CONSTITUTIONAL VIABILITY OF THE EMPLOYEE FREE CHOICE ACT'S INTEREST ARBITRATION PROVISION

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INTRODUCTION

Employer advocates, organized labor, scholars, analysts, and academics have for decades debated the reasons for the decline in union membership in the private sector.[1] Part and parcel of this discussion are the different stakeholders' positions as to the decreasing emphasis by the labor movement on National Labor Relations Board ("NLRB") representation petitions,[2] and the increased use of pre-recognition card

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1. *See* Mark A. Carter & Shawn P. Burton, *The Criminal Element of Neutrality Agreements*, 25 HOFSTRA LAB. & EMP. L.J. 173, 173-75 (2007); Cynthia Estlund, *The Death of Labor Law?*, 2 ANN. REV. L. & SOC. SCI. 105, 109 (2006); Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L REV. 1527, 1527-28 (2002); Samuel Estreicher, *Disunity Within the House of Labor: Change to Win or to Stay the Course?*, 27 J. LAB. RES. 505 *passim* (2006); Paul Weiler, *Promise to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983); Steven Greenhouse, *Unions Hit Lowest Point in 6 Decades*, N.Y. TIMES. Jan. 21, 2001, at 120; Steven Greenhouse, *Union Leaders See Grim News in Labor Study*, N.Y. TIMES, Oct. 13, 1999, at A23; James Parks, *Union Membership on the Rise*, AFL-CIO NOW BLOG, Jan. 25, 2008, http://blog.aflcio.org/2008/01/25/union-membership-on-the-rise; Press Release, U.S. Chamber of Commerce, Chamber Blasts Union Leaders Opposition to Secret Ballot Elections and Greater Financial Disclosure (Dec. 3, 2003), *available at* http://www.uschamber.com/press/releases/2003/december/03-176.htm; Bureau of Labor Statistics, Union Members Summary, http://www.bls.gov/news.release/union2.nr0.htm (last visited Dec. 7, 2008)

2. PETER C. SCHAUMBER, SEVENTY SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 2 tbl.1 (2007); Carter & Burton, *supra* note 1, at 173 (citing RONALD MEISBURG, OFF. OF THE GEN. COUNS., NLRB, MEMORANDUM GC 07-03 (2007)).

check/neutrality agreements.[3] One conclusion is undisputed: the National Labor Relations Act[4] ("NLRA") is under significant statutory reevaluation, as demonstrated by Congress' expected serious consideration of the Employee Free Choice Act,[5] ("EFCA") in early 2009. EFCA, inter alia, provides for mandatory "interest arbitration"[6] for first contract impasses and union recognition based on card checks.[7]

Irrespective of one's position on EFCA, the employer community, the labor movement, interest groups, politicians, lawyers, and academics all recognize that the bill in its current form[8] would result in a fundamental change in labor law in the United States.[9]

Supporters of EFCA argue, inter alia:

> The [current] process . . . stacks the deck against union supporters. . . . [Employers] control the information workers can receive, . . . force workers to meet with supervisors, . . . and can even imply the business will close if the union wins. . . . [EFCA would] provide . . . a real opportunity to bargain.[10]

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3. Dana Corp., 351 N.L.R.B. No. 28, 2006-7 NLRB Dec. (CCH) ¶ 17,406, at *13 (NLRB Sept. 29, 2007); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 832 (2005); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 43 (2001).

4. 29 U.S.C. §§ 151-69 (2006).

5. S. 1041, 110th Cong. (as referred to S. Comm. on Health, Educ., Pensions and Labor, March 29, 2007); H.R. 800, 110th Cong. (as placed on S. Calendar, Mar. 2, 2007).

6. "Interest arbitration" is a term of art used in labor law describing an arbitration proceeding used to determine the terms of a collective bargaining agreement. BLACK'S LAW DICTIONARY 113 (8th ed. 2004). Interest arbitration is traditionally a public-sector device. *Id.* "Grievance arbitration," on the other hand, deals with the interpretation of an existing collective bargaining agreement generally to determine whether an employer has violated a "grieved" employee's rights under a collective bargaining agreement. *Id.* at 112.

7. *See infra* Part I.B.3.

8. When this Article refers to the current version of EFCA, this Article refers to the EFCA of 2007 introduced in the same form in the House and Senate, *see infra* notes 31-36 and accompanying text, which is expected to be the version reintroduced in the next congress, *see infra* note 27 and accompanying text.

9. *See infra* notes 60-61 and accompanying text; *see also* 79 CONG. REC. S7573, (May 15, 1935) (statement of Sen. Wagner), *noted in* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 504 (1979).

> One method of approach to the problem of industrial peace would be for the Government to invoke compulsory arbitration, or to dictate the terms of settlement whenever controversy arises. Where this procedure has been tried in European nations it has met with only questionable success. In any event, it is so alien to our American traditions of individual enterprise that it would provoke extreme resentment and constant discord.

Id.

10. 153 CONG. REC. E260 (daily ed. Feb. 5, 2007) (statement of Rep. Miller); *see also The*

> [EFCA addresses] major problems with the [NLRA], and that is the law's wholly inadequate response to employers' fiercely aggressive and often illegal response to union organizing drives.[11]

Opponents of EFCA argue, inter alia:

> No outside agency, whether arbitration, courts, or government entity has the skill, knowledge, or expertise to create a collective bargaining agreement. If it is not a creature of the parties' creation it likely will fail of its purpose. . . . It must be done with tradeoffs and separate prioritizing. Only the parties can do that. There are no standards for arbitrators to apply. There is no skill set for arbitrators to use. Solomon is simply unavailable.[12]

> [O]ther means of decision-making are 'not comparable to the privacy and independence of the voting booth,' and [the secret ballot] election system provides the surest means of avoiding decisions which are 'the result of group pressures not individual decision[s].[13]

> [EFCA] would be an unprecedented government intrusion into the

Employee Free Choice Act: Restoring Economic Opportunity for Working Families Before the S. Comm. on Health, Education, Labor, and Pensions, 110th Cong. 3 (2007), *available at* http://help.senate.gov/Hearings/2007_03_27_a/2007_03_27_a.html [hereinafter *HELP Hearings*] (statement of Errol Hohrein, Former Front Range Energy Employee, United Steelworkers) ("Labor law in this country is broken. It doesn't support working people . . . . What the Employee Free Choice Act does is restore the choice to bargain for a better life . . . .").

11. *HELP Hearings*, *supra* note 10, at 1 (2007) (statement of Cynthia L. Estlund, Catherine A. Rein Professor of Law, NYU School of Law).

12. *Id.* at 15 (statement of Peter Hurtgen, Senior Partner, Morgan, Lewis & Bockius LLP). Mr. Hurtgen was a President Clinton appointee to the NLRB where he served as both a member and chairman, and later served as FMCS Director under President George W. Bush. *Id.* at 1.

13. Brief for AFL-CIO et al. at 13, Chelsea Indus., Inc., 331 N.L.R.B. 1648 (1998) (Nos. 7-CA-36846 and 7-CA-37016); *see also HELP Hearings*, *supra* note 10, at 13 (2007) (statement of Peter Hurtgen, Senior Partner, Morgan, Lewis & Bockius LLP) ("[T]he Employee 'Forced' Choice Act is not sound public policy . . . eviscerate[ing] the proud tradition of industrial democracy . . . ."); Press Release, Rep. John Boehner, House Democrats Enjoy Secret Ballot Rights for Themselves, While Denying Them for American Workers (Nov. 20, 2008), *available at* http://republicanleader.house.gov/News/DocumentSingle.aspx?DocumentID=106039 ("Congress . . . voted to expose workers' votes in union organizing elections to . . . their employers, their co-workers, and union bosses. . . . [T]hose very same Members are enjoying secret ballot rights . . . in a hotly contested race for a powerful Committee chairmanship."); Elaine L. Chao, Sec'y of Labor, U.S. Dep't of Labor, Remarks at the Society for Human Resources Management Conference (Mar. 13, 2007) ("[EFCA] effectively takes away a worker's freedom to vote in a private ballot election . . . a fundamental right in our democracy that should not be negotiated away by either management or labor.").

right to bargain freely over working terms and conditions.[14]

The fundamental change EFCA would have on management-labor relations is apparent from the attention it is receiving from both employers and unions. Numerous labor organizations and employee rights advocates, such as the AFL-CIO,[15] Change To Win,[16] and American Rights at Work,[17] have championed this proposed legislation,[18] supported cosponsors in reelection campaigns,[19] and characterized the legislation as the possible dawn of a new age in labor law and employees' rights.[20] Employer groups, such as the U.S. Chamber of Commerce,[21] National Right to Work Foundation,[22] and National Federation of Independent Business,[23] have countered organized labor's campaign[24] and advocated

14. Press Release, Executive Office of the President, Statement of Administration Policy: H.R. 800—Employee Free Choice Act of 2007 (Feb. 28, 2007) (on file with authors) (stating that if EFCA was presented to President George W. Bush for signature, he would veto it).

15. AFL-CIO, The Employee Free Choice Act, http://www.aflcio.org/joinaunion/voiceatwork/efca (last visited Dec. 7, 2008).

16. Employee Free Choice Act (EFCA): Change to Win, http://www.changetowin.org/issues/workers-rights/freedom-to-join-together-in-unions/employee-free-choice-act-efca.html (last visited Dec. 7, 2008).

17. American Rights at Work – Employee Free Choice Act, http://www.americanrightsatwork.org/employee-free-choice-act/home (last visited Dec. 7, 2008).

18. *See, e.g.*, *Strengthening America's Middle Class Through the Employee Free Choice Act Before the Subcomm. on Health, Education, Labor, and Pensions of the H. Comm. on Education and Labor*, 110th Cong. 1-4 (2007) (statement of Nancy Schiffer, AFL-CIO Associate General Counsel); *Developments in Labor Law: Examining Trends and Tactics in Labor Organization Campaigns Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce*, 110th Cong. 1-10 (2004) (statement of Nancy Schiffer, AFL-CIO Associate General Counsel).

19. *See* Steven Greenhouse, *After Push for Obama, Unions Seek New Rules*, N.Y. TIMES, Nov. 9, 2008, at A33 ("[L]abor leaders say . . . unions and their political action committees spent nearly $450 million during the [2008 presidential] race.").

20. *See, e.g.*, Amber McKinney, *Obama Win Start of New Era for Workers, Unions Say; Management Fears Policy Shifts*, WORKPLACE LAW REPORT (BNA), Nov. 7, 2008, http://emlawcenter.bna.com/pic2/em.nsf/id/BNAP-7LAKD9?OpenDocument ("Following the victory of labor-backed Sen. Barack Obama (D-Ill.) in the 2008 presidential election, unions praised his win as beginning a new era of workers rights, while management attorneys and business groups expressed concern about potential policy changes.").

21. LAB., IMMIGRATION, & EMPLOYEE RIGHTS DIV., U.S. CHAMBER OF COMMERCE, EFCA DEPRIVES WORKERS OF PRIVATE ELECTIONS 1 (2008), *available at* http://www.gcpartnership.com/uploadedFiles/Media_Center/U.S.ChamberCardCheck2008PolicyPaper.pdf ("The U.S. Chamber of Commerce vigorously opposes this legislation, or any other efforts to overturn the established NLRB procedures that guarantee a fair union election through secret ballot voting.").

22. Card Check | National Right to Work Legal Defense Foundation, http://www.nrtw.org/en/free-tagging/card-check (last visited Dec. 7, 2008).

23. Stop Union Intimidation, http://www.nfib.com/object/NFIBCardCheck.html (last visited Dec. 7, 2008).

against the legislation in Congress.[25] Even individual companies, recognizing the importance of the legislation, have launched their own campaigns against EFCA.[26]

The merits of EFCA, which can and will be debated in the months and years ahead, are not the focus of this Article. This Article will examine the constitutionality of the mandatory interest arbitration provision of EFCA, with a particular focus on procedural Due Process and Equal Protection. While organized labor has indicated that it will not allow the mandatory arbitration provision of the bill to be excised,[27] there is a viable argument that EFCA's mandatory interest arbitration provision does not satisfy constitutional requirements.

Part I of this Article sets forth the legislative history and specific provisions of EFCA. Parts II.A and II.B analyze the constitutionality of EFCA's mandatory arbitration provision under the Due Process and Equal Protection Clauses. Part II.C summarizes a few other potential constitutional challenges.

24. Michael Mishak, *Ensign Finds an Ace in Senate Election Hole: Fear of Unions*, LAS VEGAS SUN, Jul. 27, 2008, at M3 (quoting Nevada Sen. John Ensign that EFCA's bid to "Europeanize the American Workforce" is the Republican Party's "[n]o. 1 issue to raise money on"); Peter H. Stone, *Business Nervously Eyes the Senate*, NAT'L J. MAG., Jul. 26, 2008, at 46 (detailing the millions of dollars to be spent in 2008 senatorial election campaigns in order to block a Democratic, filibuster-proof Senate, including $20 to $30 million estimated by the U.S. Chamber of Commerce); Press Release, Coal. for a Democratic Workplace, New Polls: Ties to Liberal Agenda Pose Risks for Candidates, April 1, 2008, http://www.myprivateballot.com/fs/resource:id/x1wr5np68dwc8g/x292s0k6468tly (citing Coalition for a Democratic Workplce polls in battleground states averring that voters are overwhelmingly opposed to EFCA).

25. *E.g.*, *HELP Hearings*, *supra* note 10, at 1-4 (statement of Charles I. Cohen, Senior Partner, Morgan, Lewis & Bockious LLP); National Federation of Independent Businesses, Small Business Urges Committee to Oppose Employee "No Choice" Act Resolution, http://www.nfib.com/object/IO_32699.html ("The National Federation of Independent Business . . . urged members of the House Labor Committee not to support House Resolution 21 which asks Congress to pass [EFCA].").

26. Ann Zimmerman & Kris Maher, *Wal-mart Warns of Democratic Win*, WALL ST. J., Aug. 1, 2008, at A1 *available at* http://online.wsj.com/article/SB121755649066303381.html?mod=hpp_us_whats_news ("Wal-Mart Stores Inc. is mobilizing its store managers and department supervisors around the country to warn that if Democrats win power in November, they'll likely change federal law to make it easier for workers to unionize companies . . . .").

27. *See* Michael Orey, *Labor: A Proposed Law Could Swell Union Ranks*, BUS. WEEK, Nov. 17, 2008, at 38, *available at* http://www.businessweek.com/magazine/content/08_46/b4108038762359.htm ("Bill Samuel, director of government affairs for the AFL-CIO, says EFCA is 'the top legislative priority' for his organization. That has led some observers to predict that the measure will sail onto Obama's desk, perhaps in the first 100 days of his Administration.").

I. AN OVERVIEW OF EFCA

A. Legislative Status of EFCA

Rep. George Miller (D-CA) initially introduced EFCA in the House on November 21, 2003.[28] EFCA failed to make it out of committee when first introduced or reintroduced in 2005.[29] The version proposed in 2007 was referred to the Committee on Health, Education, Labor, and Pensions ("HELP Committee"), which as in prior years elicited extensive testimony.[30] On March 1, 2007, EFCA passed the U.S. House of Representatives by a wide margin.[31] All thirteen amendments to EFCA proposed in committee,[32] as well as those proposed on the House floor,[33] were defeated, almost strictly along party lines.[34] The Senate version was introduced on March 29, 2007,[35] was filibustered by Senate Republicans, and tabled after a failed effort to win a cloture vote.[36]

EFCA, as passed by the House in 2007, has three basic provisions: 1) mandatory union recognition based on signed employee authorization cards; 2) non-binding mediation—after ninety days—and binding interest arbitration for first contracts—after 120 days—if no agreement is reached directly between the parties; and 3) increased employer penalties for National Labor Relations Act violations.[37]

In the 2009 Congress, passage of EFCA in the House, without

28. H.R. 3619, 108th Cong. (2003); Employee Free Choice Act of 2007, H.R. REP. NO. 110-23, at 3, 5 (2007) (noting the 2007 bill upon introduction had 230 co-sponsors, seven of whom were Republican).

29. H.R. REP. NO. 110-23, at 3-4; *see also* S. 842, 109th Cong. (2005); H.R. 1696, 109th Cong. (2005); S. 1925, 108th Cong. (2003); H.R. 3619.

30. H.R. REP. NO. 110-23, at 4-6.

31. 153 CONG. REC. H2091 (daily ed. Mar. 1, 2007).

32. H.R. REP. NO. 110-23, at 29-42. Such amendments included an employee "do not call list" for union card campaigns, *id.* at 34, the right to vote on union contracts, *id.* at 33, and a card check decertification provision, *id.* at 30.

33. *E.g.*, 153 CONG. REC. H2078-91 (daily ed. Mar. 1, 2007).

34. *Id.*; *see also* H.R. REP. NO. 110-23, at 29-42.

35. S. 1041, 110th Cong. (2007); 153 CONG. REC. S4175 (daily ed. Mar. 29, 2007).

36. 153 CONG. REC. S8378-98 (failing to reach cloture on a vote of fifty-one to forty-eight). Cloture, or "closure," is a procedure calling for the end of debate on a legislative measure in order to bring it to a vote. BLACK'S LAW DICTIONARY 272 (8th ed. 2004). Achieving cloture in the U.S. Senate requires assent by three-fifths, generally sixty votes. STANDING RULES OF THE SENATE, S. DOC. NO. 106-1, at 21 (2006) (rule XXII). *See generally* Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of Entrenched Senate Rules Governing Debate*, 20 J.L. & POL'Y 1 *passim* (2004), for a discussion of "supermajority" rules and their constitutionality.

37. H.R. 800, 110th Cong. §§ 2-4 (2007).

amendment, seems certain,[38] and significant (majority) support in the Senate indicates probable passage there in some form.[39] However, with a filibuster likely,[40] the Senate will likely need sixty votes for cloture.[41] The possibility of supporters obtaining cloture is significantly better in 2009 than it was in 2007.[42] President Barack H. Obama indicated during his election campaign that he would sign the bill if elected: "We will pass the Employee Free Choice Act. It's not a matter of if; it's a matter of when."[43]

B. Summary of EFCA

EFCA's card check recognition proviso has received the most notoriety.[44] However, contractual obligations imposed by a non-party through mandatory interest arbitration would pose an equal or more significant change to current law.[45] The government's imposition of contractual terms would be a strict departure from clearly stated policy and

38. The House of Representatives, as of the writing of this Article, was strongly controlled by Democrats, traditionally supporters of organized labor, Stephen Franklin, *Democrats Debate; Unions Delight*, CHI. TRIB., Aug. 7, 2008, at N4, with 257 Democrats, 177 Republicans, and one seat undecided, House of Representatives Big Board – Election Results 2008 – The New York Times, http://elections.nytimes.com/2008/results/house/votes.html (last visited Dec. 7, 2008).

39. Senate Big Board – Election Results 2008 – The New York Times, http://elections.nytimes.com/2008/results/senate/votes.html (last visited Dec. 7, 2008) (stating, as of publication of this Article, there are fifty-eight Senate seats controlled by Democrats, forty-one by Republicans, and one seat in Minnesota still undecided).

40. Greenhouse, *supra* note 19 ("One of labor's main goals was to help the Democrats capture 60 Senate seats, with an eye to overcoming a Republican filibuster against the card-check bill . . . .").

41. *See supra* note 36.

42. *See* Senate Big Board, *supra* note 39.

43. Editorial, Bernard Marcus, *Bad Labor Law is Path to Economic Ruin*, WALL ST. J., Aug. 26, 2008, at A19; *see also* Barack Obama on the Employee Free Choice Act – SEIU, http://action.seiu.org/freechoice/obamavideo. *But compare*, Press Release, Executive Office of the President, *supra* note 14, stating President George W. Bush threatened to veto EFCA.

44. *See, e.g.*, Orey, *supra* note 27 (describing the entire EFCA bill as "card check"); Zimmerman & Maher, *supra* note 26 (same).

45. *See* Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 566 (2d Cir. 1993) ("[A]n employer and labor organization are not . . . foreclosed from reaching a private agreement on union recognition . . . ."); NLRB v. Broadmoor Lumber Co., 578 F.2d 238, 241 (9th Cir. 1978) ("Voluntary recognition is a favored element of national labor policy."); NLRB v. Parma Water Lifter Co., 211 F.2d 258, 261 (9th Cir. 1954) ("[I]t is well settled that the designation may be made by other means, one of the most common of which is the signing of union authorization cards."); Dana Corp., 351 NLRB No. 28, 2007 WL 2891099, at *13 (2007) ("Employers and unions agree to voluntary [card check] recognition for any number of reasons, economic and otherwise . . . .").

goals set forth in the original NLRA.[46] The U.S. Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*,[47] holding the NLRA constitutional,[48] laid down the foundational principle of American labor law: "The [NLRA] does not compel agreements between employers and employees. Its theory is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace, and may bring about the adjustments and agreements which the Act, in itself, does not attempt to compel."[49] Furthermore, in considering the Labor Management Relations Act, Congress specifically cautioned against NLRB imposed contract terms: "[u]nless Congress writes into the law guides for the Board to follow, the Board may . . . seek to control more and more the terms of collective-bargaining agreements."[50]

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46. 29 U.S.C. § 158(d) (2006) ("For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession*.") (emphasis added); *see* 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

47. 301 U.S. 1 (1937).

48. *Id.* at 30 ("We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority.").

49. *Id.* at 4-5 (1937); *see also* H. K. Porter Co. v. NLRB, 397 U.S. 99, 105 (1970); 79 CONG. REC. S7573, (May 15, 1935) (statement of Sen. Wagner) ("[Compulsory arbitration] is so alien to our American traditions of individual enterprise that it would provoke extreme resentment and constant discord."), *noted in* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 504 (1979).

50. H.R. REP. NO. 80-245, at 19-20 (1947), *noted in H. K. Porter*, 397 U.S. at 105-06.

> Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . .
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> . . . .
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> Unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements.

Id.; *see also* 79 CONG. REC. 7659, 74th Cong. (1935) (remarks of Sen. Walsh) ("The [NLRA] indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The [NLRA] does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with the sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded.").

1. Card Check Recognition

Currently, under the NLRA, an employer may choose to voluntarily recognize a union without a secret ballot NLRB election if it so desires, as long as there is majority support among the employees for the union.[51] However, an employer also may refuse to recognize a union that offers validly signed union authorization cards from a majority of its employees, and insist upon a secret ballot Board-certified election.[52] Under EFCA, the NLRB would be *required* to certify a union upon presentation of union authorization cards signed by a majority of the bargaining unit.[53] The employer would no longer have the right to require a secret ballot election, with the attendant opportunity to present its views to its employees.

2. Increased Penalties

Currently, under the NLRA, penalties for Unfair Labor Practices[54] ("ULPs") are limited primarily to workplace postings, cease and desist orders, reinstatement, and back pay.[55] An employer is not subject to fur-

51. Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 738 (1961) ("[A] grant of exclusive recognition to a minority union constitutes unlawful support in violation of [Section 8(a)(2)]."); Lincoln Park Zoological Soc'y v. NLRB, 116 F.3d 216, 219 (7th Cir. 1997) ("Under the NLRA, a binding bargaining relationship may be established between a [sic] employer and a labor union by one of two methods: NLRB certification pursuant to an election or voluntary recognition of the union by the employer.").

52. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 305 (1974) ("[I]f [an] employer ha[s] doubts as to a union's majority status, it could and should test out its doubts by petitioning for an election."); NLRB v. Gissel Packing Co., 395 U.S. 575, 609 (1969) ("[A]n employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status.").

53. H.R. 800, 110th Cong. § 2(a) (2007) ("If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative . . . the Board *shall* not direct an election but shall certify the individual or labor organization as the representative . . . .") (emphasis added).

54. "The term 'unfair labor practice' means any unfair labor practice listed in section 8 [of the NLRA]." 29 U.S.C. § 152(8) (2006).

55. 29 U.S.C. § 160(c); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346-49 (1953) (discussing the propriety of Board reinstatement and backpay remedies); Gurley v. Hunt, 287 F.3d 728, 731 (8th Cir. 2002) ("The NLRA only provides the NLRB with the authority to redress unfair labor practices through such means as cease and desist orders, backpay, and reinstatement.") (citation omitted); Roadway Express v. NLRB, 831 F.2d 1285, 1290-91 (6th Cir. 1987) (enforcing an NLRB posting order stating the employer will permit union-related material to be posted on company bulletin boards).

ther damages or punitive awards,[56] and whether to seek an injunction is for the most part subject to the NLRB Regional Directors' discretion.[57] Under EFCA, the NLRB would be authorized to levy $20,000 fines per violation, injunction applications would be mandated, and treble back pay would be available for any employee subjected to unlawful discrimination by an employer during an organizing drive or first contract negotiation.[58] The penalties would not apply to union misconduct.[59]

3. Interest Arbitration

Traditional NLRA policy, as discussed supra, encourages freedom of contract, propounding the independent negotiation of the parties as the catalyst for balancing worker protection and economic efficiency.[60] Arbitration of contract terms has never been a mandatory component of the NLRA. The Board has never sought to inject its own provisions into a privately negotiated contract.[61]

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56. *Seven-Up*, 344 U.S. at 348 (describing the NLRB's powers as "remedial," not "punitive"); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257 (1939) ("[The NLRA] did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices."); *Gurley*, 287 F.3d at 731 ("[T]he NLRB is not authorized to award full compensatory or punitive damages to individuals affected by the unfair labor practice.").

57. *See, e.g.*, Timmins v. Narricot Indus., L.P., 567 F. Supp. 2d 837, 837 & n.1, 839 (E.D. Va. 2008); Clark *ex rel.* NLRB v. Fieldcrest Cannon, No. 4:94CV00308, 1994 U.S. Dist. LEXIS 20979, at *1-2 (M.D.N.C. Aug. 25, 1994); *see also* MATTHEW M. FRANCKIEWICZ, WINNING AT THE NLRB 477 (1995) ("[W]hile the decision to seek an injunction under Section 10(j) is *discretionary*, and although usually recommended by the Region, requires the concurrence of the General Counsel and the Board."); *cf.* Terminal Freight Handling Co. v. Solien *ex rel.* NLRB, 444 F.2d 699, 709 (8th Cir. 1971) (discussing the Regional Directors' mandatory obligation to initiate 10(l) injunctions). *See generally* BRENT GARREN ET AL., HOW TO TAKE A CASE BEFORE THE NLRB 663-94 (7th ed. 2003) (detailing injunctions under the NLRA).

58. H.R. 800, 110th Cong. § 4(a)-(b) (2007).

59. *See id.*

60. *See supra* notes 46-50 and accompanying text. *But compare*, for example, John W. Tait, *The National Labor Relations Act: Administrative Democracy in Labour Relations*, 5 U. TORONTO L.J. 403, 403 (1944); David Moberg, *Empowering Workers*, *in* THE NEXT AGENDA: BLUEPRINT FOR A NEW PROGRESSIVE MOVEMENT 291 (Robert Borosage & Roger Hickey eds., 2001), for a discussion of what pro-labor advocates describe as the NLRA's only true purpose and goal—empowering workers.

61. *See supra* notes 46-50 and accompanying text; *see also* U.S. Can Co. v. NLRB, 984 F.2d 864, 870 (7th Cir. 1993) ("The 'fundamental premise' of the National Labor Relations Act is 'private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.'" (quoting H. K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970))); Derrico v. Sheehan Emergency Hosp., 844 F.2d 22, 29 (2d Cir. 1988) ("Trivializing the parties' agreed termination mechanism in this manner would also trivialize the very freedom of contract that is a fundamental policy of the NLRA." (citing *H. K. Porter*, 397 U.S. at 108)).

EFCA mandates a new system:

- Mandatory bargaining of a first contract commencing within ten days of certification of a labor organization as the exclusive bargaining agent for a group of employees.[62]
- Either party may request mediation through the Federal Mediation and Conciliation Service[63] ("FMCS") if no contract is reached within ninety days of bargaining.[64]
- If mediation fails to resolve all disputes within thirty days, mandatory binding arbitration will be required, through an arbitration panel to be established by FMCS.[65]

EFCA simply states that: "the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service."[66] Similarly, EFCA's entire description of jurisdiction, procedures, and the arbitrator(s)' reach is: "The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years."[67]

A simple textual reading easily begs the question: does EFCA provide sufficient guiding principles? Numerous issues are not addressed such as: 1) venue and limitations in jurisdiction; 2) availability and scope of NLRB, FMCS, or other administrative review; 3) availability and scope of judicial review; 4) factors to be considered by the FMCS arbitration panel; 5) whether an arbitrator is limited to imposing mandatory subjects of bargaining (such as wages) under the NLRA or whether the power extends to impose permissive subjects of bargaining (such as neutrality agreements); 6) remedies/scope of powers; and 7) relationship to other NLRA remedies and provisos.

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62. H.R. 800 § 3.

63. "The Federal Mediation and Conciliation Service ("FMCS") was created in 1947 . . . . [T]he core mission of FMCS has been, and remains, to assist labor and management to settle their disputes through mediation . . . ." Carolyn Brommer, George Buckingham & Steven Loefller, *Co-operative Bargaining Styles at FMCS: A Movement Toward Choices*, 2 PEPP. DISP. RESOL. L.J. 465, 465 (2002); *see also* Richard Barnes, *FMCS on the Cutting Edge*, 2 PEPP. DISP. RESOL. L.J. 321 *passim* (2002) (discussing in detail the history and current state of FMCS). *See generally* 29 U.S.C. §§ 172-73 (2006) (authorizing FMCS).

64. H.R. 800 § 3.

65. *Id.*

66. *Id.*

67. *Id.*

II. CONSTITUTIONAL VIABILITY OF EFCA'S MANDATORY INTEREST ARBITRATION PROVISION

Statutorily mandated interest arbitration is not a novel concept, particularly in the public sector.[68] Numerous states have enacted mandatory arbitration applicable to public sector employees.[69] However, in all, the authorizing statute contained procedural mechanisms and substantive principles which guided the agency implementing the process to apply the concept within the bounds of the Constitution.[70] Arguably, EFCA's failure to provide any direction in this regard poses issues under the Due Process Clause. Further Due Process concerns emanate from EFCA's failure to establish jurisdiction for judicial review of arbitration panel determinations or administrative review by the FMCS or NLRB. While EFCA is an amendment to the NLRA, the NLRA only provides for judicial review of Board decisions.[71] Additionally, the potential discriminatory application of EFCA between affected and unaffected employers may violate the Equal Protection Clause.

A. Due Process

The Due Process Clause of the U.S. Constitution requires sufficient process of law when due.[72] As stated in *Bi-Metallic Investment Co. v.*

68. *See, e.g.*, D.C. CODE § 1-617.17(f) (2008); N.Y. CIV. SERV. LAW § 205.4 (McKinney's 2008); TEX. LOC. GOV'T CODE § 174.153(a) (2007); *see also* Ann C. Hodges, *Symposium on Labor Arbitration Thirty Years After the Steelworkers Trilogy: The Steelworkers' Trilogy in the Public Sector*, 66 CHI.-KENT. L. REV. 631, 631-35 (1990) (discussing the common use of arbitration in the public sector).

69. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 1363, 1368-70 (Alan Miles Ruben ed., 6th ed. 2003).

70. *See, e.g.*, ALASKA STAT. §§ 09.43.030-480, 23.40.200 (2008) (detailing the specific powers and procedures of the arbitrator); CAL. CIV. PROC. CODE § 1299-1299.9 (West 2008) ("'Scope of arbitration' means economic issues, including salaries, wages and overtime pay, health and pension benefits, vacation and other leave, reimbursements, incentives, differentials, and all other forms of remuneration."); MICH. COMP. LAWS §§ 423.272-.281 (2007) (providing specific provisions on impartiality, arbitrator powers, use of witnesses, and establishment of a record, among others); *see also* ELKOURI & ELKOURI, *supra* note 69, at 1371-91 tbl.1, 1395-1401 tbl.1 (listing all state public sector mandatoy arbitration statutes, what they provide, and the specific constitutional challenges made).

71. 29 U.S.C. § 160(f). "Any person aggrieved by a final order of *the Board* . . . may obtain a review of such order in any United States court of appeals in the circuit . . . . A copy of such petition shall be forthwith transmitted . . . to *the Board* . . . . [T]he court shall . . . have the same jurisdiction to grant to *the Board* such temporary relief or restraining order as it deems just and proper, and . . . enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of *the Board* . . . ." *Id.* (emphasis added).

72. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property,

State Board of Equalization,[73] process is due when the state acts against individuals "in each case upon individual grounds,"[74] to deprive "life, liberty, or property."[75] The four classes of process that are due in an administrative proceeding were specifically outlined in *Goldberg v. Kelly*[76]: 1) fair procedures; 2) an unbiased decision maker; 3) notice of hearing; and 4) an opportunity to respond and be represented by counsel.[77] In *Matthews v. Eldridge*,[78] the court further developed the above factors, weighing them in terms of: 1) the importance of the interest involved; 2) the value-specific procedural safeguards to that interest; and 3) the government interest in fiscal and administrative efficiency.[79]

Arguably, EFCA's mandatory arbitration would act in each case upon individual grounds to deprive property rights without the requisite due process safeguards.[80] Due Process requires fairness and impartiality

without due process of law . . . .").

> [W]hether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the [Due Process Clause]. Once it is determined that due process applies, the question remains what process is due. . . . Due process is flexible and calls for such procedural protections as the particular situation demands. . . . "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (citations omitted); *see also* Bell v. Burson, 402 U.S. 535, 541-43 (1971) (holding process is due, requiring a "meaningful" hearing, prior to suspension of a driver's license).

73. 239 U.S. 441 (1915).

74. *Id.* at 446.

75. U.S. CONST. amend. V.

76. 397 U.S. 254 (1970), *superseded by statute*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub L. No. 104-193, 110 Stat 2105 (codified at 42 U.S.C. § 601), *as recognized in* State *ex rel.* K. M. v. W. Va. Dep't of Health & Human Res., 212 W. Va. 783, 792 (2002).

77. *Id.* at 266. The following is a full list of the *Goldberg* due process factors: (1) timely and adequate notice of issues; (2) an effective opportunity to confront adverse witnesses; (3) oral presentation of arguments; (4) oral presentation of evidence; (5) cross-examination of adverse witnesses; (6) disclosure of opposing evidence; (7) the right to retain an attorney; (8) a decision based on the evidence presented; (9) a determination based on findings of fact and conclusions of law; and (10) a decision by an impartial decision maker. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 530-31 (4th ed. 2000) (citing *Goldberg*, 397 U.S. at 266).

78. 424 U.S. 319 (1976).

79. *Id.* at 335.

80. *See, e.g.*, Brock v. Roadway Express, 481 U.S. 252 (1987) (holding an employer's right to

of adjudicative bodies whether or not the body is judicial or executive.[81] A court should not find an administrative proceeding sufficient where there are no guidelines ensuring the fundamental fairness of the process.[82]

The mandatory interest arbitration panel that would be established under EFCA does not contain any administrative safeguards. EFCA simply states that there will be binding arbitration to impose contract terms on the parties in accordance with terms set by the FMCS Director.[83] FMCS, an agency run by a single Presidential appointee,[84] is given broad discretion to implement regulations as may be "prescribed."[85] It has been noted by some commentators that FMCS may not possess sufficient infrastructure[86] or suitable rules[87] to develop, implement and en-

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fire employees a protectable property interest requiring due process); Truax v. Raich, 239 U.S. 33, 38 (1915) ("The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."); Chernin v. Lyng, 874 F.2d 501, 505 (8th Cir. 1989) ("The Court has continued to hold that both employees and employers have an interest in the employment relation protected from arbitrary government action by the Due Process Clause."); Henneberger v. County of Nassau, 465 F. Supp. 2d 176, 192 (E.D.N.Y. 2006) ("[C]ourts have uniformly held that a collective bargaining agreement may be the source of a property right entitled to due process protection." (citing *Brock*, 481 U.S. at 260-61)).

81. Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (stating principles of fairness are equally applicable to administrative as well as judicial proceedings); NLRB v. Phelps, 136 F.2d 562, 563 (5th Cir. 1943) ("[A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge."); Pastrana v. Chater, 917 F. Supp. 103, 107 (D.P.R. 1996) ("[W]hen an ALJ's fairness is questioned, the presumption of constitutionality must fail as well.").

82. *See* Superintending Sch. Comm. v. Bangor Ed. Ass'n, 433 A.2d 383, 387 (Me. 1981) (requiring "sufficient standards" and "adequate procedural safeguards" to satisfy due process); Buffalo v. N.Y. State Pub. Employment Relations Bd., 363 N.Y.S.2d 896, 899 (Sup. Ct. 1975) (discussing the instrumentality of judicial review to satisfaction of due process).

83. *See* H.R. 800, 110th Cong. § 3 (2007).

84. 29 U.S.C. § 172(a) (2006) ("The Service shall be under the direction of a Federal Mediation and Conciliation Director . . . who shall be appointed by the President by and with the advice and consent of the Senate. . . . The Director shall not engage in any other business, vocation, or employment.").

85. H.R. 800 § 3.

86. *See* FMCS, ARBITRATION STATISTICS FISCAL YEAR 2008, at 1, *available at* http://www.fmcs.gov/assets/files/Arbitration/FY2008%20Statistics/Issues_Arbitrated.doc (stating the FMCS handled a total of twenty-one arbitrations dealing with new contract negotiation); ARTHUR F. ROSENFELD, FMCS, REPORT FOR FISCAL YEAR 2007, at 2, *available at* http://fmcs.gov/assets/files/annual%20reports/FY2007_Annual_Report.pdf ("The FMCS is not a large agency.").

87. Role of FMCS. FMCS has no power to:

(1) Compel parties to appear before an arbitrator;

(2) Enforce an agreement to arbitrate;

(3) Compel parties to arbitrate any issue;

force regulations contemplated by EFCA, especially when left without guidance from Congress.[88]

The arbitration panel promulgated by the FMCS would not be applying law to facts but instead would be making factual and legislative determinations on a case-by-case basis.[89] FMCS and its arbitration panel would be granted the authority to impose a first contract without statutory guidelines. Without any standards to follow, factors to apply, and specific guidelines, actions taken by the arbitration panel could be deemed to violate due process rights.[90] There are no specific statutory provisions mandating fair notice,[91] development of a record,[92] evidentiary safeguards,[93] or adjudication by an impartial neutral.[94] Further, the

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(4) Influence, alter, or set aside decisions of arbitrators on the Roster;
(5) Compel, deny, or modify payment of compensation to an arbitrator.

29 C.F.R. § 1404.4(d) (2008).

88. *See* H.R. 800 § 3 ("[T]he Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service."); *HELP Hearings*, *supra* note 10, at 15 (statement of Peter Hurtgen, Senior Partner, Morgan, Lewis & Bockius LLP) ("[W]ith a lack of any historic track record between the parties . . . reaching agreement on a package that satisfies the union's political needs while being economically realistic or even feasible for the employer can be extremely difficult and time consuming."); Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959) ("There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages.").

89. Hess Collection Winery v. Agric. Labor Relations Bd., 45 Cal. Rptr. 3d 609, 618 (Ct. App. 2006) ("The creation of new rules for future application, such as is done here, is quasi-legislative in character. . . . [T]he action is . . . taken in an individual case." (citing 20th Century Ins. Co. v. Garamendi, 878 P.2d 566, 602, 604 (Cal. 1994))); *see* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 (1960) ("[The collective bargaining agreement] calls into being a new common law—the common law of a particular industry or of a particular plant."); Cox, supra note 88, at 1499 (stating collective bargaining creates the "law of the shop").

90. *Cf.* ARVID ANDERSON, LOREN KRAUSE, & PARKER A. DENACO, LABOR AND EMPLOYMENT ARBITRATION § 48.06 (2d ed. 2003) ("The limited number of appeals from interest arbitration awards is evidence that carefully drafted statutory standards are faithfully adhered to by arbitrators in their determination of the matters in dispute and that misgivings about delegating legislative authority to 'unaccountable' arbitrators have been largely unfounded.").

91. *See* Port Terminal R.R. Ass'n v. United States, 551 F.2d 1336, 1345 (5th Cir. 1977) (holding that the parties to an administrative hearing must be given adequate notice of the issues the parties must address to comport with due process); Ringsby Truck Lines, Inc. v. United States, 263 F. Supp. 552, 554 (D. Colo. 1967) (stating parties to an administrative hearing are "entitled to know by what standards they are going to be judged").

92. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner . . . .")

93. *See* Consol. Edison Co. v. NLRB, 305 U.S. 197, 230 (1938) ("Mere uncorroborated hearsay or rumor does not constitute substantial evidence."); Pasha v. Gonzales, 433 F.3d 530, 535 (7th Cir. 2006) ("Although the *Daubert* [v. Merrell Dow Pharm., 509 U.S. 579 (1993)] filter against unreliable expert testimony is not strictly applicable to proceedings before administrative agencies . . . the 'spirit of *Daubert*' is applicable to them.") (citing Rodriguez Galicia v. Gonzales, 422 F. 3d 529,

panel would not be guided by any substantive guidelines as to what issues it must resolve or substantive powers it may utilize.[95] FMCS's current rules and regulations pertaining to arbitration contemplate a voluntary system and thus provide little guidance.[96] Without guidance from EFCA, FMCS may or may not develop a constitutional arbitration infrastructure.[97] Thus, one can argue that EFCA gives FMCS free reign to establish an arbitration panel that has the ability to deprive property from an employer by administrative fiat in a manner repugnant to Due Process. And, EFCA in its current form provides the FMCS with the right to begin issuing decisions without first issuing rules governing its processes.[98]

In addition, EFCA does not contemplate administrative or judicial review for errors of law or dissonant factual decisions. Courts have specifically held that a statutory right to review of administratively imposed binding interest arbitration is necessary for procedural due process: "[A] legislative body cannot compel a private party to submit to final, binding arbitration without any right of judicial review for errors of fact or law."[99] In fact, the NLRA originally was held to meet procedural Due Process requirements in *NLRB v. Jones & Laughlin Steel Corp.* on the grounds that it provided a specific right of review:

539 (7th Cir. 2005)); Lidy v. Sullivan, 911 F.2d 1075, 1077 (5th Cir. 1990) ("'Due process requires that a claimant be given the opportunity to cross-examine and subpoena the individuals who submit reports.'" (quoting Coffin v. Sullivan, 895 F.2d 1206, 1212 (8th Cir. 1990))). *But cf.* Richardson v. Perales, 402 U.S. 389, 402 (1971) (holding a physician's report based on hearsay sufficient basis for a an administrative decision).

94. Yamaha Motor Corp. v. Riney, 21 F.3d 793, 798 (8th Cir. 1994) (dismissing the determination of a biased state motor vehicles commissioner). *But*, 18 U.S.C. § 208 (2006) (applying criminal penalties on decision-makers who, inter alia, participate in administrative determinations where there is a financial interest in the outcome).

95. Holmes v. N.Y. City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (holding lack of "ascertainable standards" or reported reasons for denial in housing applications violative of due process); White v. Roughton, 530 F.2d 750, 753-54 (7th Cir. 1976) ("[A] procedure, vesting virtually unfettered discretion in [the Administrator] and his staff, is clearly violative of due process.").

96. 29 C.F.R. § 1404.2 (2008) ("The labor policy of the United States promotes and encourages the use of voluntary arbitration to resolve disputes over the interpretation or application of collective bargaining agreements. Voluntary arbitration and fact-finding are important features of constructive employment relations as alternatives to economic strife."); 29 C.F.R. § 1404.4(d) ("FMCS has no power to: (1) Compel parties to appear before an arbitrator; (2) Enforce an agreement to arbitrate . . . ."); 29 C.F.R. § 1404.13 ("All proceedings conducted by the arbitrators shall be in conformity with the contractual obligations of the parties."); *see also* 5 U.S.C. § 575(a)(1) (providing discretionary arbitration procedures for federal agencies but only where "all parties consent").

97. See ANDERSON, KRAUSE, & DENACO *supra* note 90, § 48.06.

98. *See* H.R. 800, 110th Cong., § 3 (2007).

99. Hess Collection Winery v. Agric. Labor Relations Bd., 45 Cal. Rptr. 3d 609, 621-22 (Ct. App. 2006).

> The act establishes standards to which the Board must conform. There *must be complaint, notice and hearing*. The Board *must receive evidence* and make findings. The *findings as to the facts* are to be conclusive, but only if supported by evidence. The order of the Board is *subject to review* by the designated court, and *only when sustained by the court* may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are *open to examination by the court*. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies.[100]

However, a counter-argument can be made that the Administrative Procedure Act[101] ("APA"), applicable to all agencies created by Congress absent express language to the contrary,[102] which was promulgated to provide standardized agency procedures and basic judicial review protections to limit ad hoc determinations,[103] resolves due process concerns. The APA requires that during any type of proceeding, agencies must: (1) permit the parties to be represented; (2) allow the parties to obtain any evidence provided; and (3) provide prompt notice of the outcome as well as a brief statement of the grounds for the decision.[104] EFCA's interest arbitration provision could be held constitutional based on these automatic procedures.[105] However, additional details as to the process to be

100. 301 U.S. 1, 47 (1937) (emphasis added).

101. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521 (2006).

102. 5 U.S.C. § 551(1) ("[An agency is] each authority of the Government of the United States, whether or not it is within or subject to review by another agency."); *see also* Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967) (stating only "clear and convincing" evidence of contrary legislative intent would preclude the APA's application); Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971) ("[T]he APA . . . confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.") (citations omitted).

103. Walter Gellhorn, *Symposium on the 50th Anniversary of the APA: Birth Pangs of the Administrative Procedure Act*, 10 ADMIN. L.J. AM. U. 51, 51-53 (1996) (discussing generally the development and objectives of the APA).

104. 5 U.S.C. § 555(b)-(e). Stricter judicial-like procedures, adherent to the factors stated in *Goldberg*, are provided but only if Congress specifically requires the agency to hold a hearing on the record, which it has not done here. 5 U.S.C. §§ 554(b), (d), 555(b), 556(b), (d)-(e), 557(c)(3)(A), (d)(1); Gardner v. United States, 239 F.2d 234, 238 (5th Cir. 1956) (stating these procedures are only applicable where there is an opportunity for an agency hearing granted by statute); Gart v. Cole, 263 F.2d 244, 251 (2d Cir. 1959) (holding that the adjudicative rules of the APA only apply where there is an "express requirement of an open adjudicative hearing" under the authorizing statute).

105. *See, e.g.*, Achustequi v. Dep't of Agric., 257 F.3d 1124 (9th Cir. 2001) (indicating provisions of APA dealing with revocation of a license sufficient for purposes of due process); Clardy v. Levi, 545 F.2d 1241, 1244 (9th Cir. 1976) ("[T]here are numerous features of the APA that, to pro-

utilized and the factors to be considered by the FMCS still will be wanting especially if EFCA becomes effective prior to the issuance of regulations.

Additionally, the APA does provide judicial review for arbitrariness, capriciousness, abuse of discretion, and determinations contrary to the substantial weight of the evidence, among other grounds,[106] as well as specific standards and processes for administrative agencies to follow in rulemaking.[107] But, this argument is not completely harmonized due to the APA's jurisdictional limitations on judicial review.[108] Numerous courts have held that the APA does not provide for an independent jurisdictional basis to challenge an agency action.[109] Courts have generally required either a statutory, constitutional, or other basis to establish subject matter jurisdiction and bring an APA claim.[110] EFCA does not provide any judicial review and does not provide grounds to challenge the arbitration panel's determination. It can be argued that the inability to garner jurisdiction for the review of claims as provided under the APA militates against its compliance with due process. However, some courts have held the APA's provisions apply regardless of whether there is a right of review in the statute.[111]

EFCA is not the first statute to provide mandatory binding interest arbitration.[112] Numerous states have provided public sector binding

mote the general interest of due process could be, and perhaps already are, incorporated into prison disciplinary procedures . . . .").

106. 5 U.S.C. §§ 702, 704, 706(2)(A)-(F).

107. 5 U.S.C. § 553.

108. Califano v. Sanders, 430 U.S. 99, 107 (1977) ("[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action."); *see also* Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517, 523 n.3 (1991); Cervoni v. Sec'y of Health, Educ. & Welfare, 581 F.2d 1010, 1015 (1st Cir. 1978) ("[T]he APA does not provide basis for subject matter jurisdiction . . . .").

109. *See, e.g.*, Doe v. Mann, 415 F.3d 1038, 1045 (9th Cir. 2005); Byam v. Barnhart, 336 F.3d 172, 179 (2d Cir. 2003); Humphreys v. United States, 62 F.3d 667, 672 (5th Cir. 1995); Rueth v. EPA, 13 F.3d 227, 231 n.3 (7th Cir. 1993); *Cervoni*, 581 at 1015; Acosta v. Gaffney, 558 F.2d 1153, 1156 (3d Cir. 1977). *But cf., e.g.*, Bowen v. Massachusetts, 487 U.S. 879, 891-92 & n.16 (1988); Sharkey v. Quarantillo, 541 F.3d 75, 84 (2d Cir. 2008); Rd. Sprinkler Fitters Local Union 669 v. Herman, 234 F.3d 1316, 1319 (D.C. Cir. 2000).

110. *E.g.*, Byam v. Barnhart, 336 F.3d 172, 179 (2d Cir. 2003) (holding reviewable agency actions, or inactions, where the claimant has "been denied due process"); Wyoming v. United States, 279 F.3d 1214, 1236 (10th Cir. 2002) ("[W]e must look to the provisions of the NWRSIA to determine the district court's jurisdiction . . . ."); Nigmadzhanov v. Mueller, 550 F. Supp. 2d 540, 543 (S.D.N.Y. 2008) ("[W]hen a plaintiff alleges that the defendant violated the APA, the court may exercise subject matter jurisdiction pursuant to 28 U.S.C. § 1331.").

111. *E.g.*, *Bowen*, 487 U.S. at 891-92 & n.16; *Sharkey*, 541 F.3d at 84.

112. Note: Brian J. Malloy, *Binding Interest Arbitration in the Public Sector: A "New" Proposal for California and Beyond*, 55 HASTINGS L.J. 245, 246 (2003) (noting a majority of the states

interest arbitration to avoid strikes and boycotts which endanger public health and safety.[113] However, only one state has attempted to provide such a provision in the realm of private employees and employers—California.[114] Although federal labor law traditionally preempts state legislation in the private sector, California enacted legislation to govern agricultural employees who are exempt under the NLRA.[115] Specifically, California amended the Agricultural Labor Relations Act in 2002[116] to provide that if the parties had not completed contract negotiations within 180 days following recognition of a labor organization, either party could submit the case to "mediation" (which, in this context, resembled binding interest arbitration).[117]

In *Hess Collection Winery v. California Agricultural Relations Board*,[118] the petitioner challenged the constitutionality of California's binding interest arbitration provisions on, inter alia, Due Process grounds.[119] The *Hess* court[120] held the statute constitutional since it pro-

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have some form of public sector interest arbitration statutes).

113. *See supra* notes 69-70 and accompanying text.

114. CAL. LAB. CODE §§ 1164-1164.13 (2006); CAL. CODE OF REGULATIONS §§ 20400-08 (2008). *See generally* Jordan T. L. Halgas, *Reach an Agreement or Else: Mandatory Interest Arbitration Under the California Agricultural Labor Relations* Act, 14 SAN JAOQUIN AG. L. REV. 10-29 (2004) (discussing the history, development, and procedures under the California Agricultural Relations Act).

115. 29 U.S.C. § 152(3) (2003); Herman M. Levy, *Collective Bargaining for Farmworkers – Should There be Federal Legislation?*, 21 SANTA CLARA L. REV. 333, 334 (1981)

116. Act of Sept. 30, 2002, ch. 1145, 2002 Cal. Stat. 1156 (codified at CAL. LAB. CODE §§ 1164-1164.13).

117. CAL. LAB. CODE § 1164(a).

> An agricultural employer or a labor organization certified as the exclusive bargaining agent of a bargaining unit of agricultural employees may file with the board, at any time following (1) 90 days after a renewed demand to bargain by an agricultural employer or a labor organization certified prior to January 1, 2003, which meets the conditions specified in Section 1164.11 or (2) 180 days after an initial request to bargain by an agricultural employer or a labor organization certified after January 1, 2003, a declaration that the parties have failed to reach a collective bargaining agreement and a request that the board issue an order directing the parties to mandatory mediation and conciliation of their issues. "Agricultural employer," for purposes of this chapter, means an agricultural employer, as defined in subdivision (c) of Section 1140.4, who has employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of a declaration pursuant to this subdivision.

Id.; *see also* Halgas, *supra* note 114, at 32 ("[A]lthough the provisions call the process 'mediation' and the person presiding over the process a 'mediator,' it is clear that the process is one of arbitration.").

118. 45 Cal. Rptr. 3d 609 (Ct. App.2006).

119. *Id.* at 613.

120. It is also worthy of note that the constitutionality was only challenged to an intermediate California appellate court, which leaves open the possibility of further constitutional challenges to the California Supreme Court.

vided clear guidelines for the board to follow, as well as pages of specific procedures, deadlines, and review processes:

> The statutory scheme requires that the mediator set forth the basis for his determinations and that the record support those determinations. The Board is required to set aside any portion of the mediator's decision that is based upon clearly erroneous findings of fact or that is arbitrary and capricious in light of the findings. A party has the right to judicial review . . . includ[ing] limited factual review, that is, whether the decision is wholly lacking in evidentiary support.[121]

EFCA provides neither the standards nor review procedures that the *Hess* court relied on in finding the Due Process Clause was satisfied.

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121. The statute provided a litany of details, partly recited below, not covered by EFCA:

> (c) Upon appointment, the mediator shall immediately schedule meetings at a time and location reasonably accessible to the parties. Mediation shall proceed for a period of 30 days. . . . [I]f the parties do not resolve the issues to their mutual satisfaction, the mediator shall certify that the mediation process has been exhausted. . . . [T]he mediator may extend the mediation period for an additional 30 days.
>
> (d) Within 21 days, the mediator shall file a report with the board that resolves all of the issues . . . including all issues subject to mediation and all issues resolved by the parties. . . . [T]he report shall include the basis for the mediator's determination. The mediator's determination shall be supported by the record.
>
> . . . .
>
> Within seven days of the mediator's report, either party can petition the Board for review. The grounds for review are (1) a provision of the agreement is unrelated to wages, hours, or other conditions of employment, (2) a provision of the agreement is based upon clearly erroneous findings of material fact, or (3) a provision of the agreement is arbitrary or capricious in light of the mediator's findings of fact. If the Board determines that a prima facie ground for review is shown it may grant review.
>
> If, upon review, the Board finds one of the grounds for review has been established, then it orders the mediator to modify the terms of the agreement. The mediator meets with the parties for 30 more days and then files another report. The parties have the right to seek review of the second report. If, upon review of the second report, the Board again finds the report defective, then it determines the issues and issues a final order.
>
> The parties also have the right to seek Board review of the mediator's report on the grounds that (1) the report was procured by corruption, fraud, or other undue means, (2) there was corruption in the mediator, or (3) the rights of the petitioning party were substantially prejudiced by misconduct of the mediator. Upon such a showing the Board vacates the report, orders the appointment of a new mediator, and the mediation begins anew.
>
> After Board review, either party may petition the Court of Appeal or the Supreme Court for a writ of review. Judicial review extends no further than to determine whether (1) the Board acted without, or in excess of, its powers or jurisdiction, (2) the Board did not proceed in the manner required by law, (3) the order or decision of the Board was procured by fraud or was an abuse of discretion, (4) the order or decision violates a constitutional right of the petitioner.

Hess, 45 Cal. Rptr. 3d at 614-16 (citations omitted).

Currently, EFCA does not require a record to be established, or contain procedural or evidentiary safeguards, or substantive principles, designed to protect against arbitrary agency action. At the very least issuance of regulations prior to implementation is necessary to ensure that the Due Process safeguards lacking under EFCA's plain terms are present when this compulsory arbitration panel begins to adjudicate labor disputes.[122] Such an unbridled arbitration panel, with the right to impose its will in private contracts without any procedural or substantive safeguards, arguably violates Due Process and would be subject to constitutional challenge.[123]

Litigation surrounding the Federal Insecticide, Fungicide, and Rodenticide Act[124] ("FIFRA") is relevant to this analysis. FIFRA requires applicants wishing to sell a regulated pesticide in the United States to register and provide a data analysis of the pesticide's effectiveness and potential hazards to the EPA.[125] FIFRA requires binding arbitration when a subsequent applicant relies on data provided previously to the EPA.[126] The arbitration is binding as between the current applicant and the previous applicant, and the arbitrator determines the amount owed to the previous applicant for "free riding" on his or her data.[127]

FIFRA is notably without description as to its arbitration procedure, and merely provides:

122. *See* United States v. Nixon, 418 U.S. 683, 694-96 (1974), *overruled on other grounds by* Bourjaily v. United States, 483 U.S. 171, 179 (1987) (holding rules issued by agencies are binding even on the agency itself).

123. To bring any constitutional claim before a federal court, it must have sufficient "ripeness." Renne v. Geary, 501 U.S. 312, 321 (1991). This is based on the constitutional requirement that there must be an actual "case and controversy" before the Court may redress, with certain exceptions not relevant here. Timothy Van Der Veen, *Survey of First Circuit Law: Constitutional Law—Employee's Challenge to Prospective Application of Disability Retirement Statute Deemed Ripe for Adjudication—*Riva v. Commonwealth*, 61 F.3d 1003 (1st Cir. 1995)*, 30 SUFF. U. L. REV. 1011 (1997). Ripeness is an issue here, as with many other constitutional arguments, since a challenge to EFCA's interest arbitration provisions may only be ripe after a party has been "harmed" by the arbitration panel or FMCS's rules. Therefore, one could argue that the arbitration panel under EFCA is subject to a due process challenge only after the FMCS has had an opportunity to promulgate rules that could eliminate many constitutional challenges. The success of any constitutional argument will likely depend on the actual procedures afforded by FMCS or the arbitration panel. Ruckelshaus v. Monsanto Co., 467 U. S. 986, 1019 (holding a FIFRA takings claim not ripe since plaintiff "did not allege or establish that it had been injured by actual arbitration under the statute").

124. 7 U.S.C. § 136-136y (2006).

125. 7 U.S.C. § 136a(a), (c)(2)(a)

126. 7 U.S.C. § 136a(c)(1)(F).

127. 7 U.S.C. § 136a(c)(1)(F)(iii). FIFRA also allows the parties to make a private arrangement as to the compensation outside of the binding arbitration. *Id.*

> If . . . the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service.[128]

The statute provides the FMCS director with free reign to promulgate rules to affect this purpose. Furthermore, FIFRA states that the courts do not have "jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties."[129]

While FIFRA has been upheld on, inter alia, Due Process grounds—"[t]he scope of review under the . . . [FIFRA] while limited, preserves the appropriate exercise of the judicial function"[130]—unlike EFCA, it is voluntary. An individual or entity is not required to use prior data when registering a pesticide with the EPA; such individual or entity may develop its own data, or forgo selling a pesticide altogether.[131] The same cannot be said of EFCA. Under EFCA, a bargaining obligation may be mandated and mandatory arbitration compelled. An employer can only avoid the process by simply going out of business, unlike an applicant under FIFRA.[132] EFCA's involuntary process cannot be equated with the voluntary process in FIFRA that was held constitutional. In addition, the arbitration procedure under FIFRA is narrowly limited to only one issue and one purpose, determining appropriate compensation for a previously conducted data analysis. EFCA's interest arbitration provision, on the other hand, is open-ended and contemplates resolving unlimited issues. As stated in *Matthews*, the difference and numerosity of interests affected require greater procedural

128. *Id.*

129. *Id.*

130. Cheminova A/S v. Griffin L.L.C., 182 F. Supp. 2d 68, 78 (D.D.C. 2002) ("FIFRA at a minimum allows private parties to secure U.S. Const. art. III review of the arbitrator's findings and determinations for fraud, misconduct, or misrepresentation. FIFRA § 3(c)(1)(D)(ii). This provision protects against arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under governing law. Moreover, review of constitutional error is preserved, and FIFRA, therefore, does not obstruct whatever judicial review might be required by due process.").

131. *See* 7 U.S.C. § 136a(c)(1)(F)(iii).

132. *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 274 (1965) ("The closing of an entire business, even though discriminatory, ends the employer-employee relationship . . . .").

safeguards.[133]

The NLRA was upheld on due process grounds where its express language provided the right for Board and judicial review of agency determinations.[134] Arbitration decisions under EFCA would be subject to far less scrutiny.[135] They would not be subject to Board review and arguably any judicial review would be limited. The arbitration panel under EFCA could act "in each case upon individual grounds" as stated in *Bi-Metallic*,[136] to deprive "property" within the meaning of the Fifth Amendment,[137] while providing none of the procedural safeguards required by *Goldberg*,[138] *Matthews*,[139] and *Jones & Laughlin Steel*.[140] EFCA's interest arbitration provision will no doubt be challenged on these grounds.

II. EQUAL PROTECTION

The Fourteenth Amendment provides that no state shall deprive any person equal protection under its laws.[141] Where a statute is discriminatory based upon a distinction, Equal Protection principles are applied.[142] The statute then will proceed, in most cases, through a "rational basis review," absent a suspect category such as race, gender, or alienage,[143] with the burden of proof on the constitutional challenger.[144] The challenger must show the government has no rational basis to assert that the statute furthers any valid governmental purpose.[145] While this rational basis standard most often is satisfied, statutes have failed under this

133. *See* Matthews v. Eldridge, 424 U.S. 319, 335 (1976).
134. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 47 (1937).
135. H.R. 800, 110th Cong. § 3 (2007).
136. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 446 (1915).
137. Brock v. Roadway Express, Inc., 481 U.S. 252, 260-261 (1987) ("[T]he contractual right to discharge an employee for cause constitutes a property interest protected by the Fifth Amendment.").
138. Goldberg v. Kelly, 397 U.S. 254, 366 (1970).
139. Matthews v. Eldridge, 425 U.S. 319, 335 (1976).
140. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 47 (1937).
141. U.S. CONST. amend. XIV, § 1. The Fifth Amendment's Due Process guarantee has been interpreted as imposing the same Fourteenth Amendment restrictions on the federal government. *See* Bolling v. Sharpe, 347 U.S. 483, 495 (1954).
142. Loving v. Virginia, 388 U.S. 1, 10 (1967) ("[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.").
143. *E.g.*, *id.* at 8, 11; *see also* Korematsu v. United States, 323 U.S. 214, 216 (1944).
144. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 (1938).
145. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

analysis in some cases.[146] In *City of Cleburne v. Cleburne Living Center, Inc.*,[147] the Supreme Court struck down an ordinance that was aimed solely at hospitals for the insane or feeble-minded.[148] The Court stated "[t]he question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent."[149] The Court held the ordinance failed rational basis review.[150] Likewise, in *Romer v. Evans*[151] the court struck down a law that prohibited localities from enacting legislation that provided protections on the basis of sexual orientation.[152] The Court held that there was no conceivable rational basis for the discriminatory classification or possible non-discriminatory justification.[153]

The logic underlying the *Romer* and *City of Cleburne* decisions can be extended to EFCA's interest arbitration provisions. Is there a conceivable rational basis for only subjecting a newly unionized business to mandated contract terms? A newly organized employer could have contract terms imposed (which might result in increased operating costs) while employers in the same industry who have a pre-existing union relationship or no union at all would not be subject to this governmental mandate.

In *Hess*, discussed above in Part II.A, an equal protection objection also was raised with and rejected by the California Court of Appeals.[154] The *Hess* court noted the statute required the "mediator" (who truly acted as an arbitrator) to consider "corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements."[155] The court concluded "[t]hese requirements reasonably ensure that contracts of different employers will be similar. [Thus t]here is no equal protection violation."[156]

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146. Romer v. Evans, 517 U.S. 620, 635 (1996); *City of Cleburne*, 473 U.S. at 450.
147. 473 U.S. 432 (1985).
148. *Id.* at 436-37; *see also* Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928) ("Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.").
149. *City of Cleburne*, 473 U.S. at 449-50.
150. *Id.* at 450.
151. 517 U.S. 620 (1996).
152. *Id.* at 623-24, 635.
153. *Id.* at 635.
154. 45 Cal. Rptr. 3d 609, 622-23 (Cal. Ct. App. 2006).
155. *Id.* at 623 (quotations omitted).
156. *Id.*

EFCA does not contain such a focused directive. There is no language directing the panel to consider "corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar . . . operations with similar labor requirements." Furthermore, even if FMCS directs the arbitration panel to apply standards similar to those in *Hess*, one could argue that the statute would still be discriminatory since evaluating "other collective bargaining agreements" would *require* discrimination between unionized and non-unionized employers and industries. Since Congress simply cannot enact legislation that is solely "drawn for the purpose of disadvantaging the group burdened by the law, one could argue the law is unconstitutional."[157] At the very minimum, FMCS should promulgate rules that would provide specific standards to protect against disparate treatment of the law, although this does not preclude all discriminatory applications inherent in the law.

III. ADDITIONAL CONSTITUTIONAL ARGUMENTS

In addition to the Due Process and Equal Protection Clauses, opponents of EFCA may assert that it is unconstitutional on other grounds including but not limited to Article III Judicial Usurpation, Substantive Due Process, Article I Separation of Powers, and the Takings Clause.[158]

A. Article III Judicial Usurpation

Article III of the Constitution protects the tripartite form of government and shields the judicial branch from interference and limitation by the legislative branch.[159] The Court has never laid down an absolute construction of Article III's protections.[160] However the Court has specifically determined that contract actions arising under state law may not

157. Romer v. Evans, 517 U.S. 620, 633 (1996) (citing U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)). "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." *Fritz*, 449 U.S. at 181.

158. *See also* Richard A. Epstein, *The Employee Free Choice Act is Unconstitutional*, WALL ST. J., Dec. 19, 2008, at A15 (arguing that EFCA violates constitutional protections of free speech).

159. U.S. CONST. art. III, §§ 1-2 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . ."); *see also* United States v. Will, 449 U.S. 200, 217-18 (1980) (stating the so called "Compensation Clause" is designed to protect the "public interest in a competent and independent judiciary").

160. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985).

originate in a non-Article III court.[161] "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review."[162] EFCA's interest arbitration arguably would result in the FMCS adjusting private rights and liabilities. Therefore, Article III may be violated where the use of mandatory arbitration, here under the auspices of the executive branch, encroaches upon traditional state law claims. However, the Court has specifically held "[r]emoving the task of valuation from agency personnel to civilian arbitrators, selected by agreement of the parties or appointed on a case-by-case basis by an independent federal agency, surely does not diminish the likelihood of impartial decision-making, free from political influence."[163]

B. Substantive Due Process

The NLRA was challenged two years after its enactment in *NLRB v. Jones & Laughlin Steel Corp*.[164] The *Jones & Laughlin Steel* Court held the NLRA constitutional on Substantive Due Process grounds since no contractual provisions were imposed and the Act instead only provided "free opportunity for negotiation with accredited representatives."[165] EFCA is an amendment to the NLRA[166] and would modify this fundamental underpinning of the NLRA's constitutionality and obliterate the logic upholding the NLRA on Substantive Due Process grounds. However, the *Jones & Laughlin Steel* Court applied *Lochner* era standards.[167] Substantive Due Process during *Lochner* was protective of the freedom to contract and the Court struck down numerous laws on that ground.[168] However, this principle has been limited in the post-*Lochner* era and Substantive Due Process has only been applied to pro-

161. *Id.*

162. *Id.* (citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84 (1982)). The Court specifically stated the adjustment of private rights and liabilities is within Article III protection. *Id.* at 586 (citing *N. Pipeline*, 458 U.S. at 71).

163. *Id.* at 590.

164. 301 U.S. 1 (1937).

165. *Id.* at 45, *quoted in* H. K. Porter Co. v. NLRB, 397 U.S. 99, 105 (1970).

166. H.R. 800 § 2(a).

167. *See* Emma Dewald, Lochner *in the Lower Courts, 1930-1960*, COLUM. J.L. & SOC. PROBS 211, 215-16 (2003) (discussing Lochner v. New York, 198 U.S. 45 (1905)).

168. *Id.* The end of the *Lochner* era is described in detail in *W. Coast Hotel v. Parrish*. 300 U.S. 379, 391 (1937).

tect certain fundamental rights.[169]

C. Separation of Powers, Article I, Section 1

The Constitution forbids conferring Congress' legislative powers on any other entity.[170] State courts have struck down public sector mandatory interest arbitration schemes on this ground if the delegation of powers to the arbitrator is not carefully circumscribed.[171] The Supreme Court also has struck down laws on these grounds due to the lack of guiding principles for the quasi-legislative body to follow.[172] With that said, there are certain inherent limitations on administrative authority contained within the APA, specifically designed to avoid Article I, Section 1 issues.[173] This militates against unconstitutionality especially where all Supreme Court decisions striking statutes on Article I, Section 1 grounds were prior to enactment of the APA.

Perhaps EFCA's failure to provide any guiding principles to FMCS, other than certain technical limitations such as the two-year limit on imposed contracts, is an improper unlimited delegation of power. Those who think otherwise will argue that the NLRA itself, whose purpose is to "promote the collective bargaining process," provides a guiding "intelligible principle."[174] However, there are those who assert that EFCA would confuse the NLRA's fundamental principle—to promote the free negotiation of economic terms by the parties—by mandating imposition of contract terms on unwilling employers.[175] This would leave, arguably, FMCS without any guiding principle to implement EFCA's interest arbitration directive.

It is beyond argument that the two sentences in EFCA on the scope

169. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating a forced sterilization law for felons).

170. U.S. CONST. amend. art. I, § 1.

171. *E.g.*, Salt Lake City v. Int'l Ass'n of Firefighters, Locals 1645, 593, 1654, & 2064, 563 P.2d 786, 789-90 (Utah 1977); Greeley Police Union v. City Council, 553 P.2d 790, 792 (Colo. 1976); City of Sioux Falls v. Sioux Falls Firefighters, Local 814, 234 N.W.2d 35, 38 (S.D. 1975); Erie Firefighters Local No. 293 v. Gardner, 178 A.2d 691, 695-96 (Pa. 1962).

172. Panama Refining Co. v. Ryan, 293 U.S. 388, 432-33 (1935); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935).

173. *E.g.*, 5 U.S.C. §§ 552-53 (2006). *See generally* George B. Sheperd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 N.W. U. L. REV. 1557, 1586 (discussing the principles of administrative limitation behind the APA).

174. 29 U.S.C. § 151; *see also* Am. Power & Light Co. v. SEC, 329 U. S. 90, 104 (1946) ("[A facially vague term] may derive much meaningful content from the purpose of the Act, its factual background, and the statutory context.").

175. *See supra* Part II.B.iii.

and powers of the arbitration panel under FMCS would not limit the arbitration panel from designing *any* ruling it may so desire. Under EFCA, the FMCS and the arbitration panel are given free access to Congress' quill in order to impose any "quasi-legislative" term they so conceive.[176] Such a grant of power could be deemed impermissible.

D. Fifth Amendment ("Takings Clause")

The Takings Clause prohibits government taking of private property without just compensation.[177] To pass constitutional muster, any government taking must be for a public purpose.[178] Some may argue that EFCA's interest arbitration provision does not serve a public purpose. However, since the public purpose standard is so broadly construed that the taking of private "slum" housing for redistribution to private developers for "urban renewal" purposes has been deemed for a public purpose, such contention is weakened.[179]

That is only one aspect of the inquiry, however. In order for the Takings Clause to even be implicated, there must be a complete deprivation of value in the property (no "partial" takings).[180] There is an argument that certain contractual terms imposed through interest arbitration (such as participation in a multi-employer pension plan that has withdrawal liability, terms that cause the business to close, or other monetary obligations) could cause permanent deprivation under recent Supreme Court precedent such as *Eastern Enterprises v. Apfel*.[181] The *Eastern Enterprises* plurality held retroactive payments for former coal miners' health benefits a taking, thus indicating the Court's increased flexibility as to what constitutes a taking.[182] However, this plurality decision has not conclusively eroded the Court's previous holdings: "*[g]iven the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to*

176. *See* Hess Collection Winery v. Cal. Ag. Relations Bd. 45 Cal. Rptr. 3d 609, 618 (2006) ("There can be no doubt that the compulsory interest arbitration scheme provides for quasi-legislative action.").

177. Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

178. *Id.* at 415 (1922).

179. Kelo v. City of New London, 545 U.S. 469, 479 (2005).

180. Penn Cent. v. N.Y. City, 438 U.S. 104, 131 (1978) (mere diminution of value insufficient to show a regulatory taking).

181. 524 U.S. 498, 533-34 (1998) (holding retroactive application of health insurance premiums based for retired workers a Taking).

182. *Id.*

use his or her assets for the benefit of another."[183] In addition, challenges on this ground will possibly be limited by ripeness, requiring challenges to be made on an individual basis only after the arbitration panel has issued a decision and caused an alleged taking.[184]

Currently, EFCA does not provide for compensation, although claims may be brought for just compensation as a matter of course under the Tucker Act in the Federal Court of Claims.[185] Accordingly, if the permanency and public purpose requirements are satisfied, implicating the Takings Clause, an unintended effect of imposed contract terms by an arbitrator under EFCA may be a large number of Court of Claims actions in which the specific findings of each arbitral decision will be relitigated to determine just compensation.[186]

CONCLUSION

EFCA is monumental and unprecedented legislation. Passage of the bill, seemingly inevitable at least in some form, will result in a fundamental shift in national labor policy. The interest arbitration provisions of the bill provide a broad grant of power to the FMCS to impose contractual terms on employers. Due to the significance of the law, constitutional challenges are expected. The vast majority of these challenges will be premised on the failure of EFCA's interest arbitration clause to set forth any guidelines, procedures, or review processes while

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183. Connolly v. Pension Ben. Guaranty Corp., 475 U.S. 211, 223 (1986).

184. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1019 (1984) (holding a takings claim under FIFRA not ripe).

> Because we hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of FIFRA, we conclude that Monsanto's challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution. Because of the availability of the Tucker Act, Monsanto's ability to obtain just compensation does not depend solely on the validity of the statutory compensation scheme.

Id.

185. 28 U.S.C. § 1491. The Tucker Act provides for, inter alia, jurisdiction in the Court of Claims for any claim based upon the Constitution, (concurrently with the federal district courts where the amount in controversy is less than $10,000):

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id. The Court of Claims is specifically invoked in Takings Clause cases to determine and award just compensation. *E.g.*, United States v. 21.54 Acres of Land, 491 F.2d 301, 304 (4th Cir. 1973).

186. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736 & n.10 (1997) (stating "facial" Takings Clause claims are difficult to win and usually fail on ripeness grounds).

fundamentally altering longstanding labor law principles.