PATHS TO POWER: LABOR LAW, UNION DENSITY, AND THE GHENT SYSTEM

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ABSTRACT

Advocates for the labor movement are understandably disheartened by the uncertain future of the Employee Free Choice Act. Underlying the EFCA strategy of union revitalization is a widespread belief about the efficacy of strong labor laws for supporting strong, high-density labor movements. In this paper I ask: How necessary are strong labor laws for strong labor movements? If not labor law, what sorts of policies and institutions support high union density? By comparing the National Labor Relations Act with the labor laws of Denmark and Sweden, countries where union density has ranged between 70 and 80 percent in recent years, I argue that the necessity of strong labor laws for high union density is doubtful. Rather, what does appear to be important for these high-density Nordic countries is the administration of unemployment insurance by labor unions, an arrangement known as the Ghent system. The Ghent system helps unions overcome three separate problems that labor law in the US attempts to resolve, in evidently ineffective ways. I call these three problems the free-rider problem, the recognition problem, and the adversarial problem. Further, in helping to resolve the adversarial problem, I provide an economic analysis arguing that collectively-bargained unemployment insurance is efficient and establishes a positive-sum tradeoff between a form of labor-market security for workers and a flexible workplace for employers. The paper concludes by considering whether a version of the Ghent system could be adopted in the US as a strategy of union revitalization. One argument in support of this possibility is the broad deference states enjoy under the federal Social Security Act to design the administration of their unemployment-insurance systems, which makes possible the adoption of state-level Ghent systems and hence a "progressive-federalist" strategy of union revitalization.

TABLE OF CONTENTS

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INTRODUCTION

The Employee Free Choice Act (EFCA) is the most significant proposal for labor-law reform in over a generation.[1] Whether or not the bill ever had

[1] The last major attempt at reforming the National Labor Relations Act (NLRA) occurred with the proposed Labor Law Reform Act of 1977. H.R. 8410, 95th Cong., 123 Cong. Rec. 23, 711-14 (1977); S. 1883, 95th Cong., 123 Cong. Rec. 23, 738 (1977). A history of the bill is given in THE DEVELOPING LABOR LAW 67-68 (Patrick Hardin et al. eds., 4th ed. 2001)

a chance of passing, its prospects are now highly uncertain; when, if ever, another opportunity will become available is unknown.[2] The fate of EFCA is grim news for labor-movement advocates. If a simple reform bill—envisioning no fundamental change to the basic structure of labor law, merely "filling gaps" in the current framework—cannot pass, what hope is there for labor?[3] Underlying this despair is the virtually unquestioned belief that reform of federal labor law is essential for reviving the fortunes of labor unions.[4] One can hardly find a legal discussion of revitalizing the labor movement that does not assume the necessity of making some change, large or small, to the federal system of labor law enacted by the National Labor Relations, or Wagner, Act (NLRA).[5] This Article interrogates this assumption and poses two questions: are how important are strong labor laws for strong labor movements? If not very important, what sorts of policies or institutions support high-density labor movements? Based on a comparative and institutional analysis, this Article concludes that labor-law scholars' preoccupation with rule-based labor legislation is misplaced, and that differences in labor laws cannot explain why union density is so much higher in the countries of Denmark and Sweden than it is in the United States. Rather, the article argues that incentive-based institutions, such as the "Ghent system," make a much larger difference for union density in these two Scandinavian countries.

To conduct the comparative labor-law analysis, this Article examines how each country addresses a set of fundamental dilemmas that unions everywhere must overcome in order to increase union membership among workers. Drawing from collective-action theory, social-movements theory, and industrial relations, there are at least three such problems:

- *The free-rider problem*. This is the specifically strategic dilemma that groups and organizations face when seeking to produce collective goods: if the good will be provided to all, why should an individual contribute, when she can let others do the work and obtain the good without incurring any cost to herself? If all members

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[2] Although Speaker Nancy Pelosi and President Barak Obama have recently pledged their continued support for EFCA as a legislative priority, current political realities make its passage seem unlikely. CITE.

[3] David Brody, *A Tale of Two Labor Laws*, DISSENT __ (Spring 2010) (describing EFCA as merely filling in gaps).

[4] *See*, *e.g.*, CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE 214 (2010); Benjamin I. Sachs, *Enabling Employee Free Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 656-64 (2010) (construing the problem of workers' organization into unions as a problem of labor law); RESTORING THE PROMISE OF AMERICAN LABOR LAW (Sheldon Friedman et al. eds., 1994).

[5] *Id*.

of the group act similarly, the collective good will not be produced at all. Labor unions are archetypical examples of collective organizations that face this dilemma.[6]

- *The recognition problem*. To increase membership, social movements must not only solve the free-rider problem, they must also produce the collective goods that their organizations seek to achieve. But social movements usually do not produce collective goods on their own; rather they make claims on other powerful actors. This holds particularly true for labor unions, which lobby the state for favorable legislation and seek to bargain collectively with employers. To be successful in these endeavors, unions must be recognized as legitimate and potent actors in their own right.[7]

- *The adversarial problem*. Scholars frequently categorize different systems of collective bargaining into "adversarial" and "cooperative" types.[8] Adversarial relationships are characterized by the resort to "hard" bargaining, the propensity for industrial strife, the lack of trust between unions and management, and in general the tendency for employers to seek "union avoidance." In cooperative relationships, employers are more likely to view unions as "social partners," which in turn encourages employers to recognize labor unions and makes union membership more attractive to employees.[9]

American labor law has offered a particular set of solutions to these

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[6] The classic statement of the free-rider problem and the provision of public and collective goods remains MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971). Labor unions occupied a central place in this original formulation, *see id*. at 66-97. For a critical elaboration of Olson's theory of collective action, *see* GERALD MARWELL & PAMELA OLIVER, THE CRITICAL MASS IN COLLECTIVE ACTION (1993).

[7] *See*, *e.g.*, SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS __ (2nd ed. 1998); *and* WILLIAM GAMSON, THE STRATEGY OF SOCIAL PROTEST __ (1975).

[8] *See* Jonathan Zeitlin, *The Triumph of Adversarial Bargaining: Industrial Relations in British Engineering, 1880-1939*, 18 POL. & SOC'Y 405, 405-09 (1990). The terms "distributive" and "integrative" bargaining have also been used to describe this distinction. *See* RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (ILR Press 1991).

[9] RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 56, 56 exhibit 3.8 (1999) (finding that 63 percent of workers would prefer to have a representational organization that "management cooperated with in discussing issues, but had no power to make decisions," while 22 percent would prefer an organization "that had more power, but management opposed." Union workers gave almost identical responses.).

problems, in ways that evidently have not been very successful.[10] The answer to the free-rider problem has been the union-security agreement: the closed, union, or agency shop that makes support for the union a condition of employment. But state and federal legislation, along with judicial decisions, have considerably limited the scope of union-security agreements, undermining unions in the process. The NLRA was suppose to solve the recognition problem by protecting the right to organize, providing for representation elections to determine employee support for a union, limiting the influence of employers' in such elections, and establishing a duty for employers to bargain with a union. But deficiencies in the application and enforcement of these rights dramatically decrease their potency. Indeed, it is the primary goal of EFCA to fill these gaping remedial holes in the NLRA's recognition procedures. Finally, the broader procedural framework that the NLRA created was supposed to "promote[] the flow of commerce" by eliminating "industrial strife [and] unrest" and to seamlessly establish labor unions as part of a new industrial order.[11] Instead, union-management relations in the US are a textbook example of the adversarial model.[12] A good instance of this is the way that employers, in their drive toward a more flexible workplace, have dismantled job security and the internal labor market, opposing and undermining unions in the process.

How much better are labor laws in Denmark and Sweden? Both countries have had union densities in the 70 and 80 percents in recent years, much higher than in the US either currently or historically.[13] Given their social-democratic history and politics, one might suppose that these Nordic countries would have untrammeled union-security provisions, effective representation procedures, a strictly-enforced duty to bargain, and high levels of job security, in addition to an elaborate, overarching legal framework for regulating employment relations. In fact, on balance neither Danish nor Swedish labor law is significantly more protective of unions or workers than current labor law in the US.[14] First, in both Denmark and Sweden, union-security agreements are virtually nonexistent. As strange as it sounds, they are essentially "right-to-work" countries.

Second, with respect to the recognition problem, labor legislation plays a marginal role. For example, representation elections are, again,

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[10] *See infra* Part II.

[11] National Labor Relations Act §1, 29 U.S.C. §151.

[12] CITE

[13] Net union density in 2003 was 78 percent in Sweden, 70.4 percent in Denmark, and 12.4 in the United States. *See* Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LAB. REV. 45 tbl. 3 (Jan., 2006).

[14] *See infra* Part II.

surprisingly absent. Further, the duty to bargain—where it exists at all, as in Sweden—is weaker than the duty to bargain under US law. Moreover, Denmark, but not Sweden, has tended to rely on a system of mandatory conciliation, but this is still a weaker remedy than the binding arbitration for a first contract contemplated by EFCA. Arguably, both countries better protect the rights of workers to join, form, and assist labor unions than does the US. But such laws are of relatively recent origin, and were preceded by already high levels of union density.

Third, the adversarial problem has been minimized in both countries. Even without a comprehensive legislative framework to institutionalize relations between unions and employers, and despite the capacity their labor movements to mobilize the vast majority of the workforce—each of which could be assumed to be a source of industrial chaos—Danish and Swedish labor relations are comparatively peaceful and cooperative.

If labor law cannot explain the high union densities in Denmark and Sweden, then invariably the second question becomes: What does? This Article contends that an arrangement known as the "Ghent system" accounts in large part for labor-movement strength in these two Scandinavian countries. Named after the Belgian town where it was first instituted, the Ghent system is a voluntary system of unemployment insurance, administered by labor unions, and subsidized by public finances.[15] Both Denmark and Sweden, along with Belgium and Finland, make up the handful of countries that have adopted such a system to administer their unemployment benefits. In the social science literature, the positive, empirical correlation between the Ghent system and union density does not appear to be in dispute.[16] The contribution of this Article is to propose causal mechanisms for *why* such a relationship exists and, at least as important, to compare and evaluate the effectiveness of two different institutional paths to union power—rule-based labor legislation on the one hand, and the Ghent system on the other. This is neither to say that strengthening labor laws cannot improve the fortunes of unions, nor that these two paths are necessarily mutually exclusive.[17] Nevertheless, the Article does propose the superiority of the Ghent system over labor legislation as a method of addressing some fundamental dilemmas to

[15] *See infra* Part I.

[16] *Id.*

[17] Although they *could* be mutually exclusive, *see* Claus Offe & Helmut Wiesenthal, *Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form*, 1 POL. POWER & SOC. THEORY 67 (1980) (making the theoretical argument that "juridification" of labor relations can weaken union density and strength); *and* Daniele Checchi & Claudio Lucifora, *Union Density: The Economic Roles of Unions and Institutions*, 17 ECON. POL'Y 361 (2002) (finding empirically that some labor-law rules act as substitutes for unions and therefore decrease union density).

increasing union density and strength.

The Article contends that the Ghent system sustains higher union densities in Denmark and Sweden by contributing to the resolution of the three dilemmas defined above.[18] First, the Ghent system provides an alternative solution to the free-rider problem. Since it is voluntary and administered by unions, it gives workers an incentive to keep and maintain membership without the need for union-security agreements. Second, the Ghent system addresses the recognition problem by separating and reprioritizing *employees' decision* to join a union from the *employer's decision* to recognize it. Danish and Swedish unions are able to constantly recruit new members through their administration of unemployment insurance, and thence mobilize and build membership support among employees for other labor-movement goals, including recognition from employers, without the need for government certification procedures. These two decisions are confounded and their ordering reversed in US labor law and practice: in order for unions to recruit and build membership support, they must first prevail in a government-administered representation election against a typically intransigent employer. Finally, union participation in unemployment-insurance policy also helps sustain more cooperative labor relations. In Denmark in particular, unions and employers are able to achieve a positive-sum tradeoff whereby workers receive *income security* in exchange for ceding their demands for *job security*, which gives employers more flexibility in the workplace. Danish success with the policy—termed "flexicurity"—has garnered much attention from European policy makers.

What allows flexicurity to serve as a way of ameliorating the adversarial problem is its contribution to increasing economic efficiency. But since it is not necessarily obvious that unions' involvement in unemployment-insurance policy would have this effect, the Article builds the case for this assertion[19] and provides a formal treatment of the problem in the Appendix.[20] Even defenders of unions usually concede that unions have

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[18] *See infra* Part II.

[19] *See infra* Part III.

[20] The formal model presented in the Appendix is the first to analyze collectively-bargained employment protection rules and to compare and evaluate such contracts with collectively-bargained unemployment insurance. The model's claim that the optimal insurance contract equalizes workers' marginal utility of money across states of nature is the application of a more general insight from the economic theory of contracts, *see* PARTICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY 13 (2005) (the "Borch rule") and has been employed in other analyses of unions and unemployment insurance, *see* Alison L. Booth, *Layoffs with Payoffs: A Bargaining Model of Union Wage and Severance Pay Determination*, 62 ECONOMICA 551 (1995); *and* Jaakko Kiander, *Endogenous Unemployment Insurance in a Monopoly Union Model When Job Search Matters*, 52 J. PUB. ECON. 101 (1993).

negative effects on productivity or unemployment, or both. Indeed, I show that when unions and employers bargain over wages and employment-protection rules (such as "just cause"), risk-averse workers will prefer a contract with excessive job security that is production inefficient. However, when unions and employers bargain alternatively over wages and unemployment benefits, leaving to the employer the right to hire and fire, this externality is internalized and the resulting contract causes no loss in productive efficiency compared to the competitive, nonunion benchmark. Understanding these mechanisms can help explain the supportive role that Danish flexicurity plays in solving the adversarial problem. Moreover, as I shall argue, there are good reasons why unions should participate in unemployment-insurance policy in order to make the implementation of flexicurity a success.

Which leads us to the third question this Article raises: If the Ghent system is a better path than strong labor laws for achieving higher union density, can and should it be adopted in the US? The Article considers a variety of positive reasons to these questions.[21] Foremost among them is that unemployment insurance in the US is primarily a state-level program. Although the federal Social Security Act encourages states to create their own programs, states are broadly free to determine conditions for eligibility and the amount and duration of benefits. Since federal labor law has become "ossified"—impervious to change both at the federal level and, because of preemption, at the state level as well—unemployment-insurance reform at the state level therefore presents the possibility for a "progressive-federalist" strategy of revitalizing the labor movement. Another advantage of union-administered unemployment insurance is that it would give programmatic focus to a variety of otherwise disparate proposals for labor-movement revitalization. Not only would the Ghent system offer a means of reinventing unions in the new "boundaryless workplace,"[22] it would also provide a surer foundation for proposed "minority-union" organizing[23] and help return unions to their "mutual-aid" based roots.[24]

These accumulated advantages may not make the legislative outcome for an American Ghent system an ineluctable victory—in any case it is unlikely that easy solutions exist to the problems of union revitalization or worker welfare more generally. However, the kind of labor movement that the Ghent system prefigures is reason enough to give it the concentrated effort required to bring it into being.[25] Unions' provision of unemployment

[21] *See infra* Part IV.
[22] *See infra* Part IV.B.1.
[23] *See infra* Part IV.B.2.
[24] *See infra* Part IV.B.3.
[25] *See infra* Part IV.C.

insurance for all workers, not merely for those represented in government-certified bargaining units, would begin to fundamentally transform the relationship between unions, workers, and the economy. Rather than focusing on the immediate achievement of majorities in particular workplaces and firms, the labor movement would begin to act as the conscience and steward of the broader workforce and economy.[26]

The Article will proceed in the following fashion. Part I conducts a brief overview of the Ghent System, its history and institutional characteristics, and provides a summary of the empirical research on the impact of the Ghent system on union density. Part II conducts the comparative-institutional analysis of labor law and the Ghent system, which is organized in terms of the three-part dilemma defined in the introduction. Part III makes the argument that union-and-employer bargaining over wages and unemployment insurance is efficient. Part IV addresses the issue of whether and how the Ghent system can be adopted in the US.

I. THE GHENT SYSTEM

A. Characteristics and History of the Ghent System

The Ghent system derives its name from the Belgian town where this type of unemployment-insurance system was first instituted in 1901.[27] In that year, the Ghent municipal authority began to subsidize trade union unemployment-insurance programs with public funds.[28] Besides the fact that Ghent-system unemployment insurance systems are administered by labor unions and subsidized by the government with public funds, they tend to share several other characteristics. First, unlike public unemployment-insurance schemes, which are compulsory, most of the Ghent systems are voluntary.[29] That is, a worker must actively join an unemployment-insurance plan and make some minimum level of contributions in order to be eligible to receive benefits in the future. Second, unemployment benefits are not dispensed by the main union organizations themselves. Rather, unemployment-insurance funds are financially segregated from other union funds and administered by institutionally distinct labor exchanges or

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[26] I am paraphrasing Laura Dresser & Joel Rogers, *Part of the Solution: Emerging Workforce Intermediaries in the United States*, *in* GOVERNING WORK AND WELFARE IN A NEW ECONOMY 266, 289 (2003), in which they discuss the possibility of unions assisting workers in building skills and careers in their jobs.

[27] BRUCE WESTERN, BETWEEN CLASS AND MARKET 51 (1999).

[28] *Id.*

[29] Bo Rothstein, *Labor-Market Institutions and Working-Class Strength*, *in* STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS 33, 39-40 (Sven Steinmo et al. eds., 1992)

employment offices that are nevertheless established by and accountable to the unions.[30] Finally, consistent with the Ghent system's mixed public-private nature, unions, employer associations, and the state typically collaborate, in "corporatist" fashion, in determining benefit levels, eligibility requirements, and other aspects of unemployment-insurance policy.[31]

Soon after the first municipal scheme was established in 1901, versions of the Ghent system could be found in many European localities.[32] Ghent systems became more centralized when provincial governments began to subsidize municipal funds.[33] The first nationalized Ghent system appeared in France in 1905, followed by Norway and Denmark a few years later.[34] "Over the next three decades, the Netherlands (1916), Finland (1917), Belgium (1920), Switzerland (1924), and Sweden (1934) all adopted national voluntary unemployment plans."[35] The depression and economic crises of the early twentieth century appeared to be contributing factors in the development of the Ghent system, as governments came to the rescue of depleted union unemployment funds with public money.[36]

Other European countries took a different path. Following Britain's lead with fully public systems of unemployment insurance were Italy (1919), Austria (1920), Ireland (1923), and Germany (1927).[37] The next development in unemployment-insurance provision saw the passage of control from unions to the state. Shifts from union to state control occurred

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[30] WESTERN, *supra* note __, at 51, 55, 56. Historically, these labor exchanges also provided placement services to workers, *id.* at 54.

[31] Each of the current Ghent countries—Belgium, Denmark, Finland, and Sweden—are considered to be corporatist or have corporatist elements. Bernhard Ebbinghaus & Jelle Visser, *When Institutions Matter: Union Growth and Decline in Western Europe, 1950-1995*, 15 EUR. SOC. REV. 135, 151 tbls. 5(a) and 5(b) (1999). Denmark and Sweden exhibit corporatist participation in unemployment insurance policy. *See* Jens Blom-Hansen, *Organized Interests and the State: A Disintegrating Relationship? Evidence from Denmark*, 39 EUR. J. OF POL. RES. 391, 398; *and* Jens Blom-Hansen, *Still Corporatism in Scandinavia? A Survey of Recent Empirical Findings*, 23 SCANDINAVIAN POL. STUD. 157, 159-60 (2001). While it would be possible to have union participation in unemployment-insurance policy without union administration of benefits, and vice versa, they are typically found together, as Denmark and Sweden illustrate.

[32] WESTERN, *supra* note __, at 51.

[33] *Id.*

[34] *Id.*

[35] *Id.*, *citing* Jens Alber, *Government Responses to the Challenge of Unemployment: The Development of Unemployment Insurance in Western Europe*, *in* THE DEVELOPMENT OF WELFARE STATES IN EUROPE AND AMERICA 153 (Peter J. Flora & Arnold J. Heidenheimer eds., 1981).

[36] WESTERN, *supra* note __, at 51.

[37] *Id.* at 52.

in Norway, the Netherlands, France, and Switzerland.[38] Thus, by the close of the twentieth century, only four European countries had retained the Ghent-system: Belgium, Denmark, Finland, and Sweden.

The near triumph of public unemployment insurance over the Ghent model provokes some interesting observations. As Bruce Western observes, in most cases the shift from union to state administration, "was less a rejection of union power, than an effort at comprehensive welfare provision."[39] Moreover, labor movements did not perceive of the Ghent system as the ideal or favored form of unemployment insurance. As Bo Rothstein points out in his historical comparison, "Voluntary systems seem above all to have been favored by Liberal governments, while Labor governments have, with one exception, introduced compulsory schemes."[40] Nor can one say that the adoption of a Ghent-type unemployment-insurance scheme was a *consequence* of union density and strength. As Rothstein also shows, "there is no significant correlation between union strength and type of unemployment scheme in the 1930s," a crucial decade in the development of unemployment-insurance systems.[41] The four countries with the highest levels of union density in those years either had compulsory or no publicly-funded unemployment insurance at all.[42] Further, the mean union density for countries with compulsory systems was slightly higher than for those with a Ghent system (33 percent compared to 25 percent).[43]

B. The Ghent System and Cross-National Union Density

Table 1 gives union densities for various developed countries at several different years. The first observation to make is the large degree of variation in density between countries. France comes in at the lowest with 9.4 percent of the workforce belonging to a union in 1992, while Finland and Sweden virtually tie at the top of the list with 111.4 and 111.3 percent respectively. (The figures can exceed 100 because "gross density" is defined on the number of all wage and salary earners, whereas union membership includes unemployed and retired persons.) It is common to attribute the weakness of the labor movement in the US to an "American exceptionalism," which refers to America's supposed cultural singularity, individualism, and lack of a working-class consciousness or collective concern for the common

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[38] *Id.* at 52-53.
[39] WESTERN, *supra* note __, at 52.
[40] Rothstein, *supra* note __, at 44.
[41] *Id.* at 43.
[42] *Id.*
[43] *Id.*

good.[44] However, the theory gives little insight into understanding the degree of variation in union density reported in Table 1, either across developed countries or within Europe itself. For instance, the French working class has a reputation for massive strikes and demonstrations, and the French Communist Party was one of the strongest communist parties in postwar Western Europe.[45] Yet in recent years, union density in France has fallen below that of even the United States.

For these reasons, scholars have found that institutional factors better explain variation in union density.[46] Among the variables that these scholars highlight are: the extent of centralization in union organization and collective bargaining, the duration and frequency that a prolabor political party is in government, and the Ghent system.[47] The relationship between high union density and the Ghent system emerges very clearly in Table 1. As seen there, the four countries with the highest levels of union density are all Ghent-system countries; moreover, these are the only countries that have the Ghent system. As Rothstein notes from a similarly simple observation, "[W]e can say that it is possible to have a fairly strong union movement without a Ghent system, but that in order to have really strong unions, such a system seems necessary."[48]

[TABLE 1 ABOUT HERE]

Does such a strong conclusion hold up to more rigorous scrutiny? It does. When one controls for the other institutional factors just mentioned, cross-sectional analyses estimate that Ghent-system countries have union densities approximately 17 percentage points higher than non-Ghent countries.[49] Lyle Scruggs argues that Ghent-system effect is even more

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[44] The *locus classicus* is WERNER SOMBART, WHY IS THERE NO SOCIALISM IN THE UNITED STATES? (1906); for a more recent version of the argument, *see* SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1997); and for more critical perspectives *see* Sean Wilentz, *Against Exceptionalism: Class Consciousness and the American Labor Movement*, *1790-1920*, 26 INT'L LAB. & WORKING-CLASS HIST. 1 (1984); *and* Aristide Zolberg, *How Many Exceptionalisms?*, *in* WORKING-CLASS FORMATION: NINETEENTH-CENTURY PATTERNS IN WESTERN EUROPE AND THE UNITED STATES, 397-436 (Ira Katznelson & Aristide Zolberg eds., 1986).

[45] CITE

[46] *See generally* Ebbinghaus & Visser, *supra* note __; *and* WESTERN, *supra* note __. Institutional factors are those "humanly-devised constraints," in contrast to the economic (e.g., the business cycle) or structural (e.g., manufacturing v. nonmanufacturing) variables that earlier studies of union density have emphasized. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990).

[47] *See generally* WESTERN, *supra* note __.

[48] Rothstein, *supra* note __, at 42.

[49] WESTERN, *supra* note __, at 93.

profound and explains 82 percent of the change in diverging densities across European countries in recent decades.[50] Furthermore, to emphasize the point raised earlier, the effect of the Ghent system is unlikely to be the product of cultural differences. For example, Sweden has the Ghent system, but Norway does not. Yet despite similarities in union organization, industrial relations, political institutions, language, geography, and culture, Sweden's union density has tended to exceed that of Norway's by 20 to 30 percentage points.[51] Union density has also differed significantly between two Benelux countries, Belgium, which has the Ghent system, and the Netherlands, which does not.[52]

While the positive empirical relationship between the Ghent system and high union density is widely acknowledged, much less attention has been given to understanding the causal linkages between them. Some attention is usually given to the Ghent system's amelioration of the free-rider problem.[53] Moreover, labor legislation is also assumed to play a complementary role in supporting higher levels of union density. In particular, Western's main argument linking union density with prolabor political power is "through key events, such as a change in a labor law or an intervention in collective bargaining."[54] Yet as Rothstein points out, causation could run the other way: "Having a large number of workers organized in unions is evidently an important resource for labor parties competing in national elections …"[55] Thus the purported causal influence of labor law on union density remains undeveloped in the scholarly literature.

This Article will offer a deeper look into the causal linkages between the Ghent system, labor law, and union density. For instance, in addition to the free-rider problem, I identify two other problems of membership expansion—the recognition and adversarial problems—that the Ghent system helps resolve. Moreover, based on an examination of Swedish and Danish labor law, this Article will also question the purported causal effect of prolabor political power on union density. The finding that Swedish and Danish labor laws do not appear to be much better than American labor law suggests that if prolabor political power has a causal effect on union density in these countries, it is most likely not through the passage of union-favoring labor legislation, at least in these countries. This finding likewise bolsters the case that it is the Ghent system and other non-strictly-legal

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[50] Lyle Scruggs, *The Ghent System and Union Membership in Europe*, 1970-1996, 55 POLI. RES. Q. 275, 286-290 (2002).

[51] WESTERN, *supra* note __, at 58.

[52] *Id.* at 57-58.

[53] *See*, *e.g.*, Rothstein, *supra* note __, at 36-37; *and* Scruggs, *supra* note __, at 290-92.

[54] WESTERN, *supra* note __, at 66.

[55] Rothstein, *supra* note __, at 38.

institutions that explain differences in union density.

II. THREE OBSTACLES TO BUILDING UNION MEMBERSHIP

The central goal of EFCA is to reverse decades of decline in union membership density. Labor activists care about union density because it is a key measure of union power, influence, and legitimacy.[56] In other words, union density is not just about numbers. Higher density brings greater power from the financial contributions members make, from the information networks that membership establishes, and from ties of solidarity that membership engenders.[57] This power can be wielded by workers and their unions against (and sometimes with) other powerful actors, mainly firms and the state, in order to improve the conditions of work and the welfare of workers.

As recent labor history in the US has painfully demonstrated, however, increasing union density can be enormously difficult. I propose that achieving this ultimate end entails resolving at least three interrelated but analytically distinct problems. Sometimes these problems are resolved in different ways in different countries with different solutions based in law and policy. Each problem is not always solved, or not solved in a satisfying way.

A. The Free-Rider Problem

By the free-rider problem, I mean the hurdle that unions face in resolving the collective-action dilemma.[58] When the benefits of group action are collective—they cannot be provided to some without providing them to all—there is an incentive for a member of the group to "free ride" on the contributions of others and not join or support the group's efforts. Yet if too many group members free ride, the collective goods or the organizations that provide them are unlikely to emerge. Since virtually all of the benefits that unions provide are collective in practice, the free-rider problem is pervasive for labor unions. Accordingly, all labor movements seek to minimize or eliminate the free-rider problem—through social norms, institutions, laws, or any combination of these factors.

1. Comparative Analysis

US labor law attempts to resolve the free-rider problem through

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[56] Visser, *supra* note __, at 38.
[57] CITE
[58] *See supra* note __ and accompanying text.

statutorily authorized union-security agreements. A union-security agreement, such as a closed, union, or agency shop, obligates the employee to contribute some form of support to the union as a condition of continued employment.[59] Statutory support for union-security agreements is spelled out in the NLRA. Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate among employees on the basis of union membership.[60] However, a proviso to that section states that nothing "shall preclude an employer from making an agreement with a labor organization … to require as a condition of employment membership therein" as long as the labor organization has been certified as the exclusive bargaining representative of the employees.[61] Legislative history reveals a clear intention of permitting union-security agreements precisely in order to prevent the free-rider problem, where "the man who does not pay dues rides along freely without any expense to himself."[62]

However, from the inception of the NLRA, this method of resolving the free-rider problem has been fiercely contested. First, passed by Congress in 1947, the Taft-Hartley Act curtailed union-security devices in several ways. Taft-Hartley prohibited the closed shop,[63] a union-security agreement in which the employer agrees to hire only union members, and effectively endorsed the agency shop,[64] which allows the employer to hire anyone, and obligates the employee to become a union member thirty days after her employment begins.

Union membership under Taft-Hartley, however, takes a very shallow form. That Act also added a second proviso to Section 8(a)(3) that prohibited discrimination if the employer "has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."[65]

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[59] A closed shop requires an employer to hire and maintain in employment only union members; a union shop allows an employer to hire either union members or nonmembers, but requires employees to become union members within a certain period of time as a condition of employment; and an agency shop is like a union shop, except that employees are only obligated to make financial contributions to the union and are not required to become formal members.

[60] National Labor Relations Act § 8(a)(3).

[61] National Labor Relations Act § 8(a)(3).

[62] Communication Workers v. Beck, 487 U.S. 735, 748 (1988).

[63] National Labor Relations Act § 8(a)(3). The Taft-Hartley Act narrowed Section 8(a)(3)'s saving proviso by permitting only union-security agreements that required union membership "on or after the thirtieth day following" the date of hire.

[64] Although the language of the union shop is frequently used to refer to the Taft-Hartley change, the effect was to legally allow only the agency shop. *See infra* text accompanying notes __.

[65] National Labor Relations Act § 8(a)(3).

The consequence of this second proviso in Supreme Court jurisprudence has been to make "membership," in 8(a)(3)'s first proviso, mean nothing more than its "financial core."[66] That is, an employee cannot be terminated for losing membership after not participating in a strike, regularly attending union meetings, or otherwise failing to meet the non-monetary obligations of membership.[67] Subsequent Supreme Court decisions have in turn narrowed the scope of this financial-core obligation. In *Communication Workers v. Beck*, the Court declared that this "financial core" does not include any monetary obligation to "support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment."[68] Consequently, unions' expenditures of dues for lobbying on behalf of labor legislation;[69] participating in social, charitable, and political events;[70] and most notably "organizing the employees of other employers," have all come under judicial attack.[71]

Finally, and perhaps most infamously, Taft-Hartley amended the NLRA to authorize states to prohibit collective agreements from requiring any form of union-security agreement.[72] This has resulted in the passage of so-called "right-to-work" legislation in nearly half of the states (currently twenty two).[73] Employees who receive the benefits of union representation in right-to-work states have no obligation to support the union, financial or otherwise, as a condition of continued employment.

Such concisions in the legal scope of union-security agreements have most likely had deleterious effects on union density. Prohibiting the closed shop substantially reduces the value of union membership, especially to the unemployed union member.[74] Under an agency-shop agreement the employer can hire anyone and can therefore hire from a much larger pool of potential workers. Under a closed shop by contrast, an employer can hire only from the pool of job-seeking union members, making the reemployment prospects of union members much higher compared to the

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[66] NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

[67] Electric Auto Lite Co., 92 N.L.R.B. 1073, *enf'd per curiam* 196 F.2d 500 (6th Cir. 1952), *cert. denied* 344 U.S. 823 (1952) (deciding that union members are not subject to discharge for not paying fines assessed for infractions of internal union rules).

[68] Communication Workers v. Beck, 487 U.S. 735, 740 (1988).

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[71] United Food & Commercial Workers Union, Local 1036 v. NLRB, 307 F.3d 760 (9th Cir. 2002), *cert. denied sub nom.* Mulder v. NLRB, 537 U.S. 1024 (2002) (holding that dues charged to dissenting agency-shop members should include the cost of organizing workers outside of the bargaining unit).

[72] National Labor Relations Act § 14(b).

[73] National Right to Work Legal Defense Foundation, *Right to Work States*, *available at* http://www.nrtw.org/rtws.htm.

[74] CITE

agency shop, and therefore increasing substantially the benefits of union membership.

Constricting union membership obligations to their financial core also weakens unions' economic power. Continued financial support from the membership is not the only collective-action dilemma that unions must solve. Unions must count on their members' physical participation, especially in strikes and other economic actions. "Financial-core" membership furthermore transforms the union-member relationship into a bare monetary transaction and deprives the employee of the experience of the norms, culture, and solidarities that can be acquired as part of a civic community.

The effect of right-to-work legislation has received an enormous amount of empirical investigation.[75] A number of studies have concluded that right-to-work legislation has had significant negative effects on unions. Several studies show that the level of free riding is higher in right-to-work states, with the implication that this hinders union growth in these states because of the increased costs borne by those who prefer union representation.[76] Other studies cite right-to-work legislation as an important factor in the decline of private-sector national union membership.[77] Right-to-work legislation not only slows the growth rate of unions in adopting states, but in union-shop states as well, as capital migrates from the latter to the former in search of cheap labor.[78]

Despite these severe obstacles to overcoming the free-rider problem, EFCA proposes no specific provision to address them.

How is the free-rider problem solved in a country with dramatically higher levels of union density such as Sweden or Denmark? One might guess that in these countries with a very strong social-democratic history and culture that there would be little qualm in obligating all workers who enjoy the benefits of unions to support the union financially and otherwise. By contrast, it is only in the United States, with its individualistic culture and history, where a debate about "compelling" workers to support a labor union could possibly arise.

One then would be surprised to learn that Sweden and Denmark are both more deferential to individual rights than the US (at least in the labor law context) and that in fact there is no obligation to join a union as a condition of employment in either country. Until very recently, union-

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[75] William J. Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, 19 J. OF LAB. RES. 445 (1998).

[76] *See*, *e.g.*, Joe C. Davis & John H. Huston, *Right-to-Work Laws and Free Riding*, 31 ECON. INQUIRY 52 (1993).

[77] Moore, *supra* note __, at 450-51.

[78] *Id.*

security clauses were legally permissible in Sweden but in practice were "virtually nonexistent" [79] and were made so by agreement between unions and employer associations. The same holds for Denmark as well, where union-member "preference" clauses appeared only in collective agreements made with the minute group of employers who were not members of an employers' association (and therefore not party to an industry or sector agreement).[80] In 2006, the European Court of Human Rights declared that union-security agreements were incompatible with the principle of freedom of association under the European Convention.[81] At least partly in response to this decision, the Danish parliament passed in 2006 the Act on Protection against Discrimination Due to Membership or Nonmembership in a Union, which prohibited union preference clauses in collective agreements.[82]

However, the "extreme rarity"[83] of union-security clauses in Swedish and Danish labor agreements cannot be explained by recent trends in human rights law in the European Union. In fact, the absence of union security goes very deep into the tradition of Nordic labor relations. The banning of the closed shop dates to the early emergence of collective bargaining in Sweden, when unions and employers agreed in the 1906 "December Compromise" that employers would have the right to hire without regard to union affiliation.[84]

One is therefore confronted with a rather anomalous result. Right-to-work legislation and other statutory and judicial restrictions on union-security agreements are almost certainly undermining union strength and density in the United States. Yet Denmark and Sweden are essentially right-to-work countries. How then do these two countries overcome the free-rider problem to sustain such high union densities?

2. The Ghent System and the Free-Rider Problem

As has been argued in other studies of the Ghent system, union-

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[79] Reinhold Fahlbeck & Bernard Johann Mulder, *Sweden*, *in* INTERNATIONAL LABOR AND EMPLOYMENT LAWS 19-54 (William L. Keller & Timothy J. Darby eds., Bureau of National Affairs 2003).

[80] Ole Hasselbalch, LABOUR LAW IN DENMARK 196 (2005).

[81] Fahlbeck & Mulder, *supra* note __, at 54. *See also* European Court Reports, joined cases *Sørensen & Rasmussen v. Denmark* judgment of Jan. 11, 2006, nos. 52562/99 and 52620/99. Specifically, the court held that the *closed shop* violated the worker's freedom of association, but European labor and employment law, which does not share the United States' long and tortured history over union security, does not make fine distinctions among different kinds of union-security provisions. The term "closed shop" can mean any kind of union-security agreement.

[82] *See infra* text accompanying notes __.

[83] Fahlbeck & Mulder, *supra* note __, at 54.

[84] *Id.*; *see also* PETER A. SWENSON, CAPITALISTS AGAINST MARKETS 80-81 (2002).

administered unemployment insurance arguably solves the free-rider problem for Swedish and Danish unions by furnishing an alternative "selective incentive" for workers to join the union.[85] In Mancur Olson's classic study of collective action, he defines a selective incentive as an incentive that operates discriminately between those who do and do not contribute to the production of a collective good (or to the groups or organizations that produce them).[86] A union-security clause is one kind of selective incentive: the employee is threatened with the loss of a job if she does not join or contribute to the union.[87] Union-administered unemployment insurance is another kind of selective incentive: since the unemployment-insurance scheme is voluntary, the worker will only receive the benefit if she joins and contributes to the program. (In fact, the general contemporary rule in Ghent-system countries is that a worker does not need to join a union in order to participate in a union-run plan, although it seems that historically unions could require membership.[88] Nevertheless, this history and the simple fact that the unions administer the plans, probably ensures that there are strong social norms and reciprocal incentives that help reduce the free-rider problem.)

Union-provided unemployment insurance and union-security agreements are alternative ways of addressing the free-rider problem. But union-provided unemployment insurance is superior to union-security agreements in at least two respects. First, union membership sustained by a union-security regime is particularly vulnerable in the face of what we might broadly call "job transitions." Under a union-security agreement, union membership is conditioned on being employed in a union-represented bargaining unit. Consequently, a represented employee's entire relationship to a labor union will typically end when she leaves her job: as a result of being unemployed through dismissal or lay off, when she finds a job elsewhere and the new workplace is not represented by a union, or, under the current labor-law doctrines of successorship, when a company acquires a formerly union-represented plant and the new employer is not bound by the former union's bargaining authority. Labor movements whose memberships are supported by union security agreements are struck particularly hard during economic recessions. Indeed, union density in the US has fallen to new standards of low as a result of the current recession. For the first time ever, because of job losses in heavily unionized industries such as manufacturing, construction, and transportation, more public sector

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[85] Rothstein, *supra* note __, at 36-37; Scruggs, *supra* note __, at 290-95; Ebbinghaus & Visser, *supra* note __, at 143.

[86] OLSON, *supra* note __, at 51.

[87] *Id.* at 66-97.

[88] Ebbinghaus & Visser, *supra* note __, at 143.

workers belong to labor unions than do private sector employees—although private sector employment dominates the public sector five to one.[89]

Job transitions have entirely the opposite effect on union density in the Ghent system. Because union membership is a condition of participating in the unemployment scheme, the prospects of job loss should increase union density as workers who face an increasing risk of unemployment seek out unemployment insurance from the unions.[90] Indeed, empirical analysis demonstrates that during business cycles "unionization grew faster when unemployment increased in the Ghent systems, while it declined more rapidly as unemployment grew in the non-Ghent countries."[91] Likewise, workers are more likely to retain their union membership when they change jobs in order to enjoy continued access to unemployment insurance in the future.

A second advantage of union-provided unemployment insurance sets it apart from union-security agreements. Union-security agreements have long been the target of attack from antiunion critics for being "compulsory" and antithetical to individual liberties.[92] This sentiment is partly what fueled the passage of the Taft-Hartley Act and provides the ideological boilerplate for those promoting the passage of right-to-work legislation.[93] The "forced unionism" motif is a powerful one, used to great effect by opponents of EFCA, who were able to present the "card check" election process as another union subversion of employees' freedom of choice and the right to vote.[94] One can certainly question the substantive validity of the claim of "forced unionism."[95] But even if intellectually vacuous, the trope holds

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[89] Bureau of Labor Statistics, Economic News Release, available at http://www.bls.gov/news.release/union2.nr0.htm. Mike Hall, Job Crisis Takes a Toll on Union Membership, AFL-CIO NOW BLOG, available at http://blog.aflcio.org/2010/01/22/job-crisis-takes-toll-on-union-membership/.

[90] WESTERN, *supra* note __, at 56.

[91] Scruggs, *supra* note __, at 289.

[92] For example, this is the language used by the National Right to Work Legal Defense Foundation, whose slogan states: "Defending America's workers from the abuses of compulsory unionism since 1968," at http://www.nrtw.org/.

[93] *Id.*; on the Taft-Hartley Act, *see* Estlund, *supra* note __, at 1534 (saying that Taft-Hartley reframed national labor policy as "favoring employee 'free choice' with respect to unionization and collective bargaining").

[94] When Congress held hearings on EFCA in 2007, antiunion advocacy groups claimed that EFCA would deny workers the right to a secret ballot and ran a series of full-page ads likening prominent union leaders with Kim Jong-Il and Fidel Castro as dictators seeking to abolish the right to vote. *See* Gordon Lafer, *What's More Democratic than a Secret Ballot? The Case for Majority Sign-Up*, 11 WORKINGUSA 71, __ (2008). Antiunion advocates have also depicted card check as inherently coercive by subtly tapping into union stereotypes. *See* Sachs, *supra* note __, at 669 n. 46.

[95] "From a formal perspective … employees would have precisely the same freedom to embrace or reject union representation if the law directed that they start out *with* a union."

much symbolic power.

By contrast, the "coercion" allegation would seem to be much less of a problem under the Ghent system. Holding a job, surely a greater priority to one's livelihood than temporary unemployment benefits, does not depend on being a union member. As a publicly-subsidized, voluntary, and union-administered program, required union membership becomes less a supposed invasion of a private and individual right to work and more a contribution to an inherently collective, partly public mutual-insurance plan. An antiunion attack on the Ghent system claiming that access to a publicly-subsidized insurance scheme depended on "forced" membership in a union would have to explain why such a government-supported scheme was necessary in a labor market that, on antiunion principles, did not need one. The Ghent system therefore encourages union membership without giving rise to the allegation that individual liberties are violated.

B. The Recognition Problem

When social movements are more successful, they will attract greater numbers.[96] And to be successful social-movement organizations, unions must not only solve the free-rider problem, they must also *produce* collective goods for their members. However, the collective goods that unions provide are bargained with—sometimes wrested from—powerful business actors, who do not always make such concessions willingly. Unions must therefore solve a *recognition* problem: they must become legitimate actors in the eyes of their economic counterparts and be able to enter negotiations with them over the terms and conditions of employment.[97]

1. Comparative Analysis

The current legal framework governing union recognition in the US works in the following way. First, a labor union will petition the National Labor Relations Board to conduct a representation election among a group of employees after it secures signed "authorization cards" from 30 percent of the workers[98] (in practice usually more).[99] It is important to note that

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PAUL C. WEILER, GOVERNING THE WORKPLACE 278 n. 67 (1990) (emphasis in original). Mancur Olson himself made the argument that if it was morally legitimate for the state to compulsorily tax its citizens to provide the public good of national defense, it was equally valid for the state to license compulsory unionism in order for unions to produce collective goods to the workforce. OLSON, *supra* note __, at 91-97.

[96] MARWELL & OLIVER, *supra* note __, at 9-10.

[97] *See supra* note __ and accompanying text.

[98] National Labor Relations Act §9(c)(1)(A); 29 U.S.C. §159(c)(1)(A).

signing an authorization card does not constitute membership in the union, but is merely the employee's acknowledgement that she would like the union to represent her in the workplace.[100] If a union prevails with fifty-percent-plus one of the vote, the NLRB then certifies the union as the exclusive bargaining agent of the employees under section 9(a) of the NLRA.[101] Being an exclusive bargaining representative triggers a duty to bargain on the part of the employer, the violation of which is an unfair labor practice under section 8(a)(5).[102]

Recent labor-law scholarship has revealed the ways in which the current procedures for representation elections present enormous pitfalls to workers and their potential union allies. Once a petition for a certification election is filed, workers must wait an average of 41 days before the election is held, which gives the employer ample opportunity to mount a fierce resistance to the unionization drive.[103] Section 8(a)(3) is supposed to prevent employers from firing, disciplining, or otherwise discouraging workers from seeking union representation. However, "[t]he current system of unfair labor practice remedies has proved powerless to contain [employer] intimidation or to undo its effects."[104] Under Board-developed election law, the employer can require employees to attend "captive audience" meetings where it can present its case against the union to the employees; unions have no corresponding right or effective opportunity.[105] The Supreme Court has declared that employers' property rights trump union organizers' right of access to employees in the workplace.[106] Even a union victory in a representation campaign is no guarantee of success. Because of employer recalcitrance, resistance, and dilatory or bad-faith bargaining, only slightly less than 56 percent of certified bargaining units arrive at a first contract, despite the employer's duty to bargain with a certified representative.[107]

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[99] John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 62 INDUS. & LAB. REL. REV. 3, 5 (2008).

[100] *See* DEVELOPING LABOR LAW, *supra* note __, at 501, 730 (check).

[101] National Labor Relations Act §§9(c)(1)(A), 9(c)(3); 29 U.S.C. §§159(c)(1)(A), 159(c)(1)(A), 159(c)(3).

[102] National Labor Relations Act §§8(a)(5), 9(a); 29 U.S.C. §§158(a)(5), 159(a).

[103] Ferguson, *supra* note __, at 10 n. 9.

[104] Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1770 (1983).

[105] Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 557 (1993); Matthew T. Bodie, *Information and the Market for Union Control*, 94 VA. L. REV. 1, 23 (2008).

[106] Lechmere, Inc. v. National Labor Relations Board, 502 U.S. 527 (1992). *See also* Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305 (1994).

[107] Ferguson, *supra* note __, at 5 fig. 1, 16. This rate is now lower than the one reported a few decades ago, *see* Paul C. Weiler, *Striking a New Balance: Freedom of*

EFCA's primary goal is to address this recognition problem and its attendant legal defects. EFCA would substitute "card check recognition" for a secret ballot election administered by the NLRB.[108] The goal of card check is to both expedite the election process and deprive the employer of its information privilege during the election "campaign." EFCA would also impose heftier penalties for employers who discriminate against union supporters, making it costlier for employers to intimidate and threaten workers.[109] Finally, by providing the opportunity for binding arbitration in order to ensure a first contract, EFCA seeks to impose a stronger remedy for employers who flout their duty to bargain.[110]

One might think that with prolabor, social-democratic parties frequently in power, Swedish and Danish governments would have long ago legislated streamlined procedures for union recognition, stiff penalties for the harassment of union supporters, and a compelling duty for employers to bargain with unions. Yet the opposite is more nearly the case. According to Reinhold Fahlbeck and Bernard Johann Mulder, the "rather startling phenomenon" is that there is no formal procedure for union recognition in either of these countries.[111] Representation elections are entirely absent in Swedish labor law.[112] Presumably this absence obtains in Danish labor law as well, where the subject of representation elections in discussions of Danish collective-bargaining law does not appear.[113]

Both Swedish and Danish labor laws establish statutory protection for workers' "freedom of association," that is, the right of workers to form, join, and assist labor unions. In Sweden, employees (and employers) "have the right to organize involving (1) the right to belong to a trade union or employers' association, (2) to make use of the membership, (3) to work for the organization, and (4) to work to establish such an organization."[114] A transgressing employer is liable for compensatory as well as punitive damages.[115] In Demark, statutory law also protects workers' freedom of association, declaring that "an employer is not allowed to let an employee's

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Contract and the Prospects for Union Representation, 98 HARV. L. REV. 351, 354 (1984) (reporting that "[o]nly slightly more than 60% of newly certified units achieve a [first] collective agreement").

[108] Employee Free Choice Act, H.R. 1409, 111th Cong. §2(a) (2009).

[109] Employee Free Choice Act, H.R. 1409, 111th Cong. §4 (2009).

[110] Employee Free Choice Act, H.R. 1409, 111th Cong. §3 (2009).

[111] Fahlbeck & Mulder, *supra* note __, at 19–53.

[112] *Id*.

[113] *Id.* at 19–52-19–53 (explaining that from "a comparative law perspective, [the absence of a recognition procedure] is a rather startling phenomenon, but Sweden shares it with its fellow Nordic countries," including, presumably, Denmark).

[114] Fahlbeck & Mulder, *supra* note __, at 19–50.

[115] *Id.* at 19–51.

decision to join or not to join a union influence decisions regarding employment or termination."[116] An employee who is discriminated against is entitled to compensation, not to exceed 24-months salary and determined by the employee's seniority and circumstances of dismissal.[117] In Denmark, union representatives (e.g., shop stewards) also enjoy the protection of a "just-cause" principle in an employer's termination decision.[118] It is therefore arguable that employees' rights to join, form, and assist labor unions is more thoroughly protected under Swedish and Danish labor law than in US labor law, particularly given the more favorable remedies in the former two countries.

Nevertheless, there are reasons to be very doubtful about the role of such legal guarantees in explaining and sustaining high union-density rates in either of these Nordic countries. For one, in both cases the statutory sources of these rights are of fairly recent vintage. In Sweden, workers' associational rights were established in the 1976 Co-Determination Act.[119] In Danish law, union-membership statutory rights were codified in the 2006 Act on Protection against Discrimination Due to Membership or Nonmembership in a Union,[120] and prior to that in the Dismissals on Grounds of Union Membership Act.[121] The latter legislation was a response to a decision of the European Court of Human Rights in a case against British Rail in 1981, and was intended to make Danish law conform to that decision.[122] Therefore, given the dates of their legislative enactment, legal rights to participate in union activities cannot explain gross density rates given in Table 1 as high as 86.2 in Denmark and 89.5 in Sweden in 1980.

What of the employer's duty to bargain? Once again, the intuitive guess might be that no such liberal, "freedom of contract" concern—which underlies the thin, good-faith standard governing the duty in the US[123]—would limit employers' obligations in the social democracies of Northern Europe. But this again would be the wrong guess. Swedish labor law recognizes a duty to bargain, but "[t]he duty to bargain is limited … . There is no obligation to sign a contract (even if agreement has been reached on all substantive matters) nor is there any obligation to compromise or even to show a willingness to compromise or to reach common ground. In other words, Swedish labor law does not recognize a good-faith bargaining

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[116] Jacob Sand, *Denmark*, *in* INTERNATIONAL LABOR AND EMPLOYMENT LAWS (William L. Keller & Timothy J. Darby eds., Bureau of National Affairs 2003).

[117] *Id.* at 12–28

[118] *Id.* at 12–27.

[119] Fahlbeck & Mulder, *supra* note __, at 19–50.

[120] Sand, *supra* note __, at 27.

[121] OLE HASSELBALCH, LABOUR LAW IN DENMARK 193-94 (2005).

[122] *Id.*

[123] Weiler, [*Striking a New Balance*] *supra* note __, at 357-59.

requirement [unlike US labor law]."[124] Damages are available in case of a violation of this duty, but "[b]ecause the duty to bargain is so limited, damages on the whole are confined to situations where the employer has refused to appear at the bargaining table at all."[125] The duty to bargain therefore appears to be *stronger* in the US than in Sweden. In other words, freedom of contract in collective bargaining is better regarded in social-democratic Sweden than in the liberal US.

Unlike either Sweden or the US, a legal duty to bargain appears to be entirely absent in Danish labor law.[126] However, the obligation to bargain is perhaps stronger in Denmark than in the US in one respect. A quite prominent feature of Danish industrial relations is the use of compulsory conciliation.[127] If while bargaining a new agreement it appears that a work stoppage (either a strike or a lockout) may ensue or if one has already begun, Danish labor law provides that a conciliator from the government's Conciliation Service has the authority to intervene in the dispute on her own initiative and attempt to bring about an agreement between the two parties.[128] Unless a work stoppage has already begun, the conciliator's authority includes the right to demand that any threatened work stoppage be suspended for a maximum of 14 days.[129] Although the conciliator may make recommendations to the parties, he or she has no authority to impose a final decision following the discussions.[130] The bargaining obligation in Denmark is therefore still weaker than the binding arbitration that EFCA seeks to make available for a first contract.[131] More important still, since compulsory conciliation and arbitration are either marginal or absent[132] in the Swedish case, it is doubtful that the existence of the procedure in

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[124] Fahlbeck & Mulder, *supra* note __, at 19–56.

[125] Fahlbeck & Mulder, *supra* note 2.

[126] Neither HASSELBALCH, *supra* note __, nor Sand, *supra* note __, mention a duty to bargain in Danish labor law.

[127] Steen Scheuer, *Denmark: A Less Regulated Model*, *in* CHANGING INDUSTRIAL RELATIONS IN EUROPE 146, 151 (Anthony Ferner & Richard Hyman eds., 2nd ed. 1998).

[128] HASSELBALCH, *supra* note __, at 279.

[129] *Id.*

[130] *Id.* at 276-77.

[131] *See supra* note __. Employee Free Choice Act, H.R. 1409, 111th Cong. §3 (2009).

[132] Although Fahlbeck & Mulder, *supra* note __, at 19–73, observe that mediation is available in the Swedish case, and that the "Mediation Office may intervene at its own initiative," mediation seems to be much more limited, both legally and practically, in Sweden than in Denmark. In most instances, mediation is at the request of one of the parties to the dispute, and mediators cannot make recommendations, *id*. The stronger role in practice of mediation in Denmark is often contrasted with the case of Sweden. *See* Anders Kjellberg, *Sweden: Restoring the Model?*, *in* CHANGING INDUSTRIAL RELATIONS IN EUROPE 76, 91 (Anthony Ferner & Richard Hyman eds., 2nd ed. 1998) (calling the "voluntary and informal Swedish mediation machinery … weak by Nordic standards …").

Denmark explains very much of its high level of union density.[133]

2. The Ghent System and the Recognition Problem

How then does Sweden or Denmark resolve the recognition problem without representation elections, formal protections (historically) against employer coercion, or a strong duty to bargain? Certainly, the existence of more centralized collective bargaining (which "takes wages out of competition") and higher-level agreements between encompassing unions and employer associations (which help discipline local union and individual employer "defections") help solve the recognition problem for Danish and Swedish labor unions.

Nevertheless, the Ghent system also plays an important role. Although workers may initially come to unions merely to enroll in their unemployment-insurance plans, the Ghent system also provides unions with an incomparable organizing tool. As we have already seen, participation in union-administered plans induces an obligation—as a social norm if not a legal duty—that workers become union members.[134] Further, union membership in turn entails educating workers about the union and its benefits, building social networks and ties of solidarity among members, and the accretion of financial resources that come from member contributions.[135] All of these resources give the union the de facto power to induce voluntary (i.e., nonlegal) recognition from employers. Government-supported recognition procedures are unnecessary. And success in recognition and the benefits that flow from it encourage further growth in union density.

Evidence for this proposed mechanism becomes clear when one compares Sweden and Denmark to other countries that lack the Ghent system but possess otherwise similar institutional supports for recognition (such as centralized bargaining or its equivalent, collective-agreement "extension" laws). Even when broad, industry-level recognition is obtained by unions for wage bargaining, countries such as France or Germany

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[133] Scheuer, *supra* note __, at 151-52, notes the development in Denmark of parliamentary intervention to end a strike or lockout when conciliation has failed. On such occasions the Danish parliament has prolonged the existing agreement, adopted the mediator's recommendations, or devised its own agreement. However, it is difficult to describe this as a necessarily beneficial "remedy" to labor unions. Moreover, such interventions have their institutional equivalent in the powers that Sections 206 through 210 of the Labor Management Relations Act gives to the President to mediate a dispute and enjoin a strike or lockout considered to be a "national emergency." Labor Management Relations Act §§206-210; 29 U.S.C. §§ __ (____).

[134] *See supra* note __ and accompanying text.

[135] CITE

frequently rely on statutory means for securing representation of employee interests through nonunion channels in workplace bargaining.[136] Although the institutional details are more complex than can be stated here, both of these countries have legislatively-mandated forms of "works-council" representation at the workplace level. In fact, unions in both countries have come to depend on these institutionally-distinct works councils to bolster their presence at the workplace level.[137] In contrast, such forms of representation are redundant in Denmark and Sweden, where in addition to the unions' higher, industry-level presence, they are also able to secure strong workplace representation through their local organizations, the "clubs."[138] Indeed, for several years Sweden experimented with an additional system of works councils, which proved superfluous and was later abandoned.[139] Arguably, the Ghent system can explain these differences in workplace representation. The Ghent system provides a tool for recruiting workers into unions; this membership power helps sustain union recognition; and successful recognition feeds back into higher levels of union density. One could say that solving the free-rider problem first and independently helps solve the recognition problem second and subsequently.

From the perspective of the Ghent system, the American approach to union recognition gets it exactly backwards. Some of the more active, organizing unions do attempt to educate and build networks of solidarity among workers in the run up to a certification election.[140] But because the ultimate outcome for union membership is itself uncertain—since employees do not become union members until after a successful representation campaign—this can be a difficult task. With the right to hold "captive audience" meetings on company premises, with the right to exclude organizers from company property, and without any corresponding opportunity for the union, the employer clearly holds the advantage under US labor law.

Moreover, recruiting new union members in the American sequence of organizing creates substantial disincentives for unions. When membership recruitment follows recognition, a union can recuperate its organizing expenditures only after a successful organizing (really, recognition) drive. In addition, given that recognition is a dichotomous "yes" or "no"

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[136] *See* Marco Biagi & Michele Tiraboschi, *Forms of Employee Representational Participation*, *in* COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 433 (Roger Blanpain ed., 8th and rev. ed. 2004)

[137] Biagi & Tiraboschi, *supra* note __, at 451.

[138] Kjellberg, *supra* note __, at 104-06; Biagi & Tiraboschi, *supra* note __, at 435-41.

[139] Biagi & Tiraboschi, *supra* note __, at 454.

[140] Sachs, *supra* note __, at .

determination, the union will either represent none or all of the members of the bargaining unit following the election. This all-or-nothing aspect of organizing raises the stakes for both the union and the employer, generating more risk for the union and a greater incentive to resist the union for the employer.[141] Contrasted with the Ghent system, it seems exceedingly strange that a system of labor law would make employees' decision to join the union so vitally dependent on the employer's decision to recognize the union. Yet it is remarkable how deeply these distinct decisions are conflated in American labor-law consciousness, where the employer's recognition of the union is habitually equated with employees' ability to "form a union."[142]

Even EFCA would not have fundamentally altered this seemingly perverse principle of American labor law. Certainly, one goal of EFCA is to minimize the role of the employer's attitude toward unionization, by expediting the election process through card check.[143] But even advocates recognize that card check would not completely "deprive management of its ability to mount an argument against unionization."[144] As such, employers will unquestionably continue to seek to influence the outcome and may adapt accordingly to the new card-check environment just as they did to the current representation procedure, which itself was initially favorable to unions.[145]

C. The Adversarial Problem

It is common to divide national systems of labor relations into two types: adversarial and cooperative. The distinction is of course hardly discrete, but there seems to be little dispute that the US falls into the former category. Adversarial relationships are characterized by the resort to "hard" bargaining, the propensity for industrial strife, the lack of trust between unions and management, and in general the tendency for employers to take a "union-avoidance" strategy in employment relations. In cooperative labor relations, trust and the absence of industrial strife is more likely to prevail. Employers are more likely to view unions as playing an essential, contributing role in the governance of labor and as "social partners" with

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[141] When John Sweeney assumed the presidency of the AFL-CIO, he recommended that unions dedicate 20 percent of their budgets to organizing, yet only a handful of unions even come close to meeting this benchmark. Joel Rogers & Richard Freeman, *A Proposal to American Labor*, THE NATION, June 6, 2002, at __.

[142] This is the standard language the AFL-CIO uses to advocate for EFCA. *See AFL-CIO, Employee Free Choice Act: Key Facts*, *available at* http://www.aflcio.org/joinaunion/voiceatwork/efca/10keyfacts.cfm.

[143] Sachs, *supra* note __, at __.

[144] *Id.* at 662.

[145] MORRIS, *supra* note __, at __.

whom they are engaged in a "social dialogue." It is more difficult to grow union membership in adversarial environments. Adversarial employment relations make the recognition problem harder: employers are more likely to seek to seek an exit from a union relationship and avoid a union presence in the workplace altogether. Adversarial relationships also reduce the attractiveness of union membership. As contrasting examples of this approach to union-management relations, this section examines the reactions of unions in the US and Scandinavia to employers' recent drives toward more "flexible" governance practices in the workplace.

1. Comparative Analysis: Cooperation and Workplace Flexibility

The findings and policies of the NLRA state:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.[146]

This broad principle of using the law to encourage the "friendly adjustment" of disputes and to remove "sources of industrial strife" is found pervasively throughout American labor law. At every stage of the collective-bargaining process—from the organization of workers, recognition of the union, and the employer's duty to bargain with the union, to interpretation and enforcement of the collective-bargaining agreement—legal procedures are available as substitutes to the use of strikes, lockouts, or other forms of economic "self help."[147]

Yet despite this broad policy goal of the NLRA, labor relations in the US are regarded as a typical case of the adversarial model. As an example of the adversarial model in action, consider the recent drive of employers toward a more "flexible" governance regime in the workplace. With substantial changes in work organization and an increasingly competitive global economy, employers in the United States have sought to move their employment practices away from the traditional internal-labor-market

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[146] National Labor Relations Act §1, 29 U.S.C. §151 (1988).

[147] Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 DENV. U. L. REV. 1, __ (2010, forthcoming).

(ILM) model. The ILM model included employer and employee investment in firm-specific training, seniority-based pay and layoff policies, implicit employment guarantees (and, in union environments, explicit guarantees for dismissals only for "just cause"), narrowly-defined job classifications, and other rules and agreements promoting long-term attachments between firms and employees.[148] Firms now seek to link pay and tenure with performance; hire workers who acquire their own, broad-based portfolio of skills and competencies; and refrain from making long-term employment guarantees.[149] However, labor unions in the United States have been slow to accommodate themselves, if at all, to the new, post-ILM environment. Unions continue to press for traditional ILM "rigidities,"[150] while managements candidly express their desire to avoid a union presence for fear of losing "control" of the workplace.[151] As a result, employers have imposed workplace flexibility unilaterally, without the input of unions, often in opposition to unions, and even by removing them from the workplace altogether.

The limited role of labor legislation in Denmark and Sweden has already been observed in examining the free-rider and recognition problems. Such "voluntarism" in labor law also appears to be the case more generally for Denmark and Sweden, where the contrast with more "regulated" countries is frequently made.[152] This view emerges particularly strongly in Sweden in historical perspective, where it is clear that the Swedish trade unions frequently eschewed the opportunity to procure more extensive labor legislation.[153] In the absence of a legislative framework for industrial peace, one might think that demands by Nordic employers for workplace flexibilization would collide violently with the high densities of their respective labor movements.[154]

One should then again be surprised to learn that employment relations in these countries have remained largely peaceful and, in Denmark particularly, unions have accommodated themselves to a remarkable level

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[148] KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67-116 (2004).

[149] *Id.* at __.

[150] *Id.* at 196-216.

[151] Alex MacGillis, *Union Bill's Declining Chances Give Rise to Alternatives*, Wash. Post, Mar. 29, 2009, at __. (expressing employers' belief that passage of EFCA would "force them to give up control over how they run their business").

[152] For Sweden, *see* Kjellberg, *supra* note __, at 79-80; for Denmark, *see* Steen Scheuer, *Denmark: A Less Regulated Model*, *in* CHANGING INDUSTRIAL RELATIONS IN EUROPE 146, 149-51 (Anthony Ferner & Richard Hyman eds., 2nd ed. 1998).

[153] SWENSON, *supra* note __, at __.

[154] In Britain, the debilitating degree of strike activity in the 1960s was alleged to be caused in part by the lack of a formal legal framework for industrial relations.

of workplace flexibility. Employers in Denmark enjoy an ease in hiring and firing that is among the least restrictive in Europe.[155] Further, Denmark has a level of job mobility that rivals that of the United States and other liberal market economies. Job turnover is surprisingly high, with about 30 percent of the workforce changing jobs each year.[156] Job tenure in Denmark is also relatively low, with average lengths closer to the US and the United Kingdom, than to the much longer average job tenures in Greece, Italy, Japan, or Portugal.[157]

Flexibility has also characterized the Swedish labor market historically, although this has changed since the late 1970s. Originally, the Swedish employment relationship was at will. Also as part of the 1906 December Compromise mentioned above, the famous "Paragraph 23" of the written accord gave employers' the untrammeled right to hire or fire.[158] Decisions of the Swedish Labor Court in subsequent decades attest to the breadth of managerial discretion in this area.[159] Hence for decades, labor markets in Sweden were remarkably flexible: "The official goal of Swedish Social Democracy in the 1950s and 1960s was to provide for 'security in the labor market,' as distinct from 'job security.'"[160] Indeed, labor market policy in these decades explicitly aimed at *enhancing* the mobility of workers across firms and sectors.[161] Employment protection was legislated only in the 1970s as a reaction to severe industrial adjustment problems.[162] Despite increased levels of employment protection, even today it appears that the Swedish labor market appears to rely on the external, rather than the internal, labor market, for hiring, training and retraining, placement, and a variety of other employment practices.[163]

What do unions and workers receive for such little job protection, currently in Denmark, and historically in Sweden? Unlike the US case, workplace flexibility has not been the result of a unilateral imposition by employers in the context of an adversarial form of labor relations. Rather, as the next section will argue, unions have been able to trade job protection away for generous unemployment insurance, both in a context of cooperative labor relations and as a "mutual gains" strategy that enhances

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[155] Per Kongshøj Madsen, *The Danish Model of "Flexicurity": Experiences and Lessons*, 10 TRANSFER 187 (2004).

[156] *Id.* at __.

[157] *Id.* at __.

[158] SWENSON, *supra* note __, at __.

[159] RICHARD B. PETERSON, THE SWEDISH LABOR COURT VIEWS MANAGEMENT RIGHTS (1968).

[160] JONAS PONTUSSON, INEQUALITY AND PROSPERITY 125 (2005).

[161] SWENSON, *supra* note __, at __.

[162] PONTUSSON, *supra* note __, at 125-26.

[163] Fahlbeck & Mulder, *supra* note __, at 14.

such cooperation.

2. The Ghent System, Cooperation, and Employment Security

Lower levels of employment protection—currently in Denmark, historically in Sweden—do not imply that workers are left without any form of security. Unemployment insurance, when provided at generous enough levels, plays a key role in underwriting workers' consent to a flexible labor market. In the Danish system, the employer's freedom to hire and fire is explicitly linked to the robust unemployment-insurance guarantee in its vaunted program of "flexicurity." Hence, just as the official slogan of Swedish Social Democracy proclaimed in the 50s and 60s, Denmark's model of flexicurity is described as providing "employment security, not job security."[164]

As a consequence, unemployment insurance serves as a labor market substitute to job protection regulation. At around 70 percent, Denmark has one of the highest average replacement rates among OECD countries, the "replacement rate" being the percentage of the unemployed worker's former wage that is paid in unemployment benefits.[165] In the US, the average replacement rate is 36 percent.[166] While greater flexibility for the employer arguably contributes to higher mobility and shorter tenures for employees, the adoption of flexicurity has also contributed to a fall in the unemployment rate (from 9.6 percent in 1993 to 4.3 in 2001 and 1.7 in 2008)[167] and an increase in the employment rate to 75 percent, one of the highest in the OECD.[168] More importantly, despite greater mobility and shorter tenures, Danish workers nevertheless do not feel greater insecurity. According to two different surveys, from 1996 and 2000, Danish workers do not report very high levels of insecurity, and in fact the proportion of Danish workers feeling insecure is "considerably lower than for all the other countries in the sample," which presumably includes other European countries with much higher levels of employment-protection legislation.[169] Arguably the level of benefits provided by unemployment insurance contributes to this sense of security, as does the higher job-mobility rate and

[164] Joshua Cohen & Charles Sabel, *Flexicurity*, *in* PATHWAYS 12 (Spring 2009).

[165] Madsen, *supra* note __, at 193-94.

[166] Lori G. Kletzer & Howard F. Rosen, Reforming Unemployment Insurance for the Twenty-First Century Workplace, Brookings Institution Discussion Paper (September 2006), at 12.

[167] Madsen, *supra* note __, at 188. The 2008 unemployment rate for Denmark is from Liz Alderman, *Denmark Starts to Trim Its Admired Safety Net*, N.Y. TIMES, Aug. 17, 2010, at B1.

[168] Madsen, *supra* note __, at 190.

[169] *Id.* at 192.

lower unemployment rate, which makes it easier to find or switch jobs and reduces the length of the unemployment spell.

Up until now, nothing that has been said about the participation of unions in unemployment-insurance policy necessarily implies that it helps resolve the adversarial problem. Indeed, one could argue that flexicurity is actually a *consequence* of labor relations that are cooperative for other reasons. To a great extent this is true. There are certainly several institutional features of the "Nordic model" that contribute to cooperative employment relations, and cooperation between the "social partners" clearly serves as an important enabling factor in sustaining the policy of flexicurity. However, I argue that unions' involvement in unemployment insurance also *contributes* to resolving the adversarial problem. In particular, union participation in unemployment-insurance policy is efficient. This efficiency entails positive-sum gains that make cooperative strategies between employers and unions easier to sustain. Giving up job security for enhanced workplace flexibility enhances firms' and workers' productivity, and this greater productivity generates both higher profits and greater welfare for union members.

It is not particularly obvious that the involvement of unions and employers in unemployment-insurance policy would be efficient. Although collectively-bargained or legislated employment-protection rules may reduce the firm's productivity, unemployment-insurance typically requires taxes on employers. Furthermore, even proponents of collective bargaining concede that unions may cause some inefficiency; collective bargaining is sometimes justified on other grounds, such as its role in reducing income equality. The next Part makes the case that union participation in unemployment insurance policy is more efficient than employment protection and, even more, results in no loss of productive efficiency when compared to the case where there is no collective bargaining at all. In addition to illustrating its economic logic, Part III will also explain why unions are essential to the success of a flexicurity policy.

III. ECONOMIC ANALYSIS OF COLLECTIVELY-BARGAINED UNEMPLOYMENT INSURANCE

This Part of the Article provides an economic argument for the efficiency of collectively-bargained unemployment insurance.[170] The argument proceeds in stages, beginning with an analysis of the labor market without a union and then analyzing the cases where a union and employer bargain over wages, over wages and employment protection (e.g., just

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cause), and finally over wages and unemployment insurance. A more formal analysis can be found in the Appendix.

The basic intuition is that when workers are risk-averse, unions will bargain for inefficient levels of employment protection. Just-cause rules obligate employers to retain workers whose match-specific productivity is too low from an efficiency perspective. Such productivity losses also reduce the bargained-for wage that workers receive (which is still greater than the market-determined wage), but workers will prefer to trade higher wages away for better job security when they are risk averse. However, when unions bargain over unemployment insurance instead of job-protection rules, they can seek benefit levels that correspond to their wage demands. This makes workers relatively indifferent to job loss and therefore reduces their preferences for job-security rules, and the absence of such rules increases the firm's productivity. Wage-and-benefit bargaining therefore improves the welfare of both employers and employees relative to wage-and-job-protection bargaining.

It is "positive-sum" gains such as these that help underwrite more cooperative labor-relations strategies in Nordic countries. In addition to this explanatory insight, the analysis also reveals the optimal way to tax firms in this flexicurity arrangement. In short, a "layoff" tax is better than a payroll tax from an efficiency perspective. Interestingly, the rationale for a layoff tax is identical to the "experience rating" system already used by several states in their unemployment-insurance plans. Finally, I proffer several reasons for why union participation in flexicurity is essential for its success.

Following the presentation of this argument, I informally address two potential objections to the argument. The first is that unemployment insurance induces moral hazard on the part of unemployed workers. The second is that, in the absence of job security, workers may not have sufficient incentive to invest in specialized kinds of human capital.

A. Efficiency of Collectively-Bargained Unemployment Insurance

1. The Competitive (Nonunion) Benchmark

Consider first the case where there is no labor union in the labor market. The graph in Figure 1 displays two dimensions: wages (w) and a "standard of production" ($\bar{y}$). A point on the standard-of-production axis marks the cutoff point where employers decide to keep or dismiss workers based on the worker's match-specific productivity. Before hiring a new worker, an employer typically does not know the productivity of the specific employer-worker match. Will the firm and the worker make a good fit? Over time, however, the employer will have a chance to observe the productivity of the

match, which we call y. If $y \geq \bar{y}$, then the employer keeps the employee; on the other hand, if $y < \bar{y}$, the employer will dismiss the employee.

How is $\bar{y}$ determined? First, define b as the monetary value of being unemployed (e.g., through some form of nonmarket or "home" production). When there is no union to bargain over wages, wages will equal the value of home production, or $w_c = b$, in a competitive labor market. Suppose also in this initial case that the employment relationship is at will. Under an at-will relationship, an employer can dismiss an employee "for good reason, bad reason, or no reason at all" and can therefore choose whatever standard of production it desires. From the employer's perspective, it only makes sense to retain a worker if her match-specific productivity exceeds the wage she receives. Therefore, employers will keep all workers whose productivity equals or exceeds the value of this competitive wage. Hence, $\bar{y}_c = b$ in a competitive labor market. This in turn is defined as the "production efficient" standard of production. The intuition underlying this standard is that social welfare is maximized if all workers whose match-specific productivity equals or exceeds b work and produce while those whose productivities are lower than b do not work and receive b instead.

[FIGURE 1 ABOUT HERE]

2. The "Right-to-Manage" Contract

What happens when a labor union enters the scene? As in Figure 2, when unions only bargain for wages, they will bargain a wage above the competitive level determined by their bargaining power (w_n). Since the regime is still at will, the employer retains the power to set the standard of production (hence the "right to manage"). Again, the employer's optimal choice in an at-will regime is to set $\bar{y}_n = w_n$. Since $w_n > b$, the employer's standard of production is too high from an efficiency point of view, so the resulting contract is production inefficient. That is, society would be better off if workers whose match-specific productivities were lower than $\bar{y}_n$ but higher than $\bar{y}_c$ were employed rather than dismissed.

Moreover, in view of the union's indifference and the employer's isoprofit curves shown in Figure 2, the right-to-manage contract is Pareto suboptimal as well. That is, both the union and the employer would prefer to reduce wages a little in exchange for a more relaxed standard of production. In Figure 2, any point within the "lens" created by the intersection of the union's and employer's indifference curves (the "Pareto set") improves the welfare of both the union and the employer.

[FIGURE 2 ABOUT HERE]

3. The Weakly-Efficient Contract

Indeed, if the union and the employer bargain over both wages and the standard of production (prior to the employer's observing the productivity of the match), they can attain a Pareto-efficient contract (that is, where neither the employer nor the union can be made better off without making the other worse off). Since the standard of production is now bargained over it is no longer determined solely by the employer's discretion. The employer will how have to accept some limitations on its right to dismiss and will have to demonstrate "just cause" for why a particular employee should be terminated.

Although the resulting contract will be Pareto optimal when compared to the right-to-manage contract, the question remains whether the resulting contract is production efficient. This depends on the risk preferences of the union members. Figure 3 shows two different contract curves. A contract curve defines the set of Pareto-optimal points, that is, the set of agreements that exhaust all the gains from trade, such that one party cannot be made better off without making the other party worse off. (Since any point within the Pareto-optimal set is optimal, the bargaining power of the respective parties will locate a point within this set to make the outcome determinate.) If workers are risk neutral, the contract curve will be a vertical line from $\bar{y}_c$, and the agreement will be production efficient. However, when workers are risk averse, the contract curve will be slanted, with the bargained level production standard lower than the competitive level, $\bar{y}_{ra} < b$. Compared to the risk-neutral case, workers are more willing to trade away higher wages for greater employment security.

Since workers are typically risk averse, the production inefficient contract would seem the more likely outcome. Thus, the employer will be compelled to retain workers whose match-specific productivity is too low from an efficiency perspective. That is, society would be better off if employment-protection rules did not prevent a better "sorting" of worker-firm matches, and instead employed only those workers whose match-specific productivity exceeded $\bar{y}_c$.

[FIGURE 3 ABOUT HERE]

4. The Strongly-Efficient Contract

Even when workers are risk averse, however, collective agreements need not be production inefficient. In fact, if a union and an employer were to bargain instead over wages and unemployment insurance, returning to an

employment-at-will regime where the employer has sole discretion to determine the production standard, they can achieve a contract that is both Pareto optimal and production efficient. From the union's point of view, the optimal contract is to bargain a wage for employed members (w_u) and an unemployment benefit (u) to unemployed members such that $w_u = b + u$. Such a contract is optimal from the perspective of workers since it fully insures workers against unemployment risk by making them indifferent between being employed and unemployed. Furthermore, since the unemployment benefit is equal to the difference between the wage and home production, $u = w_u - b$, from the perspective of the employer it is as though it were paying u to all members of the union (employed or unemployed) and paying an additional b to those who are employed. In deciding which hires to keep and which to dismiss, b is thus the only factor that matters, and the employer will once again set $\bar{y}_u = \bar{y}_c = b$. The resulting collective agreement is therefore both Pareto optimal *and* causes no loss in production efficiency relative to the competitive benchmark.

In this simple, one-period model, unemployment benefits are like severance payments which an employer makes to laid off workers. Equivalently, it is also identical to a situation where an employer pays a "layoff" tax to the state, which the state then pays to workers as unemployment benefits. Furthermore, a layoff tax is a more efficient way to levy a tax than, say, a payroll tax. Layoff taxes in this case represent a classic example of Pigovian internalization. Union-bargained wage increases give employers an incentive to enforce inefficiently high production standards. This would increase unemployment and therefore the costs of administering unemployment benefits. But since layoff taxes depend on both the wage and the frequency or number of employees the firm dismisses, firms internalize these costs. This is the same reasoning behind the "experience rating" systems used by different US states in their unemployment insurance tax assessments.

[FIGURE 4 ABOUT HERE]

5. The Role of Unions in Flexicurity

In addition to the illustration of the efficiency rationale for flexicurity, the above analysis also provides some intuition for why unions ought to participate in such a policy. Flexicurity is a subject of much debate and anticipation among European circles, but the role of unions in its successful implementation is often overlooked.[171] Yet the role of unions is arguably

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quite critical. First of all, suppose that the level of home production (b) used in the model above is instead an exogenously, state-determined level of unemployment benefits.[172] As was shown, unions will have an interest in raising wages above this level and in bargaining for employment-protection rules to protect those gains. By extension, unions would prefer this strategy when benefit levels are set by the state, no matter how generous. As was also shown in the analysis of bargaining over wages and employment protection, employment-protection rules cause inefficiencies as a result of workers' risk preferences. In contrast, when unions can influence both wages and unemployment benefits, they prefer to equalize wages and benefit levels, and this reduces workers' demands for productivity-reducing employment-protection rules.

There are other reasons why unions ought to play a participating role in flexicurity. For instance, the possibility of collectively-bargained employment protection provides a credible threat that helps sustain the flexicurity tradeoff. Hence the importance of union (as well as employer) participation is made manifest whenever a political proposal in Denmark is made to restrict access to unemployment insurance. "In such cases a strong alliance between trade unions and employers' organisations is formed, where the employers' organisations point to the risk of claims for better employment protection in the event of deterioration of the benefit system."[173] Collectively bargaining provides unions with a direct, nonlegislative means of achieving some level of employment security for workers. Thus, the possibility of reintroducing such employment protection through collective bargaining makes the combination of a liberal dismissal policy with generous unemployment benefits an "incentive-compatible" strategy for firms and unions.

In addition, unions may also act as a crucial secondary association that coordinates various conflicting interests in the direction of flexicurity. For instance, employed individuals may always prefer stricter employment protection, again, regardless of the level of unemployment benefits. However, unemployed individuals prefer less job protection, since stricter rules make it harder for the unemployed to find work. Hence, maintaining both generous unemployment benefits and a flexible employment regime may not be legislatively feasible without a coordination of these interests. Unions can act as organizations that better coordinate the interests of the employed and unemployed.[174]

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[172] The analogy is inexact, since I have not specified the source of funding for b when construed as unemployment benefits.

[173] *Id.* at 205.

[174] For a general statement about the ability of secondary associations, such as unions, to help curb the "mischief of factions," *see* JOSHUA COHEN & JOEL ROGERS, ASSOCIATIONS

Finally, the compatibility of other labor-movement goals with flexicurity also helps ensure the success of the policy. For instance, Nordic unions strive to compress wage differentials within and across industries. This fact also makes workers more willing to accept unemployment risk by increasing the likelihood that one can find work at comparable wages following unemployment.

B. Possible Objections

1. Moral Hazard

Moral hazard is one potential objection to the argument that union-bargaining over unemployment insurance is efficiency enhancing relative to other forms of collective bargaining. That is, some workers may prefer to receive benefits from the unemployment-insurance system over working or searching for a new job. Such behavior can increase the pool of unemployed workers and lengthen the duration of unemployment, which imposes costs on public-insurance funds and on the workers and firms that pay the taxes to support such funds.

The simple, static version of unemployment insurance used in this paper does not account for unemployed workers' job-search behavior, so I do not offer any formal argument to counter the objection. Nevertheless, empirical research demonstrates that the appropriate design of unemployment-insurance systems can substantially reduce the problem of moral hazard. Stephen Nickell shows that generous unemployment-insurance benefits do not increase unemployment so long as they are accompanied by pressure on the unemployed to take jobs, for example, by "fixing the duration of benefit and providing resources to raise the ability/willingness of the unemployed to take jobs."[175]

Denmark is perhaps the best example of the possibility of diluting moral hazard through the appropriate design of the institution. Indeed, both the ease of hiring and firing and generous unemployment benefits have been a part of Danish labor-market policy since the 1970s. Yet for much of the time from this period until the 1990s, Denmark was beset with a high unemployment rate. What accounts for the dramatic fall in unemployment in the 1990s was a tightening of eligibility requirements.[176] Policy changes

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AND DEMOCRACY (1995).

[175] Stephen Nickell, *Unemployment and Labor Market Rigidities: Europe versus North America*, 11 J. OF ECON. PERSP. 72 (1997).

[176] At four years, the duration one can receive unemployment benefits in Denmark is still much longer than in the US. The duration was recently changed to two years, after finding that most unemployed workers find work either shortly after becoming unemployed

in the 1990s have eliminated the time period one could obtain unemployment benefits without having to participate in "active" job retraining programs, as well as the possibility of regaining "passive" benefits once one has entered a retraining program. Prior to such reforms, benefits could in effect be obtained indefinitely, since as the passive period ended, one could become re-eligible by participating in an active retraining program. Such reforms provide strong motivation for the unemployed to seek work and have substantially reduced unemployment, from 9.6 in 1993 to 1.7 in 2008.[177]

2. Specialized Human-Capital Investments

Another objection to the use of unemployment insurance in place of employment-protection rules is that the absence of "just cause" restrictions will reduce employees' incentives to invest in firm-specific human capital. In the standard internal-labor-markets analysis, both firms and workers can increase productivity by investing in firm- or industry-specific human capital. Such investments are risky for workers, since such specialized skills have little value outside the relationship or industry. Just-cause restrictions shield employees from arbitrary dismissals and assure them that such skill investments will not be in vain. Unemployment benefits would supply income insurance to dismissed workers, the objection would go, but not protect workers' skill investments.

One response to this objection is that to the extent that employment guarantees improve worker productivity through encouraging investment in specialized skills, such gains may come at the expense of the productivity gains identified earlier, namely, the better matching of workers with jobs that comes with greater labor market mobility.

Another response to the moral-hazard objection is the standard contractual argument to the claim for just cause. If employment protection does yield greater productivity, then firms would be willing to contract with employees and provide it. One could argue that employers do not contract for just cause because of some externality in the labor market and therefore that legislating employment protection would be socially optimal. Then again, it is apparent that employers do in fact sometimes commit themselves not to discharge without cause as a legally unenforceable norm, so arguably employers do see the benefits of implicit job guarantees.[178] In addition, there may be reasons why this social norm is best enforced through

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or just before the end of the four-year eligibility period.

[177] *See supra* note __.

[178] Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1930 (1996).

nonlegal sanctions.[179] Of course, the existence of implicit job guarantees does not imply that there are no market failures in contracting for employment protection.

But even if legal or norm-based employment guarantees were wealth and/or welfare maximizing, such guarantees are not the only, and perhaps not even the best, way to encourage worker investment in specialized kinds of skills. First, generous unemployment benefits, because they guarantee a higher income stream to the individual, in fact probably do constitute a significant safeguard for encouraging investment in specialized human capital. Further, better unemployment benefits permit workers to be more selective about which job offers they accept, which makes it more likely that workers will find work in those jobs for which their skills are best suited. As empirical support for this claim, it is known that better unemployment benefits yield higher post-unemployment earnings for workers.[180] In addition, to the extent that firms and individuals fail to invest in skills, the government may also subsidize the acquisition of specialized human capital. All of these elements are present in the "external" labor markets of Sweden and Denmark. And even with Denmark's more lenient employment dismissal rules, Danish labor markets do not face the skill-gap problem found in the United States.

IV. IMPORTING GHENT?

A. A Progressive-Federalist Strategy for Union Revitalization

As was shown above, the positive effects of the Ghent system on union density are not the result of either culture or an already-strong labor movement. In fact, the benefits of increased union membership were unanticipated by most of the young labor movements that implemented them.[181] Only in the case of Sweden do the advantages seem to have been foreseen, and there the Ghent system was adopted to secure the future growth and security of the labor movement, not to consolidate already accumulated union membership gains.[182] Thus, union-administered unemployment insurance holds tremendous promise as an institutional basis for revitalizing union strength.

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[179] *Id.* at 1932-38 (arguing that the just-cause norm should not be legally enforced because of the informational asymmetries of third-party enforcement, the incompleteness of contracts, and the potential that law may undermine self-enforcing norms).

[180] *See*, *e.g.*, Markus Gangl, *Scar Effects of Unemployment: An Assessment of Institutional Complementarities*, 71. AM. SOC. REV. 986 (2006).

[181] *See supra* note __ and accompanying text.

[182] *See supra* note __ and accompanying text.

Can the Ghent system be imported into the US? A leading reason in favor of this possibility is the fact that the federal social security system gives states broad latitude to design and administer their programs. Under the Social Security Act, federal law encourages states to create their own programs, while broadly permitting them to determine the requirements for eligibility, as well as the amount and duration of the benefits.[183] Concerns about constitutionality drove the framers of the Social Security to create a cooperative federal-state, rather than a purely federal, program. Under this board principle, the Ghent system would be compatible with the devolution of administrative functions to the states while taxation and finance remain the prerogative of the federal government.

The text of the Act also appears consistent with a state-level Ghent program. In particular, sections 303(a)(1) and (2) of the Social Security Act establish that the Secretary of Labor will not certify payments of federal funds to states unless states provide "[s]uch methods of administration … as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due" and "[p]ayment of unemployment compensation solely through public employment offices *or such other agencies as the Secretary of Labor may approve* …"[184] The legislative history suggests that the meaning of "such other agencies" was open. The original bill required that compensation be paid through public employment offices. This language was qualified in the Senate version by adding "to the extent that such offices exist and are designated by the state for the purpose." The conference committee revised the language into its present form. Furthermore, the phrase "public employment offices" did not refer to public agencies designed specifically for administering unemployment benefits. Public employment offices were promoted by the Wagner-Peyser Act of 1933, and were intended to provide job referral and other employment services which "bear no relation to the administration of an unemployment compensation law." I have found no case law that construes the meaning of "such other agencies," but according to one Attorney General's opinion, the "statute does not prescribe any particular form of State organization …" Thus, while it is doubtful that nonpublic agencies were ever contemplated as possible forms of administration, neither does the statutory language appear to expressly prohibit such

[183] Amy B. Chasanov, *Clarifying Conditions for Nonmonetary Eligibility in the Unemployment Insurance System*, 29 U. MICH. J. L. REFORM 89 (1995-96) (describing the American unemployment-insurance program as "a federally funded program, where each state determines its own eligibility requirements with only minimal requirements imposed by the federal government"). *See also* Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259, 312 (1994).

[184] Social Security Act §303(a)(2), 42 USC §503(a)(2).

alternatives.

A US version of the Ghent system can therefore constitute a "progressive-federalist" strategy of union revitalization.[185] Such an alternative offers promise since the federal Congress is arguably the largest obstacle to labor law reform.[186] Outside of Congress, in the agencies or states, federal labor-law reform is likewise hampered, because rulemaking at the NLRB has become ossified or because federal labor law preempts reformation at the state level.[187] However, since unemployment insurance falls outside of the purview of federal labor law, new reform possibilities open up. Strategically, unions can promote the Ghent system in states where they are strongest and best regarded. Following on those successes, with renewed vigor and image, unions can then begin to advance in territory where they have been less welcomed.

Following the example of the Ghent-system countries, I envision labor unions establishing their own unemployment-insurance plans, responsible to but organizationally distinct from them. The AFL-CIO already has labor councils organized at the state level and, given their "general" jurisdiction and responsibility for workers in all sectors of the economy, they seem to be ideally suited for establishing such plans. To address concerns about fiscal propriety, state governments should establish a set of regulations setting forth criteria under which these AFL-CIO plans can be licensed to receive public funds. States should also make participation in the plans voluntary: to receive unemployment benefits, one most join a union-administered fund and begin making contributions for some amount of time before one can be eligible to receive benefits. Workers can join the plan at a reduced fee if they agree to join a labor union; or pay an administration fee equivalent to union dues if they choose not to join a union.[188] The union unemployment agency can help the worker determine which union she would be best suited to join, based on occupation and industry, and put the worker in contact with the relevant union representative or organizer.

B. The Ghent System and Other Union Revitalization Strategies

In addition to the benefits that the Ghent system would bring to union density and the political advantage of the progressive-federalist opportunity

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[185] On the idea of a "progressive federalism," *see* Richard B. Freeman & Joel Rogers, *The Promise of Progressive Federalism*, *in* REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY 205 (Joe Soss et al. 2007).

[186] *See* Estlund *supra* note __, at __.

[187] *Id.* at __.

[188] Since the social norms against union free riding are likely not as strong currently in the US as in Denmark or Sweden, I would favor some way of strengthening the obligation to join a union as a condition of participating in a union-run unemployment-insurance plan.

presented the federal social security system, the adoption of the Ghent system would also bring programmatic focus to a variety of other plans for revitalizing the labor movement.

1. Workers in the Boundaryless Workplace

First, using unemployment insurance as a basis for union membership is much more consistent with the realities of the modern workplace. Katherine Van Wezel Stone has recently demonstrated the great transformation in employment relations that has occurred in the last few decades as firms have dismantled their internal labor markets and moved away from long-term attachments with workers.[189] Accordingly, she writes, "As careers become boundaryless and work becomes detached from a single employer, unions need to become boundaryless as well. They need to develop strategies, skills, and strengths that go beyond single contracts with single employers. They need to move beyond worksite-based collective bargaining …"[190] As we saw previously, workers who become union members as a condition of employment under a union-security agreement in an established bargaining unit have no reason to retain membership when they leave or lose their jobs.[191] What Stone's analysis suggests is that job transitions are an even more prominent feature of the new, boundaryless workplace. So the Ghent system is more appropriate than union-security agreements, not only because of the brute fact of job transitions alone, but because job transitions are becoming an increasingly conspicuous part of the labor-market landscape.

2. Minority and Members-Only Organizing

Union-administered unemployment insurance would also support new ways of organizing workers. Joel Rogers and Richard Freeman, as well as Charles Morris, have written recently about union representation outside the NLRB's representation-election framework.[192] As described above, it is currently conventional wisdom and common practice for unions not to represent workers or for workers not to join unions until after the union prevails in an NLRB representation election and is made the exclusive

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[189] STONE, *supra* note __, at 67-116.

[190] *Id.* at 218.

[191] *See supra* note __ and accompanying text.

[192] Joel Rogers & Richard Freeman, *A Proposal to American Labor*, THE NATION, June 6, 2002, at __; CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2005).

representative of the employees.[193] However, this "majority" unit bargaining, as exclusive representation is sometimes called, was not standard practice prior to the passage of the Wagner Act in 1935[194]—nor is it standard practice in Denmark or Sweden.[195] During the early history of the Wagner Act, as well as prior to its passage, the more common practice was for unions to represent "minority" groups of workers and to enter into "members-only" agreements with employers.[196] These practices were often viewed as a preliminary stage in the development of more mature collective bargaining.[197] Nevertheless, once unions found that it was faster and less expensive to organize workers through certification elections under the early Board's administration of the NLRA, they quickly dropped this intermediate stage of bargaining and organizing.[198]

However, organizing workers under the aegis of a NLRB-supervised election is now extremely slow and costly. Accordingly, these authors advocate a return to minority or members-only representation, both to open representation and membership to employees in workplaces where majority support for a union does not currently exist and to restore an intermediate stage of the organizing process.[199] As they point out, foregoing exclusive representation and certification elections does not, as one might presume, place workers and their unions in a legal "black hole."[200] All of the labor protections that workers have with an exclusive representative are available to them without one: the foundation for these rights, granted in Section 7 of the NLRA, is not contingent on the designation of an exclusive bargaining agent.[201] As Morris convincingly demonstrates in spite of conventional legal wisdom, these rights even include the right for a members-only unit to collectively bargain with their employer.[202]

However, one hurdle with seeking to expand labor's influence through minority and members-only bargaining is in locating the immediate gains for those brave few workers who take the initial step to join the union. Collective bargaining gains are likely to be slight when the union represents

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[193] *See supra* note __ and accompanying text.

[194] Rogers & Freeman [*A Proposal*], *supra* note __, at __; MORRIS, *supra* note __, at 81-88.

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[196] MORRIS, *supra* note __, at 81-88.

[197] *Id.*

[198] *Id.*

[199] *Id.* at 184-200; Rogers & Freeman, *supra* note __.

[200] *Id.* at __; MORRIS, *supra* note __ at __.

[201] "Employees," not unions or union members, are the subject of Section 7 rights. National Labor Relations Act §7, 29 U.S.C. §157.

[202] *See generally* MORRIS, *supra* note __.

only a minority of the workforce.[203] Enrollment in an unemployment-insurance plan would provide that initial impetus for membership. The employee receives insurance against the risk of job loss and the union acquires a new member, access to strategic information about the workplace, and the nucleus of a new union formation is born. Arguably, this is precisely the way organizing new workers and securing representation works under the Ghent system in Denmark and Sweden.[204]

3. Unions and Mutual Aid

In fact, the provision of benefits such as unemployment insurance was how unions historically, in the US and elsewhere, initially attracted and retrained new members. Indeed, early trade unions were often established first as "friendly societies" and only later became collective bargaining organizations.[205] Accordingly, the notions of "self-help" and "mutual aid" have been central organizing principles for labor unions and were "instrumental in the coalescence of the American labor movement."[206] Speaking of the labor movement's mutual-aid benefits, Samuel Gompers, first president of the American Federation of Labor, wrote:

> I saw clearly that we had to do something to make it worthwhile to maintain continuous membership, for a union that could hold members only during a strike could not be a permanent constructive and conserving force in industrial life. … An out-of-work benefit, provisions for sickness and death appealed to me. Participation in such beneficent undertakings would undoubtedly hold members even when payment of dues might be a hardship."[207]

Such sentiments express a philosophy of self help or voluntarism, through which labor seeks to achieve its goals without the aid of government, and is frequently construed as a narrow, conservative, and even debilitating stance

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[203] Although Rogers & Freeman, as well as Morris, rightly insist that even a small, members-only unit can serve important functions, for example, as an "information clearinghouse," these benefits are slight compared to the hours, compensation, and other terms that full contract bargaining entails. *See* Rogers & Freeman, *supra* note __, at __; and MORRIS, *supra* note __, at 191.

[204] *See supra* notes __ and accompanying text.

[205] SIDNEY & BEATRICE WEBB, THE HISTORY OF TRADE UNIONISM 22-23, 23 n. 1 (1907).

[206] SAMUEL BACHARACH ET AL., MUTUAL AID AND UNION RENEWAL 35 (2001).

[207] *Id*. at 36.

for a labor movement.[208] Nevertheless, more radical labor unions, such as the Western Federation of Miners, also "attributed their survival to their strong traditions of mutual-aid."[209] Moreover, the "self-help" and voluntary attributes underlying the Ghent system, as have been described, have been sources of strength for labor unions in Denmark and Sweden, countries which are typically held to exemplify the social-democratic antithesis of voluntarism.

Nevertheless, as the state came to be regarded as the main and proper source for citizen welfare, this insurance role for unions has correspondingly diminished.[210] As Samuel Bacharach, Peter Bamberger, and William J. Sonnenstuhl argue, this transformation has been costly to unions in terms of member loyalty and social legitimacy. Rather than following a mutual-aid logic, American unions currently pursue a "servicing" logic.[211] Unions that operate according to a servicing logic are regarded as only instrumentally legitimate: members remain committed only to the extent that material benefits exceed the costs.[212] In contrast, unions that follow a mutual-aid logic generate "core commitment" from their members, who treat the organization as an "extended family" rather than an arms-length service provider.[213] Accordingly, Bacharach and his colleagues advocate a return to the mutual-aid logic, and study the reemergence of this logic in the mutual-assistance programs established by a handful of unions to provide member-to-member support for alcoholism or other personal problems. I add here that union-administered unemployment insurance, subsidized by the state, but also—and critically, from the stand point of the logic of mutual-aid—retaining a voluntary component for members' contributions, would in addition revive a traditional mutual-aid function for today's beleaguered labor movement.

C. Toward a New Labor Movement

Whatever obstacles are bypassed by avoiding a labor-law reform strategy in Congress, enactment of union-administered unemployment insurance at the state level will not be an easy task. There is no royal road to

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[208] *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 1 (1991) (arguing that "the paltriness of American labor law and social provision lies in … organized labor's historical devotion to voluntarism," that is, the absence of a "class-based political movement to press for more generous and inclusive protections").

[209] BACHARACH ET AL., *supra* note __, at 36.

[210] *Id*. at 42-43.

[211] *Id*. at 6-9.

[212] *Id.*

[213] *Id.*

union revitalization and, indeed, any form of public support that aims to substantially improve the lives of employees and conditions of work will face stiff opposition. In addition, not all of the benefits of the Ghent system may be available upon its enactment. For instance, the conditions necessary to implement flexicurity—the Ghent system's solution to the adversarial problem—are not currently available. A broad union-employer pact in which employment security was traded away for more generous unemployment benefits would require higher taxes and far higher levels of both intraunion and union-employer coordination than currently exists in the US.

Nevertheless, the broader and potentially transformative effects of the Ghent system fully justify the concentrated effort required to bring it into being. Through a Ghent-type system, labor unions provide a benefit that is available to all workers—not on condition of being a member of a government-certified bargaining unit, not on condition of securing a victory in a NLRB certification election. The labor movement will thus gain a presence in the economy and labor-market as a whole, and not be condemned to merely represent those few workers in its shrinking niches. Union unemployment agencies can also form the basis for further expansions in similar directions. These agencies could provide placement services for workers as well as skill training and upgrading. The reflections of Laura Dresser and Joel Rogers are applicable here: "The natural direction of taking these suggestions seriously would be a labor movement that was much more dependent on its ties to friends outside its immediate ranks, more accommodating and inclusive of diverse membership, and more concerned in general with establishing itself as the conscience and steward of the broader economy."[214]

With this larger goal in mind and yet with the obstacles in view, the correct path may be focus on institutional principle by forsaking some substance in policy. Specifically, by maintaining taxes and benefits at their current levels but granting to unions a role in benefit administration, the labor movement can begin to address the free-rider and recognition problems while leaving the achievement of a more cooperative system of labor relations to a time when the organizational and numerical strength of the labor movement can support it. Sweden—perhaps the only country to consciously adopt the Ghent system as a means of institutional support for labor unions—again serves as a relevant historical example. As Rothstein observes, "In sum, the [Swedish] Social Democrats compromised greatly about the content of the scheme (i.e., the actual policy) in order to be able to institutionalize an insurance scheme that would greatly enhance their future

[214] Dresser & Rogers, *supra* note __, at 289.

organizational strength."[215] Such a strategy has been very successful in Sweden; perhaps it will be in the US as well.

CONCLUSION

The labor movements' hopes for EFCA are grounded in a belief that union density cannot be restored in the US without substantial—and perhaps following EFCA—fundamental improvements in federal labor law. Based on a comparative analysis of Swedish and Danish labor law, I have questioned the necessity of labor law as a means of union revival. Furthermore, I have identified what I believe is one of the more convincing sources of Nordic union strength, namely the Ghent system. The Ghent system helps unions solve three basic problems of increasing union membership: the free-rider problem, the recognition problem, and the adversarial problem. US labor law attempts to resolve these same dilemmas, but with obvious inadequacy. Further, union-determined and administered unemployment insurance is efficient and establishes a positive-sum tradeoff between a form of security in the labor market and a flexible workplace. Finally, the Ghent system offers a path to union revitalization in the US. It can fundamentally transform the relationship between workers, unions, and employers, as it has done in the Nordic countries. Moreover, the absence of federal constraints opens up reform possibilities at the state level that are currently absent in Congress.

APPENDIX

This Appendix provides a formal version of the argument for the efficiency of collectively-bargained unemployment insurance that was presented in Part III.

Tastes and technology are as follows:

(1) Consider a single firm which chooses a single employee who is represented by a single union. The assumption of a single employee is a simplifying one and does not affect the results.

(2) The firm is risk neutral. After the firm hires a worker, the productivity of the match between the firm and the worker is revealed. Productivity is given by y from cdf $G(y)$, with density $g(y)$ on $[0,1]$. The firm, but not the worker or the union, observes y.

[215] Rothstein, *supra* note __, at 48.

(3) Prior to hiring a worker, the firm chooses a production standard, $\bar{y}$. If the worker's productivity is such that $y \geq \bar{y}$, the firm keeps the worker and produces; if $\bar{y} < y$, the firm lays the worker off, and the worker then becomes unemployed.

(4) Workers are risk averse, with utility function $v(\cdot)$. (Recall that strict risk aversion implies $v'(\cdot) > 0$ and $v''(\cdot) < 0.$) Absent unemployment benefits, the utility of an unemployed worker is $v(b)$, so b is the wage equivalent of being unemployed.

In a labor market with an employment-at-will rule and without a union, the firm will choose the lowest possible wage; hence, $\bar{w} = b$. Furthermore, the firm will also choose the most exacting standard of production. In particular, it will choose to keep any worker whose productivity exceeds the wage cost, $y \geq \bar{w}$. Hence, the firm will set its production standard at $\bar{y} = b$. Define the production standard in this competitive benchmark as $\bar{y}^* = b$, the "production efficient" productivity standard.

A. The Right-to-Manage Contract

In a "right-to-manage" contract, the firm and the union bargain *ex ante* only over the wage, and the firm retains the right to set the production standard under the background employment-at-will regime. To determine the bargained wage, I use the Nash bargaining solution. The union seeks to maximize the employee's expected utility, which is the weighted sum of the probabilities that the employee will retained or terminated by the employer: $\big(1 - G(\bar{y})\big)v(w) + G(\bar{y})v(b)$. In the case of disagreement the employee gets the utility of being unemployed. Thus the union's Nash maximand is:

$$U(w, \bar{y}) = \big(1 - G(\bar{y})\big)[v(w) - v(b)]$$

The firm's expected profits are given by:

$$\pi(w, \bar{y}) = \int_{\bar{y}}^{1} y dG(y) - \big(1 - G(\bar{y})\big)w$$

In the case of disagreement, I assume the employer gets zero profit. We can therefore write the Nash program to solve:

$$\max_{\{w\}} [\pi(w, \bar{y})]^{1-\beta} \, [U(w, \bar{y})]^{\beta}$$

where β determines the relative bargaining power of the parties: an increasing β indicates greater union bargaining power. The first-order condition for this Nash program is given by:

$$(1-\beta)\partial\pi/\partial w[U(w,\bar{y})] + \beta\partial U/\partial w[\pi(w,\bar{y})] = 0$$

where the partial derivatives of the the firm's expected profits and the union's Nash utility with respect to wages are:

$$\frac{\partial \pi}{\partial w} = g(\bar{y})(w-\bar{y}) - \big(1-G(\bar{y})\big),$$
$$\frac{\partial U}{\partial w} = -g(\bar{y})[v(w)-v(b)] + \big(1-G(\bar{y})\big)v'(w)$$

As can be seen in the partial derivatives, bargaining wage increases have two effects each on the firm's profits and the union's utility. Since the employer retains the control over the standard of production, a profit-maximizing employer will choose $\bar{y} = w$, which implies that an increase in the wage will have an identical effect on the production standard, that is $d\bar{y}/dw = 1$. Thus, an increasing $\bar{y}$ has a positive impact on firm profits, as indicated by the term on the left on the right-side of the equation, while wages increases have a negative impact on profits, as indicated by term on the right. (Note that because an employer will choose $\bar{y} = w$, the term on the left will equal zero; nevertheless an increasing $\bar{y}$ will mitigate the negative impact on firm profits, as seen in the term on the right.) Similarly, but in an opposite fashion, an increase in the production standard has a negative effect on the union's utility, while wages have a positive effect. More intuitively, wage increases cut into profits, but by increasing the standard of production, employers can ensure that they will only pay higher wages when they get higher productivity. Similarly, wage increases improve the utilities of the employee and union, but an increasing production standard increases the chances the employee will be dismissed.

Substituting the partial derivatives into the first-order condition and rearranging terms (and using the fact that $\bar{y} = w$), we can write:

$$\beta\frac{\pi(w,\bar{y})}{(1-G(\bar{y}))} = (1-\beta)\frac{U(w,\bar{y})}{\big(1-G(\bar{y})\big)v'(w) - g(\bar{y})[v(w)-v(b)]}$$

This gives the familiar implicit expression of the bargained wage from the Nash solution. Intuitively, when the union has no bargaining power (i.e., $\beta = 0$), the expression on the left-hand side of the equation becomes zero, and in order to satisfy the equation, $U(w,\bar{y})$ must equal zero, which will be

the case when the union is powerless to bargain wage increases and $w = b$. On the other hand, when the union has all of the bargaining power (i.e., $\beta = 1$), the right-hand side of the equation becomes zero and the firm's expected profits must become zero in order to satisfy the equation, which is to say the union bargains the entire surplus to the employee.

The right-to-manage contract is inefficient in two ways. First, because the employer will choose $\bar{y} = w$ and in general $w > b$, then $\bar{y} > b$, and the contract is production inefficient. Second, the contract is not Pareto optimal since there exist agreements specifying both the wage and production standard that would make the union and employer better off. We investigate this possibility next.

B. The Weakly-Efficient Contract

Collective-bargaining agreements typically contain more than wage increases for employees. Nearly as common as compensation terms, collective agreements also contain terms governing employment security, such as just-cause restrictions on dismissals. In fact, as I will show here, firms and unions can each improve their outcomes by bargaining over *both* wages and employment protection.

Rewrite the Nash program as:

$$\max_{\{w,\bar{y}\}} [\pi(w,\bar{y})]^{1-\beta} \, [U(w,\bar{y})]^{\beta}$$

The first-order conditions for the wage and the standard of production are as follows:

$$\beta\pi(w,\bar{y}) = (1-\beta)\frac{U(w,\bar{y})}{v'(w)}$$

$$\beta\frac{\pi(w,\bar{y})}{w-\bar{y}} = (1-\beta)\frac{U(w,\bar{y})}{v(w)-v(b)}$$

Eliminating β between these two equations allows us to write the contract curve, which is the locus of tangency points between the union's isoutility curves and the employer's isoprofit curves. More intuitively, the contract curve is the set of wage and employment protection combinations where any change in terms can make one party better off only at the expense of the other. The contract curve is:

$$w - \bar{y} = \frac{v(w) - v(b)}{v'(w)}$$

The contract curve expresses in a clear way the relationship between wages and the performance standard, and hence the level of security the employee enjoys. We know that when the union's bargaining power is zero, the bargained wage must equal the wage equivalent of being unemployed, which will make the term on the right-hand side of the equation zero. Satisfying the equation, the employer will be able to impose its most preferred production standard, which will be equated with the wage. However, as the union's bargaining power increases, both the wage must increase and the performance standard must become more lenient, that is, the performance standard must fall below the bargained wage. Thus, wages and employment security increase with the union's bargaining power.

Bargaining an agreement on the contract curve allows the employer and union to secure a Pareto optimum contract. Will the contract be production efficient as well? Implicitly differentiating the contract curve gives us:

$$\frac{dw}{d\bar{y}} = \frac{v'(w)}{v''(w)(w - \bar{y})}$$

Since we have assumed that workers are risk averse (i.e., $v''(\cdot) < 0$), the contract curve will have negative slope from the competitive wage and the production-efficient performance standard. In other words, a union representing a risk averse worker will bargain for a production standard lower than the production-efficient one, $\bar{y} < b$. As the worker becomes more risk averse, the absolute value of $v''(\cdot)$ becomes larger, and the contract curve becomes flatter. This means that prefer employment security more than wage increases and both the production standard and wage fall. On the other hand, as workers become more risk neutral, $v''(\cdot)$ moves closer to zero, and the contract curve becomes steeper. When workers are exactly risk neutral, the expression for the contract curve becomes infinitely large, meaning that the contract curve becomes a vertical line from the competitive wage and the production-efficient performance standard (see Figure 3). In this case, workers care only about maximizing the wage and hence bargain for an efficient level of employment protection in order to obtain the highest wage gain possible. Note that even if workers are risk neutral and the performance standard is production efficient, this is not the performance standard that employer's would choose independently.

C. The Strongly-Efficient Contract

Suppose that instead of bargaining over wages and employment protection, the union and employer bargain over wages and unemployment insurance, the latter which is denoted u. And once again the employer reserves the "right to manage" and selects its preferred production standard. The Nash program is now written:

$$\max_{\{w,u\}}[\pi(w,\bar{y},u)]^{1-\beta}\,[U(w,\bar{y},u)]^{\beta}$$

and the union's Nash maximand and the firm's expected profits are respectively:

$$U(w,\bar{y},u) = \big(1-G(\bar{y})\big)v(w) + G(\bar{y})v(b+u) - v(b)$$

$$\pi(w,\bar{y},u) = \int_{\bar{y}}^{1} y dG(y) - \big(1-G(\bar{y})\big)w - G(\bar{y})u$$

It can be shown that a contract that specifies $\hat{w} = b + \hat{u}$ always Pareto dominates a contract that provides $w \geq b + u$ as long as workers are risk averse. That is, a union will prefer a contract that gives equal utility to employed and unemployed workers to one that makes employed workers better off than unemployed workers. It can also be shown that the firm is indifferent with respect to a similar choice of contracts. Thus a contract that provides $\hat{w} = b + \hat{u}$ is Pareto superior: it makes the union better off without making the firm worse off.

With the knowledge that $w = b + u$, we can rewrite the union's and firm's contributions to the Nash problem in the following form:

$$U(\bar{y},u) = v(b+u) - v(b)$$

$$\pi(\bar{y},u) = \int_{\bar{y}}^{1} y dG(y) - \big(1-G(\bar{y})\big)b - u$$

Since we have removed w from the maximands, the Nash program can now be rewritten as simply a bargain over the level of unemployment benefit:

$$\max_{\{u\}}[\pi(\bar{y},u)]^{1-\beta}\,[U(\bar{y},u)]^{\beta}$$

Writing the problem in this fashion generates the following first-order condition:

$$\beta\pi(\bar{y},u) = (1-\beta)\frac{v(b+u)-v(b)}{v'(b+u)}$$

In addition to the contract being Pareto optimal, it will be production efficient as well. As is easily seen, in the firm's expected profit function, $\pi(\bar{y},u)$, $\bar{y}$ is independent of u and depends only on b. The firm will therefore choose $\bar{y}=b$, which is the production-efficient performance standard.

More intuitively, the union maximizes expected employee utility by equalizing the utility of an employed and unemployed worker. This follows from risk aversion. If we begin with equal utility for an employed and an unemployed worker, and then transfer a dollar from the unemployed to the employed worker, aggregate utility decreases because of declining marginal utility for money. Since the employed and unemployed worker receive the same utility, from the firm's viewpoint it pays u to the worker whether it keeps or dismisses her. If it keeps her, it pays her an additional b. Therefore, b is the only value that influences the employer's production-standard decision.

	Density 1950	Density 1980	Density 1992	Ghent
High-density countries				
Belgium	36.9	76.6	80.5	Yes
Denmark	58.2	86.2	91.6	Yes
Finland	33.1	85.8	111.4	Yes
Sweden	62.1	89.5	111.3	Yes
Middle-density countries				
Australia	56.0	52.4	39.6	No
Austria	62.2	65.3	53.2	No
Canada	26.3	36.1	37.0	No
Germany	36.2	41.3	41.2	No
Ireland	38.6	63.4	53.5	No
Italy	47.4	60.5	68.0	No
New Zealand	49.4	46.0	25.9	No
Norway	53.8	65.3	67.7	No
UK	45.1	56.3	41.3	No
Low-density countries				
France	30.9	19.7	9.4	No
Japan	46.2	31.2	24.5	No
Netherlands	36.2	39.9	31.0	No
Switzerland	40.1	34.5	30.0	No
US	28.4	24.9	15.3	No

Table 1. Union Density and the Ghent System

Source: Michael Wallerstein & Bruce Western, *Unions in Decline? What Has Changed and Why*, *in* 2000 ANN. REV. POL. SCI. 355, tbl. 1 358.

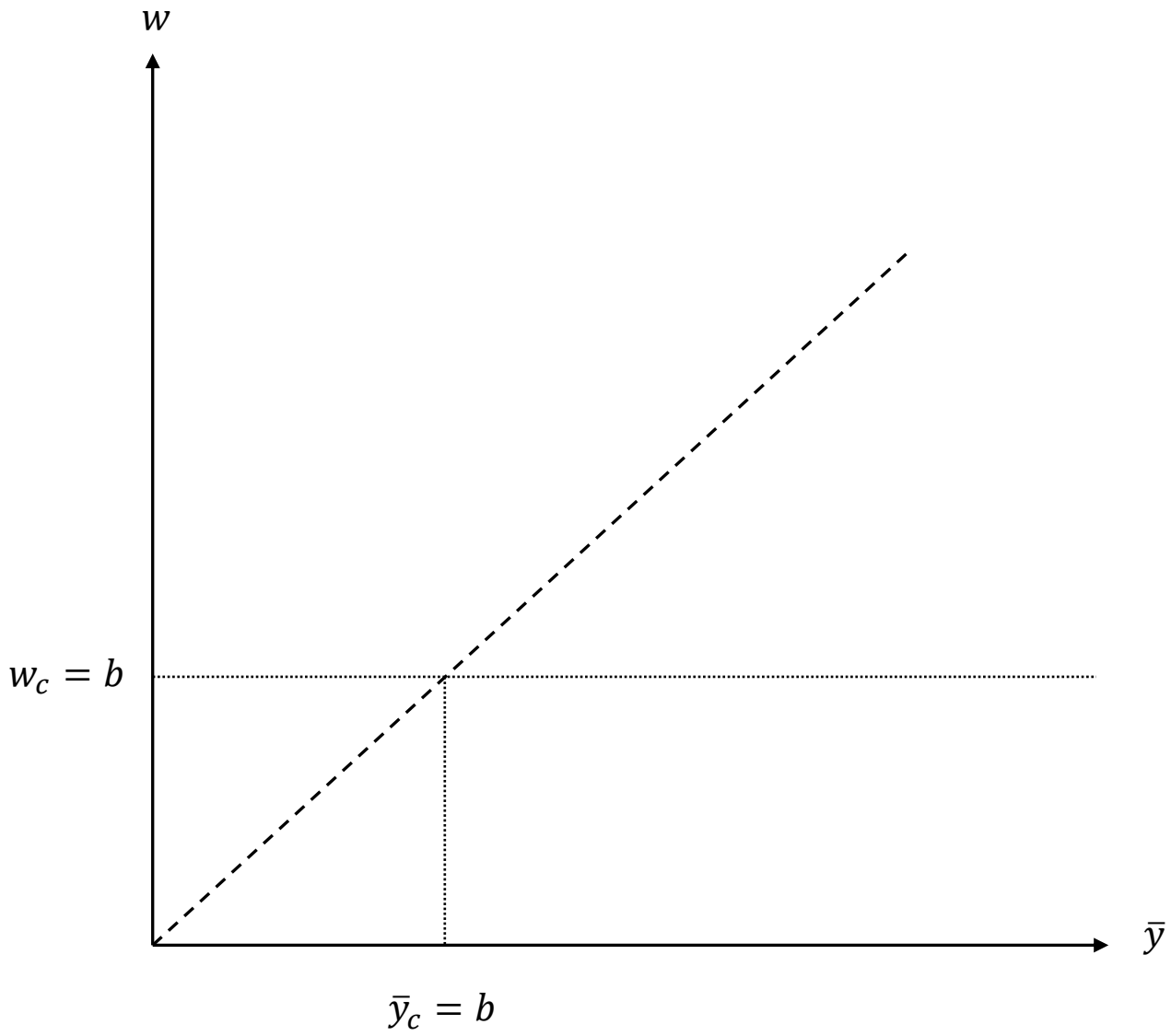

Figure 1: The Competitive (Nonunion) Benchmark

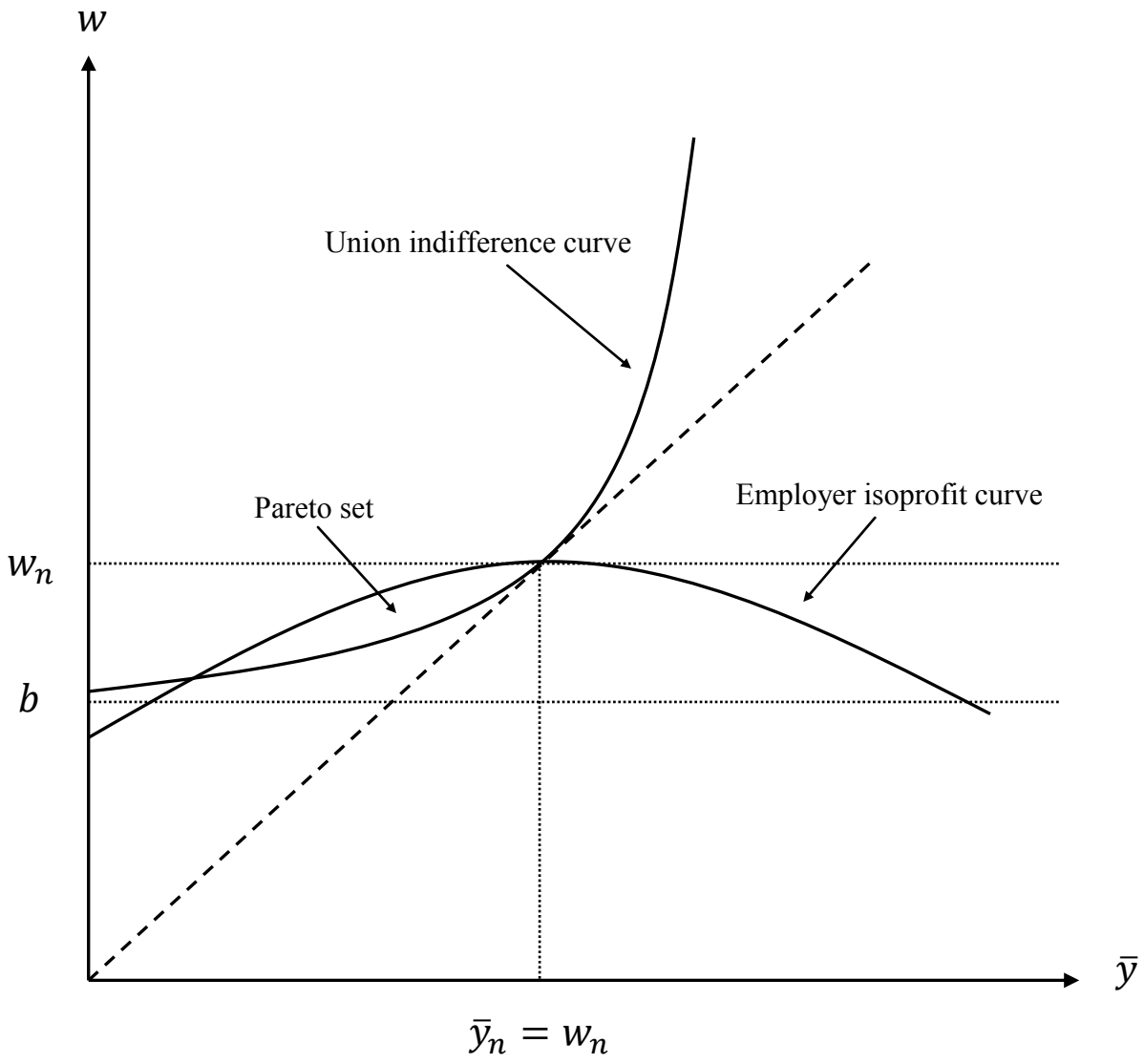

Figure 2: The Right-to-Manage Contract

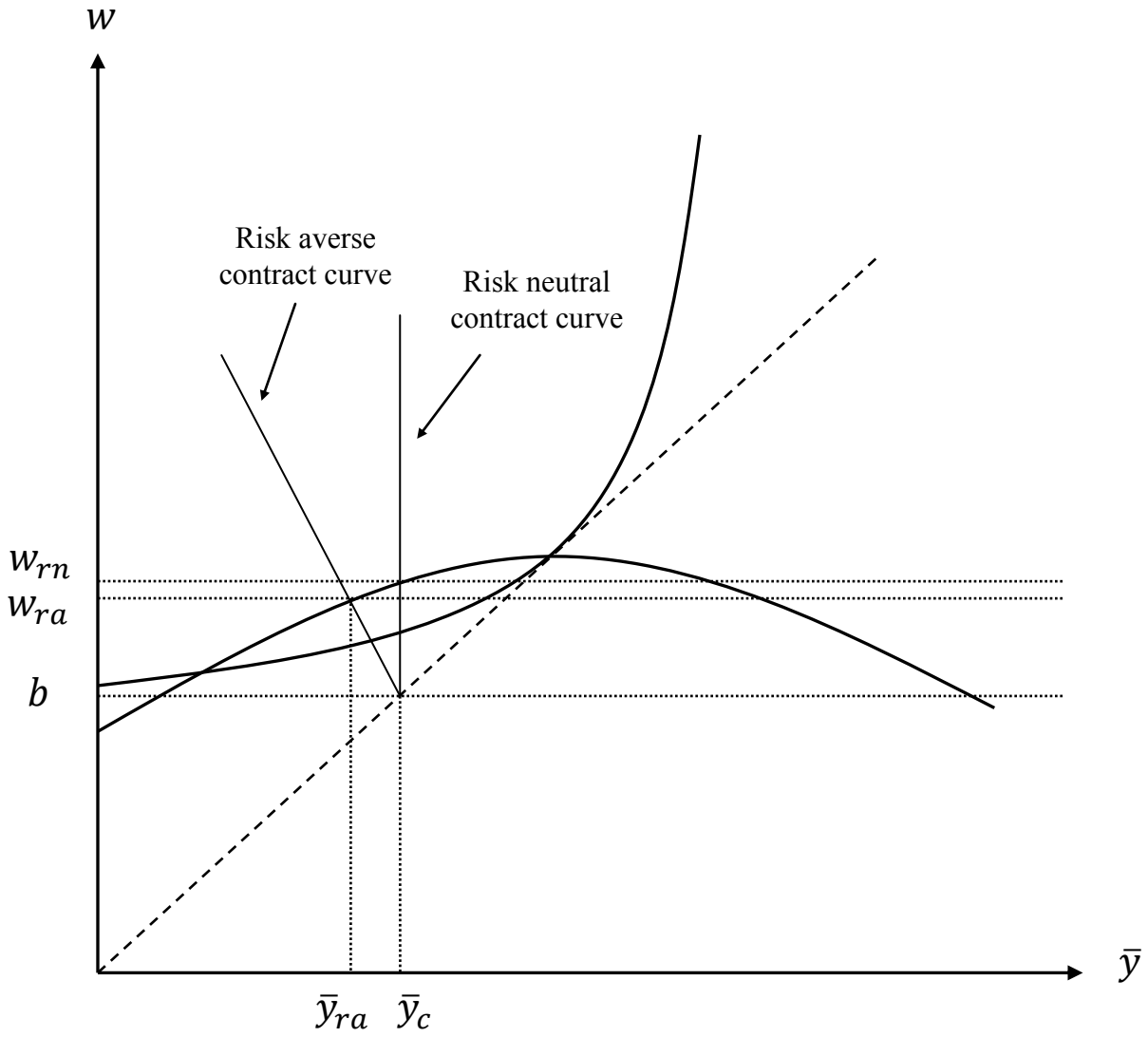

Figure 3: The Weakly-Efficient Contract

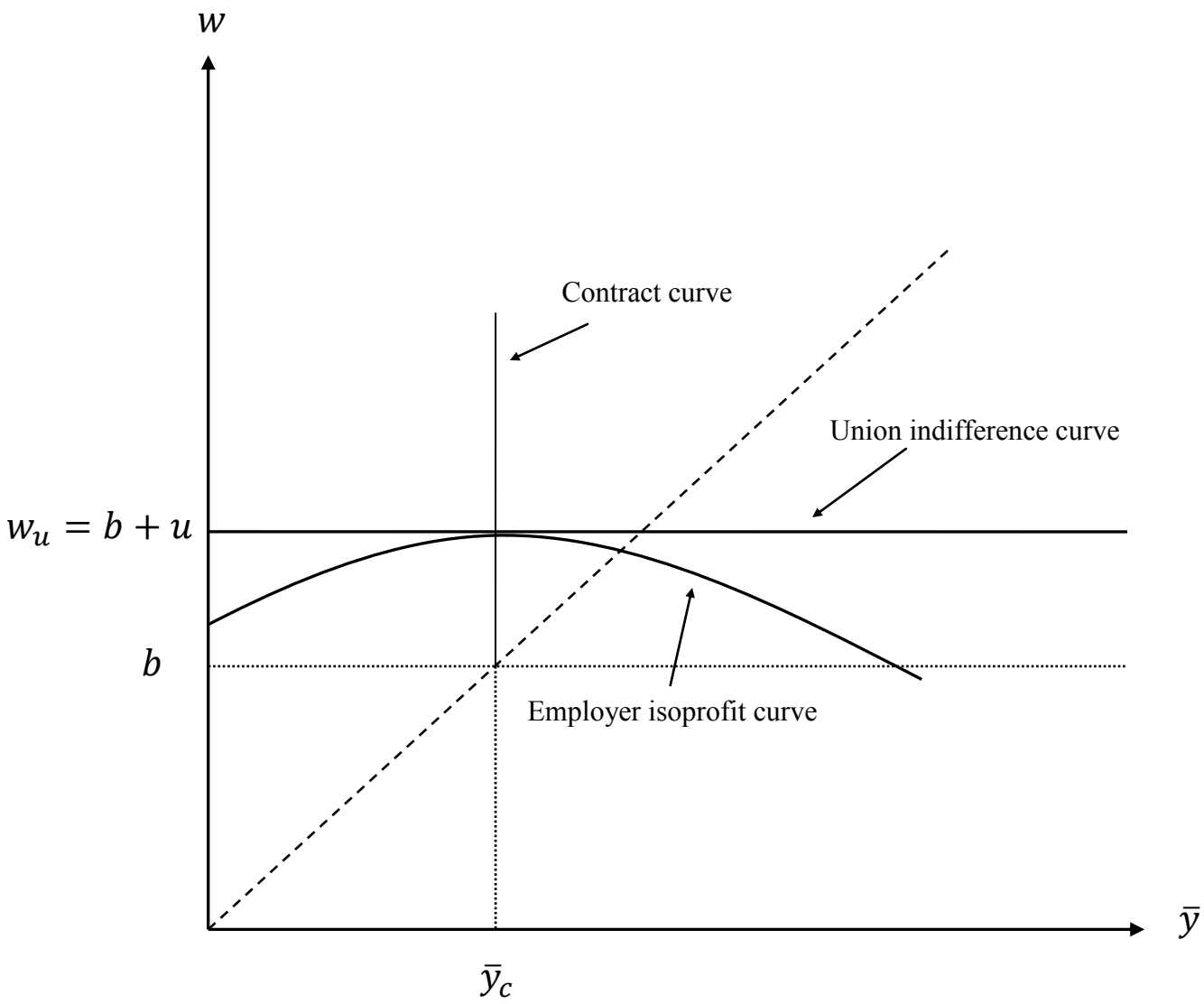

Figure 4: The Strongly-Efficient Contract