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

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Review Essay:
The Case Against the Employee Free Choice Act
by Richard A. Epstein (2009)

Although many contemporary American workers are drawn to the promise of individual autonomy,[1] they also find themselves in a quandary. They are dissatisfied with the uncertainty of a world that appears to have fallen apart;[2] they are waiting, yet they cannot fully articulate what they are waiting for.[3]

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1. A complete description of human rationality grounded in individual autonomy admits a wide array of explanations for the choices that humans make without necessarily succumbing to unconstrained greed. Rationality, economics, and self-interest, as such, do not necessarily defend John Stuart Mill's claims in *On Liberty*, "where . . . flawed conceptions of autonomy and individuality combine with an obsessional enmity to tradition and convention to yield a liberalism in which rationalist hubris, antinomian individualism and a sentimental religion of humanity reinforce and strengthen each other." JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 260 (1993).

2. Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?*, 26 QUINNIPIAC L. REV. 799, 800 (2008) [hereinafter Hutchison, *What Workers Want*] (citing Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1197 (2005)).

3. CHANTAL DELSOL, ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD, at xxvii (Robin Dick trans., ISI Books 2003).

Seeking freedom and liberation on the one hand,[4] and on the other, workers confront the contention that the workplace suffers from too much freedom and too little control.[5]

In the face of such opposing contentions, it is no surprise that the government has intervened. In fact, government-employment regulation has risen substantially during the past century, reflecting the fact that "[t]he state has permeated civil society to such an extent that the two are mostly indistinguishable."[6] This dynamic has advanced since the latter part of the nineteenth century and coincides with the rise of the Progressive Era; modern hierarchs, however, aim to break limits and generally "assume the perfectibilty of man and the conquerability, so to speak, of nature."[7] Attempting "to achieve great things in the face of life's perpetual disappointments,"[8] law reformers, attracted to a broad interpretation of the Commerce Clause[9] and an expansive understanding of the police power,[10] have sought to implement a new world order of labor relations—a world without industrial strife and unrest—through ideologies and bureaucratic instruments.[11] Progressive labor reform began during President Herbert Clark Hoover's administration and continues to develop today.[12] Despite this consistent pursuit of progress, workers are plagued by "allegations of falling or stagnant wages, increasing employment uncertainty, and increasing disparities in nonwhite versus white

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4. *See* Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 WM. & MARY BILL RTS. J. 1309, 1311–13 (2006) [hereinafter Hutchison, *A Clearing in the Forest*] (discussing the possibility that the decline in union participation can be explained by individual motivations of autonomy and liberation).

5. *See* Thomas C. Kohler, *Labor Law: "Making Life More Human"—Work and the Social Question*, *in* RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW 163, 180–81 (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007) (describing the American labor-law scheme as involving "controlled self-regulation" in which there is an absence of state regulation in the "ordering of relationships").

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

7. Paul Seaton, *Translator's Preface* to CHANTAL DELSOL, UNJUST JUSTICE: AGAINST THE TYRANNY OF INTERNATIONAL LAW vii (Paul Seaton trans., ISI Books 2008).

8. Rex G. Carr, Book Review, 52 J. CHURCH & ST. 160, 160 (2010) (reviewing J. CALEB CLANTON, RELIGION AND DEMOCRATIC CITIZENSHIP: INQUIRY AND CONVICTION IN THE AMERICAN PUBLIC SQUARE (2008)).

9. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .").

10. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 419–23 (1908) (holding that women are afflicted with certain physical limitations, and the state is justified in restricting the conditions under which they may work pursuant to its police power).

11. *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006) (recognizing the need for legal protection for employees who engage in collective bargaining).

12. Hutchison, *What Workers Want*, *supra* note 2, at 800.

unemployment rates," all of which may be linked to a rise in bureaucratic control.[13]

Although the federal government is an entity with limited and enumerated powers,[14] the establishment of a new order of labor relations has been fashioned by the pursuit of progress and exclusion.[15] Through pseudo-science[16] and notions of fairness, labor-law reform advocates have claimed "the moral high ground of public interest."[17] This move, consistent with progressive presuppositions, has enabled reformers to assert that "their programs and policies benefit[] the disadvantaged citizens they target[]."[18] An impartial examination of such programs and policies uncovers that they are often tainted by the human tendency to use power unimpeded by moral restraint for purposes of self-aggrandizing domination and abuse.[19] This taint frequently takes the form of consequences that place human liberty at risk and further suppress the economic and social prospects of the marginalized portion of society.[20]

Most reform efforts represent a combination of law and sociology conducive to statutory innovation. During the early part of the twentieth century, this led to the construction of sociological jurisprudence.[21] This development contributed to a jurisprudential trend that surfaced as an intellectual force in

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13. *Id.*

14. ROBERT A. LEVY & WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM 37 (2008).

15. Harry G. Hutchison, *Waging War on the "Unfit"? From* Plessy v. Ferguson *to New Deal Labor Law*, 7 STAN. J. C.R. & C.L. (forthcoming 2011) (manuscript at 33–36) [hereinafter Hutchison, *Waging War on the "Unfit"*?], *available at* http://ssrn.com/abstract_id=1674048 (explaining that progressive labor reform was implemented as a discriminatory weapon against "inferior" races); *see also* David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177, 177 (2009) (explaining that the original New Deal progressives designed labor legislation to exclude certain classes of workers).

16. *See* Bernstein & Leonard, *supra* note 15, at 177 ("[T]he exclusion of undesirables acquired new scientific legitimacy.").

17. Hutchison, *Waging War on the "Unfit"?*, *supra* note 15, at 24.

18. *Id.*

19. *See* HUNTER, *supra* note 6, at 188 (suggesting that the natural disposition of the human race is manipulating, dominating, and controlling).

20. *See* Hutchison, *Waging War on the "Unfit"?*, *supra* note 15, at 34 ("[T]he implementation and enforcement of labor law became a weapon to displace biologically suspect workers. 'At times, such efforts were grounded in the ideology of white supremacy.' At other times, the economic benefits of exclusion propelled union efforts." (quoting Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. RACE & L. 369, 400 (2010) [hereinafter Hutchison, *Employee Free Choice*])).

21. *See* David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 811 (1998) (explaining the emergence of sociological jurisprudence).

constitutional law; it suggested "that the purpose of law is to achieve social aims" that cannot be constrained by abstract notions of rights tethered to the language of the Constitution.[22] This flight from the notion of individual rights enabled progressives to argue that the Constitution could not constrain the federal government's social and economic goals; this movement reached its apotheosis during President Franklin Delano Roosevelt's administration.[23]

Provoked by the U.S. Supreme Court's failure to permit the expansion of state power that he favored, President Roosevelt threatened to pack the Court.[24] The Roosevelt administration sought public support for its scheme to restructure the economy by offering plans and proposals involving a substantial element of deception.[25] For example, supporters of the National Industrial Recovery Act (NIRA) hoped that this statute "would rebuild the American economy on the model of Mussolini's fascist Italy, then widely regarded as a successful alternative to laissez-faire capitalism," thus surreptitiously eliminating a number of widely accepted government departments.[26]

Consistent with its overall approach of ignoring the contrary views of citizens, the Roosevelt administration, after the demise of the NIRA, pushed to enact the National Labor Relations Act (NLRA) in the absence of strong public support.[27] "The NLRA marked the culmination of a systematic effort of the progressive movement that dominated so much of American intellectual life during the first third of the twentieth century."[28] Overall, it was an effort aimed at creating a transformed society.[29] Offering an iconic conception of labor progress, this move was reified by the Supreme Court in *NLRB v. Jones*

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22. *Id.*

23. *See* Laveta Casdorph, *The Constitution and Reconstruction of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 485 (1999) (describing President Roosevelt's belief that "government intervention was necessary to save the nation's economy" at a time when individual liberty and government noninterference was the norm).

24. Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 659 (2003).

25. *Id.* at 652 ("The Roosevelt Administration's strategy for gaining public support for the NIRA apparently involved a substantial element of deception.").

26. *Id.* Specifically, "National Recovery Administration (NRA) Director Hugh Johnson privately told Secretary of Labor Frances Perkins that 'when this crisis is over and we have the recovery program started, there won't be any need for a Department of Labor or a Department of Commerce' because their functions would be subsumed by the NRA." *Id.* (citing FRANCIS PERKINS, THE ROOSEVELT I KNEW 240 (1946)).

27. *See id.* at 657–58.

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

29. *See id.* (noting that, prior to the Employee Free Choice Act, the NLRA was the most progressive labor legislation enacted in America).

& Laughlin Steel Corp.[30] Accepting the contention that the NLRA regulated labor practices "affecting commerce" and rejecting the distinction between production and commerce, the Court announced that it "would no longer define the commerce power in terms of the Tenth Amendment's reserved power concepts."[31] The Supreme Court thus accepted the NLRA's stated objective of eradicating industrial strife through collective bargaining.[32] Departing from "the *Lochnerian* tradition of hostility to class legislation and laws interfering with free labor markets,"[33] the Court accepted pro-regulation and declared "that it considered liberty of contract a nonfundamental right."[34]

The publication of Richard Epstein's book, *The Case Against the Employee Free Choice Act*, provides an opportunity to reconsider: (a) the movement to use legislation and regulations, rather than the common law, to control labor relationships;[35] (b) the original purpose of the NLRA; and (c) the revolutionary implications of the effort to transform the NLRA into a law that favors unionization.[36] Describing the central provisions of the Employee Free Choice Act (EFCA), its economic consequences, its constitutional implications, and its connection to the decline of unionism, Epstein offers a balanced portrayal of the EFCA that suggests that this statutory initiative is not likely in the interest of most workers, employers, or the nation as a whole. Part I of this Article describes Epstein's inspection of the EFCA, its most important provisions, its institutional structure, and its probable economic consequences. Part II maintains that a more comprehensive review of the EFCA and its inescapable connection to progressive presuppositions indicates that the true enemy of unionization is the American worker and the national interest. American workers who are adequately informed of labor unions' ongoing participation in the social control of work and the marginalization of workers, as well as union participation in transformational politics financed by union dues revenues, are likely to perceive the EFCA as an ill-considered statutory effort that most Americans ought to reject. Properly appreciated, the EFCA joins a long line of

30. 301 U.S. 1, 49 (1937); *see also* EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 2 ("Congress passed the original version of the NLRA (the Wagner Act), which was upheld against constitutional challenges in *NLRB v. Jones & Laughlin Steel Co.* [*sic*].").

31. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.9, at 185 (7th ed. 2004).

32. *Jones & Laughlin Steel Corp.*, 301 U.S. at 33–34.

33. DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 98 (2001).

34. *Id.* at 7; *see* Chi., Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911) ("[F]reedom to contract is a qualified and not an absolute right.").

35. EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT, *supra* note 28 (discussing the purpose of the creation of the NLRA).

36. *Id.* at 2 (describing the NLRA, as amended by the Taft-Hartley Act, as "respect[ing] employee's collective choice on unionization").

progressive law-reform proposals that would enable union hierarchs and their philosophic allies to expand the realm of progressive hegemony and subordinate the social, economic, and liberty interests of workers.

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

I. EPSTEIN'S ASSESSMENT OF THE EMPLOYEE FREE CHOICE ACT

A. Prolegomena

Epstein's book and his consequent analysis focus on the EFCA of 2007,[37] but because an identical version of the proposal was introduced on March 10, 2009,[38] this Article utilizes the most recent version for citation purposes. In assessing the EFCA, Epstein provides a substantial, albeit incomplete, background of the evolution of collective bargaining in the United States. Throughout his analysis, he shows how the EFCA would change many of the important provisions of the National Labor Relations Act and how those changes would affect various constituencies.[39]

B. The Employee Free Choice Act Changes Everything

It is clear that the original language of the NLRA promoted labor organization in the private sector.[40] Subsequently, the NLRA was amended by the Taft-Hartley Act.[41] As amended, the NLRA continued to respect employees' "collective choice on unionization," though it did not favor or promote unionization.[42] Rather, the Taft-Hartley Act explicitly stated that

37. *See id.* app. at 177–81.

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

39. EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT, *supra* note 28, at 4–10 (explaining the specific provision of the NLRA that the EFCA seeks to change and the effects of those changes on interested parties).

40. *Id.* at 2 (quoting National Labor Relations Act, Pub. L. No. 74-198, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (2006))).

41. *See* Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 7, 61 Stat. 136, 140 (1947) (codified as amended at 29 U.S.C. § 157 (2006)).

42. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 2.

employees "shall also have the right to refrain from" engaging in self-organization, joining a union, or pursuing any other concerted activities for the purpose of collective bargaining.[43] After providing this background, Epstein makes two important claims regarding the original NLRA:

> The two central pillars of the original NLRA have survived to this day. The first was a system of union democracy whereby unions could only obtain the rights of exclusive representation for firms if they could prevail in elections held by secret ballot. If a union was selected, both parties were under an obligation to negotiate in good faith to work toward a collective bargaining agreement. In addition, the legislative history of the NLRA went to great pains to establish a second pillar of free negotiation.[44]

Although it purportedly "establish[es] an efficient system to enable employees to form, join, or assist a labor organization,"[45] the EFCA rejects both pillars.[46] The legislation would substantially alter the NLRA by allowing the National Labor Relations Board (NLRB) to certify a labor organization as the collective-bargaining representative without ordering a secret-ballot election if "no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit."[47] As such, though the EFCA does not supply guidelines and procedures for employees to designate a bargaining representative, it orders the NLRB to do so.[48]

The EFCA contains three provisions that, if enacted, would significantly change the institution of collective bargaining.[49] First, though the EFCA would continue to allow secret-ballot elections, provided that a representation petition supported by at least thirty percent of the employees in the bargaining unit is filed, the bill would permit labor unions to use a card-check system instead.[50] Whether the addition of a card-check system will actually enable

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43. Taft-Hartley Act § 7, 61 Stat. at 140; *see also* EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 2 (quoting Taft-Hartley Act § 7, 61 Stat. at 140).

44. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 4. The legislative history of the Act states that "[t]he committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms." S. REP. NO. 74–573, at 12 (1935).

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

46. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 4.

47. Employee Free Choice Act of 2009, H.R. 1409 § 2(a)(6).

48. *Id.* § 2(a)(7) (mandating the NLRB to develop procedures for employees to declare a representative).

49. *See* EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 4–6 (introducing the three most transformational provisions of the EFCA).

50. *Id.* at 4–5.

workers' wishes to surface or not, as Epstein explains, this provision would likely displace elections in nearly all representation cases.[51]

Next, Epstein notes that the "EFCA's second major provision would introduce a system of compulsory interest arbitration that leads to a first 'contract' of two years duration."[52] The term "contract" is deceptive "because an actual agreement representing the assent of both parties is not required during this initial period."[53] Additionally, rather than being limited to wages and benefits, the contract must encompass the issues that are usually decided by agreement under the present NLRA system.[54] Epstein thoroughly explicates why this change constitutes a core redefinition of collective bargaining.[55] Indeed, this provision would likely destroy collective bargaining arising out of an organizing contest. Because it is conceptually possible that initial arbitration decrees will lead to interest-arbitration extensions, this may eliminate collective bargaining for time periods beyond the initial contract.[56]

Finally, Epstein explains that the EFCA's third major change "ties in closely with the adoption of the card-check system, [and] substantially increases the penalties imposed on employers for violations of section 8(a)(3) of the NLRA, which prohibits discrimination against employees for union activities."[57] Taken together with the requirement that the NLRB give priority to unfair labor practice (ULP) charges that arise in the course of organizing campaigns, increased penalties for employers supports the advantages that unions expect to receive from the addition of the card-check alternative.[58]

Major economic consequences accompany the EFCA's proposed changes, which will "radically alter the balance of power between management and labor."[59] This impact will be felt differently by small and large businesses, but, as Epstein argues, "the passage of [the] EFCA will create huge dislocations in established ways of doing business that will in turn lead to large losses in productivity."[60] This will result in a substantial social-welfare reduction.[61] Epstein adroitly shows that unions and their hierarchs will gain at

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51. *Id.* at 5.

52. *Id.*

53. *Id.*

54. *Id.* at 5–6.

55. *Id.* at 4–10 (describing the consequences for both large and small businesses if they are faced with an increased demand for unionization).

56. *See id.* at 98–100 (explaining that the "current law has little to say about compulsory interest-arbitration, because it is so rare in the private sector," and noting that gaps in the EFCA could allow an initial arbitral decree to extend to future contract negotiations).

57. *Id.* at 6.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.* at 6–7 (discussing the possibility that the EFCA will lead to less job creation and more businesses operating overseas).

the expense of employee liberty and the nation's economic interests through this legal-reform initiative.[62]

C. Epstein's Critique of the Employee Free Choice Act's Provisions

Demonstrating that the EFCA was poorly drafted,[63] filled with troublesome gaps,[64] and grounded in unwarranted assumptions about the causes of decline in private sector unionization,[65] Epstein illustrates how the proposal seeks to bias law in favor of unions.[66] Ignoring current labor-union campaign advantages,[67] the proposal changes the calculus of costs and benefits in order to supply additional advantages to labor unions within the parameters of an organizing contest[68] and creates a truncated card-check program that exposes workers to union coercion, intimidation, and deception.[69] Epstein argues that "[i]t is hard to imagine any process that is less democratic in either intention or execution than the card-check rule under EFCA. The only clear winner of this skewed and expedited process is the union leadership, which gains dues and power through the successful certification campaign."[70]

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62. *Id.*

63. *See id.* at 89 (arguing that the proposal offers no standards for mandatory arbitration, does not ensure that checked cards are valid, particularly those cards collected before the passage of the Act, and fails "to establish any standards before the organization drives begin").

64. *See id.* at 70 (noting that the NLRB is charged with "developing procedures for 'establishing the validity of signed authorizations designating bargaining representatives'" (quoting Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2(a)(7)(B) (2009))).

65. *Id.* at 13–18 (discussing the decline of unions in the United States and abroad and arguing that those who support the EFCA refuse to consider the various causes of this decline).

66. *Id.* at 73–76. For example, § 2 of the EFCA only allows the card-check system for workers who are not yet organized. Employee Free Choice Act of 2009, H.R. 1409 § 2(a)(6). In addition, the card-check system, as designed by the drafters of the EFCA, cannot be used for purposes of union decertification. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 73.

67. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, 42–43 (noting that unions have advantages with the secret-ballot system because they can time the campaign; define the bargaining unit, which enables them to shrink or expand the unit to increase the odds of prevailing; have "exclusive possession [of] the signed authorization cards"; receive a list of names and home addresses of all union members after the petition is filed; and make promises of benefits or threaten workers if they refuse to support the union because unions are not governed by the restrictions on employer speech (citing *Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Emp't, Labor & Pensions of the H. Comm on Educ. & Labor*, 110th Cong. 82 (2007) (statement of Charles I. Cohen, Senior Partner, Morgan, Lewis & Bockius, LLP)).

68. *Id.* at 68–70 (showing how the EFCA's proposed card-check system provides gains to unions while simultaneously disadvantaging workers who may feel trapped or intimidated into signing a card despite the costs of unionization).

69. *Id.*

70. *Id.* at 73.

Although the EFCA would reward union-sponsored intimidation and fabrication, it would do little to constrain the impact of employer abuse on the election process, which is an ostensible purpose motivating the authors of this proposal.[71] This is so because employer abuse is largely imaginary.[72] Nonetheless, the EFCA envisions a substantial increase in penalties for employer ULPs committed during organizing campaigns in response to the allegation that illegal employer resistance has fueled union decline.[73]

Epstein punctures the employer-hostility thesis by showing that private-sector unionization has declined for reasons that are independent of employer intimidation, which is consistent with conclusive evidence that shows a reduction in union density in most western countries.[74] This is also true of countries that have instituted specific labor legislation; for example Australia, France, Great Britain, and Japan have seen their union-density rate fall faster than that of the United States.[75] In addition, a critical examination of data on American employees fired during a union-organizing campaign severely undermines the contention that private-sector union decline is largely a function of employer hostility.[76]

Relying on J. Justin Wilson's analysis, Epstein reveals that during a three-year period from 2003 to 2005, 11,342 organizing petitions were filed with the NLRB.[77] Of the 1538 NLRB unfair-practice cases involving remedial action, however, *only* 303 arose during the course of an organizing campaign, implying that the likelihood of an improper firing during the course of a union organizing campaign is only 2.7%.[78] The thrust of this analysis, which is corroborated by other commentators, indicates that the employer-hostility

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71. *See id.* at 43–46 (explaining that a check-card system may result in workers being pressured by both unions and employers and noting that the statute itself "purports to empower workers to exercise their 'free choice'" in union elections).

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

73. *Id.* at 13, 18–19.

74. *Id.* at 14 tbl.1 (showing substantial declines in unionization in Australia, the European Union, France, Germany, Ireland, Japan, New Zealand, the United Kingdom, and the United States, and more modest declines in Canada, Italy, and South Korea).

75. *Id.* at 13, 14 tbl.1.

76. *See* J. JUSTIN WILSON, CTR. FOR UNION FACTS, UNION MATH, UNION MYTHS: AN ANALYSIS OF GOVERNMENT DATA ON EMPLOYEES FIRED DURING UNION ORGANIZING CAMPAIGNS 1, 5 (2008), *available at* www.unionfacts.com/downloads/Union_Math_Union_Myths.pdf.

77. *See* EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 51 (citing WILSON, *supra* note 76).

78. *Id.* This calculation reflects the fact that the number of remedial actions in organizing campaigns (303) divided by the number of organizing campaigns (11,342) equals 2.7%. *See id.*

thesis cannot explain union decline.[79] The evidence exposes as false the contention that the existing NLRA system "gives management near-veto power over whether workers can achieve such union representation, through their critical role in NLRB-supervised elections."[80] Reliance on the employer-hostility thesis enables union advocates to disregard evidence that traditional labor organizations find it difficult to fully respect the diversity in individual variations in the tastes and demands of workers, particularly those of women and minorities.[81] A lack of respect for differences among employees and between workers and union leaders, coupled with the ongoing movement of some workers to embrace expressive individualism,[82] reveals that labor-union advocates have missed the target. This, combined with evidence that traditional unions are "out of step with current economic practices," explains that unions are "increasingly irrelevant to the bulk of workers and employers" and creates a lack of demand for unionization.[83] Many labor sympathizers admit as much.[84] Unions require solidarity, which "denotes the ability of people to cooperate in the absence of legal sanctions."[85] Because American workers tend to favor their autonomy and mobility, "the consequent loss of labor solidarity plays a role in the ongoing decline in union density, as well as a 'loss of legitimacy for unions as the enablers of group action.'"[86] Although these factors increasingly contribute to the ongoing reduction in demand for labor unions, they are often conveniently overlooked by union advocates.

A crucial issue afflicting the EFCA is the proposal's flight from democracy, which is evidenced in its provisions that limit employee voice in representation

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

80. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 185 (updated ed. 2006) (explaining the flaws in U.S. labor law).

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

82. *See* Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, *in* EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING § 3-1, at 41, § 3-2(a), at 43 (Samuel Estreicher ed., 1998).

83. FREEMAN & ROGERS, *supra* note 80.

84. *See id.*

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

86. Hutchison, *What Workers Want*, *supra* note 2, at 823 (quoting James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1564 (1996)).

campaigns.[87] In contrast, numerous labor-union advocates assert that one of the chief benefits of labor unions is that they allow employees' voices to be heard within the workplace.[88] This contention is amplified by the assertion that "[t]here is a major gap in America between what workers want by way of democratic say at their workplace and what they have."[89] Although such sentiments fuel EFCA advocacy, when aptly comprehended they represent a capitulation to irony because the EFCA as written would allow union hierarchs to exercise their democratic rights by encouraging workers to join a union; however, it would equally prevent dissenting workers from having a voice in the democratic process that the existing representation-election system allows.[90] This is so because the EFCA disrespects the democratic process for currently unorganized workers. Although the statute clearly "purports to empower workers to exercise their 'free choice[,]' [it] necessarily, and by its own terms, disenfranchises a potentially large fraction of them."[91] As such, the language and grammar of the EFCA signifies a fundamental misunderstanding of the "central objective of the NLRA by ignoring the key language in section 7 of the Act that states in addition to the 'right of self-organization,' workers 'shall also have the right to refrain from any or all such activities' if they choose not to join a union."[92]

The EFCA's failure to vindicate employee rights is compounded by virtue of existing levels of union intimidation.[93] Indeed, intimidation is further incentivized by the EFCA because workers could no longer take refuge in secret-ballot elections that enable them to correct or invalidate signatures that labor unions obtain through coercion.[94] As Epstein points out, this controversial possibility, which suggests that union hierarchs possess an aristocracy of knowledge with respect to workers' best interests and that this knowledge ought to be imposed on workers without their informed consent, has provoked a sharp response by labor's traditional supporters.[95] For example,

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87. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2(a)(6) (2009) (providing the NLRB with the ability to certify a labor representative without an election by employees).

88. *See, e.g.*, Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation*, *in* UNIONS AND ECONOMIC COMPETITIVENESS 173, 174 (Lawrence Mishel & Paula B. Voos eds., 1992) (arguing that unions give workers the ability to use their collective voice and participate more in the workplace).

89. FREEMAN & ROGERS, *supra* note 80, at 184.

90. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 44.

91. *Id.*

92. *Id.* (quoting 29 U.S.C. § 157 (2006)).

93. *See id.* at 45–46 (explaining that EFCA supporters often ignore the fact that union organizers also use intimidation techniques during union elections).

94. *Id.*

95. *Id.* at 46.

> former Democratic senator and presidential nominee George McGovern condemned EFCA because of its failure to take into account the obvious: "There are many documented cases where workers have been pressured, harassed, tricked, and intimidated into signing cards that have led to mandatory payment of dues." And he pointedly asked why it is that a protection that Americans think desirable outside the United States should be dispensed with here: "Some of the most respected Democratic members of Congress . . . have advised workers in developing countries such as Mexico to insist on the secret ballot when voting as to whether or not their workplaces should have a union. We should have no less for employees in our country."[96]

The failure to protect employees' liberty interests is further complicated because a successful card-check campaign does not promote democracy or encourage negotiations.[97] Rather, it promotes "'interest' arbitration, whereby union recognition necessarily leads to a guaranteed first contract instead of a union election" without providing workers with a correlative right to seek union decertification through the same process.[98] This signifies that the EFCA is neither aimed at balancing the playing field nor intended to vindicate workers' rights. In the context of this proposal, union democracy becomes highly theoretical and highly unlikely.

Epstein exposes other core issues, including the fact that the proposal as presently written (1) permits the acceptance of invalid signatures because the EFCA does not require unions to have the employee's signature witnessed, implying that incentives for fraud exist;[99] (2) enables unions to collect cards without outside supervision,[100] affirming that "there is no way a card-check system could replicate the reliability and freedom of expression provided by a secret ballot election";[101] (3) mandates arbitration without integrating this approach with the NLRA's existing obligation to bargain in good faith;[102] (4) skews the collective-bargaining process by discouraging good-faith bargaining;[103] and (5) authorizes compulsory arbitration without any

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96. *Id.* (quoting George McGovern, *My Party Should Respect Union Ballots*, WALL ST. J., Aug. 8, 2008, at A13).

97. *Id.* at 47.

98. *Id.*

99. *Id.* at 76.

100. *Id.* at 67.

101. *Id.* at 76.

102. *Id.* at 83–84 (describing the impact that interest arbitration will have on labor relations given the wide discretion that arbitrators will have because of the lack of procedural statutory requirements).

103. *Id.* at 82, 87–88.

standards.[104] Notably, with regard to its arbitration requirement, the statute fails to provide guidance regarding the constitution of arbitration panels, the scope of their authority, or which matters will be subject to review.[105] The EFCA also does not provide any standards relevant to issuing an arbitral award.[106] The implementation of an arbitration mandate instantiates a coercive proceeding but neglects to set out rules by which both parties will be bound.[107]

The card-check scheme and the mandatory interest-arbitration provision, when paired with the imposition of increased penalties on employers who violate a provision of the NLRA by discriminating against employees for union-organizing activities, shifts power to labor organizations.[108] Although increased penalties relate to ULPs by employers, as Epstein shows, the EFCA fails to "establish any tight relationship between the supposed wrong and the curative legislation."[109] This failure is exacerbated because the proposal neglects to increase penalties on unions for any ULPs they might commit.[110] This lacuna ignores *existing* levels of labor unions' violent coercion[111] and confirms Epstein's intuition that strengthening enforcement against employers "tilts the scale in unions' favor, without any effective mechanism for remedying abuses associated with union authorization cards or petitions."[112] Epstein lucidly and consistently shows that aggressive action, including constant threats, may assist labor unions in winning recognition and fueling union coffers without doing anything to improve the welfare of the firm's workers.[113]

D. Epstein's Analysis of the Employee Free Choice Act's Social Consequences

Although Epstein's book identifies many of the adverse effects of the EFCA, his analysis lacks a recognition of the historical roots of labor organizations and the consequences that progressive ideas and presuppositions have on the

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104. *Id.* at 88–89.

105. *Id.* at 88.

106. *Id.* at 89.

107. *Id.* at 88–89. Further, the gaps in the EFCA include the absence of a provision governing successor liability. *Id.* at 93. Moreover, "[t]he imposition of the scheme of compulsory arbitration in labor disputes will increase costs and uncertainty in negotiations." *Id.* at 100.

108. *Id.* at 6.

109. *Id.* at 18.

110. *Id.* at 18–19.

111. *See, e.g.*, GEORGE C. LEEF, FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT 1–3 (2005) (describing the plight of a United Parcel Service worker worker who, after declining to participate in a 1997 strike called by Teamsters Local 769, was severely beaten and stabbed in the chest with an ice pick by labor-union militants).

112. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 21.

113. *See id.* at 24–32 (discussing the aggressive techniques unions employ).

current market.[114] Epstein shows that "employment laws are perceived as the primary regulatory threat facing American firms today—even without EFCA."[115] He also claims that "[t]he adoption of EFCA will only compound the problem with its twin threats of card check and compulsory arbitration" and that "legal reforms can never produce social gains by shrinking the size of the pie, which is what always happens when administrative costs go up and productive output goes down."[116] This foundation supplies a defensible basis to ascertain "how EFCA will affect four groups: unions, employees, employers, and all third parties."[117]

First, Epstein explains that the EFCA enhances unions' ability to organize and engage in advantageous political activity, thus increasing their financial power.[118] As explicated below, this point deserves amplification because evidence shows that labor unions are increasingly (perhaps primarily) focused on taking political action in pursuit of political, social, and ideological objectives outside the parameters of the workplace. Union leaders and their allies often capture ideological and psychological benefits at the expense of the interests of workers and the general public.[119] In other words, the goal of remediating problems within the workplace may no longer be the primary driver of union activism.

Second, turning to the EFCA's effect on workers, Epstein maintains that ambiguity surrounds this group's position.[120] With regard to what a worker risks and enjoys from engaging union activity, Epstein concedes that the traditional and still-prevailing viewpoint is "that the NLRA allows unions to exercise on behalf of their members some degree of monopoly power, which in turn allows them to raise wages, reduce hours, and otherwise improve working conditions."[121] This position is largely correct aside from the cases of workers

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114. Epstein does not discuss the fact that progressives were driven by a commitment to social Darwinism and pursued power and influence at the expense of the weak and the unfit. *See* Bernstein & Leonard, *supra* note 15, at 179–80 (discussing the motives of progressives). Their analysis exposes the progressives' concurrent liberal and conservative ideologies wherein white males were deemed worthy of assistance, while women, minorities, immigrants, and defectives were deemed unworthy. *Id.* Thus understood, progressive ideas emerged in numerous statutes, such as minimum-wage laws, that interfered with the market on behalf of "worthy" individuals and further disadvantaged members of groups perceived as unworthy. *Id.* at 186–90; *see also infra* Part II.A.

115. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 111.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See* Hutchison, *A Clearing in the Forest*, *supra* note 4, at 1391–94 (showing that organizing increases union dues revenues, enabling leaders to achieve political benefits that are not necessarily in workers' interests).

120. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 111–12.

121. *Id.* at 112.

who are laid off or who otherwise remain unemployed as a result of the presence of a labor union. Still, the traditional view of union power likely overstates union influence given that increased global trade and improved infrastructure have created a more competitive economy in recent decades.[122] Nevertheless, monopoly power can result in a wage differential that favors unionized workers.[123] Some estimates place the union wage and benefit advantage at somewhere between eight and twenty percent.[124] But such estimated benefits, though confirming that economic rents are available, do not offer any measure of overall social welfare or indicate how benefits are distributed.[125] Complexity often surfaces when the individual interests of workers diverge because of the distributive benefits attending seniority within a unionized workforce.[126] The increased use of lower-wage scales further complicates an analysis of worker benefits, as they disfavor new hires in companies facing economic strain.[127]

Epstein argues that "[u]nion monopoly power is a constant threat but not a uniform presence."[128] The EFCA exemplifies how the legislative process can be used to increase unions' monopoly power.[129] If the EFCA is enacted, Epstein concludes that some workers will be adversely affected because firms will either contract work out or go out of business entirely if their productivity fails to rise in the face of higher wages.[130] Other "firms will invest their capital in the nonunion portions of the business," which would again vitiate the economic position of unionized workers.[131] Of course, some would remain in business with a unionized workforce, and workers who retain their jobs could reap the economic benefit achievable through unionization, which is abetted by the adoption of the EFCA.[132] Taken as a whole, this picture is ambiguous

122. *Id.* at 112–13.

123. *Id.* at 113.

124. *See id.* at 113 ("Workers in unions earn 30 percent higher wages, are 59 percent more likely to have employer-based health coverage, and four times more likely to have pension benefits." (quoting Mike Link, *Anna Burger: The Economic Recovery Program Our Nation Needs*, SEIU BLOG (Dec. 12, 2008, 2:48 PM), http://www.seiu.org/2008/12/anna-burger-the-economic-recovery-program-our-nation-needs.php) (internal quotation marks omitted)).

125. *Id.* at 114.

126. *Id.* It is likely that such age-related differences in workers' benefits may lead to intergenerational conflicts. *Id.*

127. Herman Rosenfeld, *The North American Auto Industry in Crisis*, MONTHLY REV., June 2007, at 28 (explaining that the autoworkers union responded to the large market losses of the Detroit Big Three by "bargain[ing] for two-tier wages for new hires in the 2007 agreement," thus cutting wages for new hires in half).

128. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 113.

129. *See id.* (discussing data showing that historically, union members have had higher wages than nonunion workers).

130. *Id.* at 123–24.

131. *Id.* at 124.

132. *Id.*

because it remains possible that monopoly wage gains may offset the overall productivity losses of the firm and because some workers may either receive uneven financial benefits through unionization or lose their jobs.[133]

Third, in contrast to the ambiguous picture with respect to workers, it is doubtful that the EFCA would provide any positive benefits to employers. Epstein bracingly suggests that a suspension of belief is required in order to seriously consider the proposition that unionization benefits employers wherein "a nonunionized firm should fret if its rival obtained a competitive advantage from being unionized."[134] He contests as incredible the assertion that unionization is beneficial to firms and accordingly states that the EFCA ought to be viewed as an opportunity to advance America's social-welfare interests.[135] This claim, once unpacked, operates as a form of self-deception and assumes that employers are "ignorant of their own business interests when they oppose unions whose innovations could enhance productivity and profits."[136] This resilient allegation is stubbornly offered despite the fact that firm managers have every incentive to oppose unionization while labor sympathizers in economics, law, and labor relations have every incentive to be wrong.[137] Incentives to be wrong arise when labor-union advocates can obtain ideological, political, and even economic benefits through their advocacy.[138] The existence of such incentives explains why pro-union scholars "buy into an inaccurate parody of labor relations in unregulated firms which claims that any union presence has to improve relationships in the workplace."[139] This defenseless abstraction enables labor-union advocates to ignore evidence that existing techniques available to nonunion firms are sufficient for them to handle issues of internal management, thus vitiating the claim that labor unions actually solve problems for employers.[140]

Finally, Epstein offers a three-part analysis—divided into the allocative effects, the distributional consequences, and disruption and dislocation—to show that the EFCA's third-party effects are decidedly detrimental to society.[141] In so offering, he reasons that "the introduction of the original NLRA in 1935 shrank the size of the pie available to employers and employees by imposing external restrictions that prevent the emergence of dynamic

133. *Id.* at 124–25.

134. *Id.* at 125.

135. *Id.*

136. *Id.* at 126.

137. *Id.*

138. *See, e.g.*, Hutchison, *A Clearing in the Forest*, *supra* note 4, at 1389–92 (showing that union insiders and union outsiders, such as academics operating as ideological allies of labor unions, gain benefits through unionization).

139. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 135.

140. *Id.* at 140.

141. *Id.* at 141–56.

competitive markets."[142] Although society will likely accept these losses as a trade-off for increased unionization, this societal satisfaction with the status quo does not necessarily translate into a commitment to the EFCA.[143]

Epstein goes on to argue that unionization has greater adverse effects under the EFCA because it is more intrusive than the NLRA on the relationship between the employer and its employee.[144] In addition, such harmful effects extend beyond unionized businesses currently subject to NLRB supervision.[145] Businesses with employees also engage in many different transactions with customers, suppliers, and lenders, and these third-party interactions, too, may be regulated by the NLRA.[146] As Epstein explains:

> Whenever labor law prohibits a firm from subcontracting—or from altering its current production model using current workers—it not only makes the operation of the regulated firm less efficient than it would otherwise be, but it also imposes losses on potential trading partners who necessarily have fewer options in the market.[147]

Such epiphenomena are felt throughout the economy, creating social losses for a number of reasons.[148] Consistent with this pattern, the EFCA is likely to induce social-welfare losses in the form of increased unemployment. This is so because if the EFCA, in a transparent effort to boost labor regulation, succeeds in raising union-density rates by even one percentage point, unemployment will likely increase by 0.30 percent.[149] This indicates that "if union density were to return to its 1995 level of 14.9 percent, . . . the U.S. unemployment rate would increase by 0.83–0.99 percentage points."[150]

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142. *Id.* at 141.

143. *Id.*

144. *Id.* at 141–42.

145. *Id.* at 142.

146. *Id.*

147. *Id.*

148. *Id.* Epstein explains that

> social losses from lost opportunities are not entirely offset by the less efficient relationships adopted in their place, for strategies of mitigation can only reduce, not eliminate, the losses. Even in the absence of such direct prohibitions, a strong labor regime will influence the welfare of both suppliers and customers through the price mechanism. The lower output by the unionized firm implies that it will purchase fewer complementary goods and services from its suppliers. . . . It will also ship fewer goods or render a smaller level of services to third persons.

Id.

149. *See id.* at 145 (citing Anne Layne-Farrar, An Empirical Assessment of the Employee Free Choice Act: The Economic Implications 22 (Mar. 3, 2009) (unpublished manuscript), http://ssrn.com/abstract=1353305 (follow "One-Click Download" hyperlink)).

150. *Id.* (quoting Anne Layne-Farrar, An Empirical Assessment of the Employee Free Choice Act: The Economic Implications 22 (Mar. 3, 2009) (unpublished manuscript)). Although Epstein's book seems to quote the Layne-Farrar piece, the exact quote does not appear in her manuscript.

In examining the distributional consequences of the EFCA, Epstein argues that, to the extent that observers are concerned about increased differentials in wealth in the United States, they should be wary of the passage of this proposal.[151] Conceding that the reasons for this differential are easily discernable, Epstein maintains it largely results from differential opportunities for education and the consequent effects on productivity in the current world of advanced technology.[152] Thus understood,

> [t]here is nothing that can be done through unionization to alter that distribution of power, for if the competitive wage falls for persons with little or no education, as it surely has in the past generation or so, the monopoly power of unionization starts from a lower base, which makes it unlikely that it could ever offset that decline, especially since the increased supply of nonunion workers poses at least some limitation on the power to raise these wages.[153]

To be sure, some observers contend that the original NLRA strengthened middle-class status; however, Epstein notes that there is no evidence to support this claim.[154] Instead, increased incomes follow increases in productivity, which in turn result from innovation that generates more overall wealth.[155] He argues that because unions often apply pressure to decrease productivity, there is no basis to believe that the EFCA, if passed, will improve middle-class conditions.[156] Additionally, because union members have varied identities, such as pension-fund beneficiaries and consumers, any gains that they may realize as a result of the EFCA are likely to be tempered by a reduction in share prices of pension-fund assets and by rising prices for consumer items.[157]

Lastly, the EFCA will lead to increased disruption and dislocation because it would introduce uncertainty that may result in acrimonious negotiations and frustrated expectations for the parties involved.[158] For instance, because it is possible that mandatory arbitration will continue beyond the initial two-year contract period, it would likely produce one of two things.[159] If the proposed

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151. *Id.* at 154.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 154–55.

156. *Id.* at 155. Downward pressure on productivity arises for several reasons including the fact that employers, in response to the threat of unionization, may make "socially wasteful decisions solely for defensive reasons." *Id.* at 150. For instance, firms may physically relocate to antiunion areas, increasingly rely on machinery, or move certain production activity overseas. *Id.*

157. *Id.* at 155. Additionally, benefits may also be offset by losing jobs that move overseas. *Id.*

158. *Id.*

159. *Id.* at 155–56.

arbitration arrangement is extended forward in time,[160] "it will lead to contraction of business or bankruptcy, which is itself a source of tension."[161] Alternatively, if the arbitration scheme does not move forward beyond the first contract period, it is likely that employer resistance will be intensified.[162] Either way, according to Epstein, labor unrest is likely to rise during the current downturn in the economy.[163]

In addition, as Epstein explains, there should be no presumption that the EFCA is constitutional.[164] In fact, the statute may raise First Amendment considerations, particularly with respect to card-check and interest arbitration.[165] It is doubtful that Congress seriously considered the relevant constitutional issues, such as freedom of speech and assembly, in relation to the EFCA.

Considered as a whole, Epstein's placement of the EFCA within the pantheon of American labor law is both thought provoking and largely accurate. Moreover, it is likely that only commentators offering weak, inadequate arguments could contest Epstein's claim that the EFCA, if enacted, would radically alter the balance of power between management and labor, lead to distributive costs and benefits among workers, have a negative impact on America's productivity, and induce some employers to shift capital and other resources overseas. Epstein illustrates the unfairness of a system that would allow workers and employers to be victimized by union coercion tied to a card-check system that is capable of being manipulated. He demonstrates that the status quo, however imperfect, "will outperform any system that adopts card-check rules for union recognition and compulsory arbitration for a two-year 'first contract,' augmented by tougher penalties for employer ULPs."[166] The EFCA would vitiate social welfare and lead to disruptions in employment, neither of which is in the public interest, while at the same time compromising human liberty.[167] Such observations lead Epstein to conclude that the "[l]egislation often promises grand improvements, only to be entrenched before its failures become evident. The correct presumption in all cases is that further legislation, being costly, has to be shown to be a good, or

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

161. *Id.* at 156.

162. *Id.*

163. *Id.*

164. *Id.* at 157.

165. *Id.*

166. *Id.* at 176.

167. *See supra* notes 59–62 and accompanying text.

otherwise it should be treated as harm."[168] He rightly argues that the EFCA fails that test.[169]

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

II. LIBERTY, FAIRNESS, AND SOCIAL WELFARE

A. The Past as a Prologue to a Transformational Future

Properly situating the EFCA within the rich tapestry of progressive thought is not difficult. Among the best places to start is with the work of Bernstein,[170] Vedder and Gallaway,[171] Pestritto,[172] and Moreno,[173] among others.[174] Indeed, Professor Epstein has made an enormous contribution to the literature

168. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 176.

169. *Id.*

170. *See, e.g.*, BERNSTEIN, *supra* note 33, at 5 (discussing the effect of labor regulations from Reconstruction to the New Deal, and how those regulations adversely affected blacks).

171. *See* RICHARD K. VEDDER & LOWELL E. GALLAWAY, OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA, at xii–xiii (1993) (tracing the history of U.S. unemployment patterns, critiquing the developments that have shaped unemployment, and concluding that the state's fiscal manipulations have increased unemployment).

172. *See* RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 283 (2005) ("[President] Wilson was a central figure in progressivism's fundamental rethinking of traditional American constitutionalism."); *see also* AMERICAN PROGRESSIVISM: A READER (Ronald J. Pestritto & William J. Atto eds., 2008) (providing an overview of the Progressive Era by focusing on those individuals whose writings have influenced present politics).

173. *See* PAUL D. MORENO, BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY 287 (2006) (detailing the antagonistic relationship between blacks and labor unions, and discussing the various rationales behind it).

174. *See, e.g.*, JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING 16 (2007) (drawing comparisons between Progressive Era policies and fascism); AMITY SHLAES, THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION 13 (2007) (highlighting the class of individuals left out of the Progressive Era reforms).

himself[175] by showing how competitive processes were replaced by state-sponsored cartels[176] and how labor-law regulation has harmed many Americans.[177] Essential to any examination of the EFCA is a brief assessment of the goals, objectives, and presuppositions undergirding progressive architecture, which surfaced during the Progressive Era. Equally essential is a brief review of the baleful distributional consequences of New Deal programs, which represented, and continue to represent, the instantiation of progressive thought.

Progressive reformers went to work between the 1890s and the 1920s, responding to industrialization that moved the nation toward an industrial economy and to increased urbanization.[178] As Bernstein and Leonard explain,

> [a]s elitists, the progressives believed that intellectuals should guide social and economic progress, a belief erected upon two subsidiary faiths: a faith in the disinterestedness and incorruptibility of the experts who would run the welfare state they envisioned, and a faith that expertise could not only serve the social good, but also identify it.[179]

Economists and reformers played a leading role in the expansion of government intervention in the economy, but they were not necessarily one-dimensional.[180] Instead, they were "simultaneously conservative and liberal."[181] Many were "enthusiastic biologizers" who believed that race

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175. *See, e.g.*, RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 135 (2006) [hereinafter EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION] (setting forth the argument that Progressive reformers transformed the Constitution to reflect their own intellectual ideas); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357 (1983) ("New Deal legislation is in large measure a mistake that, if possible, should be scrapped in favor of the adoption of a sensible common law regime . . . .").

176. *See* EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 175, at 52–53. Epstein argues that

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

Id.

177. *See id.* at 89–92 (explaining how labor regulations harmed women by viewing them as inferior to men).

178. Bernstein & Leonard, *supra* note 15, at 178.

179. *Id.* at 179–80.

180. *Id.* at 179.

181. *Id.*

determined worth.[182] Progressives maintained ambivalent views toward economically marginalized groups, such as the working poor.[183] Their liberal inclinations sought social justice, but their conservative beliefs yearned for social control.[184] They reconciled this tension by supporting assistance for some and simultaneously seeking to suppress poor people who were seen as threats to the nation's public health, wealth, and social advancement.[185]

At their very inception, progressive ideas were pregnant with future adverse distributional effects for members of certain communities.[186] Relying on scientific advancement for legitimacy, some intellectuals concluded that Darwinian progress was not only possible, but inevitable.[187] Progressive law reformers stressed a commitment to societal efficiency and sought to accelerate the nation's preordained advancement; the initiatives they developed were tied to the belief that public opinion should not stand in the way of the transformative sociology offered by social planners.[188] Relying on an appeal to hereditary fitness, many progressives sought to rid the labor force of "unfit workers: the immigrants, African Americans, women, and other 'defectives.'"[189] This effort resulted in disfranchisement, segregation, and discrimination that stalled the economic progress of blacks from 1900–1920[190] and threatened the advancement of women.[191] For better or for worse, the Progressive Era signified the low point of race relations in the United States[192] as well as the apex of claims that there is a scientific basis for female inferiority.[193]

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182. *Id.* at 179–80.

183. *Id.* at 180.

184. *Id.* at 179.

185. *Id.* at 180.

186. *See id.* at 177 (suggesting that the progressive ideology of excluding certain groups of people was not new to U.S. policy).

187. *See id.* (acknowledging the use of eugenics to exclude from society those deemed undesirable).

188. *See* GOLDBERG, *supra* note 174, at 95 (discussing President Woodrow Wilson's intellectual development as a prototypical illustration of how German ideas influenced American Progressivism).

189. Bernstein & Leonard, *supra* note 15, at 180.

190. MORENO, *supra* note 173, at 82.

191. *See* Muller v. Oregon, 208 U.S. 412, 421–23 (1908) (upholding regulations limiting hours of work which were grounded in the progressive presumption that women were inferior beings).

192. MORENO, *supra* note 173, at 82.

193. *See Muller*, 208 U.S. at 419 n.1 (describing over ninety reports, both foreign and domestic, that concluded that "long hours of labor are dangerous for women, primarily because of their special physical organization"); Bernstein & Leonard, *supra* note 15, at 190 (explaining how progressive women-only labor legislation was premised on the notion that women were inferior because of biological weaknesses and natural familial duties).

Progressives advanced their ideas and initiatives by coupling "blithe self-confidence" in their own ability to solve problems with a reckless reliance on the "benevolence of the state."[194] This presupposition nourished a commitment to state hegemony.[195] Believing that the individual ought to serve the state, and presuming that the remedy for the "chaotic individualism" of America "was a 'regeneration' led by a hero-saint who could overthrow the tired doctrines of liberal democracy in favor of a restored and heroic nation,"[196] intellectuals pursued legal, sociological, and scientific theories that justified their position regarding how "unemployable" individuals should be treated.[197] Labor unions were not immune to such ideas either. Consequentially, "as unionization took hold among skilled workers, inequality among American workers increased."[198] Between 1900 and 1920, "[t]he earnings gap between skilled and unskilled workers was greater in America than anywhere else in the world."[199] As unions grew in power and influence, businesses sought out the largest union organization of the time, the American Federation of Labor, in a cartel-like attempt to quell labor unrest.[200]

Inspired by this emerging *zeitgeist*, nourished by unionists and others, and led by Hobbesian ideas,[201] members of the political class regarded unconstrained power as positive.[202] This pernicious virus spread exponentially during the Progressive Era. Progressive elites responded to the force of Darwinian thought and the deduction "that the state was a natural, organic, and spiritual expression of the people themselves."[203] Hence, they viewed the state's growing power as wholly organic.[204] In harmony with this view, "the vast majority of progressive intellectuals . . . believed that the increase in state

194. *See* Andrew Scull, *Progressive Dreams, Progressive Nightmares: Social Control in 20th Century America*, 35 STAN. L. REV. 575, 576–77 (1981) (reviewing DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980)) (discussing the response of progressives to the plight of the mentally ill and handicapped).

195. *Id.* at 577.

196. GOLDBERG, *supra* note 174, at 99.

197. Bernstein & Leonard, *supra* note 15, at 179–90 (discussing the various progressive theories linking race, gender, and ethnicity to work capacity).

198. MORENO, *supra* note 173, at 83.

199. *Id.*

200. *Id.* at 93.

201. THOMAS HOBBES, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL 72 (Michael Oakeshott ed., Collier Books 1962) ("The greatest of human powers, is that which is compounded of the power of most men, united by consent, in one person, natural, or civil, that has the use of all their powers depending on his will . . . .").

202. *See* GOLDBERG, *supra* note 174, at 84–87 (discussing President Woodrow Wilson's comprehensive conception of power and the state).

203. *Id.* at 86.

204. *Id.*

power was akin to an inevitable evolutionary process.[205] Embodying Nietzsche's will to power,[206] the progressives' predilection for expanding the scope of state action[207] further enabled them to create legislation and social policies that discriminated against those they saw as impediments to the nation's success.[208]

Consistent with this vision, the expansionist state could not be constrained by quaint documents such as the Constitution. Perhaps the best representative of this viewpoint was President Woodrow Wilson, who did not believe that state power ought to be thwarted by an "'antiquated' eighteenth-century system of checks and balances."[209] Instead of being restricted by old documents, society was urged to embrace a living Darwinian constitution that would enable the nation to "obey the laws of Life."[210] Guided by such revolutionary ideas, "Woodrow Wilson's first administration in 1913 set off some of the most rapid and profound changes in the history of American labor and race relations."[211] The Wilson administration was not alone in its effort to change the labor-relations paradigm in America. After assuming the reigns of government during the Progressive Era, especially at the state level,[212] the progressives sought "to engineer the diminution of both justice and democracy for American blacks—who were enjoying little of either to begin with."[213] Although many progressives opposed these maneuvers,[214] it would be a mistake to forget that the resegregation of the U.S. Civil Service occurred during President Wilson's time in office[215] or that leading progressives—part of the vanguard of reformist thought—were enthusiasts for the application of

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205. *Id.*

206. *See* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 259 (Walter Kaufmann trans., Vintage Books 1989) (1966) (explaining that higher cultures arise because anything that is a living body is propelled by an inherent will to power, and "it will strive to grow, spread, seize, become predominant").

207. *See* Scull, *supra* note 194, at 577 ("Central, too, is a naive and dangerous faith in the benevolence of the state and its agents—a faith that prompted the new generation of reformers to promote program after program widening the scope of state action.").

208. Hutchison, *Waging War on the "Unfit"?*, *supra* note 15, at 4.

209. GOLDBERG, *supra* note 174, at 88.

210. *Id.* (internal quotation marks omitted).

211. MORENO, *supra* note 173, at 117.

212. *See e.g.*, EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 175, at 89–100 (discussing state labor regulations initiated by progressives).

213. *Id.* at 102–03 (quoting Charles Paul Freund, *Dixiecrats Triumphant: The Secret History of Woodrow Wilson*, REASON.COM (Mar. 2003), http://reason.com/archives/2003/03/01/dixiecrats-triumphant (last visited Mar. 27, 2011)).

214. *Id.* at 103.

215. *Id.* at 102.

eugenic remedies in order to protect the "higher elements" from being "'swamped' by the black and brown hordes below."[216]

Arising out of such a racially charged environment and striving to protect the living standards of racially superior groups,[217] progressives advanced their assumptions through law reform initiatives that creative judicial interpretations supported.[218] Often advanced with vulpine efficiency, this contagious move deployed contempt as a weapon and reached its inflection point in a pioneering legal regime that was, in important respects, designed to exclude or suppress laborers other than white males.[219] The implementation and enforcement of labor law became an exceptionally effective means of displacing biologically suspect workers.[220] Such efforts, frequently led by organized labor, were sometimes rooted in white supremacist ideals, but, at other times, "the economic benefits of exclusion" propelled labor-union efforts.[221] Victims of these progressive reforms were separated by gender,[222] race,[223] and hereditary incapacity[224] from the rest of the population consistent with the deduction that "an impressive array of human groups, male Anglo-Saxon heads of household

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216. GOLDBERG, *supra* note 174, at 247.

217. *See* Samuel Gompers, *Talks on Labor: Addresses at St. Paul and Minneapolis*, 12 AM. FEDERATIONIST 636, 636 (1905) (exhibiting the sentiment of the time that "caucasians are not going to let their standard of living be destroyed by negroes, Chinamen, Japs or any others"). "As the depression worsened, undesirable jobs traditionally held by blacks became attractive to whites . . . ." MORENO, *supra* note 173, at 163. Cities responded to this phenomenon by passing ordinances that restricted blacks from working in certain jobs, and vigilante groups strongly encouraged employers to fire their black employees. *Id.*

218. Hutchison, *Waging War on the "Unfit"?*, *supra* note 15, at 4.

219. *See* EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 175, at 102–03 (discussing the influence that progressive ideas had on many Supreme Court decisions that upheld discriminatory practices).

220. *See* Hutchison, *Employee Free Choice Act*, *supra* note 20, at 396–400. For example, President Franklin D. Roosevelt created the NRA, a result of the NIRA. *Id.* at 396–97. The NRA granted new collective-bargaining powers to unions, and trade unions seized this monopoly power to oust laborers they disfavored. *Id.* at 398.

221. *Id.* at 400.

222. *See* Muller v. Oregon, 208 U.S. 412, 422–23 (1908) (affirming the constitutionality of a statute that limited female laundry workers to a maximum of ten hours per day because of innate female inferiority); EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 175, at 90–91 (explaining how Justice Louis Brandeis, using ideals of the Progressive tradition, justified discrepancies in work hours between the genders by relying on sociological research).

223. *See* GOLDBERG, *supra* note 174, at 247 (arguing that Darwinian thought led intellectuals to believe that rapid population explosion was the result of modern technology that "removed the natural constraints on population growth among the 'unfit'" and noting that "American progressives were obsessed with the 'racial health' of the nation").

224. *See* Buck v. Bell, 274 U.S. 200, 205, 207 (1927) (concluding that societal efficiency and progress were sufficient reasons to sustain the removal of the plaintiff's reproductive capacity because it was claimed that she inherited defective genes); *see also* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND *BUCK V. BELL* (2008) (describing the progressive movement's pursuit of so-called "defectives" through legal reform).

excepted, [were deemed] unworthy of work or 'unemployable.'"[225] This movement took many forms and responded to the usual stimuli that labor unions, intellectuals, and politicians supplied.[226] As such, this campaign was, in many respects, very comprehensive.

Provoked by the economic dislocation the Great Depression caused and convinced by influential appeals of labor organizations, progressive leaders pressed for action.[227] Originally, the Commerce Clause limited Congress's authority to impose cartel-like arrangements.[228] As Congress expanded its power within a number of arenas in response to economic difficulties, courts increasingly caved to legislative pressure to act.[229] Legislators and courts, embracing a constantly evolving conception of the Constitution, moved away from a consensus suggesting that federalism required a limited interpretation of the Commerce Clause;[230] this led to the passage of a large number of labor statutes.[231] Throughout the administrations of Presidents Herbert Hoover and Franklin Roosevelt, progressives and labor unions employed the commerce power, a form of federal police power, to transform industrial relations.[232] Specifically, political and legislative action embraced the power of labor and business cartels in the form of fair-competition statutes and the protection of collective bargaining for private-sector employees.[233]

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225. Bernstein & Leonard, *supra* note 15, at 180.

226. BERNSTEIN, *supra* note 33, at 6. For example, in 1931, construction unions achieved their goal of regulating the market through politics when Congress passed the Davis-Bacon Act, which required federal construction contractors to pay the prevailing wage of the specific locale. *Id.*; *see also* Act of March 3, 1931, Pub. L. No. 71-798, § 1, 46 Stat. 1494, 1494 (codified as amended at 40 U.S.C. §§ 3141–4148 (2006)). As David Bernstein shows, this law was sponsored by racist legislators who sought to ensure that white labor-union members would not have to compete with black workers. BERNSTEIN, *supra* note 33, at 6. The Davis-Bacon Act was followed by the 1932 enactment of the Norris-LaGuardia Act, which "placed sharp limitations on the traditional ability of employers to obtain injunctions during labor disputes." EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 2; *see also* Act of Mar. 23, 1932, Pub. L. No. 72-65, § 1, 47 Stat. 70, 70 (codified as amended at 29 U.S.C. §§ 101–115 (2006)).

227. MORENO, *supra* note 173, at 164, 169.

228. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 175, at 53.

229. *See id.* at 54–68 (explaining that progressive claims that a race to the bottom would ensue without federal legislation enabled Congress to regulate various industries based on the necessity to ensure fair competition, including, for example, through the National Industrial Recovery Act).

230. *Id.* at 68–70.

231. *See id.* at 66–67 (discussing how the Supreme Court's expansive reading of the Commerce Clause enabled it to uphold the NLRA).

232. Hutchison, *Waging War on the "Unfit"?*, *supra* note 15, at 32.

233. *See* EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 175, at 64–68 (discussing statutes and regulations enacted as a result of the NIRA).

These developments were constituent parts of the NRA, which resulted from the NIRA.[234] The NRA granted new collective-bargaining powers to unions, which gave them the ability to exclude blacks from the labor market.[235] Eagerly seizing this advantage and operating as "job trusts,"[236] organized labor removed disfavored workers from their forces.[237] One estimate demonstrates that "the NIRA's minimum wage provisions destroyed the jobs of half a million Blacks" in a short period of time,[238] which supports the observation that this statute served to "redistribute employment and resources from blacks—the most destitute of Americans suffering from the Depression—to the white masses."[239] Enhancing this remarkably repugnant record, Congress passed the NLRA, which continued some of the NIRA's policies,[240] and the Fair Labor Standards Act (FLSA), which instituted "minimum wage provisions [that] caused between 30,000 and 50,000 workers, mostly southern Blacks, to lose their jobs within two weeks."[241] As a result of these laws, vast numbers of blacks lost their jobs.[242]

The NLRA originally prohibited organized labor from excluding individuals from unions because of discriminatory considerations, such as race.[243] However, the American Federation of Labor (AFL) led the successful effort to eliminate the antidiscrimination clause.[244] Because most "New Dealers accepted discrimination against blacks as an inevitable cost of economic recovery," the Roosevelt administration was unruffled by this development.[245]

In addition to raising the price of labor, New Deal legislation "not only increased unemployment and human suffering, it also widened the unemployment gap between blacks and whites."[246] It was only natural that

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234. *See* Somin, *supra* note 24, at 652 (discussing the intended functions of the NRA).

235. GOLDBERG, *supra* note 174, at 155–56.

236. MORENO, *supra* note 173, at 4.

237. Hutchison, *Employee Free Choice*, *supra* note 20, at 398.

238. *Id.* (citing David T. Beito, *Review of* Only One Place of Redress *by David E. Bernstein*, 10 GEO. MASON L. REV. 293, 296 (2001) (book review)).

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

240. *See, e.g.*, BERNSTEIN, *supra* note 33, at 94–99.

241. Hutchison, *Employee Free Choice*, *supra* note 20, at 398.

242. BERNSTEIN, *supra* note 33, at 94.

243. *See id.* at 94–95 (explaining that the clause was dropped from the Act after Senator Robert F. Wagner was pressured by labor-union advocates to do so).

244. *Id.*

245. *Id.* at 95 (internal quotation marks omitted) (quoting 1 HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE 54 (1978)).

246. Hutchison, *What Workers Want*, *supra* note 2, at 825 (citing VEDDER & GALLAWAY, *supra* note 171, at 272–79). Vedder & Gallaway show that racial differences in terms of unemployment rates were essentially nonexistent between 1890 and 1930, but during the 1930s,

progressives justified their programs and policies to the wider world by focusing on the beneficiaries of such programs without fairly considering the adverse effects of such policies.[247] Although the economic isolation resulting from progressive policy preferences continues to plague blacks and many others today,[248] and though few contemporary commentators justify the racism that infected labor-law reform initiatives throughout much of American history, the distributional and moral consequences of this war on the "unemployables" form an indispensable backdrop for accurately appreciating the likely adverse consequences associated with the passage of the EFCA. Whether the result of an intentional or an inadvertent policy, remnants of this war on members of marginalized communities remain. Given the EFCA's inescapable connection with this history, it is likely that this proposal constitutes more of the same.

B. Pursuing Revenues in Order to Transform the Nation

"Contrary to the classical theory of the state as the provider of public goods—goods, that is to say, which in virtue of their indivisibility and non-excludability must be provided to all or none—*modern states are above all suppliers of private goods*."[249] This concept has diminished the independence and vitality of institutions, which otherwise serve as the "life-blood of civil society."[250] As a consequence, the freedoms of the individual and of contractual liberty have decreased, while the scope of hierarchical and bureaucratic organizations has increased.[251] This result has led to "the erosion of civil society by an expansionist state," which, in turn, has

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federal-government initiatives widened the unemployment gap between black and white workers and contributed to increased income inequality. VEDDER & GALLAWAY, *supra* note 171, at 272, 278–79. The following table captures the widening gap.

RACIAL DIFFERENCES IN UNEMPLOYMENT RATES

Year	White	Nonwhite
1890–1930 (average)	5.82%	5.90%
1940	9.50%	10.89%
1950	4.90%	9.00%
1975	7.80%	13.80%
1990	4.70%	10.10%

See id. at 272 tbls 14.1 & 14.2.

247. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 175, at 72.

248. Hutchison, *Employee Free Choice*, *supra* note 20, at 371–72.

249. GRAY, *supra* note 1, at 11.

250. *Id.* at 12.

251. *Id.*

resulted in "the outbreak of *a political war of redistribution*."[252] John Gray aptly summarizes this development:

> From being an umpire which enforces the rules of the game of civil association, the state has become the most potent weapon in an incessant political conflict for resources. Its power is sought, in part because of the vast assets it already owns or controls, but also because no private or corporate asset is safe from invasion or confiscation by the state. From being a device whereby the peaceful coexistence of civil association is assured, the state becomes itself an instrument of predation, the arena within which a legal war of all against all is fought out. The rules of the game of civil association—the laws specifying property rights, contractual liberties and acceptable modes of voluntary association—are now themselves objects of capture.[253]

In light of the rich possibilities associated with capture, corporate interests, including labor organizations, pressure regulatory authorities, through lobbying and the like, to create regulations that suit their agendas.[254]

Given these developments, it would be a mistake to believe that labor unions, one of America's leading lobbying and pressure groups with more than $17 billion in annual revenues,[255] were simply supporting the EFCA on the basis of the broad public interest. This conclusion is reinforced by the fact that unions spend only a fraction—perhaps less than twenty percent—of their dues revenues "on collective bargaining and related activities."[256] Correspondingly, labor unions occupy *nine* of the top twenty spots on a recent list of America's leading contributors to political parties.[257]

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252. *Id.*

253. *Id.*

254. *Id.*

255. LINDA CHAVEZ & DANIEL GRAY, BETRAYAL: HOW UNION BOSSES SHAKE DOWN THEIR MEMBERS AND CORRUPT AMERICAN POLITICS 12 (2004) (explaining also that labor unions are not taxed on their revenue).

256. *Id.* The U.S. Supreme Court conducted a detailed examination of union financial records in two cases. *See* ROBERT P. HUNTER ET AL., MACKINAC CTR. FOR PUB. POLICY, THE MICHIGAN UNION ACCOUNTABILITY ACT: A STEP TOWARD ACCOUNTABILITY AND DEMOCRACY IN LABOR ORGANIZATION 15 (2001), *available at* http://www.mackinac.org/s 2001-02 (follow "Download PDF of the entire publication" hyperlink). In *Communication Workers v. Beck*, the Court held that seventy-nine percent of the plaintiff's union dues were not chargeable to collective bargaining and related activities. *Id.* (citing ROBERT HUNTER, MACKINAC CTR. FOR PUB. POLICY, COMPULSORY UNION DUES IN MICHIGAN 16 (1977)); *see also* Commc'n Workers v. Beck, 487 U.S. 735, 740, 745 (1988). In *Lehnert v. Ferris Faculty Ass'n*, the Court determined that the union spent ninety percent of its dues revenue on nonrepresentational activities. *Id.* (citing Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991)).

257. *Top Overall Donors*, OPENSECRETS.ORG, http://www.opensecrets.org/overview/top contribs.php (last visited Mar. 27, 2011).

Organizing efforts of labor unions can have at least two objectives: (1) broad political, economic, and social transformation of society, which provides private benefits to union hierarchs; and (2) financial gains for workers.[258] As a result of this dynamic, labor unions have an incentive to blur the line between the political and social benefits, and the economic gains accruing to unionized workers.[259] This gives rise to the possibility that EFCA advocacy is not necessarily driven by an impartial desire or intent to provide disinterested benefits to workers by way of improved wages and benefits. Instead of acting as trustees of the livelihood of rank and file members, and rather than concentrating their political advocacy on efforts that protect or expand workers' economic clout within the workplace, labor unions, facing only nominal financial-disclosure requirements,[260] are likely often propelled by the objective of acquiring transformational political power. The successful purchase of transformational power supplies ideological benefits to union hierarchs and their political and philosophic allies. This syllogism manifests itself in evidence that organized labor has previously lent its political and financial support to highly contested issues, such as efforts to decriminalize marijuana, freeze nuclear weapons, and expand abortion rights[261]—activities that are not central to the improvement of wages and working conditions for the rank and file.

When union hierarchs advance union funds to finance controversial propositions, it underscores a persistent intra-union conflict rooted in the political and social interests of union leaders that tend to oppose the objectives of workers.[262] Tensions surface when labor leaders view union members and their dues as powerful instruments for achieving their own aims.[263] Given that labor unions only spend a fraction of revenues on collective-bargaining-related activities[264] and that the appeal of individualism and other values hinder union solidarity, rational workers will often resist union-organizing efforts.[265] Although many workers, and virtually all employers, have incentives to resist unionization, union hierarchs, guided by their own rational self interests, have the opposite incentives.[266] This claim is bolstered by evidence of "the

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258. Hutchison, *A Clearing in the Forest*, *supra* note 4, at 1392.

259. *Id.* at 1395.

260. *See* HUNTER ET AL., *supra* note 256, at 3 (providing that the absence of financial oversight is a reason that unions can use dues for activities other than collective bargaining).

261. *See* CHAVEZ & GRAY, *supra* note 255, at 18 (listing political issues that unions have financially supported).

262. Hutchison, *A Clearing in the Forest*, *supra* note 4, at 1317.

263. *See id.* at 1316–17 (discussing motivations of union leaders and noting that these are not always consistent with the desires of union members).

264. *Id.* at 1315–16.

265. *Id.* at 1321.

266. *See id.* at 1317.

autocracy, entrenchment, and corruption of some union leaders."[267] Similarly, the evidence shows that "union elections provide members with little real control over leaders,"[268] suggesting that unions are often "inherently undemocratic."[269]

With these incentives, unions have embarked on an aggressive strategy of intermingling politics and union organizing.[270] A commitment to the combination of organizing efforts and political power[271] provides a strong explanation for union support of the EFCA, which, if passed, will provide additional opportunities to enrich union coffers.[272] Gary Becker explains that "[p]olitical influence is not simply fixed by the political process, but can be expanded by expenditures of time and money on campaign contributions, political advertising, and in other ways that exert political pressure."[273] Consistent with this, union leaders insist that "the only way to start winning [political] elections [is] to organize."[274] Because successful organizing campaigns provide labor leaders with additional dues revenue to fund their private objectives, it is likely that leaders and their political allies have self-interested reasons for proposing and supporting the EFCA.

Although labor-union advocates see unions as communal institutions that must thrive in order to create a society imbued with the values of social and economic justice and industrial and social peace,[275] crumbling worker solidarity impairs union capacity to fashion a durable community.[276] As a consequence, union-density rates have fallen sharply from their peak during

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

268. *Id.* at 369 (citing Edgar N. James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, HARV. C.R.-C.L. L. REV. 247 (1978)).

269. *Id.* at 370.

270. *See* Hutchison, *A Clearing in the Forest*, *supra* note 4, at 1317 (noting, for example, that the "president of the AFL-CIO . . . proclaimed that labor unions would tie their politics to union organizing").

271. *Id.* at 1317–18.

272. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 111.

273. Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 372 (1983). Moreover, "[g]roups, like individual human beings, are not animated simply by pecuniary gain. They are also animated by ideological and social objectives that provide both self-interested and nonexcludable benefits." Hutchison, *A Clearing in the Forest*, *supra* note 4, at 1318 (footnote omitted).

274. Jill Lawrence, *Democrats Ponder Labor Split's Political Effect: Unions Have Been Central to Party's Election Successes*, USA TODAY, July 27, 2005, at 4A.

275. Harry G. Hutchison, *Compulsory Unionism as a Fraternal Conceit? Free Choice for Workers: A History of the Right to Work*, 7 U.C. DAVIS BUS. L.J. 125, 164 (2006) [hereinafter Hutchison, *Compulsory Unionism*].

276. *See* Hutchison, *A Clearing in the Forest*, *supra* note 4, at 1319, 1321, 1332.

the 1940s and 1950s.[277] Reacting to this development, union activists and their ideological allies have become despondent.[278] They rightly see the present state of the labor movement "as the crystallizing apogee of their discontent."[279] As John Gray explains, union hierarchs and their ideological allies now have additional reasons to redouble their efforts to achieve their goals through politics.[280] If workers are unwilling to join a labor organization, if they are averse to voluntarily funding labor-union hierarchs' political preferences, and if they refuse to freely enlist in the war for social justice, then their interests will be hindered by the provisions of the EFCA, which shrink contractual liberties and offer the prospect of worker coercion coupled with mandatory arbitration, resulting in a "first contract."[281] Whether or not card-check signatures are obtained through fabrication or intimidation, they ultimately yield additional revenues while subordinating the individual worker's interest.[282] This deduction is consistent with the observation that Nietzsche was, for the most part, correct: "while the will to power has always been present, American democracy increasingly operates within a political culture—that is, a framework of meaning—that sanctions a will to domination."[283]

Because politics abets dominance, the EFCA constitutes an ideal vehicle to advance the political goals and objectives of union hierarchs.[284] This predatory process undermines the democratic aspirations of union workers in two ways. First, through its card-check scheme, the EFCA gives priority to certifying a labor organization as the collective-bargaining representative without ordering a secret-ballot election and without allowing workers to decertify an existing labor organization.[285] Second, though the original NLRA was designed to avoid compelling the parties to come to an agreement and to avoid imposing government supervision of the agreement's terms,[286] the EFCA's

277. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 10 ("[T]he level of private sector unionization has fallen from its high of about 35 percent of eligible workers in 1954 . . . ."); Jennifer Friesen, *The Costs of "Fee Speech"—Restrictions on the Use of Union Dues to Fund New Organizing*, 15 HASTINGS CONST. L.Q. 603, 642 (1988) (discussing the "dramatic decline in union strength since the end of World War II" and noting that in 1947, union membership was at 35.3%).

278. Hutchison, *Compulsory Unionism*, *supra* note 275, at 166.

279. *Id.*

280. GRAY, *supra* note 1, at 12.

281. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 5–6, 9.

282. *See id.* at 45–47.

283. HUNTER, *supra* note 6, at 109.

284. *See* EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 6–8.

285. *Id.* at 5, 21.

286. S. Rep. No. 74-573, at 12 (1935).

mandatory-arbitration provision enables arbitrators to impose a contract without the agreement of the parties.[287] In addition, under the EFCA, rank-and-file members of the union are not required to ratify a contract.[288]

The EFCA's capability to subvert union democracy is further emphasized by recalling that unions expend a large fraction of their revenues for non-collective-bargaining purposes, reflecting the fact that "expenditures for political and related purposes continue to rise on a per member basis while membership declines."[289] As referenced above, this pattern indicates that unions persistently pursue financial revenues in order to vigorously participate in America's political contest for economic, social, and ideological resources rather than to concentrate on the narrow economic interests of their members.[290] Taken together, this implies that, at most, collective bargaining for the benefit of workers is a secondary objective of union-organizing campaigns, which belies public-interest claims made on behalf of the EFCA.

C. Fashioning a More Comprehensive Critique of the EFCA

Among the many strengths of Richard Epstein's critique of the EFCA is the persistent clarity of his analysis. He briefly and correctly places the EFCA within America's labor-law pantheon as part of an evolutionary move aimed at displacing judge-made law—a process of legal reform that commenced almost a century ago.[291] On a parallel track, progressives sought to increase the level of government intervention through both a broad understanding of the police power and an expansive interpretation of the commerce power.[292] The NLRA emerged as the centerpiece of this transformational process.[293]

Although the NLRA, as originally enacted, expressed a strong preference for labor organizations, most contemporary workers have rejected this policy preference, conducing to a sharp decline in private-sector unionization.[294] Provoked by this decline, labor advocates have offered a plethora of proposals

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

288. *Id.*

289. Hutchison, *A Clearing in the Forest*, *supra* note 4, at 1316 (citing Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 350 (1998)).

290. *Id.* at 1316–17.

291. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 1. During the Progressive Era, the federal government began to grant special privileges to labor unions. *See id.* at 1–2. This move commenced with a statute that "insulated labor unions from the application of all antitrust laws," and it culminated with the passage of laws that conferred special privileges on labor unions for purposes of collective bargaining and of limiting employers' right to obtain injunctions during labor disputes. *Id.*

292. *See* EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, supra note 175, at 66–70, 102.

293. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 4.

294. *Id.* at 4, 10–11, 18.

designed to restore unions to prominence.[295] The EFCA is one of many such efforts, which are justified on the grounds that "private sector labor law . . . has shrunk in its reach, and its significance, and is clearly ailing."[296] This impairs "workers' efforts to advance their own shared interests through self-organization and collective protest, pressure, negotiation, and agreement with employers."[297] This observation fuels the contention that a gap exists between "the desire for and the supply of collective representation in workplace governance," and that employer abuse drives this lacuna.[298] Explaining why this thesis is unsustainable, Epstein's inspection of the EFCA offers a corrective showing that the employer-abuse allegation is supported by groundless presumptions.[299] As Epstein deftly explains, employee and employer resistance to unionization can be both "rational" and "defensible."[300] And he is not alone in this assertion.[301] Hence, it appears that reliance on the employer-abuse thesis to explain declining unionization represents the triumph of ideology over empirical evidence. Continued reliance on this thesis appears to be a form of self-deception that sustains union suzerainty and worker subordination.

Conversely, resistance can enhance social welfare. Turning to these considerations, Epstein reasons that the criticism of progressive initiatives "does not depend upon any exaggerated sense of individualism"; instead, its very decisiveness "depends on an overall programmatic critique that examines the effect that policy initiatives have on the full range of relevant parties."[302] This means that only those initiatives that contribute to the common good

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295. *See, e.g.*, Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approaches to Union Growth*, 50 N.Y. L. SCH. L. REV. 337, 337–53. These proposals included the following: effectuating new and better organizing efforts; deploying corporate campaigns; bargaining to organize, through which a union seeks to expand recognition within a corporation once some of its employees are organized; deploying union-lobbying advantages, whereby firms seeking to expand in an area gain the trust of unions by agreeing not to oppose unions in exchange for the coercive transfer of public resources that benefit the firm; using public procurement and contracting power to force employers to bend to union organizing attempts; and advocating and enacting state and local laws that change the environment to assist labor-union organizing efforts. *Id.*

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

297. *Id.*

298. *Id.* at 1528–29 (citing "brazen employer resistance" as an explanation for the lack of union representation).

299. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 124–26.

300. *Id.* at 124–25 (noting the losses employers generally incur from unionization).

301. *See, e.g.*, Hylton, *supra* note 79, at 695–98 (repudiating the current viability of the employer-hostility thesis and showing that employers were much more hostile to labor unions during the 1940s).

302. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 175, at 73.

should survive.[303] On this score, the EFCA is clearly deficient. Taken together, Epstein's crisp analysis destabilizes the legitimacy of attempts to strengthen unionism through legislation.

Equally clear is Epstein's argument that it is difficult to offer a comprehensive critique of the EFCA "without undertaking a close examination of some of the defects of [America's] current labor law system," because the "EFCA only exaggerates [the system's] flaws."[304] Taking up this challenge, this Article shows that the EFCA's own flaws stem from its entrenched hierarchical assumptions, which are tied to the inevitability of progress, demanding that certain workers be excluded or otherwise subordinated in order for the nation to advance. Prescinding from the pursuit of equal rights for all workers—males, females, and members of various ethnic groups—labor unions were established during the Progressive Era in order to gain benefits at the expense of others, particularly members of biologically suspect classes.[305] When empowered by the state through the passage of legislation creating labor cartels, this policy preference produced a net social loss and constrained human liberty. At times, labor-union policy was grounded in notions of biological superiority; at other times, it was premised on the economic advantages of exclusion.[306] In either case, labor unions' pursuit of monopoly power, in combination with the racial animosity unleashed by the political and intellectual class during the Progressive Era, provided a sturdy foundation for New Deal labor-law reform.[307] Reform produced rather toxic fruit: the persistent exclusion of large numbers of Americans from the workforce.

In addition to the social cost and welfare losses imposed by President Roosevelt's policies during the 1930s and 1940s, members of marginalized groups continue to suffer adverse repercussions from New Deal policies and subordinating assumptions rooted in labor-law statutes today.[308] Consistent

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303. *Id.*

304. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 175.

305. *See* MORENO, *supra* note 173, at 81–136 (describing the interaction between blacks and labor unions during the Progressive Era); *supra* text accompanying notes 217–25.

306. *See* MORENO, *supra* note 173, at 97–98.

307. *See id.* at 137 (explaining the evolving national reaction from the Progressive Era to the New Deal).

308. GOLDBERG, *supra* note 174, at 268–69. Goldberg explains that the

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

with this conclusion, "the widening unemployment gap between white and black Americans that commenced during the Great Depression," in response to the progressive statutory innovation, is growing stronger and more resilient in present-day America.[309] Minimum-wage laws in the United States, like similar efforts in apartheid-era South Africa, continue to disproportionately deprive members of marginalized groups of employment.[310] Following the passage of the 1965 Civil Rights Act, and operating through the collective-bargaining process, labor unions have "played a crucial role in institutionalizing a variety of discriminatory practices."[311] Remarkably, this narrative proceeds logically with the deduction that biology entitles white workers "to more desirable job classifications and to 'inherent' white employment privileges."[312]

This record reinforces Epstein's claim that the implementation of the EFCA produces union benefits that are unevenly distributed among workers.[313] In addition to this distributive difference, which is a function of seniority within a unionized workforce, a thorough assessment of the adverse distributive effects that are a function of race, ethnicity, and the individual's placement within the union hierarchy would further strengthen Epstein's case against the EFCA. The adverse consequences associated with New Deal labor law should serve as the canary in the coal mine by suggesting that Americans ought to be wary of the EFCA's claimed benefits. However, to be fair, no EFCA advocates have explicitly embellished their support of this proposal with the language of racial animus that characterized the Progressive Era—language that propelled the enactment of laws such as the Davis-Bacon Act and operated as part of the framework of union privilege.[314]

Id.

309. Harry G. Hutchison, *Racial Exclusion in the Mirror of the New Deal Responses to the Great Crash*, 15 NEXUS: CHAP. J.L. & POL'Y 5, 13 (2009–10) (reviewing JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT: FROM MUSSOLINI TO THE POLITICS OF MEANING (2007)).

310. Harry Hutchison, *Toward A Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 126–30 (1997).

311. HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW 5 (Univ. of Wis. Press 1985) (1977).

312. *Id.*

313. *See* EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 28, at 4–9.

314. Bernstein & Leonard, *supra* note 15, at 191–92 (showing how the law honors the progressive legacy of Robert Bacon, the Davis-Bacon Act's co-author, who "denied anti-African American animus, but made clear his discomfort with 'defective' workers taking jobs that were assumed to belong to white union men").

Nonetheless notable are the recent comments of a Democratic congressman, who successfully supported financial-regulatory reform on grounds that it benefits the racially superior among us as opposed to the "unfit" and biologically-suspect minorities and "defectives." Andrew Malcolm, *Rep. Paul Kanjorski Says His Plan Helps 'Good American People,' Not 'Minorities' or*

III. CONCLUSION

No longer captivated by the belief that unions should be seen simply as limited organizations designed to further self-government by workers oriented toward their own narrow economic interest, contemporary union leaders and their allies now believe that unions ought to "be conceived as the robust engine of collective insurgency against globalization . . . [and] class-based injustice."[315] This shifting meta-narrative, posited as an ontology of necessity and embraced as a compelling faith, is catalyzed by a reduction in worker solidarity. No longer able to capture the hearts and minds of workers and no longer animated by workers' narrow interests, organized labor—the beneficiary of government intervention in the past—has, once again, turned to politics to achieve the broad goals of political, social, and economic transformation.[316]

The possibility of achieving these objectives, which cannot otherwise be obtained through a voluntary, freely chosen process, unleashes incentives that motivate interest groups and their leaders to capture the coercive power of the state. The demand by pressure groups for ever-expanding government intervention is an understandable outgrowth of the fact that "the State has permeated civil society to such an extent that the two are mostly indistinguishable."[317] Implicit in this demand is the conclusion that, as the government becomes more scientific and accepts the possibility that it can manipulate human action, "[g]overnment itself becomes a hierarchy of bureaucratic managers" and experts, whose arbitrary power is justified by the claim that they possess knowledge resources and competencies that most citizens do not.[318] Although human liberty is always at risk in the face of the demand for government intervention in society, the purchase of government power serves private ends. The EFCA constitutes a clear example of this ruinous process that continues to consume western democracies.

Richard Epstein's book, *The Case Against the Employee Free Choice Act*, constitutes a public service as it illustrates the pitfalls of state-sponsored cartels

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'Defective' People, L.A. TIMES (June 25, 2010, 2:32 AM), http://latimesblogs.latimes.com/washington/2010/06/democrat-paul-kanjorski-defective-americans.html. Given the public expression of such sentiments rooted in hierarchy and subordination, it is possible to infer that those attitudes are merely the tip of the exclusionary iceberg infecting other legislation, including the EFCA. Equally clear, the tacit acceptance of such sentiments within the domain of labor law would serve to redistribute benefits from workers and employers to union leaders and their allies.

315. Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 U. MICH. J.L. REFORM 447, 448–49 (2000).

316. Hutchison, *Compulsory Unionism*, *supra* note 275, at 164.

317. HUNTER, *supra* note 6.

318. ALASDAIR MACINYTRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 85 (2d ed. 1984).

and their debilitating public-policy implications. His analysis exposes the Employee Free Choice Act as a disingenuous proposal that, rather than promising an increase in human liberty, creates a system that opposes the rights of the rank and file to freely choose labor representation. Although the EFCA and its misleading title recall the Roosevelt administration's reliance on deception to pass unpopular measures without public support, Epstein's book serves the public interest without misleading its readers. His book offers a sharp contrast to the proclivity of modern mass democracies, which have increasingly succumbed to the temptation of supplying private goods for powerful constituencies. Nevertheless, Epstein's analysis could be enriched by exposing the permanent defects in the labor-reform agenda—defects that originated more than a century ago. His critique could also be enhanced by exhibiting far greater skepticism toward the EFCA's attempt to enshrine organized labor's pursuit of additional dues revenue to fund its insistent search for political, economic, and social transformation.