New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?

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Modern American labor law emerged alongside of the spectacular growth of industrial unions in the form of the Congress of Industrial Organizations during the Great Depression, long after the American Federation of Labor, representing skilled tradesmen and craftsmen, had come to the fore in the previous century. The National Labor Relations Act (NLRA) of 1935 promoted the public policy of freedom of association and collective bargaining that remains with us today, and it did so through creating a system of secret ballot box elections to resolve disputes about representation and an unfair labor practice system, a kind of “code of conduct” initially applicable exclusively to employers. The Act—then and today—contains a trinity of principles, i.e., the concept of exclusive bargaining representative status, which imposed an obligation upon the employer to bargain with the single union chosen by a majority of employees; the concept of an appropriate unit, or grouping of employees, who would be represented by a labor organization of their own choosing; and the principle of majority rule itself.

In the 1940s and '50s the trade union movement grew dramatically, its growth fueled in substantial part by the War Labor Board during the crisis of World War II, and ultimately the merging of CIO and AFL in 1955 at the time of the trade union movement’s zenith—a position of strength that at that point seemed to be substantially unaffected by the Taft-Hartley...
amendments of 1947, which put new restrictions upon organized labor.³

After the 1935 legislation, the statute was amended not only in 1947 but again through the Landrum–Griffin amendments in 1959, which both provided for a bill of rights for individual union members vis-à-vis their unions and, more relevant to the issues discussed in this Article, the new union unfair labor practices restricting picketing and certain types of clauses in collective bargaining agreements.⁴ For the past half century, except for some extension of jurisdiction in 1974, there have been no substantial amendments affecting labor-management relations.

In Part I of this Article, I discuss some of the ways in which labor law got off the track from the 1960s and early '70s onward and the form that law reform proposals took. Part II analyzes the recognition machinery and the debate about it that emerged with some focus upon the Employee Free Choice Act (EFCA or the “Proposed Bill”) of 2007 and proposals discussed subsequent to that time. Part III examines proposals about so-called first contract arbitration as a means to resolve differences in negotiating contracts in the wake of a union’s certification as exclusive bargaining representative. Part IV discusses the proposals relating to remedies for violations of the NLRA and the difficulties with them today. Part V deals with other labor law reform proposals, particularly concerning the method of appointment of National Labor Relations Board (NLRB or the “Board”) members. Part VI examines some new voluntary initiatives, particularly those of the British multinational FirstGroup America dealing with promoting freedom of association on a private basis and the implications of such for public law. Part VII analyzes the NLRA jurisdiction and the fact that today’s law has expanded considerably the breadth of the NLRA and proposes that state regulation could provide for the expansion of state law over employers that federal law should not cover. Part VIII addresses the need for rulemaking in lieu of adjudication, which has been the only method for NLRB case dispute resolution.


The need for reform in the basic labor law of the United States has been recognized, discussed, and debated for the past half century, beginning with the Pucinski Committee report in the 1960s. Even prior to that development, the alarm had been sounded by scholars and journalists who focused upon the decline of labor from its zenith in 1955 when approximately thirty-five percent of employees belonged to trade unions. The numerical decline accelerated over the years, particularly in the hostile decades of the 1980s and 2000s. Simultaneously, the problem of deficiencies in the creaky administrative processes of the NLRB—through which justice delayed is so often justice denied—has grown worse over the years. This provided an unfolding drama in the form of the statute’s inadequate remedies as defined by both the NLRB itself and the Supreme Court.

Along the way, the debate at times has been confused and has wandered off course. The most recent of many reform efforts has emerged in the form of EFCA—a bill passed by the House of Representatives in 2007. The Proposed Bill, as currently written, provides for (1) a system of recognition in which the ballot box

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7. See H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (1970) (holding that the NLRB is precluded from imposing any contract term as a remedy); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941) (holding that the remedies of the Act provide compensation that requires mitigation of damages and the deduction of interim earnings from back pay); Republic Steel Corp. v. NLRB, 311 U.S. 7, 11–12 (1940) (holding that the NLRB is precluded from imposing punitive damages).

8. H.R. 800, 110th Cong. (2007); for a discussion of the bill as passed by the House of Representatives, see William B. Gould IV, Employee Free Choice Act: Bill No Cure-All for What Ails Labor, SAN JOSE MERCURY NEWS, Mar. 6, 2007, at 11A. For the most recent developments (as of this writing), see Steven Greenhouse, Democrats Drop Key Part of Bill to Assist Unions, N.Y. TIMES, July 17, 2009, at A1.
will be displaced by authorization cards as a means to determine union majority support; (2) arbitration to resolve first-contract disputes where labor and management are unable to voluntarily negotiate a collective bargaining agreement within a four month period; and (3) new procedures for law enforcement.

The suggestion has been made—and it has been fueled by considerable rhetoric—that reform in the law can both substantially reverse the membership decline of organized labor and promote a more middle-class America. But, of course, this overlooks the fact that many other factors are responsible for the decline of the unions and that the law, while relevant, is subordinate to most of them. And the decline, which is so often measured in international terms, fails to take into account the fact that it is Continental Europe that has possessed relatively centralized systems unrestrained by the American individual exceptionalism and the prominence of antitrust law since the turn of the previous century. The difference between the systems lies in principal part between the coverage of employees through trade union initiatives, which includes nonmembers by virtue of various extension systems in Germany, the Netherlands, and France. (France provides the most dramatic example with ten percent union membership at a lower level than the Americans, but with eighty percent of employees in the workforce covered by trade union negotiations!) The decentralized American system, which


10. For the development of antitrust law as a significant feature on the American legal landscape, see Standard Oil Co. of N.J., 221 U.S. 1 (1911); Phillip E. Areeda & Herbert Hovenkamp, Fundamentals of Antitrust Law (3d ed. 2005). Antitrust law, of course, played a major role in thwarting trade union development. This changed appreciably with United States v. Hutcheson, 312 U.S. 219 (1941); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Loewe v. Lawlor (Danbury Hatters), 208 U.S. 274 (1908).

in its sophisticated and detailed dispute resolution machinery is the
product of comprehensive plant level bargaining, does not apply
beyond the plant, or to a lesser extent the company, and
infrequently across corporate lines through multiemployer
association bargaining.

Thus, institutionally the American system starts at a
disadvantage in acquiring union membership and influence, and
this, along with other factors, makes the law a secondary factor in
any process of change. It is possible that law reform—particularly
if unions can obtain compulsory recognition for collective
bargaining purposes on the basis of employee-executed
authorization cards, as EFCA proposed until recently—can
produce more union members. But more than this is needed to alter
the membership terrain. One obvious matter that needs redress is
immigration law and the status of undocumented workers,
addressed already fairly unsuccessfully by labor law. Only
immigration law can address the actual status of such employees,
as the current status places such workers effectively beyond union
organizational efforts with or without labor law reform.

Nonetheless, millions are being spent by both labor and
management in the battle of labor law reform. Neither side shows
any interest in a sensible or moderate compromise at this juncture,
though it seems obvious from the merits of the debate as well as
the political composition of the members of the United States
Senate—in which a filibuster will have to be broken by sixty

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12. The authorization card provision of EFCA appears to have been
 dropped in an effort to strike a compromise. Greenhouse, supra note 8 (“A half-
dozen Senators friendly to labor have decided to drop a central provision of a
bill that would have made it easier to organize workers . . . . [t]he abandonment
of card check was another example of the power of moderate Democrats.”).
 aff’d, 159 F.3d 1345 (2d Cir. 1998), abrogated by Hoffman Plastic Compounds,
Inc. v. NLRB, 535 U.S. 137 (2002) (holding that the Board may not award back
pay to illegal, undocumented workers).
14. Said the New York Times:
 If you uphold workers’ rights, even for those here illegally, you uphold
them for all working Americans. If you ignore and undercut the rights
of illegal immigrants, you encourage the exploitation that erodes
working conditions and job security everywhere. In a time of economic
darkness, the stability and dignity of the work force are especially vital.
votes—that some kind of intermediate position is the only one that can be obtained.\textsuperscript{15}

The debate in 2009 has taken a number of confusing turns. In the first place, frequent reference is made to Canada by many of the relatively sophisticated, who apparently believe that the Canadian experience contains a model that supports the card check approach to recognition. This is not so. Indeed, the Canadian experience is precisely to the contrary. Though all jurisdictions at both the federal and provincial level—Canadian labor law in contrast to American is principally provincial law,\textsuperscript{16} not federal law\textsuperscript{17}—adhered to a card check system in the 1960s, the majority of jurisdictions have switched to secret ballot box elections, and the trend is in that direction.\textsuperscript{18}

Today, only the federal jurisdiction (which covers industries like transportation and banking) and the provinces of Quebec, Prince Edward Island, New Brunswick, and Manitoba have a card check system. What is particularly important is that a majority of provinces have not only gone over to the secret ballot box as a basis for recognition, but also a consensus in favor of the ballot

\textsuperscript{15} See Greenhouse, \textit{supra} note 8 ("[s]enators decided to scrap [the card check provision] to help secure a filibuster-proof 60 votes . . . . "). See also Steven Greenhouse, \textit{Union Head Would Back Bill Without Card Check}, N.Y. TIMES, Sept. 5, 2009, at B3.

\textsuperscript{16} See generally GEORGE W. ADAMS, CANADIAN LABOUR LAW \S 1.120–1.130 (2d ed. 2004) ("Provincial jurisdiction [is a] characteristic of Canadian labor law that distinguishes it from approaches in the United States . . . . ").

\textsuperscript{17} See \textit{Machinists Lodge 76 v. Wis. Employment Relations Comm.}, 427 U.S. 132 (1976) (noting that the states must yield to federal jurisdiction if the activities the states desire to regulate are encompassed in the NLRA); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (holding that the states’ jurisdiction over subject matter normally relegated to the NLRB is displaced, even when the NLRB has declined to assert jurisdiction over the dispute in question). See generally William B. Gould, \textit{The Garmon Case: Decline and Threshold of “Litigating Elucidation”}, 39 U. DET. L.J. 539, 556 (1962).

\textsuperscript{18} E-mail from Tom Archibald, Heenan Blaikie to Author (May 9, 2009, 10:06 pm PST) (on file with author). For an extensive discussion of relevant Canadian provisions of law, which relate to the contemporary labor law reform debate in the United States, see Kenneth G. Love, Q.C., Chairperson, Saskatchewan Labour Relations Board, Speech at the Association of Labor Relations Agencies Conference (July 20, 2009) (copy on file with author); Pierre Flageole, Vice-Chair, Commission des relations du travail du Québec, Card Check and First Contract Arbitration: the Quebec Experience, Association of Labor Relations Agencies Conference (July 20, 2009) (copy on file with author); Ginette Brazeau, Canada Industrial Relations Board, Canadian Experience with Certification by Card Check and First Agreement Arbitration, Association of Labor Relations Agencies Conference (July 20, 2009) (copy on file with author); Geoffrey England, \textit{Evaluating the Merits of the 2008 Reforms to Collective Bargaining in Saskatchewan}, 71 SASK. L. REV. 307 (2008).
elected has stabilized. Alberta has had the vote since 1988, and Nova Scotia since 1972 (though there have been switches in the interim since then). Ontario, by far the largest province, has led the way toward ballots since 1995—and expedited ballots at that, requiring that the election take place within one week subsequent to the filing of the petition! Newfoundland has had the vote since 1993, British Columbia since 2001, and, more recently, Saskatchewan since 2008 after remaining in the card check camp since 1964. Some supporters of EFCA seem to assume that the shift is toward card check rather than ballots—but the opposite is true!

Finally, there have been debates about what EFCA means, as one might expect with any legislation of import. But one of the most confusing aspects of this relates to the Proposed Bill’s treatment of the secret ballot itself. In fact, EFCA provides that recognition on the basis of union authorization cards will supplant the secret ballot box election. Authorization cards are viewed by unions and employers as facilitating union recognition because (1) employees are unlikely to be exposed to employer free speech or anti-union propaganda inasmuch as the cards will be executed in some instances before the employer is even aware of the union campaign—or before it is able to mount an anti-union campaign; (2) employees are at an additional disadvantage because union organizers have no access to company property in the midst of one-sided employer anti-union speech—though curiously EFCA does not provide for the right of union organizers to have access; (3) the execution of cards in a union hall, local tavern, or other meeting place frequently attaches less solemnity to the selection process than casting a secret ballot; and (4) cards may be signed as the result of peer pressure even when coercion is not present. Whatever the scope of peer pressure and union coercion has been in Canada—and the treatises addressing Canadian labor law contain many references to such cases—it is obviously a less deliberative process than casting the secret ballot.

At the same time, the Canadian experience seems to demonstrate that union recognition may have been easier to obtain

through cards than is the case with ballots. Thus, it would be a rare union or group of employees who would invoke the ballot given the fact that cards are such an easier road. That is the point of the proposal and the expectation of many of EFCA's proponents, i.e., that trade union membership will rise as the result of this measure. Accordingly, the ballot will be moribund, rarely used under these new statutory procedures contained in an unamended EFCA.

II. THE RECOGNITION PROCESS

As noted, the debate about secret ballot box elections as opposed to card check has divided largely along labor and management lines. The unions have argued that cards would immunize employees from employer self-help and one-sided propaganda that might either influence or intimidate workers and thus induce them to vote against the union. Employers, of course, have noted the obvious, i.e., that employees will get a lopsided view of the pros and cons of union representation if they only have the opportunity to listen to one side and that unions can mislead, as well as pressure or coerce, workers to sign cards in this environment. Of course, the union assumption is that employees will be immunized from employer interference for just that reason—they will not even hear the other side of the argument contained in the employer's message.

With considerable persuasiveness, unions point out that nonemployee union organizers are, under virtually all circumstances, denied access to company property and that employer captive-audience, anti-union messages go unanswered—though EFCA will not change this! Unions also rely upon

23. One commentator notes that "there has been a marked overall decline in the number of certifications issued by the Board in the years since the mandatory vote procedure was introduced . . ." and concludes, by statistical regression, that the passage of legislation prohibiting card check "had a significant negative impact on certification success rates." Sara Slinn, An Analysis of the Effects on Parties' Unionization Decisions of the Choice of Union Representation Procedure: The Strategic Dynamic Certification Model, 43 OSGOODE HALL L.J. 407, 441 (2005). It is not clear to me, however, that the regression accounts for all relevant factors. Moreover, though union representation in Canada is more substantial than in the United States, this is in large part attributable to Canada's larger public sector economy. All struck out: Weaker than they look, THE ECONOMIST, Oct. 17, 2009, at 52.


academic examinations of the rising voluntary use of cards to resolve recognition issues. But the limited number of controversies and problems emerging here—unions often cite this experience to suggest that the controversies and litigation under an EFCA card check law will be infrequent—probably tells us little about what would happen when cards are used in an adversarial context in which employers are resisting unions altogether. In other words, the infrequency of disputes where employers and unions have voluntarily negotiated such procedures tells us little about what will happen should the procedures be set by statute.

The unions are right about the ballot—it is discredited, and the problems with it rest in two factors. The first is the gap between untrammeled employer free speech and the lack of union free speech rights at the workplace. This, as noted, can be partially remedied by providing for union access to private property; the labor law reform should include this element—EFCA does not! But the second problem is that of delay, given the fact that most representation votes taken under existing NLRA procedures will allow for a lapse of at least fifty to sixty days from the filing of the petition to the vote itself—and a minority of elections take much longer! This period of time during which card majorities are often dissipated is harmful to union organizational efforts.

The delay is caused by disputes prior to the ballot itself—both potential and actual—over who is eligible to vote and what the appropriate unit shall be. But the fact that the same delay will exist in connection with cards does not seem to be widely understood. The Board cannot determine whether a union has a majority on any basis until the identity of the voters and the size of the unit is resolved. Given the fact that the ballot is more likely to be the product of a deliberative process as compared to cards, I have advocated an expedited election within five to ten days—just as Ontario and British Columbia provide for with considerable success!

Even though there may be subsequent disputes about eligibility and the unit following the vote under a vote-now-and-litigate-later


procedure, such as that favored by the Canadians, the votes will be in the bank, so to speak, and employees will not be influenced by anti-union messages during the period of litigation subsequent to the vote where the numbers in dispute at the time of the vote are outcome-determinative given the count that is finally taken. Congress should mandate a time limit for resolution of these post-election issues as well so that the union's representativeness is not undermined during the period that it takes for the Board to decide when it is necessary for these issues to be addressed because the outcome of the election will be affected by their resolution. My Board in the 1990s used a vote-now-and-litigate-later approach (albeit not in the context of a Canadian-style expedited election), and, as it happened in a number of instances in which it was utilized, it was not necessary to resolve certification because the votes in dispute were not outcome-determinative. But quite obviously there will be many close elections, and it will be


29. This was the case, for example, in Columbia Hospital for Women Medical Center, Case 5-RC-140331, and Baltimore Gas & Electric Co., Case 5-RC-1435. For a brief discussion of this procedure, see GOULD, REPORT, supra note 28.
important for the Board to discharge its responsibilities promptly so that employees do not lose faith in the process of collective bargaining in the interim. Employers are also well served by a process that brings contact with legal institutions to an end promptly.

Again, a particularly important point here is that the votes are in the bank under an expedited procedure; thus, employees cannot be influenced by anti-union conduct or expressions of a view after the votes are cast. But the same can also be said of the execution of authorization cards while disputes about eligibility and unit are resolved subsequent to their submission to the Board. However, there are two additional complexities relating to cards that do not pertain to the ballot. In the first place, notwithstanding the numerous and well-publicized disputes about “hanging chads” and the like in political elections, there are very few disputes about the ballot itself. The same is not true of cards, though presumably the rules and regulations of a new Obama Board devised under the authority given to it by EFCA will diminish some of the controversies that have existed with cards under the Act to date where disputes have been adjudicated within the context of unfair labor practice litigation addressing the question of whether the union has majority status where employee free choice in the

30. As in the “hanging chad” controversies, serious disputes tend to center around divining the voter’s intent. In Bishop Mugavero Center, 322 N.L.R.B. 209 (1996), the Board agreed to void a ballot marked with a diagonal line in one box and an “X” in the other. In TCI West, Inc. v. NLRB, 145 F.3d 1113 (9th Cir. 1998), the court refused to enforce the Board decision and sided instead with my dissenting opinion that a ballot marked with a diagonal line in one box and a darkened, emphasized “X” in the other box should be counted. Bishop Mugavero, 322 N.L.R.B. at 209 (Chairman Gould, concurring). The Ninth Circuit overruled the Board’s decisions in Bishop Mugavero Center and TCI West, Inc. that ballots so marked were presumptively unclear and voidable. The court observed that the Board’s general policy was to determine the voter’s intent and held that this policy should be applied uniformly. Following the direction of the court of appeals, the Board now uniformly counts all ballots from which the voter’s intent can be determined. See Thiele Indus., Inc., 325 N.L.R.B. 1122 (1998) (ballot marked with “X” in YES box, with YES circled, and a diagonal line in NO box is a clear yes vote); NLRB v. Americold Logistics, Inc., 214 F.3d 935 (7th Cir. 2000) (enforcing Board’s voiding of ballot marked with the words “neither[e] nor” written between YES and NO boxes as ambiguous). That these disputes address such a narrow band of issues attests to the robustness of the ballot process. Similar issues—and many more—would arise when certifying authorization cards.

31. There is some evidence that employers are devising new tactics that resemble the “yellow dog contracts” of the early twentieth century to preempt union reliance upon cards under a newly enacted EFCA. Steven Greenhouse, A Dispute Over Unionizing Montana Hair Salons, N.Y. TIMES, Aug. 29, 2009, at A16.
The election process has been contaminated. Yet the problem of the frequently voiced issue of misrepresentation will always be there because some employees will complain about the circumstances under which the card was signed, with or without *sub rosa* employer connivance. The Board will have to obtain some form of evidence or testimony about the facts on this and related issues.

A second and related issue will arise in connection with decertification efforts put forward by employees who maintain that even if they were not misled or coerced, they have changed their minds. This has been a major problem that has arisen under the NLRA as written and is frequently linked to the disputes about the reasonable period of time during which any kind of challenge to majority status is permitted during the period of time that collective bargaining is proceeding. Under EFCA, disputes of this kind will bedevil efforts to bargain a first contract and to arbitrate if collective bargaining is unsuccessful. In part, this problem can and should be addressed by requiring elections where employers or employees do not want to see the collective bargaining process move forward because of the allegations that the union possesses no majority status. Under the Act, employers can simply refuse to bargain, requiring lengthy unfair labor practice proceedings where the claim is made that a majority of employees no longer support the union, though the Board has made it easier for employers to challenge a union's representative status if they use the election machinery rather than trigger an unfair labor practice charge by refusing to bargain. Symmetry requires that an election be mandated here in contrast to the current situation that allows the union's status to be challenged through an employer refusal to

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32. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). One of the most difficult problems for *Gissel* exists because of the fact that many circuits have taken the position that considerable turnover with substantial passage of time and changed circumstances at the plant can be a basis for a representation election and not a *Gissel* bargaining order. See *Overnight Transp. Co. v. NLRB*, 280 F.3d 417, 435–36 (4th Cir. 2002); *HarperCollins S. F. v. NLRB*, 79 F.3d 1324 (2d Cir. 1996); *NLRB v. Cell Agric. Mfg. Co.*, 41 F.3d 389 (8th Cir. 1994); *Somerset Welding & Steel, Inc. v. NLRB*, 987 F.2d 777 (D.C. Cir. 1993); *Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990); *Impact Indus., Inc. v. NLRB*, 847 F.2d 379 (7th Cir. 1988); *NLRB v. Koenig Iron Works, Inc.*, 856 F.2d 1 (2d Cir. 1988).


35. See *Levitz Furniture Co. of the Pac.*, 333 N.L.R.B. 717 (2001).
bargain. Employers, who are insistent upon retaining the ballot in the EFCA debate, cannot reasonably oppose a mandatory ballot where decertification is at issue. Again, under EFCA, as written where elections are not required either at the time of certification or decertification, these disputes will be frequently linked to the question of whether the cards were properly signed in the first instance—the employees maintaining that they never intended to support unionization. The same is not true where the ballot has been cast in an NLRB-supervised election.

Elections are more likely to smooth the way to effective collective bargaining whether an amended Act contains first contract arbitration or not. But this will be particularly important where there is a probability of a contract or a mandate through the arbitration process as provided by EFCA. The collective bargaining agreement should be promptly available to the parties because that is all a union can do for employees that it represents under our system, and if a contract is not obtained the result will be decertification de facto or de jure. The point here is that the collective bargaining process itself is more likely to be bedeviled with recognition issues under a system that provides for cards rather than a secret ballot box election because a substantial number of employers will inevitably challenge the union’s

36. Of course, proponents of an unamended EFCA are in an awkward position to advocate for elections in decertification proceedings while attempting to supplant them in certification proceedings.


The Board now properly views the ballot box as more deliberative:

[L]ast minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations. The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.

Michem, Inc., 170 N.L.R.B. 362 (1968). See also Mediplex of Conn., 319 N.L.R.B. 281, 298 (1995) (affirming the administrative law judge’s finding that “victory party” remark by union agent did not amount to “sustained conversation with waiting prospective voters prohibited by Mitchem, Inc. 170 N.L.R.B. 362 (1968”)”); Patrick Industries, Inc., 318 N.L.R.B. 245, 256 (1995) (affirming the administrative law judge’s finding that supervisors had not engaged in lengthy conversations as the employees made their way to the polling area and that the supervisors were present for work-related reasons).
legitimacy and representative status in the midst of collective bargaining where cards are the basis for recognition—so too will some employees in certain circumstances.

The idea of ballots by mail or post rather than casting them at the employer facilities has been discussed as a possible EFCA compromise. In my judgment, an amendment to the Act providing for a postal ballot rather than one at the employer facilities would not be required since the statute does not mandate that the ballot be cast in a particular place or location but rather leaves this to the discretion of the Board. Accordingly, in San Diego Gas & Electric, the Board held that postal ballots could be cast pursuant to Board mandate. The difficulty is that the poorly reasoned plurality opinion concluded without statutory support that postal ballots could be ordered only where (1) eligible voters were scattered because their job duties took place over a wide geographical area; (2) the voters were scattered in the sense that their work schedules would vary significantly so that they were not present at a common location at common times; or (3) there was a strike, lockout, or picketing in progress and some of the employees were not at plant facilities because they were honoring the picket line, were locked out, or engaged in the strike.

In effect, even though the plurality noted that mail ballots have been conducted ever since the NLRA was enacted and that there were no abuses associated with them, it adopted a presumption against holding them. This view seemed to be rooted in the hostility of employers to postal ballots rather than the existing statutory framework. In a concurring opinion, I expressed my disagreement with these limited criteria and stated that elections can be conducted by postal ballot not only to enfranchise scattered voters but also to conserve NLRB resources, given the fact that only clericals are needed to mail the ballots out as opposed to utilizing NLRB professional staff to go to a facility and spend time there and incur hotel expenses, etc. (This was particularly true in

40. Id. at 1145.
41. Id. at 1147 (Chairman Gould, concurring).
One of the principal objections of the dissent to mail ballots was to be found in the employer's inability to use the captive audience close to the time that the employees cast their votes since the twenty-four-hour prohibition against such techniques was clocked from twenty-four hours prior to the time the Board sends out their ballot, in contrast to the twenty-four-hour period prior to the actual casting of the votes in the employer's facility. I noted that the Board was under no compulsion to enhance employer anti-union free speech though the right to communicate for employers and unions is protected by the statute. Moreover, my concurring opinion stated that the employer's voice was not silenced during the campaign, inasmuch as the captive audience is not its "only method of communication," and that employers could communicate with the workers through other means such as literature, one-on-one conversations, and the like. I expressed the view that during the time that the election process was established, when NLRB agents first visited the plant facilities, frequently employers had sent the message to employees that management, through control of the plant facilities on which the Board would conduct the vote, controlled the entire process. I said in San Diego Gas & Electric: "[S]ome employers attempt to direct the Board agent and the procedures surrounding the election in a way that creates the appearance in the eyes of the employees that their

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42. Id. at 1151 (Members Hurtgen and Brame, dissenting) (citing Or. Wash. Tel. Co., 123 N.L.R.B. 339, 341 (1959) (applying Peerless Plywood Co., 107 N.L.R.B. 427 (1953) to mail ballot cases)).

43. The right of employer free speech under the Act has been established by the Supreme Court:

employer controls not only their salary and benefits but also the Board's procedures.\textsuperscript{44}

Manual ballot procedures, I stated, had been "manipulated by sophisticated employers and labor consultants in ways that mail ballots cannot be manipulated."\textsuperscript{45} Though the dissenters emphasized the potential for union interference with the employee vote-casting, I pointed to the history of the Railway Labor Act (RLA), covering the railroads and airlines,\textsuperscript{46} where the postal ballot is the rule and not the exception, and to the virtual absence of objections to union conduct under the RLA as well as the NLRA.\textsuperscript{47}

Because this view did not carry the day in the Clinton Board, it seems appropriate for Congress to provide more substantial, explicit discretion, at a minimum, for the Board to order postal ballots along the lines that I propounded in my \textit{San Diego Gas & Electric} concurring opinion. This approach should not be viewed as an alternative to expedited elections. It is possible, and indeed even more practicable, for the Board to order the election within the same abbreviated period subsequent to the filing of a petition for representation, as provided for in Ontario and British Columbia, and at the same time allow the employees to have a week or two to cast their ballots. The important point here is that ballots actually be mailed out within the expedited period. From that point on, both the employer and the union are "prohibited from making election speeches on company time to massed assemblies of employees."\textsuperscript{48} If the union breaches confidentiality or interferes

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\item[44.] \textit{Id.} at 1148 (Chairman Gould, concurring).
\item[45.] \textit{Id.} at 1148 n.3.
\item[46.] \textit{Id.} at 1147 n.1.
\item[47.] The Board briefly surveyed the history of the RLA in \textit{London's Farm Dairy, Inc.}, 323 N.L.R.B. 1057, 1058 (1997).
\item[48.] In \textit{Or. Wash. Tel. Co.}, 123 N.L.R.B. 339, 341 (1959), the Board found: Henceforth, the Regional Director will give the parties written notice setting forth the time and date on which "mail in" ballots will be dispatched to the voters, and also setting forth a terminal time and date by which the ballots must be returned to the Regional Office. Such notice will be given the parties at least 24 hours before the time and date on which the ballots will be dispatched by the Regional Office. Employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within the period set forth in the notice, i.e., from the time and date on which the "mail in" ballots are scheduled to be dispatched by the Regional Office until the terminal time and date prescribed for their return. Violations of this rule by employers or unions will cause an election to be set aside whenever valid objections are filed.

The employer obligation to provide the union with names and addresses of employees under \textit{Excelsior Underwear, Inc.}, 156 N.L.R.B. 1236 (1966), will
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in some other way with the employees’ free choice, that ought to be a violation of the statute and perhaps a basis for setting aside the results of the election under the current Act and under the amendments to be enacted.

III. FIRST CONTRACT ARBITRATION

Under the NLRA, a contract may not be imposed through an NLRB remedy, although the parties are obliged to enter into a written agreement when they have negotiated an agreement and one side refuses to put it in writing in the form of a collective bargaining agreement. Under EFCA, unresolved disputes relating to wages, hours, and working conditions may proceed to arbitration in first contract bargaining. This is so-called “interest arbitration,” relatively unknown and rare in the United States, where the arbitrator has authority to impose an award that provides for a new contract—in contrast to “grievance” or “rights” arbitration where the impartial third party is interpreting the agreement that has been negotiated among the parties. The fact that this is so unusual does not argue against its legislative adoption. But, along with other factors, it ought to make Congress particularly cautious and very careful in devising its approach.

have to be expedited under a new statute providing for expedited elections, i.e., within two or three days subsequent to the filing of a petition.

52. Under NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958), the parties are obliged to bargain to the point of impasse over a mandatory subject of bargaining. Interest arbitration—in contrast to grievance arbitration—such as is contemplated by EFCA, providing for arbitral resolution of future contract terms, is a nonmandatory subject of bargaining because it substitutes a third party for labor and management in the collective bargaining process. NLRB v. Columbus Printing Pressmen & Assistants’ Local 252, 543 F.2d 1161 (5th Cir. 1976); La Crosse Elec. Contractors Ass’n, 271 N.L.R.B. 250 (1984); Sheet Metal Workers Int’l Local 59, 227 N.L.R.B. 520 (1976). However, though the circuits are split, interest arbitration awards in the private sector are judicially enforceable generally. See, e.g., Chattanooga Mailers Local 92 v. Chattanooga News-Free Press, 524 F.2d 1305, 1315 (6th Cir. 1975); Chattanooga Mailers Local 92 v. Chattanooga News-Free Press, 524 F.2d 1305, 1315 (6th Cir. 1975); Winston-Salem Printing Pressmen Local 318 & Assistants’ Local 318 v. Piedmont Publ’g
And when the Senate addresses this bill it must make certain that particular criteria, e.g., comparability in the industry and in related industries and cost of living increases, are explicitly written into the statute. To fail to do so is not only bad policy but also may render the arbitration provisions in EFCA unconstitutional.\(^5\)

Under EFCA, collective bargaining is to commence not later than ten days after a written request for bargaining subsequent to certification, and if no agreement is reached within ninety days, the parties may initiate third-party intervention through mediation from the Federal Mediation and Conciliation Service, which, if unsuccessful, may refer the unresolved dispute to an interest arbitration panel. Thus, the commencement of collective bargaining, the use of mediation culminating in arbitration, is to take place over a four-month period—a period of time considerably more abbreviated than that contained in the NLRA that, through its protection of the relationship, bars virtually any challenge to the union’s majority status during a full certification year and, thus, assumes that collective bargaining will take place during this time.\(^5\) On the one hand, it is important that bargaining move forward promptly. On the other hand, the parties are often confronted with numerous issues and considerable challenges in addressing them for the first time as they make a new contract and a new relationship. Quite clearly this matter needs to be addressed, for as Professors Ferguson and Kochan have found, only fifty-six percent of newly certified bargaining units are successful in reaching a first contract—and only thirty-eight percent are able to

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54. In Brooks v. NLRB, 348 U.S. 96 (1954), the Supreme Court held that the presumption that the union holds majority status is irrebuttable during the first year after certification. The implication is that first contract bargaining will continue for at least a year and the fledgling bargaining relationship deserves protection during that period. But EFCA contains a much more accelerated time period.
do so within the first year. Even the Bush-appointed General Counsel of the NLRB has noted that "initial contract bargaining constitutes a critical stage of the negotiation process because it forms the foundation for the parties' future labor-management relationship."

Of course, some of the problems with first contract negotiations are exacerbated by Board and circuit court law that either make collective bargaining more difficult or do little to promote it. Illustrative of the latter is the so-called "surface bargaining" line of authority where the complaint is that the employer is simply going through the motions about meeting with the union but by its posture on all issues at the table evinces an unwillingness to consummate a collective bargaining agreement. EFCA will mandate injunctions against employer unfair labor practices during first year contracts as well as in the midst of organizing campaigns. Yet these first contract negotiation cases alleging an unlawful refusal to bargain are always more difficult to prove and are extremely fact-intensive. This suggests that other


approaches are important, including, as I discuss below, some limited availability of interest arbitration.  

Some of the former cases frequently consist of the so-called "duty to provide information" case law, which is part of the employer’s duty to bargain in good faith. In these cases, some of the most difficult litigation circles around the issue of whether parties have reached impasse so that the employer can unilaterally change working conditions, notwithstanding the presence of unremedied unfair labor practices that have occurred during the collective bargaining process itself. Other cases stem directly from a half-century-old Supreme Court decision authored by Justice Black, NLRB v. Truitt Manufacturing Co., where the Court held that the employer generally must open its books and disclose financial information when it claims an inability to pay. Said the Court:


62. 351 U.S. 149 (1956). Justice Frankfurter in his partial concurrence would have found:
The ability of an employer to increase wages without injury to his business is a commonly considered factor in wage negotiations. Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition[s]; employees have even voted to accept wage decreases because of such conditions.

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true of an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of [collective] bargaining, it is important enough to require some sort of proof of its accuracy . . . . We agree with the Board that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.63

But there are two problems here. The first is that sophisticated employers who really base their position on an inability to pay will not articulate it if they are concerned with opening their books. They may claim that other false or partially false reasons are the basis for their positions—e.g., a comparison between wages of other employers or wages in other industries. Obfuscation has been the direct result of the Truitt holding in all too many cases. Perhaps encouraged by more recent authority discussed below, some employers will baldly state that they simply want revenues to go elsewhere, i.e., profit margins rather than labor costs, instead of saying the magic words that require disclosure—"We have no resources to pay."

These sections [of the NLRA] obligate the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith. "Good faith" means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness, or even with what, to an outsider, may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination. The appropriate inferences to be drawn from what is often confused and tangled testimony about all this makes a finding of absence of good faith one for the judgment of the Labor Board, unless the record as a whole leaves such judgment without reasonable foundation.

Id. at 350–51.
63. Id. at 152–53.
The second and related problem is that the principle of Truitt is easy to state but difficult to apply, and for more than two decades the Board and the courts have given the principle a restricted meaning. Admittedly influenced by dubious case law developed by the Court of Appeals for the Seventh Circuit,\footnote{E.g., Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063 (7th Cir. 1988).} the Board has held that the employer’s position—that it cannot grant increases because to do so would place it at a competitive disadvantage—is not a claim of an inability to pay. And in recent years the Board has said:

[W]e note that the phrase “inability to pay” means, by definition, that the employer is incapable of meeting the union’s demands. That is, the phrase means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. ‘Inability to pay’ means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to nonsurvival in business.\footnote{AMF Trucking & Warehousing, Inc., 342 N.L.R.B. 1125, 1126 (2004).}

Accordingly, these two areas of the law have circumscribed robust and authentic negotiations and, thus, have not served the collective bargaining process well and have played a major role in producing the phenomena observed by Ferguson and Kochan. Yet, EFCA itself is not only badly out of sync with the period of time provided to negotiate a first contract under the Proposed Bill, but it also fails to take into account the complexity and length of the interest arbitration process itself.\footnote{See Shikha Dalmia, Op-Ed., The ‘Free Choice’ Act and Binding Arbitration, WALL ST. J., July 11, 2009, at A11; Paul Kersey, Card Check, Binding Arbitration and Employee Free Choice: The Arbitration Gamble, Feb. 27, 2007, http://www.mackinac.org/article.aspx?ID=8326.} Experience to date in the public sector indicates that these cases can take some time. Amongst the interest arbitrations that I have done was one between the Detroit School Board and the Federation of Teachers twenty years ago where hearings continued day and night for a week, detailed briefs were filed thereafter, and the arbitration board was required to meet and decide on the basis of voluminous submissions at the end of it all.\footnote{Sch. Bd. of Detroit v. Detroit Fed’n of Teachers, 93 Lab. Arb. Rep. (BNA) 648 (1989) (Gould, Arb.).} Though we cannot tolerate delays such as the fifteen months that apparently exist in the public sector in Michigan, framers of the law must realize that it will take considerable time and expense.

\footnote{E.g., Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063 (7th Cir. 1988).}
\footnote{AMF Trucking & Warehousing, Inc., 342 N.L.R.B. 1125, 1126 (2004).}
Even more important, EFCA is also flawed because it does not provide well for a necessary uncertainty about (1) the period of time that will pass before arbitration is invoked and also (2) the terms on which it will be available. If there is a time certain at which interest arbitration can be invoked, parties will simply maneuver in anticipation of the process and focus less upon the genuine task of voluntary collective bargaining. Moreover, the prospect of arbitration (particularly at a time certain) will frequently produce rigidity in the collective bargaining process because both sides will adopt relatively extreme positions, hoping that the third-party impartial arbitrator will split the difference in its favor.

The first problem can be addressed by providing uncertainty, albeit within the constraints of producing a collective bargaining agreement—in most instances through voluntary negotiation—that takes form at least within the certification year so that an incumbent union’s representative status is not rendered vulnerable.68 The Canadian provinces have generally imposed a “screen” as a barrier to be surmounted before the process is available. Some finding must be made by a mediator or an administrative agency that the parties are at impasse, that bargaining is not productive, or that there has been a pattern of conduct that obstructs collective bargaining thereby rendering it dysfunctional.69 Generally, the focus will be upon the employer, but the union, if it believes that it can obtain arbitration on terms more favorable than bargaining can render, may itself be responsible for the roadblocks. One way to reduce this potential problem is to diminish the incentive to arbitrate by providing that the award cannot replicate the union-negotiated rate in the industry or geographical area—or that it cannot mirror such a contract where the arbitrator or the institution (which plays a screening role) finds that the union bears some responsibility for the

68. Brooks v. NLRB, 348 U.S. 96 (1954). Once a collective bargaining agreement is negotiated—EFCA provides for an award of a contract with a duration of two years—the contract acts as a bar to a further challenge. General Cable Corp., 139 N.L.R.B. 1123 (1962), set the maximum time for such a bar at three years. The Board has refused to extend the period in which a contract acts as a bar to a representation petition from three to four years despite my contention that there has been a significant increase in the number of paper industry contracts with a duration of at least four years. Dobbs Int'l Servs., Inc., 323 N.L.R.B. 1159, 1159 (1997) (Chairman Gould, dissenting). American Seating Corp., 106 N.L.R.B. 250 (1953), had set the bar at the lesser period of the agreement and set a permitted maximum period (then two years).

bargaining breakdown. The latter consideration reflects a quasi-no-fault approach that has been accepted in Japan, but not the United States. The objective must be to make arbitration rare and collective bargaining the rule.

The second problem also relates to the bargaining process. If parties believe that the arbitrator will split the difference then there will be no incentive to compromise, an ingredient that is a prerequisite to reaching an agreement voluntarily. Here, the answer may be baseball arbitration or a variation on this theme. Baseball arbitration, adopted in a number of state jurisdictions, is so-called “final offer” arbitration where the parties must submit their final offers, and the arbitrator must select from one of the two. This approach has been incorporated in a number of public sector statutes that provide for interest arbitration in classifications where the strike cannot be tolerated, basically police, fire, and

70. WILLIAM B. GOULD IV, JAPAN’S RESHAPING OF AMERICAN LABOR LAW 89–93 (1984) (Japanese NLRB providing for conditional relief where both parties have misbehaved).

71. See ALASKA STAT. § 23.40.070(b) (2006) (compulsory arbitration for police, fire, correctional facility, and hospital employees); CONN. GEN. STAT. ANN. §§ 5-276a(e), 7-473c (West 2007 & Supp. 2008) (binding, item-by-item final-offer arbitration available at either party’s request after statutory period of negotiation for all state employees; mandatory after statutory period of negotiation for municipal employees); DEL. CODE ANN. tit. 19, §§ 1614–1615 (2006) (binding, total-package final-offer arbitration available at either party’s request or the mediator’s recommendation for police and fire employees); D.C. CODE ANN. §§ 1-617.02, .17 (2009) (compulsory binding, total-package final-offer arbitration after statutory negotiation period for all Washington D.C. employees when compensation is at issue; a variety of mechanisms are available in other cases); HAW. REV. STAT. ANN. § 89-11 (LexisNexis 2007) (compulsory binding arbitration for most state employees—including police and fire—after statutory negotiation period is the default rule; parties may stipulate their own impasse procedures that end in arbitration); 5 ILL. COMP. STAT. ANN. 315/14 (2005 & Supp.) (binding, item-by-item final-offer arbitration at either party’s request after statutory period of negotiation for security employees, peace officers, and firefighters); IOWA CODE ANN. §§ 20.22, 679B.15–.27 (West 2009) (binding, item-by-item final-offer arbitration available at either party’s request after statutory negotiation process for most public employees, including police; bargaining on behalf of firefighters in towns larger than 10,000 is probably governed by § 679B, which does not provide for binding arbitration); ME. REV. STAT. ANN. tit. 26, § 965 (2007 & Supp. 2008) (compulsory binding arbitration on issues other than salary, pension, and insurance after statutory negotiation process for public employees including police and fire employees; parties may agree to binding arbitration on those issues as well); MICH. COMP. LAWS ANN. §§ 423.231–247 (West 2001 & Supp. 2008) (compulsory binding item-by-item final-offer arbitration for police and fire employees); MINN. STAT. ANN. § 179A.16 (West 2006 & Supp. 2008) (binding final-offer arbitration at the request of either party for “essential employees,” a designation which includes police and fire employees; the parties may choose item-by-item or total-
sometimes teachers in public education. There is no scope for compromise inasmuch as the arbitrator must select one or the other, thereby inducing the parties to become reasonable in the final position that they put forward in the hope that the arbitrator will select theirs as the best one. This appears to have worked very well in baseball salary disputes (I was involved in some of them in 1992–93), but of course the difference between salary arbitration and the collective bargaining process is that in baseball salaries


See DEL. CODE ANN. tit. 14, §§ 4014–4015 (binding, total-package final-offer arbitration available at either party’s request or the mediator’s recommendation for public school employees); D.C. CODE, §§ 1-617.02, .17 (2006) (compulsory binding, total-package final-offer arbitration after statutory negotiation period for all Washington D.C. employees when compensation is at issue; a variety of mechanisms are available in other cases); IOWA CODE ANN. § 20.22 (West 2001) (binding, item-by-item final-offer arbitration available at either party’s request after statutory negotiation process for most public employees including teachers); ME. REV. STAT. ANN. tit. 26, § 965 (2007 & Supp. 2008) (compulsory binding arbitration on issues other than salary, pension, and insurance after statutory negotiation process for public employees, including teachers; parties may agree to binding arbitration on those issues as well); N.M. STAT. ANN. § 10-7E-18 (West 2003 & Supp. 2008) (binding, total-package final-offer arbitration available at either party’s request after statutory negotiation period for public employees); R.I. GEN. LAWS §§ 28-9.3-1–16 (2006) (arbitration available at either party’s request; the decision is binding on all issues “not involving the expenditure of money”).
there is simply one issue, i.e., the salary, and the arbitrator is authorized to only write in one or the other proposal to the individual contract of employment.

In collective bargaining there are many issues, and the process is more complicated as a result of this fact. But if the arbitrator selects a series of proposals item by item much of the purpose of final offer arbitration will be undermined because the parties may take unreasonable positions on the items that they do not need to have adopted or are less serious about in the hope that the arbitrator will be inclined to split the difference in their favor by adopting their position on the contract clauses that are important to them where they adopt reasonable positions. In other words, item-by-item final offer arbitration lends itself to adoption of the very tactics that the process is designed to combat. On the other hand, if the arbitrator is restricted to selecting from an entire package put forward by either side—a position that seems preferable to an item-by-item approach—the potential for providing an award that includes some unsuitable positions increases. This is particularly so when there are a large number of issues in dispute, a phenomenon ever more likely in first contract negotiations and arbitration. Intrinsically, interest arbitration is difficult enough because this process involves issues made more difficult by virtue of the fact that the arbitrator is legislating for the parties rather than operating under the standards that the parties (always infinitely more expert than the arbitrator himself) have provided.

One approach, designed to take into account the need to get the parties to adopt a series of positions on an entire package and at the same time recognizing the perils involved in it, would be to allow the third party to make recommendations as a fact-finder does under some public employee labor statutes.\(^7\) Then the statute could explicitly permit the parties to negotiate for a limited period of time, e.g., ten to fourteen days subsequent to the recommendation. The parties, upon completion of their bargaining and perhaps with the assistance of the third party who can act as a mediator, may then propose modifications to the initial set of recommendations in the event that they are unable to resolve their differences within the time period established. The arbitrator, at this point operating within a framework that presumes that his award is the appropriate one to impose, would render an award that nonetheless takes into account the subsequent bargaining and

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positions of the parties.\textsuperscript{74} Perhaps in most instances under these circumstances it would not be necessary to come back to the third party, with labor and management resolving their differences on their own initiative. But, in any event, the third-party arbitrator, having seen the parties close up as a mediator subsequent to his or her initial recommendations, would have a better sense of what is practicable in light of subsequent negotiations and proposals.

IV. REMEDIES, SANCTIONS, AND INJUNCTION PROCEDURES

In this arena, now more than ever, the overriding theme is delay in the administrative process. Delay makes the awards of back pay and reinstatement to workers discriminatorily dismissed in union organizational campaigns by the Board a "license fee" that the employer must pay, which is considerably more inexpensive than negotiating a collective bargaining agreement with the union. The cost of increased wages and fringe benefits will be in excess of any back pay award provided to unlawfully dismissed workers. Moreover, the problem is exacerbated because of the considerable delay in the administrative and judicial process when workers have "scattered to the winds," and, even if they can be located, may have lost interest in the union organizational activity because of the absence of any collective bargaining process and the failure to change employment conditions, which are frozen until the union activity is resolved. Dismissed workers may not avail themselves of reinstatement under these circumstances and may not even seek back pay when faced with the prospect of future litigation to determine whether the amount in controversy is diminished by interim earnings or that which could have been obtained through reasonable diligence—and the burden of proof to show mitigation that the Bush II Board has thrust upon the General Counsel to prove entitlement.\textsuperscript{75}

This problem is compounded by the fact that a union, whose organizational activities have triggered discriminatory conduct engaged in by the employer, gets a satisfactory remedy only when it speaks to the collective interest, i.e., the imposition of recognition on the basis of authorization cards where employer misconduct contaminates the electoral process and thus makes the secret ballot box election an ineffective test of employee free choice. The Board—and particularly the circuit courts of

\textsuperscript{74} This suggestion is inspired by and akin to ideas propounded by Professor Goldberg in Stephen B. Goldberg, \textit{A Modest Proposal for Better Integrating Collective Bargaining and Interest Arbitration}, 19 LAB. LAW. 97 (2003).

\textsuperscript{75} See St. George Warehouse, 351 N.L.R.B. 961 (2007).
appeals—have circumscribed this remedy, which emerges only subsequent to convoluted unfair labor practice proceedings before an administrative law judge, the Board, and ultimately the circuit courts themselves through which delay is extended and union support consequently dissipated. Finally, other forms of compensatory remedies for the union are relatively insignificant—for it is only through collective bargaining that the union can establish itself and that freedom of association can be respected.

What are the best answers to this problem? In the first place, EFCA is right to enhance the Board's authority to obtain injunctive relief in employer unfair labor practice cases arising in union organizational campaigns or first contract negotiations. The statute as presently written mandates the Board, through its regional officials, to obtain injunctive relief against certain union unfair labor practices in an expeditious fashion. On the other hand, injunctions against employer unfair labor practices are treated in a fairly cumbersome manner. Here, the question of whether injunctive relief can be obtained is within the Board's discretion—and the matter must go to the Board in Washington, D.C., after its investigation at the regional level. Thus, EFCA is right to fashion some measure of symmetry between injunctions against employer and union unfair labor practices. But because

76. See cases cited supra note 32.
77. See, e.g., Tiidee Prods., Inc. v. NLRB, 502 F.2d 349 (D.C. Cir. 1974) (refusing to award litigation expenses even while upholding sanctions for a "clear and flagrant" violation), cert. denied, 421 U.S. 991 (1975); Hecks, Inc., 215 N.L.R.B. 765 (1974) (refusing, on remand from the Supreme Court, to award litigation expenses where the court of appeals in the earlier proceeding—reversed by the Court—had awarded them). But see NLRB v. Unbelievable, Inc., 71 F.3d 1434 (9th Cir. 1995) (sanctioning an employer and its counsel for filing a frivolous appeal by ordering them to pay attorneys' fees and double costs).
78. Employee Free Choice Act of 2007, H.R. 800, 110th Cong. § 4 (2007). This provision of EFCA would extend the expedited injunction process to any employer interference with the rights of employees set forth in Section 7 of the NLRA.
79. At present, in response to many types of unfair labor practice complaints against a union, "the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred." 29 U.S.C. § 160(l) (2006).
80. In response to other types of unfair labor practice complaints—including virtually all that can be filed against an employer—"[t]he Board [merely] shall have power . . . to petition any [jurisdictionally appropriate] United States district court . . . for appropriate temporary relief or restraining order." 29 U.S.C. § 160(j) (2006).
these injunctions against employers are extraordinarily labor-intensive, they will necessitate an outlay of expenditures and appropriations by Congress far beyond anything anticipated at present. This means that injunctions, however important they have been in the Board’s history prior to any amendments, will probably assume a role that is secondary to the actual sanctions that can be imposed against such conduct.

The approach of EFCA on sanctions, i.e., to award triple back pay, seems to be one that provides a good deterrent for statutory violations—or at least a deterrent that is much superior to that which exists under the law today. This should reduce the “license fee” phenomenon and make the remedies more of a deterrent.\footnote{81}

The deterrent may be even more considerable in connection with another feature of EFCA, i.e., the provision of up to $20,000 fines that may be imposed for each violation. This kind of approach is long overdue and should have been available to the Board in the past when the Supreme Court declared that undocumented workers, while employees within the meaning of the Act and thus entitled to its protection,\footnote{82} could not obtain back pay relief.\footnote{83} Fines would have been a more than adequate surrogate for back pay awards, especially given the difficulties in finding such workers who fear deportation as the result of employer retaliation and who are afraid to come forward and protest in any event.\footnote{84}

But there are other aspects of the delay issue that have not obtained the attention of EFCA’s authors and that should. The first is that the problem of delay in the all-important representation cases remains a significant one because of the fact that employers can litigate disputed issues in representation proceedings after they have lost before the Board by simply refusing to bargain, thus raising the very same issues through the unfair labor practice machinery that have already been resolved in representation matters. An amended statute should make the Board the final

\footnote{81} But the mitigation principle contained in \textit{Phelps Dodge Corp. v. NLRB}, 313 U.S. 177 (1941), which EFCA presumably leaves intact, will diminish and delay any award. (I am indebted to one of my research assistants, Mike Scanlon, for reminding me of this point.)


arbiter of these disputes and preclude appeals to the courts thereafter. The initial objective in the Act was to provide an expeditious avenue for the resolution of representation cases because they needed special and prompt attention, but this goal has been substantially circumvented through the availability of unfair labor practice cases. The Board has attempted to address this with summary proceedings through which relitigation of representation issues is dealt with on the fast track. But after the fast track is completed, the courts are still available, and Congress, as part of any amendments to the Act, should deny this avenue so that the statute works more effectively.

V. LAW REFORM PROPOSALS ON NLRB APPOINTMENTS

A second aspect of delay that has not received attention from EFCA relates to the appointments process. This matter has created difficulty in the past two to three decades as there has been considerably more polarization between labor and management and Democrats and Republicans. Said Colby College Professor G. Calvin Mackenzie:

What is most distressing ultimately is the transcendent loss of purpose in the appointment process. The American model did not always work perfectly, but it was informed by a grand notion. The business of the people would be managed by leaders drawn from the people. Cincinnatus, in-and-outers, non-career managers—with every election would come a new sweep of the country for high energy and new ideas and fresh visions. The [P]resident’s team would assume its place and impose the people’s wishes on the great agencies of government. Not infrequently, it actually worked that way.

But these days, the model fails on nearly all counts. Most appointees do not come from the countryside, brimming with new energy and ideas. Much more often they come from congressional staffs or think tanks or interest groups—not from across the country but from across the

86. See generally AFL v. NLRB, 308 U.S. 401 (1940).
87. GOULD, LABORED RELATIONS, supra note 84, at 19–21.
street: interchangeable public elites, engaged in an insider's game.\textsuperscript{88}

As Professor Mackenzie has noted, the appointments made to the Board in the past few decades have been disproportionately "inside the Beltway" appointments where connections on Capitol Hill and with lobbying organizations are valued more than previously obtained expertise in the field of labor-management relations and the law. Proceeding alongside this phenomenon has been the recently devised so-called "batching" method of appointment through which a package of nominees is confirmed together, which both labor and management and Democrats and Republicans can support.\textsuperscript{89}

Until 1994, when I was confirmed as Chairman and two other Board Members and the General Counsel were simultaneously appointed and confirmed due to Senator Nancy Kassebaum's opposition to me, there had been no batching of confirmations in fifty-one years after the Taft–Hartley amendments increased the number of Board members from three to five, therefore necessitating the simultaneous appointment of a Democrat and Republican in 1947. For the past fifteen years, i.e., during the Clinton and Bush II administrations, both Democratic and Republican Congresses have followed the Kassebaum approach. Regrettably, the Obama Administration—which campaigned on a platform of "change"—appears to adhere to the new status quo of "batching."\textsuperscript{90}

\begin{footnotes}
\item[89] This "batching" is associated with a polarization both between labor and management as well as between Democrats and Republicans, which has lead to a two-member Board in 2008 and 2009. On the question of whether such a Board is lawfully constituted, see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), \textit{petition for cert. filed}, (Sept. 29, 2009) (No. 09-377); New Process Steel, LP v. NLRB, 564 F.3d 840 (7th Cir. 2009), \textit{petition for cert. filed}, (May 22, 2009) No. 08-1457); Snell Island SNF, LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009), \textit{petition for cert. filed}, (Sept. 11, 2009) (No. 09-328); Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36 (1st Cir. 2009), \textit{petition for cert. filed}, (Aug. 18, 2009) (No. 09-213). In my view, the opinion of Judge Cabranes in \textit{Snell Island} is the most well-reasoned one, reflecting the policies of the Act.
\item[90] \textit{Acorn's Ally at the NLRB: Obama appoints an SEIU man with ties to Blago}, WALL ST. J., Oct. 15, 2009, at A16 ("The NLRB has both GOP and Democrat members, and nominees are typically packaged together to avoid hearings.")
\end{footnotes}
This policy should be abandoned. For, again, Professor Mackenzie has described this process well:

The tendency to select appointees to an agency as teams and to divide up control over the choices has become the norm in Washington. The Senate, in fact, often delays confirmation until several nominations to the same agency accumulate, thus allowing it to require that the President include some nominees who are effectively designated by powerful Senators. This kind of batching of nominations rarely happened before the present date. Even on the regulatory commissions, whose original statutes require that only a bare majority of appointees can be from one party, a vacancy in an opposition party chair was usually filled by the President with an enrollee in the opposition party who supported the President. These appointments, common for most of this century, came to be known as "friendly Indians" and were routinely confirmed by the Senate even when it was controlled by the opposition party. But they allowed the incumbent President to control the appointment process and to shape the majorities on most regulatory commissions.

That is nearly impossible these days. The membership of the regulatory commissions has become little more than the sum of the set of disjointed political calculations. Concerns about fealty to leadership, effective teamwork, and intellectual or ideological coherence play almost no part in the selection of regulatory commissioners. The juggling of political interests dominates. That we as a nation often get inconsistent and incoherent regulatory policies should be no surprise to those that follow the shuffling and dealing that produces regulatory commissioners.

An additional complicating factor in "batching" is that the Republicans do not have the same incentive to make a deal regarding a group of nominees for a particular agency. This is especially so of an agency like the National Labor Relations Board which operates under statutory principles in which a large number of Republicans do not believe. Accordingly . . . all of the incentives are weighted toward crippling the agency.\(^9\)

This phenomenon is directly linked to the delay in Washington, where the statutory loopholes exploited by employers have dilated

\(^9\) E-mail from Professor G. Calvin Mackenzie, supra note 88; MACKENZIE, supra note 88.
into a “black hole” of administrative delay into which cases descend—particularly when they reach the Board in Washington. There are, after all, time limits established by the Board for administrative law judges and Regional Directors who handle cases as they arise throughout the region. There are none for the Board operating in Washington, D.C., though I unsuccessfully advocated such a reform when I was Chairman—as well as other reforms that would have the effect of producing cases even though the Board Members wanted more to write subsequent to the issuance of the majority opinion. As much as any other factor, the decline in case production and increase in delay during the last years of the Clinton Board and the Bush II Board had to do with reticence by Board Members to decide cases because a decision may have exposed the Board Member to congressional hostility, which would have interfered with reappointment prospects at the end of what is usually a five-year term. As I have written elsewhere, only when I belatedly and reluctantly began to speak out on this issue did Congress seek the identity of recalcitrant Board Members. Only when I provided members of Congress with permission to make direct telephone calls to the offending individuals were the cases in question actually disgorged. They could have been released many months, if not years, in advance of this painful process.

Production has continued to decline even more so in this century, notwithstanding the fact that the caseload itself has diminished in the wake of disillusionment with the Board. Even though President Obama has appointed two outstanding union lawyers as the Democratic nominees, the Obama administration has bought into the idea so roundly condemned by Professor Mackenzie that it is required by this fifteen-year tradition to only appoint Republican members that have the imprimatur of the Republican congressional leadership—even though this policy emerged in the Clinton era when President Clinton had no choice because of the control of Congress by the opposition party. This adherence to the package concept means delay in the appointments and in the future course of an Obama Board, which had no confirmation hearings scheduled as of late-2009 because of the failure of the Republicans to come forward with someone

93. Id. at 61–62.
95. Id. at 280–86.
acceptable to them and the President! Now that a Republican has been “batched” with the Democratic nominees appointed by President Obama, the Republican nominee turns out to be the Republican Labor Policy Director in the Senate Labor Committee. Professor Mackenzie’s criticisms remain valid in 2009, 2010 and beyond. Institutional memory seems to stop at the fifteen-year-old water’s edge.

Abandonment of this policy that has eroded the effectiveness and mission of the Board would have been a good first step by the Obama Administration. But it has moved down a different course. Similarly, reduction in the Board membership from five to three would make the Board more focused and reduce the potential for “holds” by incumbent Board Members who, without explanation, will not produce decisions. This remains true even if the statute, through revised recognition procedures as well as interest arbitration, becomes more complicated and the caseload is increased at the same time. But even more importantly, I am of the view that statutory amendments relating to the term of office and prospects for reappointment or lack thereof will be most likely to improve Board standards.

There have been too many cases, such as *Goya Foods of Florida*, that have languished at the Board for almost a decade because of a lethargic unwillingness of the Board to move. I have long advocated a bar against reappointment to the Board, which would reduce the incentive to maneuver in anticipation of adverse congressional reactions. If reappointment was denied by statute, the appointee would know that there is nothing that he or she could do to extend their Washington service at the Board, even though they might want to extend it elsewhere in another government institution. However, it must be admitted that Washington is inherently dysfunctional and that this reform might well simply turn the attention of Board incumbents to other federal positions.

At the same time, I am of the view that the term of office should be extended to eight years so that the public gains from the acquired expertise and the inevitable turnover produced by an inability to reappoint does not interfere with the Board’s efficiency. All of this, it seems to me, will go some way towards depoliticization of the Board, break the appointment of

Washington insiders described by Professor Mackenzie that continues onward through the present, and induce service on the part of a geographically diverse group of the best people who are willing to serve for the very best reasons. As I have previously written, the Board needs those, like Cincinnatus, who will depart at the end of the day rather than cling to the trappings of office in Washington. If a variety of measures, including an attack upon the "black hole" phenomenon of inertia in Washington itself, are undertaken, the Board's credibility in the circuit courts will inevitably improve, regardless of the panel of reviewing judges.

Congress could have then, and should now, enact time limits requiring the Board to issue decisions within three to four months. It could follow the example of California, which requires its agencies (1) to decide whether to take action on an administrative law judge's proposed decision within 100 days of its receipt and (2) to issue its final decision within 100 days of this. There is no earthly reason why the NLRB cannot meet these standards, and they should be part of labor law reform. This would avoid the growing embarrassment to which the Board has subjected itself.

The growing perception is well reflected in the comments of Judge John Henry Noonan of the Court of Appeals for the Ninth Circuit:

No decisionmaking body is totally immune from the dilatory virus, and delay is sometimes the too human way of grappling with the thorny issue of policy. Nonetheless, the Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardship it is causing . . . . We call [the doctrine that extraordinary delay is grounds for refusing to enforce an administrative order] to the Board's


100. CAL. GOV'T CODE § 11517(c)(2), (c)(E)(iv) (West 2005 & Supp. 2009). (I am grateful to Professor Michael Asimow for bringing this to my attention.) Similarly, the Sarbanes-Oxley Act contains a provision allowing a whistleblower to bring a private action at law or equity for de novo review in a federal district court if the Secretary of Labor does not issue a final decision on a complaint within 180 days of its filing. 18 U.S.C. § 1514A(b)(1)(B) (2006). (I am grateful to Mike Scanlon for bringing this to my attention.)

101. In one case, a writ of mandamus was successfully sought and obtained from the Court of Appeals for the District of Columbia requiring the NLRB to issue a decision that was pending with the court for seventeen years, within only a twelve-day time period. See In re Pirlott, 2007 U.S. App. LEXIS 1352 (D.C. Cir. Jan. 18, 2007). The NLRB obeyed. Scheiber Foods, 349 N.L.R.B. 77 (2007).
VI. THE PROMOTION OF VOLUNTARY INITIATIVES

An amended NLRA ought to promote voluntary initiatives to resolve many of the issues that come before the Board at present. Regrettably, the Bush II Board has done exactly the opposite by discouraging and, one might say, precluding voluntary recognition procedures without the authorization of the Board. At the same time, as Professor Laura Cooper has written, the Board’s processes are substantially superior to those that are the subject of private negotiation. In part, this is a matter of institutional resources—an arbitrator resolving recognition issues usually does so alone without any staff, independent or otherwise. Whatever finally emerges in EFCA or in another statute that serves the same basic purpose, it is clear that the Board can do a better job resolving card check procedures and disputes about secret ballot box elections than private parties when it comes to issues such as the unit, eligibility to vote, and disputes about the cards (if that is what the basis for recognition is). As noted above, in some instances it seems to me that the statute itself can address the problem of delays in representation matters through expeditious elections, injunctions, and sanctions, as well as by the denial of appeals.

But disputes arising out of union organizing complaints could be handled by the parties themselves through appointment of an impartial third party to either issue recommendations or binding decisions. What is particularly important here is that “[t]he path to systemic reform . . . probably lies not only in easing agency workloads and increasing their resources, but also in recognizing that trial-type procedures are not necessarily the best or only fair means of reaching administrative decisions.” It is unlikely that Congress will legislate procedures that preclude provisions for

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hearings—at least it is unlikely in 2009. But Congress can encourage the parties to do it for themselves!

And the roadmap is available. This is the approach, i.e., investigations without hearings, undertaken by FirstGroup, a major British multinational with 110,000 employees in the United States and Canada. In so doing, it has relied upon the Board to resolve recognition itself through the secret ballot box election, thus avoiding some of the problems identified by Professor Cooper but at the same time establishing an independent monitor mechanism to resolve freedom of association complaints arising out of union organizational efforts. The Freedom of Association (FOA) policies were derived from the company’s social responsibility policy and explicitly state that its protection for employees is not only rooted in international law, but also is stronger than those in the NLRA—though employees and union organizers may always file a charge with the NLRB at any point. The process does not provide for a hearing but rather an investigation conducted by the independent monitor staff with public recommendations to the company and complaining party within thirty to sixty days subsequent to the filing of the complaint. The company has an additional thirty days to respond to the recommendations and, in a substantial majority of the cases, has accepted the recommendations.

The advantages to this process are obvious. The first is the remarkable speed within which complaints are processed, and, while the independent monitor does not possess affidavits or the authority to issue subpoenas, the company and the relevant unions have thus far complied with the inquiries of a neutral party who, in contrast to an arbitrator in card check cases, has an investigative staff. Thus, the discovery problem alluded to above is overridden. Additionally, in contrast to the NLRA—which is the only modern employment statute that is not posted in company facilities—extensive publicity about freedom of association rights and procedures is provided through enclosed bulletin boards with complaint forms and related FOA information, as well as a DVD for the company’s 110,000 employees.

This approach is in some respects similar to the settlement judge process created during my chairmanship at the Board when administrative law judges attempted to resolve unfair labor practice charges without the need for further litigation and with both sides

free to pursue the available statutory avenues if the effort was unsuccessful. It seems to me that making this option available in the first instance could similarly resolve these issues within a matter of weeks or months, in sharp contrast to the years of NLRB litigation that are so frequent. If the controversy culminates in a formal opinion, such as the kind of recommendations that are provided for in the FirstGroup machinery, it is possible that written recommendations could be taken into account where one party accepts them and the other does not—perhaps in some measure akin to arbitration decisions.\(^{109}\) The FirstGroup policy, as well as other voluntarily devised procedures, requires that the employer not engage in anti-union speech, whether it be of the coercive or non-coercive variety—and captive audience speeches that employees are compelled to attend in order to listen to the employer’s message are prohibited as well. Anything that emanates from the employer and is derogatory of the union is prohibited.

These approaches do not need to be replicated \textit{in toto} in order to find statutory favor. But it seems to me that the new amendments to the Act ought to promote adherence to such policies in the interest of both speed and voluntary dispute resolution. They allow a laboratory to develop, which might ultimately influence NLRA provisions as well. If the new procedures work well, Congress could consider the abbreviation or elimination of full-fledged hearings under some circumstances.

\section*{VII. Jurisdiction over Small Employers}

Section 14(c)(2) of the Landrum–Griffin amendments enacted in 1959 were a direct response to the Eisenhower Board’s states’ rights positions through which it vacated jurisdiction over particular industries that it deemed to be local in nature or appropriate to state resolution—where, in its view, the amount of

\footnotesize{109. The appropriate NLRB deference is contained in Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955) (deference to arbitration decisions), and Collyer Insulated Wire, 192 N.L.R.B. 837 (1971) (deference for arbitration decisions); see also Mobil Oil Exploration & Producing, U.S., Inc., 325 N.L.R.B. 176, 180 (1997) (Chairman Gould, concurring) (“In order to obtain deference under the statute, arbitrators should consider, and be competent to consider, the unfair labor practice controversy which would otherwise be adjudicated by this Agency. In this respect, some of the same policy considerations mandated by the Supreme Court in employment discrimination and individual employment contract litigation are applicable to the National Labor Relations Act.”). The same standards have been applied to joint union-employer committees. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Gen. Drivers Local Union No. 89 v. Riss & Co. 372 U.S. 517 (1963).}
business done in interstate commerce was simply too small for federal government involvement. Out of this policy came the "no man's land" created as the result of Supreme Court decisions that precluded the exercise of state jurisdiction over subject matter that the Supreme Court found that Congress had deemed to be within the realm of federal regulatory authority and thus preempted. Again, section 14(c)(2) was designed to reverse the Eisenhower Board's policy of states' rights in that it froze the jurisdictional yardsticks of the Board and consequently precluded the agency from declining jurisdiction over more than it was declining at the time of the 1959 amendments.

But the problem here, a half-century later, is that inflation has changed dollar values so that the effect of the jurisdictional yardsticks involves the Board in regulation of employers much smaller than those within Congress' contemplation in 1959. In the 1990s, the Republican Congress urged my Board to revise the guidelines, but I pointed out to them that this process could only be undertaken by Congress itself. My views were not always well

111. During my time as Chairman, I had the following exchange with Representative Porter while testifying at a hearing before the Appropriations Committee:

[Mr. Porter:] Let me tell you that I'm also very concerned about the proposed NLRB rule on single bargaining units. I frankly do not understand why an agency with a caseload like yours would want to go to a rule at all. It seems crazy, frankly. I know that probably Mr. Bonilla has already discussed it with you. I understand that you generally justify the rulemaking in terms of increasing efficiency and reducing litigation. But let me suggest to you perhaps a more reasonable, fair, and effective way of reducing your caseload. In 1959, the NLRB established jurisdictional thresholds to screen out cases with very small economic impact. The dollar amounts of these thresholds have not been updated for inflation in almost 40 years. I suggest that you update the thresholds. As an example, in 1959 the NLRB declined jurisdiction over any non-retail business with less than $50,000 in interstate commerce. Adjusted for inflation, that $50,000 is now $262,000. Just as the Board declined jurisdiction for businesses under $50,000 in 1959, so it should now decline jurisdiction for any business less than $262,000.

Can you tell us for the record for each year 1990 to 1995 how many cases over which the NLRB exercised jurisdiction would not have merited NLRB consideration if the thresholds had been updated to the Consumer Price Index?

Mr. Gould: Congressman, I cannot tell you how many cases, although I will—

Mr. Porter: You can do that for the record, can you not?

Mr. Gould: I think I can do it for the record. I will certainly attempt to do it for the record. I think that you raise in your comments three points. If I may, Mr. Chairman, I would like to be able to respond to
received by the Republican members of the House Labor Appropriations Committee. Subsequently, their deregulatory zeal diminished, even prior to their loss of congressional control, and

them. Let me take the last first. The question of asserting jurisdiction is something that Congress decided for us through the Landrum-Griffin Amendments of 1959. The jurisdictional yardsticks which were last revised in 1958 were frozen in effective in the Landrum-Griffin Act of 1959. Only a revision of the proviso in section 14(c)(1) would allow us to decline jurisdiction by virtue of increasing the jurisdictional yardsticks along the lines that you refer to. Section 14(c)(1) contains a proviso which precludes the Board from declining jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing on August 1, 1959. As you know, that came out of a very difficult period in the 1950s of detailed litigation arising under preemption doctrine and was part of the compromise the Congress arrived at.

Mr. Porter: We would disagree with your interpretation of that section and believe that it was never written with that understanding because in 1958 there was no inflation in the economy; that you could interpret that more broadly.

Mr. Gould: Not only do my predecessors agree with me, including Chairman Dotson who was appointed by President Reagan, but the House Subcommittee on Government Operations in a statement that it issued in 1984 expressed a similar point of view. From a policy point of view, it was also noted Member Zimmerman’s view that if we begin to deny jurisdiction, of course that will in and of itself be a litigation-producing device which will expend more of our resources. I might say—

Mr. Porter: Let me interject if I may, Mr. Gould, that you could suggest this to the authorizing committee of jurisdiction and I’m certain that they would be interested in listening. Of course, this would not leave the parties without recourse. The States would have jurisdiction, would they not?

Mr. Gould: If Congress changed the law, States—

Mr. Porter: In other words, since 1958 inflation has grown and we have gobbled up more and more jurisdiction that was traditionally left to the States previously. Why not go back to where Congress thought it ought to lay in 1958?

Mr. Gould: That would be a policy matter that Congress might want to revisit and reconsider. The pros and cons of that, Mr. Chairman, are detailed and something that the appropriate congressional committee may want to revisit.

Hearings Before a Subcomm. on Appropriations, House of Representatives, 104th Cong., 1289–91 (1997). See also id. at 1299–1301 (exchange between Representative Istook and Chairman Gould on jurisdictional thresholds).

there the matter has been left undisturbed since. However, even though they were wrong on the law, i.e., only Congress, not the Board, could provide that more jurisdiction be declined or withdrawn, their position may nonetheless be good policy. The effect of the freeze coupled with a half-century of inflation has been to bring many very small employers within the Board’s jurisdiction—employers who may be beyond the reach of other regulatory statutes that frequently establish jurisdiction over employers who employ a particular number of employees.

Now, as part of comprehensive labor law reform, small employers concerned about the impact of new, more effective labor legislation should renew this issue. The Board’s jurisdictional yardsticks could and should be indexed for inflation, now and in the future, thus leaving regulation within the hands of the states. The major question today, as in 1959, is which law applies: federal or state? The weight of authority at present is that the state courts are free to apply state law but are not required to do so.\(^{112}\)

This approach, if retained as part of the 2009 or 2010 amendments, has the dual virtues of taking new jurisdiction away from the NLRB at a time when labor law reform could substantially increase its caseload and court activity at the same time that its membership is diminished from five to three—and would allow the states to act as laboratories, as Justice Brandeis once advocated,\(^{113}\) to go beyond the protections afforded under the NLRA or amended federal law for small employers.\(^{114}\) For instance, the states could devise statutory machinery that would allow employees to bring complaints to a state administrative agency or a court of general jurisdiction without the prosecutorial blessing of a state General Counsel, a requirement of federal labor

\(^{112}\) Eatz v. DME Unit of Local Union No. 3 of IBEW, 973 F.2d 64 (2d Cir. 1992); Kempf v. Carpenters Local Union No. 1273, 367 P.2d 436 (Or. 1961) (en banc). Both cases arrived at the same conclusion—that states are free to apply their own laws—based on the legislative history surrounding the passage of the 1959 Landrum–Griffin amendments.

\(^{113}\) New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

law today.\textsuperscript{115} Punitive and compensatory damages above and beyond triple damages and fines could be authorized.

The argument will be made that states hostile to unionization, like Mississippi or South Carolina, should go below federal protection. Though this seems undesirable as a matter of policy, it might be a necessary accommodation in the interest of a grand compromise, which will surely be necessary for bipartisan support.

\textbf{VIII. RULEMAKING}

The question of whether the Board should use its rulemaking authority as a substitute for adjudication in certain areas has been discussed in detail for years.\textsuperscript{116} There are at least two areas where rulemaking is particularly appropriate. The first is where there has been enormous litigation because of confusion about certain issues that come up time and time again. A good example of this is the acute health care industry, where the Board engaged in rulemaking for the first time, its authority to do so being approved by the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{115} \textit{NLRB v. United Food & Commercial Workers Union, Local 23}, 484 U.S. 112, 126 (1987). The Court speaking through Justice Brennan referred to the General Counsel's "concededly unreviewable discretion to file a complaint" and held that any General Counsel function that can be characterized as "prosecutorial" is not subject to review by any other entity under the Act.


The NMB, which serves as an analogue to the NLRB on recognition issues in the railway and airline industries, has long made use of its rulemaking powers. 29 C.F.R. §§ 1201-9 (majority of rules published in 11 Fed. Reg. 177A-922 (Sept. 11, 1946)). Moreover, the NMB has recently decided to create a new rule regarding the certification of representative elections which will follow NLRB practice by certifying collective bargaining representatives on the basis of the majority of ballots cast in an election as opposed to the number eligible voters in the election. Representation Election Procedures, 74 Fed. Reg. 56,750 (Nov. 3, 2009) (to be codified at 29 C.F.R. §§ 1202, 1206); see R.C.A. Mfg. Co., 2 N.L.R.B. 159, 179 (1936) ("The right of the Union to be certified as the exclusive representative must be decided solely by reference to Section 9(a) of the Act. That Section, as shown above, provides that the organization receiving a majority of the votes cast at an election shall be the exclusive representative for collective bargaining."). However, disputes sometimes arise over whether a sufficient complement of employees have voted. See Glass Depot, Inc., 318 N.L.R.B. 766, 767 (Chairman Gould, concurring) (concluding, as with political elections, the ballot should not be upset because a snowstorm or \textit{force majeure} prevented some employees from casting their ballot).
\end{enumerate}
\end{footnotesize}
Supreme Court.\textsuperscript{117} Litigation was diminished and the process was successful.

When I was Chairman, I proposed, with Board concurrence, that the process be used where the law was quite clear as it was with regard to the presumption that single-location bargaining units were appropriate.\textsuperscript{118} The difficulty with these cases, however, was that although the Board had continuously agreed on the critical criteria to be used—(1) the geographical distance between the locations in question; (2) the amount of interchange between employees at the different locations; and (3) common supervision—the applications of (1) and (2) were always unclear. That is to say, in some instances the combination of a particular geographical distance and an amount of interchange would uphold the presumption, but if one of these factors were altered in another case (i.e., a shorter distance or fewer instances of interchange), the presumption could be rebutted. Here, the principle was clear, but the application of it invited continuous and wasteful litigation. This litigation fostered delay. Delay, as we have seen in other contexts, undermines the policies of the Act.

But this was the difficulty in this particular portion of rulemaking. It became clear that many business groups thought that if the process moved quickly, employees, particularly low-income employees in service, restaurants, and the like, would be more likely to vote for union representation. In this context, employer groups found one of the major policy benefits of rulemaking particularly troubling.

The principal virtue associated with rulemaking is that through its notice and comment process it invites substantial public input and, therefore, the rule devised incorporates more of the stare decisis gravitas. That is to say, quite frequently the Board has oscillated from one doctrine to another after hearing a case where a limited number of lawyers, i.e., usually the lawyers representing the immediate parties themselves, have appeared. Reversal of precedent under these circumstances is itself more susceptible to subsequent reversal. Policies promulgated in the context of rulemaking where the input is more considerable do not lend themselves to such oscillation.


\textsuperscript{118} See Notice of Proposed Rulemaking: Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50,146 (Sept. 28, 1995) (to be codified at 29 C.F.R. pt. 103); see also NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) (stating in dicta that the NLRB has the power to engage in rulemaking).
Of course, the existence of term appointments rather than the life tenure given to judges necessarily lends itself to political influence. Each President can influence the policy of the Board immediately with new appointments, and all, since the time of the Eisenhower Board, have done so. The opaque and necessarily ambiguous language of the statute itself, i.e., prohibitions against “interference,” “restraint,” and “coercion,” lend themselves to policy judgments that Congress is unprepared or ill-equipped to make in a particular category of cases.

But my Chairmanship demonstrated the difficulties with rulemaking—almost as much as holding oral argument. The benefit of adjudication is that it can be done in the middle of the night, so to speak, as we did in holding that undocumented workers were entitled to back pay under the Act. Holding oral argument on, for instance, the rights of contingent employees to be part of the collective bargaining process, as well as engaging in rulemaking, simply served to generate opposition on the part of the Republican Congress by virtue of its opposition to the NLRA itself. Now, with a new Obama Board and a Democratic Congress, the environment is more hospitable to collective bargaining in the NLRA. Rather than simply reverse the numerous flawed Bush II Board decisions, the Obama Board might be better served by engaging in rulemaking in a variety of areas, particularly where the principles are reasonably clear but the application of them is not.

The important point here is that the reversals from one Board to another—Eisenhower, Kennedy–Johnson, Nixon–Ford, Carter, Reagan, Bush I, Clinton, Bush II, and Obama—can go on endlessly, and in some measure these kinds of swings involving policy are inevitable even in the process of the life-tenured judiciary. But they represent particularly sharp swings where each President can so immediately influence policy (they would be able to do this less so under my proposed amendments because terms of office would be eight years, not five), and respect for legal principles is diminished in the process. In some measure the careful, deliberative, public input that is involved in rulemaking can reduce this tendency, and, again, the Obama Board should start the process where the Clinton Board was unable to do so because of political pressure from a hostile Republican Congress.

120. Gould, Labored Relations, supra note 84, at 134.
121. Id. at 176–78.
IX. CONCLUSION

The existing body of labor law and its administration is in need of a substantial, if not clean, of the past. The recognition process is impaired, and this matter can be addressed through expedited elections and postal ballots (the latter long contemplated under the Act and under the Railway Labor Act as well!\(^{122}\)). The debate about card check is a diversion from the attempt to obtain a process that allows employees to fairly hear opposing views, yet does not both extend the period of debate and unfair influence and coercion unduly and allows unions and employers to bring their message to the employees in the central forum for debate, i.e., the workplace. Canada has been this way before and, after an experiment with card check in the 1960s, has gradually shifted to use of election machinery—but in the case of Ontario and British Columbia, more effective and expedited machinery is used.

The same approach should apply to decertification elections. Curiously, the ability of employers to engage in self-help where a union majority may be in question, i.e., by simply refusing to bargain and thus requiring litigation of the union’s future status in lengthy unfair labor practice proceedings, has been strengthened by the card check approach and the idea that a process other than elections should be the preferred method. The same approach should apply to both situations, and employers should be restricted from utilizing refusal-to-bargain litigation and required instead to file decertification petitions just as unions must do under existing law and the statute, if amended along the lines that I advocate.

The road does not end, however, with certification. As Professors Ferguson and Kochan have demonstrated, the problem for collective bargaining is a major one where the relationship is fragile in the wake of a certification. Part of this fragility can be remedied by changing the course of some of the refusal to bargain case law, such as the duty to provide information in cases where the employer is unwilling as well as unable to pay. The union ought to have access to company financial information and the ability to pay in the collective bargaining process without utilization of a Truitt-type ritual where the employer is obliged to open the books only if it says the right (or from its perspective, wrong) words in response to the union’s demands. Workers ought to be in a position to know the economic facts of life, which will make collective bargaining move more smoothly in first contract situations and elsewhere.

But the need is particularly strong in first contract negotiations, where the relationship is embryonic. This is why arbitration, not after a specific time but rather where there is a certification that the process is dysfunctional in some sense of the word, should be permitted—albeit a baseball final-offer arbitration and one that takes the form of recommendations and subsequent collective bargaining before finality.

Beyond effective sanctions, the problem of delay can be diminished through both specific time limitations within which the NLRB is required to act as well as better appointments—and one of the ways to obtain the latter is through one-term Board Members. This will not remedy the problem, but it can only help. Professor Mackenzie's concern with the loss of "transcendent purpose" in the appointment of Washington insiders continues on, at least in part, with the Obama Administration. "Change," the campaign slogan of the President in 2008, could be furthered in the labor law arena if reappointments were denied, the number of Board appointees reduced, and the caseload expedited. This could be furthered through a diminution of the caseload, with both rulemaking and the cessation of jurisdiction taking into account the amount of inflation that has occurred over the past half century clearing out some of the backlog underbrush.

While flawed in some respects—it is right to propose strengthened sanctions and to enhance NLRB injunctions—EFCA has been an important first step in realizing effective and balanced labor law reform. Now it is up to Congress and the President to pursue this objective sensibly. The chance to do so does not come often.

123. Though I am of the view that more work can be done with fewer members, I recognize that this idea is counterintuitive and, in any event, impracticable in the contemporary political appointment arena.