitrator may choose a resolution that is not in a company's interest. This is entirely speculative, of course. There is no factual basis for believing that arbitrators chosen to resolve bargaining disputes will not understand the company's business. In the first place, interest arbitration, like collective bargaining, always occurs based on research and projections both parties have done about the employer's financial situation, labor and product markets, the working conditions at comparable companies, and so forth. This evidence is produced to the arbitrator by both parties. Because federal labor law already requires private sector employers to provide some information to substantiate their claims in bargaining, it will not be a significant change to require that the information be provided to an arbitrator.[145] Nor is there any reason to believe that arbitrators will choose a resolution that harms the company's business. Experienced arbitrators generally believe that interest arbitration rarely results in a departure from the status quo in terms of economic and noneconomic working conditions. As

143. *See* Walter J. Gershenfeld, *Interest Arbitration: State and Local Government Experience*, 35 PROC. NAT'L ACAD. ARB. 190, 201 (1983).

144. *See* Epstein, *Case against EFCA*, *supra* note 9, at 64; Letter from Seyfarth Shaw, LLP to Senator Edward Kennedy, et al. (Feb. 13, 2009).

145. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

Professor Malin, himself an experienced interest arbitrator, put it, "[a]rbitrators are inherently conservative as adjudicators" and "are strongly inclined against changing the status quo."[146] The reason for this, Professor Malin explains, is that the arbitrator's function "is to devise a contract that the parties likely would have reached had the process not broken down."[147]

The Epstein-Chamber of Commerce position is primarily that interest arbitration will be bad for business because it will increase labor costs and reduce management discretion.[148] The argument about labor costs is easily addressed. If arbitration contributes to the higher average salaries in the public sector, as compared to comparable private sector work, it can be attributed to the so-called "ratchet" effect of repeated cycles of interest arbitration in which an arbitrator is reluctant ever to impose a concession on labor, as noted in the various studies cited above. Under EFCA, there will be no repeats of interest arbitration (unless, of course, the employer and the union both agree to it) since the statute only applies to first contracts. So, if an arbitrator awards wages and benefits that the employer deems too high (or the union deems too low), the parties are free to negotiate for a change after the expiration of the two-year contract. If the arbitrator imposes a term that both the company and the union find undesirable, they can change it immediately. EFCA allows the parties, by mutual consent, to renegotiate the contract even within its two-year term.

The thrust of this critique, like so many of the criticisms of the interest arbitration provision, is that first contract interest arbitration will not be as beneficial for employers as the current approach of delay and bad faith negotiation until employers are able to unilaterally implement their final offer. This is not a critique of interest arbitration itself, but rather of the goal of equalizing power in labor-management relations.

Moreover, insofar as the argument is that an "outside" arbitrator is involuntarily imposing a contract on workers and employers, and thus depriving them of "choice," EFCA would still be fairer in this regard than the current system. Under the current system, the default when the parties fail to reach an agreement is the unilateral imposition of the employer's preferred terms. Here, at the least a third-party will select the terms if the parties cannot themselves agree.

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146. Malin, *supra* note 97, at 333 (1993).

147. *Id.* at 333.

148. Epstein, *Ominous EFCA*, *supra* note 31, at 54 (arguing that EFCA would "force the employer to hire some arbitrary workers" at a wage it does not wish to pay and might lead an employer into bankruptcy).

C. Interest Arbitration Is Better than the Alternatives

1. Arbitration Is Expeditious and Affordable

One argument against arbitration advanced by the Chamber of Commerce is that it is "a time-consuming, expensive process."[149] It is odd to see companies objecting so strongly to arbitration as a "time-consuming, expensive process" ill-suited to employment relationships, inasmuch as they have insisted for years that arbitration is a speedy, affordable, and flexible way to resolve disputes involving employment relationships.[150] But the Chamber of Commerce argument seems to be that first contract arbitration will take longer than negotiating a first contract. This is an assertion with no basis in fact. Consider a simple example drawn from a California Court of Appeal decision upholding first contract arbitration under California's Agricultural Labor Relations Act.[151] In that case, a union was certified as the representative of Hess Winery agricultural employees.[152] After an unspecified time, Hess Winery and the union commenced negotiating for a first contract.[153] They bargained for four years, from 1999 to 2003, without reaching agreement.[154] At that point Hess Winery declared an impasse and unilaterally implemented its preferred terms.[155] In April 2003, the union sought the involvement of the state agency, the Agricultural Labor Relations Board.[156] The Board ordered the parties to mediate, which they did, but by August 2003, the mediator had been unable to get the parties to resolve all the outstanding issues.[157] Arbitration promptly ensued and concluded by late September 2003, at which time a collective bargaining agreement was adopted.[158] Then the company spent three more years challenging the collective bargaining agreement in court; the California Supreme Court finally rejected the challenge in September 2006.[159] The unsuccessful bargaining took three years, and the fruitless litigation took another three years. The mediation

149. Letter from Seyfarth Shaw, *supra* note 44.
150. *Id. See, e.g.*, Circuit City Store, Inc. v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
151. Hess Collection Winery v. Cal. Agric. Labor Relations Board, 45 Cal. Rptr. 3d 609, 616 (Cal. Ct. App. 2006).
152. *Id.* at 616.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 628.

and arbitration produced a collective bargaining agreement in less than six months.[160]

At the same time, Richard Epstein argues that the arbitration provision forces employers to act *too quickly*.[161] He contends the availability of interest arbitration 130 days after union recognition presents an unfair surprise to employers when combined with the card check provision of EFCA since unions "know[] in advance the targets of [their] card check drives and can have [their] negotiation team in place before the results of the card check are computed."[162] Epstein is particularly concerned with the effects such "surprise" will have on small businesses that "may not be even able to find a lawyer to represent them during this short period" and could "be besieged by multiple claims at the same time."[163]

There is no data that supports this theory of unfair surprise. Epstein does not explain what exactly will be so difficult about putting a "negotiation team in place" that would prevent good faith bargaining from occurring in a period of over four months. He also presumes that unions will always want to initiate interest arbitration at the 130-day mark. This ignores reality and is tied to a general view of unions as manipulators. If a union and employer are engaged in good faith negotiation, there is no reason to presume the union will terminate that negotiation in favor of interest arbitration and its uncertain outcome. Moreover, there is no reason why it would take an employer acting in good faith over four months to seriously engage with its workers and their certified representatives. Employers have been competent to craft anti-union organizing campaigns in much shorter time periods.

Even when a union chooses to initiate interest arbitration, though, there is still a ninety-day period during which the parties must continue to negotiate.[164] Epstein makes the unsupported blanket statement that ninety days represents a "short time for addressing the multiplicity of issues in play."[165] But in the commercial context, few would claim that ninety days is an unreasonable time to negotiate a complex contract; even fewer would argue that the 220 combined days is an unreasonable time to negotiate such a contract. Furthermore, Epstein assumes that workers and employers will be at impasse over every single issue in a contract. By the 220th day after certification, it is likely that at

160. *Id.*
161. Epstein, *Case against EFCA*, *supra* note 9, at 11.
162. *Id.*
163. *Id.*
164. EFCA § 3.
165. Epstein, *Case Against EFCA*, *supra* note 9 at 11.

least some aspects of the contract will be resolved if the parties have been negotiating in good faith.[166]

As for costs, it is hard to see how the shortened timetable of interest arbitration could be more costly than months of unfruitful bargaining followed by proceedings before the NLRB and often a federal court of appeals. In perhaps one of his most absurd arguments, Epstein asserts that interest arbitration would impose an unfair cost on employers who would be forced to spend money lobbying the FMCS because it creates implementing regulations.[167] First, any such burden will be shared by unions, who have just as great an interest in the outcome as any other party. Second, the cost of regulatory lobbying by businesses has never caused businesses to fail before, and it is disingenuous to suggest that this provision will be the nail in the coffin.

2. Arbitration Should Not Be Limited to Cases in Which Bad Faith Bargaining Has Been Proven

Some have asserted that EFCA should be revised to provide for interest arbitration only as a remedy in cases where the NLRB has determined that an employer or a union has bargained in bad faith.[168] The essence of the argument is that arbitration is essentially a punishment and should be imposed only when one party to negotiations has violated the law and deserves to be penalized. But the premise of the argument is false—arbitration is not a punishment. More importantly, limiting arbitration to cases of proven bad faith will not eliminate the employer's incentive to engage in bad faith bargaining because the delay associated with the legal proceedings necessary to prove bad faith will enable the determined employer to undermine employee support for the union before the union has a chance to prove itself by negotiating a contract.

As noted above, one of the problems with current law is the incentive to delay and drive up costs as a way of defeating a newly recognized union. In the Mid-Continent Concrete case (*Hardesty*) discussed above, the employer dragged out the bargaining for a year in order to avoid the statutory requirement that a newly certified union cannot be challenged through a representation election for a year from initial certification. It took the NLRB until

166. Of course, if the argument against this provision is merely that the time periods should be extended, that is something that could easily be modified in the proposed legislation without altering section 3's general function.

167. Epstein, *Case against EFCA*, *supra* note 9, at 12.

168. *See, e.g.*, Broderdorf, *supra* note 18, at 348.

six years after bargaining began to issue its decision finding the employer had bargained in bad faith, and it took the court of appeals more than a year to enforce that decision. It hardly protects the employees' right to bargain collectively to make them wait seven years to litigate through multiple levels of the NLRB and then litigate again in the federal court of appeals in order to finally obtain arbitration.[169]

Some have suggested that the problem of delay could be addressed if the NLRB were to aggressively invoke its power under Section 10(j) of the NLRA to seek federal court injunctions against bad faith bargaining. But a Section 10(j) injunction would only produce a court order to the employer to bargain; under current law the employer cannot be forced to enter into a contract.[170] And so the employees would still have to wait the years it would take to have a final NLRB determination of bad faith bargaining.

Moreover, the standards articulated by the NLRB to prove a failure to bargain in bad faith are exceedingly high. In *Hardesty* it was only the ill-advised remarks by certain management employees, that they had no intention ever of agreeing to a contract with the union and that they planned to wait until the one-year certification bar had passed before seeking to decertify the union, that clinched the case for a finding of bad faith.[171] In the face of a legal regime that protects the right of an employer to refuse ever to agree to a contract term, proving a failure to bargain in good faith is extremely difficult. Would it be bad faith for an employer to decide to allow its employees to strike, or to lock them out, and then to hire permanent replacements in the hope of undermining support for the union?

In the end, most of the policy arguments against first contract arbitration reveal themselves to be simply arguments against unions and collective bargaining more generally. In critiquing the first contract interest arbitration provision of EFCA, Richard Epstein unintentionally bolsters the case for interest arbitration by demonstrating his fundamental gripe: he does not like collective bargaining. He says labor unions misleadingly describe the purpose of interest arbitration as "facilitating initial collective bargaining agreements" and that, in reality, unions are merely "frustrated by their inability to obtain first contracts that advance

169. Hardesty Co. v. Teamsters Local Union 373, 336 N.L.R.B. 258, 260–61 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002).

170. *See* Gould, *supra* note 30, at 325 (noting inadequacy of 10(j) orders).

171. *Hardesty*, 336 N.L.R.B. at 260–61.

their interests under the traditional bargaining system."[172] First, it is unclear how these descriptions are inconsistent. But even if one adopts the second description only, there should be nothing objectionable about union frustration regarding a widespread inability to negotiate beneficial terms in first contracts. The idea that there is something wrong when unions seek to achieve mutually beneficial agreements via good faith negotiation speaks to a general hostility to the idea of collective bargaining as a whole, not to an ulterior motive on behalf of unions.

Interest arbitration is not a perfect system. FOA, particularly when it follows bargaining and mediation as it would under EFCA, promotes settlement, but when settlement fails arbitrators find themselves making difficult choices.[173] Arbitration that allows the arbitrator to impose terms not offered by either party may not promote as much voluntary settlement as FOA. Interest arbitrators tend to lament that parties cannot bargain to their own contract. But the alternative to interest arbitration in at least half of all cases involving newly certified unions is *not* that the parties agree to their own contract. The alternative to interest arbitration is that nearly half of newly unionized bargaining units will have *no* contract. So the relevant question is not whether arbitration is better than bargaining at producing a collective bargaining agreement—the question is whether arbitration is better than no agreement after years of bargaining. The answer is clearly yes.

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172. Epstein, *Case against EFCA*, *supra* note 9, at 16.

173. For example, as was stated by Professor Malin in his Opinion and Award in *Illinois Fraternal Order of Police Labor Council & Village of Fox Lake*, ISLRB No. S-MA-98-122, at 9 (1999) (Marlin, Arb.):

> The theory behind such final offer interest arbitration is that the "winner take all" nature of the proceeding will motivate the parties to moderate their positions and will push them toward agreement. Even if they do not reach agreement, their positions will be sufficiently moderated that what will remain is for the arbitrator to select the more reasonable of the competing offers. Most of the time the process works. However, sometimes the final offers presented are far from ideal and the arbitrator is faced with weighing factors to determine which of the competing offers is less problematic.

And as stated by Arbitrator Lankford, in his Opinion and Award in *Oregon State Police Officers Association and Oregon Department of State Police* (2000) (Lankford, Arb.), *reprinted in* JOSEPH R. GRODIN, JUNE M. WEISBERGER & MARTIN H. MALIN, PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 346, 358 (2004) ("In package-based interest arbitration there is an inevitable hazard that the prevailing package will include one or two quite disreputable minor proposals. This is such a case.").

IV. FIRST CONTRACT ARBITRATION IS CONSTITUTIONAL

Another argument advanced by some critics of EFCA is that the use of FMCS mediators is an unconstitutional delegation of congressional authority. As a matter of legal doctrine, the first contract arbitration provision of EFCA is indisputably constitutional. Whatever the continuing vitality of the nondelegation doctrine, a matter as to which there is significant scholarly dispute,[174] it has not been held to apply to delegations of power to establish procedures for resolving individual disputes, as we explain below.[175] EFCA does not delegate legislative power to create rules applicable across the board to every workplace; it simply empowers the FMCS to resolve individual disputes involving particular workplaces. Even if the nondelegation doctrine were to apply to individual instances of dispute resolution, EFCA and the statutes that it amends provide sufficient standards to guide the FMCS in the exercise of its power.

The nondelegation doctrine was first announced by the Supreme Court in the early 1930s when the Court held that Article I of the Constitution implicitly barred Congress from delegating its legislative power to administrative agencies.[176] In the face of the growth of administrative agencies—beginning in 1887 with the creation of the Interstate Commerce Commission and continuing with the creation of the Federal Trade Commission by the antitrust laws of the 1890s and the creation of the NLRB in 1935—those concerned with the development of the modern administrative state argued that the Constitution restricted the ability of Congress to delegate legislative power to the executive branch or independent agencies. In two 1935 decisions, the Supreme Court held two legislative delegations in the National Industrial Recovery Act unconstitutional. In *Schechter Poultry Corp. v. United States*, the Court struck down a provision that instructed the poultry industry to create a code governing the sale of chickens in New York City and working conditions for those raising and selling live chickens,

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174. *See infra* note 180.

175. *See, e.g.*, April Rolen-Ogden, Note, *When Administrative Law Judges Rule the World: Wooley v. State Farm*, 66 LA. L. REV. 885, 893–94 (2006) (noting demise of non-delegation doctrine allows agencies to exercise adjudicative power); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 145 n.388 (2006) (noting adjudicatory delegations resulting in case-by-case decision-making would survive even a more restrictive nondelegation doctrine).

176. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 327–28 (3d ed. 2006); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 362–65 (2d ed. 1988).

with the only congressional guidance being that the code should "promote fair competition."[177] In *Panama Refining Co. v. Ryan*, the Court struck down a provision that authorized the President to prohibit the shipment in interstate commerce of oil produced in excess of state-imposed production quotas, holding the statute did not provide the President with sufficient standards.[178]

The nondelegation doctrine was controversial from the start, as many believed that good governance in the complex modern state necessitated the delegation of power to expert agencies that were able to manage the huge quantity of complex regulations that Congress could not possibly control itself.[179] The Supreme Court abandoned its nondelegation doctrine war on the administrative state almost as soon as it began and has not declared any federal law to be an impermissible delegation of legislative power since 1935.[180] While, in recent cases, the Court has stated that when Congress delegates legislative power it must provide "intelligible principles" to guide the agency's exercise of discretion,[181] it has found every delegation of rulemaking power, no matter how broad, to be permissible.[182] Agencies across the range of the government operate under exceedingly broad and vague delegations of authority. The Federal Communications Commission (FCC) is

177. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

178. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

179. *See, e.g.*, Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

180. As a consequence, there is a lively debate among scholars as to whether the nondelegation doctrine is or should be thought of as grounds for judicial invalidation of congressional and agency action. *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 202 (2002) (defending nondelegation doctrine); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) (arguing that the nondelegation doctrine never existed—"[n]ondelegation is nothing more than a controversial theory that floated around the margins of nineteenth-century constitutionalism," that was applied in two aberrant cases in 1935, and is unjustifiable on grounds of original meaning or structure of constitution and on grounds of sensible policy); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (defending nondelegation doctrine); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323 (1987) (arguing that the nondelegation doctrine is not judicially administrable).

181. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).

182. For instance, the Supreme Court upheld a broad delegation of power to the Sentencing Commission to promulgate sentencing guidelines for the federal courts. Mistretta v. United States, 488 U.S. 361 (1989). The Supreme Court rejected a nondelegation challenge to the provision of the Uniform Code of Military Justice, under which the circumstances in which the death penalty would be imposed were prescribed by executive order. Loving v. United States, 517 U.S. 748 (1996).

delegated power to regulate broadcasting "in the public interest."[183] The Federal Trade Commission (FTC) is empowered to address "unfair methods of competition" and "unfair or deceptive acts or practices."[184] The Occupational Safety and Health Administration (OSHA) is empowered to issue standards "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[185] The Secretary of State is authorized to issue passports "under such rules as the President shall designate and prescribe."[186]

Although the nondelegation doctrine has supporters in academia and in some lower federal courts,[187] the Supreme Court in *Whitman v. American Trucking Associations, Inc.* unanimously reversed the only recent case in which a court of appeals had revived the doctrine.[188] In *Whitman*, the D.C. Circuit Court of Appeals declared unconstitutional the Environmental Protection Agency's (EPA) air quality regulations as to ozone levels on the grounds that the Clean Air Act, which delegated the power to adopt the regulations, had no "intelligible principle" to determine why one level of pollution is permissible rather than another when all amounts entail some risk to public health.[189] The Supreme Court reversed, with Justice Scalia, himself no fan of expansions of federal power, writing for the Court, on the ground that the statute did provide "intelligible principles" to guide the agency's discretion.[190]

To the extent that the nondelegation doctrine remains a serious constitutional restriction on the ability of Congress to delegate

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183. 47 U.S.C. § 303 (2006); *see* Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) (upholding Communications Act delegation to FCC of power to regulate "in the public interest" against a nondelegation challenge).

184. 15 U.S.C. §§ 41, 45(a) (2006).

185. 29 U.S.C. § 652(8) (2006). The Supreme Court rejected a nondelegation doctrine challenge to OSHA in *Industrial Union Department v. American. Petroleum Institute*, 448 U.S. 607 (1980). The argument that broad delegations of power to set working conditions is unconstitutional seems to have gained respectability lately with Cass Sunstein's article arguing that OSHA represents an unconstitutional delegation of power to the Occupational Safety and Health Administration to set standards for workplace safety. Cass Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407 (2008). The Sunstein argument essentially revives the position articulated by then-Justice Rehnquist in his concurrence in *Industrial Union Department*.

186. Zemel v. Rusk, 381 U.S. 1, 21 (1965) upheld that regime against a nondelegation challenge.

187. *See supra* note 175.

188. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).

189. Am. Trucking Ass'ns v. U.S. EPA, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

190. *Whitman*, 531 U.S. at 476.

power to agencies, there are two questions to consider in assessing Section 3 of EFCA. The first is whether the nondelegation doctrine even applies to the arbitration process for resolving individual bargaining disputes in individual workplaces. As explained below, it does not. The second question, which is reached only if the nondelegation doctrine applies, is whether a court could find intelligible principles to guide the FMCS in conducting arbitrations from general statements in the NLRA, as amended, about the duty to bargain, the harms to commerce of unnecessary work stoppages, and the desirability of FMCS intervention to facilitate bargaining and to prevent labor disputes from interfering with the flow of commerce. Such intelligible principles exist.

A. The Nondelegation Doctrine Does Not Apply to Delegation to an Agency of the Power to Resolve Individual Disputes

Unlike the vast majority of instances in which litigants or commentators have raised the nondelegation doctrine, EFCA does not delegate power to the FMCS to impose rules applicable across a segment of the economy. Rather, the power that Congress proposes to delegate in Section 3 of EFCA is the power to establish a procedure for resolving individual negotiating disputes. This is not the kind of delegation subject to a nondelegation challenge, as it is widely accepted that Congress need not specify the processes an agency must follow in resolving individual disputes. For example, in *Sibbach v. Wilson*, the Supreme Court summarily rejected a nondelegation challenge to the Rules Enabling Act, in which Congress delegated to the Supreme Court, which in turn delegated to a Rules Advisory Committee, the power to promulgate rules of practice, procedure, and evidence for the federal courts.[191] The guidance Congress provided in the Rules Enabling Act is that federal rules may not "abridge, enlarge, or modify any substantive right."[192] As is well known to every law student who has wrestled with the *Erie* doctrine,[193] this vague guidance hardly provides a clear, "intelligible principle."

There are a number of reasons why EFCA's proposed system of resolving individual negotiation disputes is not an unconstitutional delegation of legislative power. First, what the agency is considering is an individual dispute, and the resolution of the dispute will be a private contract. The FMCS is *not* empowered to establish rules generally applicable to every workplace or rules

191. 312 U.S. 1, 9–10 (1941); 28 U.S.C. § 2072 (2006).
192. 28 U.S.C. § 2072(b) (2006).
193. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

enforceable through criminal or other processes of law. The nondelegation doctrine has never been held to apply to the resolution of individual disputes (what is usually considered adjudication); rather, it has only been argued to apply to rulemaking. The classic nondelegation challenge is to a statute through which Congress has decided to apply a new substantive rule or standard to govern the behavior of a sector of society but leaves to the agency the task of actually determining what that rule or standard will be. The argument behind the nondelegation challenge to OSHA was that it empowered the agency to set standards not explicitly approved by Congress that would be binding on every workplace covered by the statute.[194] The argument behind the nondelegation challenge to the Clean Air Act was that it authorized the EPA to create its own standards that would be binding on every covered polluting entity.[195] In contrast, with individual negotiation disputes, the only standards that are set are wages and working conditions for a single bargaining unit for a period of two years—and only if the union and the employer fail to agree to their own terms. This is adjudicatory in nature because it is a narrow decision based on the specific factors of a specific case and only applying to that specific case. A nondelegation challenge could perhaps exist if Congress delegated to the FMCS the more general authority to set terms and conditions for an entire sector of the workforce, but that is not what EFCA does.

Much of the NLRA, including Section 3 of EFCA, does not regulate terms of employment. It simply controls the method by which the parties resolve disputes in their efforts to set their own terms by regulating the processes of unionization and bargaining and by empowering arbitrators to fill in the gaps. Congress has left to private entities the decision whether to pay or work for wages above the federally-mandated minimum, whether good cause will be required for firing, whether layoffs will be based on seniority or other factors, and the like. When the employer has market power, it can dictate those terms with little concern for the desires of the employees. When the employees unionize or find other forms of labor market power, they can insist on better terms than they might otherwise receive. Under current federal labor law, the employer can impose the terms even on an unwilling union and employees once the negotiations have reached impasse.[196] All that the NLRA does is make the agreement that the parties ultimately reach enforceable in federal court, and it empowers private arbitrators to

194. *See* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980).
195. *See Whitman*, 531 U.S. at 457.
196. NLRB v. Katz, 369 U.S. 736 (1962).

decide what those agreements mean.[197] Similarly, under the Federal Arbitration Act, Congress has authorized private arbitrators to resolve individual disputes in the non-union sector, and it has made those arbitrators' decisions enforceable in federal court.[198]

In addition, the mandatory arbitration provision also differs from statutes traditionally challenged under the nondelegation doctrine in that resort to arbitration is entirely optional. Unlike OSHA, the Clean Air Act, or the other regulatory regimes that have drawn nondelegation challenges, any employer or union that does not wish to have a contract or any term of a contract imposed by arbitration need only bargain to an agreement themselves. Parties can opt out of the system simply by agreeing to terms, which is the entire point of the NLRA as it exists.

The third and most important reason why the first contract arbitration provision is constitutional is this: the alternative to having the arbitrator impose terms is having the employer unilaterally impose terms. Under the current legal regime, if the employer and the union cannot reach an agreement, the employer is entitled to unilaterally implement the terms it made in its final offer.[199] EFCA changes this regime in one limited circumstance by providing that in the case of a newly certified union, the employer cannot impose its final offer, but instead, if it and the union cannot agree, the terms will be set by an arbitrator for a period not to exceed two years. After that two year period, the employer and union will go back to the bargaining table, and, if they cannot agree, the employer will have the right to unilaterally impose its terms after bargaining to impasse. If it is not an unconstitutional delegation to give employers the power to unilaterally set wages, it is hard to see how allowing an arbitrator to set wages would be.

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197. 29 U.S.C. § 301 (2006).

198. *See* Circuit City Store, Inc. v. Adams, 532 U.S. 105 (2001); 2 U.S.C. § 2 (2006).

199. As is well known, the Supreme Court decided in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), that Section 301 of the LMRA, which vests jurisdiction in the federal courts of suits for violations of collective bargaining agreements, was in fact a delegation of power to make substantive rules governing labor-management relations. The Court then proceeded to invent a series of rules in the famous *Steelworkers* Trilogy that further delegated to arbitrators the largely unreviewable power to decide the scope, meaning, and enforcement of collective bargaining agreements. United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navig. Co., 363 U.S. 574 (1960).

B. Intelligible Principles

It may be contended that the constitutional infirmity is not to the use of arbitration to set the terms of contracts, but rather that the statute, at least as it was introduced in Congress in March 2009, does not give the FMCS sufficient direction in telling arbitrators *how* to conduct the arbitration. The March 2009 bill did not, for example, specify whether the arbitrator must choose final offer arbitration or conventional arbitration, or upon what basis the arbitrators should make their decisions. News reports suggest that later drafts of the bill may direct the FMCS to use final offer arbitration.[200] Some have pointed out that states that use interest arbitration typically have legislative guidelines telling the arbitrator what factors to consider, and that EFCA as introduced in March 2009 does not.[201] But all sorts of federal statutes delegate decision-making power to agencies without detailed specifications of how the agency should exercise its power. Moreover, the law governing agency interpretation of statutes, namely the doctrine of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*,[202] seems premised on the very idea that delegation in the form of broad statutory language is both necessary and permissible.[203] Where statutes are nonspecific, courts are to defer to any reasonable interpretation by an agency authorized to interpret the statute.

Even so, EFCA, as an amendment to the NLRA, does provide "intelligible standards" to govern the exercise of FMCS discretion. The interest arbitration provision of EFCA is an amendment to Section 8 of the NLRA that imposes a duty to bargain as part of the general purpose of the NLRA. With respect to the general purposes underlying the duty to bargain, Congress found:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce,

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200. MacGillis, *supra* note 6.

201. *See, e.g.*, Broderdorf, *supra* note 18, at 345.

202. Chevron USA, Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984) (courts should defer to agency interpretations of their enabling statutes).

203. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478 (1989) (noting that the theory behind nondelegation doctrine is "fundamentally at odds with *Chevron*'s assumption that Congress may empower agencies to decide what regulatory statutes mean whenever they appear ambiguous").

> and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.[204]

With respect to assistance in resolving bargaining disputes, the LMRA of 1947, which was an amendment to the NLRA, created the FMCS and empowered it "to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes."[205] The purposes of the LMRA were broadly stated, following a finding that:

> [I]ndustrial strife which interferes with the normal flow of commerce . . . can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.[206]

To that end, the LMRA imposed on "employers and employees and their representatives" the duty to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions" and to "participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute."[207]

The FMCS and its processes, as well as the general practices of interest arbitration in the sectors where it is used, are well known to labor and management, so Congress is not writing on a blank slate. The factors and processes that interest arbitrators use are also well known. No one has argued that EFCA prescribes some procedure other than interest arbitration. By providing the private sector with the exact same type of negotiating dispute resolution that has been used in the public sector for decades, Congress is simply applying a familiar process to another sector of the economy.

The California Court of Appeal rejected a nondelegation challenge to an almost identical first contract arbitration provision

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204. 29 U.S.C. § 151 (2006).
205. 29 U.S.C. § 173(a) (2006).
206. *Id.* § 141.
207. *Id.* § 174.

of the California Agricultural Labor Relations Act (ALRA).[208] Under the California Constitution, a legislative delegation is permissible unless the legislature has failed "to render basic policy decisions."[209] Like EFCA, the ALRA provided for first contract arbitration but did not specify the factors the arbitrator should use to resolve the dispute.[210] The state agency adopted a set of criteria to govern the arbitration process. The California legislature later amended the statute to add those criteria to the statute, but at the time the events leading to the case occurred, the criteria were not yet in the statute. The California court concluded that the legislature had made the "basic policy decisions" when it concluded that first contract arbitration was necessary to prevent failures to bargain, to improve the working conditions of agricultural employees, and to promote stability in agriculture.[211] The fact that the statute did not specify the criteria for the arbitrator did not render the statute unconstitutional because the court concluded that the agency was permitted to use its expertise to decide the details of the process.[212]

Other provisions of federal law make similarly broad delegations of authority to the FMCS and to arbitrators to resolve disputes. For example, Section 206 of the LMRA provides for third-party dispute resolution in the case of labor disputes that "in the opinion of the President of the United States . . . will, if permitted to occur or continue, imperil the national health or safety."[213] This is a very broad and largely standardless delegation

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208. Hess Collection Winery v. Cal. Agric. Labor Relations Board, 45 Cal. Rptr. 3d 609 (Cal. Ct. App. 2006). The California Supreme Court denied review in that case. *Id.*

209. *Id.* at 624.

210. The ALRA calls the process mediation, but unlike what is usually described as mediation (in which the third party lacks the power to impose a resolution on the parties), the ALRA procedure empowers the mediator to impose a resolution on the bargaining dispute. It is thus indistinguishable from first contract arbitration under EFCA.

211. *Hess Collection Winery*, 45 Cal. Rptr. 3d at 624.

212. *Id.* at 624. The California Supreme Court has, however, found invalid a state statute that provided for interest arbitration for county government employees on the ground that the state legislature lacked the authority under the state constitution to set salaries for county government employees. County of Riverside v. Superior Court, 132 Cal. Rptr. 2d 713 (Cal. 2003). This was not a nondelegation case, but rather a case on the respective powers of state and local government. State supreme courts in other states generally have rejected constitutional challenges to statutes providing interest arbitration for public sector employees. *See* Joseph R. Grodin & Joyce M. Najita, *Judicial Response to Arbitration*, *in* PUBLIC SECTOR BARGAINING (Benjamin Aaron et al. eds., 2d. ed. 1988).

213. 29 U.S.C. § 176 (2006).

of power by Congress to the President to decide which labor disputes will "imperil the national health or safety" and to make appointments to the board of inquiry to resolve the dispute.[214] Similarly, the Federal Arbitration Act provides for arbitration to determine individual employment disputes without specifying procedures or standards for the arbitration.[215]

Consider a simple example. A union is newly recognized or certified. The employer proposes in negotiations to continue to pay $7.50 per hour, the rate the employer had set unilaterally before the union organizing campaign began. The union requests $9.50 per hour. The wages that will ultimately be paid will be determined either by a collective bargaining agreement, in which case the wages will be set based on whether the employer or the union has more leverage, or, if no agreement is reached, by unilateral action of the employer. Under EFCA, if no agreement is reached and mediation fails, an arbitrator would be appointed and empowered to decide the dispute. Under the settled practices of interest arbitration, the arbitrator could either choose one of the parties' final offers (in which case, the wages would be either $7.50 or $9.50) or adopt a wage that makes the most sense according to his own judgment. Arbitrators often split the difference, and so the wages might be $8.50. Under the version of EFCA introduced in March 2009, the FMCS is empowered to direct arbitrators as to the best method of arbitration to use, just as every other federal agency that resolves disputes is authorized to decide which process of dispute resolution is most conducive to the statutory goal. Under revised versions of the bill reported in the news in the fall of 2009, the FMCS would apparently be required to direct arbitrators to use the final offer method.[216] In either circumstance, the delegation of power to an arbitrator to resolve the dispute over wages for the bargaining unit is perfectly constitutional.

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214. The statute specifies only that the President "may appoint a board of inquiry" of "a chairman and" an unspecified number of members with unspecified qualifications, that the board of inquiry should make "a written report . . . within such time as [the President] shall prescribe." The report "shall include a statement of the facts" but "shall not contain any recommendations," and the board of inquiry "shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute." 29 U.S.C. §§ 176, 177 (2006).

215. 9 U.S.C. § 2 (2006).

216. *See supra* note 6.

C. Other Constitutional Arguments

As weak as the nondelegation argument about first contract arbitration is, the other constitutional challenges that have been leveled at it are even more preposterous. In the California case described above that upheld interest arbitration for agricultural employees, the employers argued also that interest arbitration violated the liberty of contract supposedly protected by substantive due process, denied employers due process by eliminating judicial review, and deprived agricultural employers of the equal protection of the laws by subjecting only them to interest arbitration.[217] Richard Epstein has argued that EFCA's first contract arbitration constitutes a taking of private property violative of the Fifth Amendment by imposing an "expropriation risk of forcing employer to pay far more for workers . . . than they would voluntarily agree to do."[218] Under well-settled principles of constitutional law, these arguments do not even pass the red face test.[219]

First, as pointed out by the California Court of Appeal, the substantive due process–liberty of contract argument has not enjoyed support since 1937 when the Supreme Court abandoned its lonely fight against the New Deal.[220] No wonder then that the employers in the California agricultural interest arbitration case cited only cases from the 1920s and early 1930s to support their position.[221] Second, inasmuch as employers have successfully defended their own right to resolve all disputes with their non-union employees through arbitration without judicial review under the Federal Arbitration Act, it is difficult to see how they could argue that imposing arbitration on them over their objection violates due process.[222] Third, although the California agricultural employers argued that imposing interest arbitration on some sectors of the economy but not on others violates equal protection, the California court had little trouble discerning a rational basis for

217. *Hess Collection Winery*, 45 Cal. Rptr. 3d 609.

218. Epstein, *Ominous EFCA*, *supra* note 31 at 54.

219. *See, e.g.*, *In re* Premier Auto. Servs., Inc., 492 F.3d 274, 283 (4th Cir. 2007) (rejecting idea of "a right to do business" under substantive due process); Lin v. Great Rose Fashion, Inc., No. 08-cv-4778 (NGG), 2009 WL 1544749, at *14 n.7 (E.D.N.Y. June 3, 2009) (characterizing similar argument as one made with "infinite audacity").

220. West Coast Hotel v. Parrish, 300 U.S. 379 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

221. Hess Collection Winery, 45 Cal. Rptr. 3d at 618–19.

222. *See id.* at 621–22; Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

the legislative decision regarding the scope of interest arbitration—and a rational basis is all that is required for economic legislation.[223] As for Epstein's argument that interest arbitration imposes a taking on employers, since he freely concedes that minimum wage regulation does not constitute a taking,[224] it is hard to see how arbitral resolution of wage disputes would do so. He asserts that the distinction between EFCA and minimum wage regulation is that EFCA "force[s] the employer to hire some arbitrary workers at that wage when it does not wish to do so,"[225] but this statement is completely false. EFCA does not force an employer to hire employees. It simply regulates wages and working conditions and the process of establishing wages and working conditions, just like every other piece of labor legislation enacted since the New Deal. As noted above, interest arbitration is no more of a taking from employers than the current system of allowing the unilateral imposition of a contract on employees is a taking from them.

What these antiquated constitutional arguments do reveal is that current opposition to interest arbitration is really a variation of the arguments employers made early in the twentieth century against unions, collective bargaining, wage and hour regulation, laws protecting workplace safety, and every other form of legislation aimed at protecting workers. All such laws restrict the ability of companies to use their concerted power and market dominance to impose conditions on workers that are unhealthy or unfair. Employers resisted such laws on the grounds that they interfere with the employers' supposed constitutional right to dictate working terms, and courts since 1937 have unanimously rejected the employers' arguments. Any challenge to the interest arbitration provision on freedom of contract grounds would call into question all of these laws, as well as longstanding Supreme Court precedent like *West Coast Hotel Co. v. Parrish*,[226] an unlikely proposition even if free market advocates may support such a course of action. Of course, as with all the modern regulation of working conditions and labor markets, reasonable people may disagree about whether every provision of EFCA represents wise policy. For the reasons given above, we believe it is wise policy. But it is a policy argument to be won or lost in the legislature, not a constitutional argument to be resolved in the courts.

223. *Hess Collection Winery*, 45 Cal. Rptr. 3d at 623.
224. Epstein, *Ominous EFCA*, *supra* note 31 at 54.
225. *Id.*
226. 300 U.S. 379 (1937).

V. CONCLUSION

The interest arbitration provision of EFCA will fill a glaring hole in current labor law by ending the process by which employers can flout the duty to bargain, talk a union to death, and thus act with total impunity in defeating the employees' choice of unionization. The provision creates no new substantive right but merely provides employees (and employers) with a means to enforce their existing right to engage in good faith bargaining over the terms of their employment. As such, interest arbitration will have no effect on law-abiding employers who negotiate in good faith to reach an agreement with their employees. It will only affect those employers who violate the law, and it will do so by adopting a time-honored and tested arbitration process.

First contract arbitration is not necessarily pro-labor. In today's economic and legal climate, however, it is pro-labor because a surplus of labor, the lack of grassroots labor militance, and the widespread tendency of firms to permanently replace striking workers all combine to make strikes rare and unions weak. But someday the tables may turn, and labor may feel that it can get a better deal by striking. If there is a return of the labor militance of the 1930s, which closed down entire cities like San Francisco and Detroit in general strikes and secured good wages because workers were willing to occupy entire steel mills and auto factories, we may expect to see business groups insisting that first contract arbitration is necessary to protect the free flow of commerce and labor groups complaining that it deprives labor and management of the freedom to set their own terms. There is historical precedent; as this Article has shown, first contract arbitration, which is now excoriated by the Chamber of Commerce as a terrible infringement on the right of businesses to contract freely with their employees, has in the past been regarded by business as an invaluable protection against rapacious and irresponsible unions and by unions as a terrible infringement of the fundamental freedom to use their market power to secure better wages.

But it is also important to remember that the first contract arbitration proposed by EFCA is a relatively modest two-year limit on the ability of management and labor to use their economic leverage. After the first contract, it will still be up to management and labor to negotiate a contract. If the union has not done enough to secure the support of workers, and if labor market conditions favor management, we may expect to see employers bargain hard, insist on reductions in the economic and noneconomic terms in the first contract, unilaterally implement such reductions after impasse, lock out the employees and temporarily replace them or

permanently replace them if there is a strike, hire anti-union replacement workers, and ultimately get rid of the union through a decertification election or withdrawal of recognition.

Commentators are entitled to their beliefs that the interest arbitration provision is a bad policy choice. However, many anti-EFCA arguments simply reflect opposition to any legislation that aims to equalize the disparities in bargaining power between employees and employers. But if interest arbitration merely means that laborers will gain power and employers will no longer be able to flout the good faith bargaining requirement of the NLRA that has been in existence for seventy years, that does not mean interest arbitration is an inappropriate procedure for first contracts. Rather, it means interest arbitration may just be the perfect solution.