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### Labor Law, New Governance, and the Ghent System

Matthew Dimick

*University at Buffalo School of Law*

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# LABOR LAW, NEW GOVERNANCE, AND THE GHENT SYSTEM\*

MATTHEW DIMICK\*\*

*The Employee Free Choice Act (“EFCA”) was the most significant legislation proposed for reforming the National Labor Relations Act (“NLRA”) in over a generation and the centerpiece of the American labor movement’s revitalization strategy. Yet, the EFCA hewed closely to the particular regulatory model established by the NLRA at the peak of the New Deal, now over seventy-five years ago. Further, recent scholarship suggests that traditional regulatory approaches are giving way to new kinds of governance methods for addressing social problems. Rather than reviving an old regulatory model, should “New Governance” approaches instead be sought for addressing problems in employment representation? Through a comparative legal and institutional analysis, this Article offers a novel study of an alternative governance approach in labor and employment law by exploring the Ghent system.*

*The Ghent system is a voluntary system of unemployment insurance in which labor unions administer publicly subsidized insurance funds and, along with employers and the state, participate in unemployment insurance policymaking. The Ghent system helps overcome three separate problems in collective employment relations that existing labor law in the United States attempts to resolve in evidently ineffective ways, which the EFCA had sought to reform. First, the Ghent system encourages employers to recognize and bargain with unions by providing workers with incentives to join labor unions prior to and independent of the employers’ recognition of the union. Second, voluntary, union-administered unemployment insurance*

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\*\* Associate Professor, University at Buffalo Law School, State University of New York; Fellow, Kalmanovitz Initiative for Labor and the Working Poor, Georgetown University. For their comments, I wish to thank Hannah Alejandro, Susan Carle, Dan Ernst, Cindy Estlund, Catherine Fisk, Willy Forbath, Charlotte Garden, Mike Gottesman, Jeffrey Hirsch, Greg Klass, Nancy Leong, Gillian Lester, Mitt Reagan, Alvaro Santos, Logan Sawyer, Paul Secunda, Katherine Stone, David Super, Josh Teitelbaum, Marley Weiss, Robin West, Michael Zimmer, and participants at the Summer 2010 and Spring 2011 Faculty Workshop Series at Georgetown Law, the 2010 Labor & Employment Law Colloquium, and the 2010 Seton Hall Employment & Labor Law Scholars’ Forum. I owe special thanks to Bill Corbett and Steve Willborn for detailed attention and comments provided at the Seton Hall forum.

*provides an alternative “selective incentive” that reduces free riding on collective union goods. Finally, union and employer collaboration in unemployment insurance policy generates efficiency gains that underwrite cooperative labor relations and reduce employer resistance and workplace adversarialism. In exchange for generous unemployment benefits, unions yield on employment-protection rules, giving employers more flexibility in the workplace—a bargain referred to as “flexicurity.” The Article concludes by drawing policy lessons from the Ghent system analysis. A “progressive-federalist” strategy of unemployment insurance reform at the state level may be more feasible than federal labor law reform because of the broad deference states enjoy under the federal Social Security Act, but non-legislative lessons can also be applied, as several contemporary and U.S. examples illustrate.*

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## INTRODUCTION

Labor unions held great aspirations with the victory of Barack Obama in the 2008 presidential election. At the top of their legislative agenda was the Employee Free Choice Act (“EFCA”), by far the most significant proposal for reforming American labor law in over a generation.<sup>1</sup> Having devoted vast economic and political resources to its passage, the organized labor movement considered the EFCA its central revitalization strategy.<sup>2</sup> However, like many of the other hopes that progressives held for the early Obama Administration, the EFCA succumbed to the maelstrom of bitter partisan politics.<sup>3</sup> The fate of the EFCA is grim news for labor movement advocates. If a simple reform bill cannot pass—envisioning no fundamental change to the basic structure of the National Labor Relations Act (“NLRA”), merely “filling gaps” in the current framework—what hope is there for revitalizing the labor movement?<sup>4</sup> Yet precisely as a gap-filling measure, the EFCA hews closely to the NLRA’s New Deal “regulatory” model. The irony is that the EFCA arrived at a time when both recent scholarship and experience suggest that the New Deal model of regulation is being supplanted by new forms of public responses to social problems, labeled broadly as “governance.”<sup>5</sup>

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1. The last major attempt at reforming the National Labor Relations Act (“NLRA”), which failed, 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 1 *THE DEVELOPING LABOR LAW* 71–73 (John E. Higgins, Jr. et al. eds., 5th ed. 2006).

2. Jane McAlevey, *Making Unions Matter Again*, NATION (N.Y.C.), Dec. 20, 2010, at 12, 13 (“Encouraged by pollsters and Democratic Party consultants, union leaders decided to bet the farm on the [EFCA]. With the economic crisis ravaging the nation, this was the number-one ‘ask’ of the new administration labor had fought so hard (and paid so dearly) to elect.”).

3. Steven Mikulan, Op-Ed., *Labor’s Love Lost*, L.A. TIMES, Feb. 7, 2011, <http://www.latimes.com/news/opinion/commentary/la-oe-mikulan-labor-20110207,0,5224608.story> (reporting that the EFCA is “fatally stalled”).

4. David Brody, *A Tale of Two Labor Laws*, DISSENT (N.Y.C.), Spring 2010, at 63, 67 (“The [EFCA] bill made no pretense at rethinking the law. All it did was patch up the holes.”).

5. See generally Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (synthesizing and providing a broad overview of the literature addressing “new governance” and contemporary approaches to regulation).

Rather than allocating scarce political and financial resources to reviving the NLRA's regulatory framework, should the labor movement instead be searching for "New Governance" models to address the pressing problem of workplace representation?

The distinction between regulation and governance has received much attention in recent legal scholarship.<sup>6</sup> It is perhaps most associated with research in administrative law,<sup>7</sup> but it has also extended into corporate law<sup>8</sup> and, more recently, labor and employment law.<sup>9</sup> As a matter of definition, the distinction encompasses a variety of valences. "Regulation" evokes prescriptive rules, substantive prohibitions, coercive enforcement, and an adversarial relationship between regulating and regulated entities.<sup>10</sup> At the extreme, regulation conjures the image of state-based, top-down, and "command-and-control" forms of managing social problems.<sup>11</sup>

"Governance," in contrast, involves a more collaborative or cooperative relationship between regulating and regulated entities,<sup>12</sup>

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6. See, e.g., *infra* notes 7–9.

7. See generally David A. Dana, *The New "Contractarian" Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35 (describing an alternative to traditional regulation wherein regulators reduce enforcement in exchange for the regulated entities' agreement to additional obligations that exceed the requirements of existing law); Daniel A. Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278 (1993) (discussing, in the context of environmental regulation, the "contractarian" approach in which regulators and regulated entities negotiate obligations); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (proposing a new model of collaborative governance as an alternative to "adversarial administrative decision-making"); Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986) (discussing the use of "reconstitutive" strategies as an alternative to the extreme choices between centralized regulation and deregulation).

8. See, e.g., Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, in *THE ANATOMY OF CORPORATE LAW* 21, 23 (Reinier Kraakman et al. eds., 2004).

9. See generally CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE* (2010) [hereinafter ESTLUND, *REGOVERNING*] (exploring methods for strengthening employee rights and labor standards within self-regulatory regimes); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005) [hereinafter Estlund, *Rebuilding*] (same); Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005) (arguing for the expansion of "governance-based policies" in the context of workplace safety); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (arguing that a governance-based approach could address employment discrimination not captured by traditional regulation).

10. See Lobel, *supra* note 5, at 343–45 (describing the regulatory paradigm).

11. *Id.*

12. *Id.*

as well as a more “reflexive”<sup>13</sup> or “experimentalist”<sup>14</sup> approach to developing rules and standards. More in the spirit of this Article’s usage, “governance” is also used to refer to ways of influencing behavior “indirectly, either by enhancing [actors’] power or by molding [their] incentives.”<sup>15</sup> In the administrative law context, incentive molding might take the form of “monitored self-regulation,” where the regulated entity is encouraged to adopt internal compliance mechanisms and is rewarded with less interventionist forms of oversight.<sup>16</sup> In corporate law, incentive shaping might include shareholder rights to appoint directors, as opposed to direct regulation of managerial decision making or, more broadly, a “pay-for-performance” compensation contract that aligns a manager’s incentives with shareholder interests.<sup>17</sup> Until now, research has imagined what governance would look like in the labor and employment law context only by analogy to administrative law or monitored self regulation.<sup>18</sup> This Article proposes a different model of labor and employment governance. This model is found in countries that employ the Ghent system of unemployment insurance.

Named after the Belgian town where it was first instituted, the Ghent system is a voluntary system of unemployment insurance where funds are administered by labor unions but supervised through legislation and subsidized with public finances.<sup>19</sup> This Article conducts a comparative legal and institutional analysis of the United States, Denmark, and Sweden, countries where the fortunes of labor unions have differed markedly during the recent decades of globalization and workplace reorganization. Unlike the United States, which relies on a regulatory model, Denmark and Sweden feature the Ghent system. This Article’s thesis is that the Ghent system ameliorates some central problems in the collective representation of employee interests, not prescriptively through the elaboration of detailed rules

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13. STATE, LAW AND ECONOMY AS AUTOPOIETIC SYSTEMS: REGULATION AND AUTONOMY IN A NEW PERSPECTIVE 11–13 (Gunther Teubner & Alberto Febbrajo eds., 1992).

14. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (identifying a new form of decentralized government, labeled “democratic experimentalism,” that combines decentralized implementation to take advantage of local knowledge and individual circumstances, as well as centralized coordination for setting “best-practice standards” and sharing information across localities).

15. Hansmann & Kraakman, *supra* note 8, at 23.

16. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 106–08 (1995).

17. Hansmann & Kraakman, *supra* note 8, at 26–27.

18. See, e.g., ESTLUND, *REGOVERNING*, *supra* note 9, at 48–51.

19. See *infra* Part I.A.

and their coercive enforcement, but indirectly by molding the incentives of workers, unions, and employers.

There are three fundamental dilemmas that occur in collective employment representation.<sup>20</sup> These are labeled the recognition problem, the free-rider problem, and the adversarial problem. Where the NLRA and EFCA have proffered a regulatory solution to each problem, the Ghent system offers a governance alternative.

Perhaps the most pressing problem in employment representation, and the one to which the EFCA was addressed, is the recognition problem.<sup>21</sup> A familiar rationale for collective representation of employee interests is that unions produce collective goods that are likely to be underprovided in the market. To provide these goods to their members, however, unions must first be recognized by and be able to bargain with firms over terms and conditions of employment. Currently, the NLRA seeks to ensure that employees have a choice about union representation. While the default rule is that workers are not represented by a union, the NLRA seeks to minimize employer interference and resistance when employees express a preference for union representation. It does so by providing for representation elections to determine employee support, protecting employees from discrimination on the basis of union support or opposition, and establishing a duty for employers to bargain with a union if employees have voted for representation. Both the EFCA and recent scholarship have sought to address deficiencies in the free exercise of employee choice by proposing rules and processes, including the stiffening of sanctions for prohibited behavior, that mitigate the impediments to departure from the nonunion default. By contrast, the Ghent system works not by changing the representation default rule or through government-supervised procedures, but by molding incentives. Union-provided, publicly funded unemployment insurance encourages workers to become union members, and it is from the accumulation of members and their resources that unions in Denmark and Sweden are able to sustain recognition from employers without any government-supervised election process.

Collective employment representation also faces a free-rider problem.<sup>22</sup> Given the collective nature of the goods they produce, unions always face the danger that workers will “free ride” on these

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20. *See infra* Part II.

21. *See infra* Part II.A.

22. *See infra* Part II.B.

benefits and not join the union or otherwise fail to bear their fair share of the costs of their production. Under the NLRA, statutorily authorized and regulated union-security agreements provide a “negative” incentive for workers to avoid free riding by obligating them to financially support the union as a condition of continued employment. By contrast, in Denmark and Sweden, voluntary, union-provided unemployment insurance (from which nonparticipants are easily excluded) gives workers a “positive” incentive to join and remain in the labor union. Workers are not required to join the union when enrolling in an insurance plan, though the fact that unions administer the funds undoubtedly encourages workers to do so.

Finally, there is an adversarial problem. Parties will choose to exit a relationship when the joint gains from it are less than what each party can get outside of it.<sup>23</sup> Similarly, an employer will be less resistant to unionization when presence of a union can enhance the employer’s productive efficiency or at least minimize any inefficiencies the union may cause. Hence, trust and cooperation are more likely to prevail when joint gains are larger, while resistance and adversarialism will result when those gains are smaller. While the NLRA’s regulatory framework was supposed to channel and contain “industrial strife” in employment relations, employer antipathy toward unions and union-employer intransigence in collective bargaining are the hallmarks of the U.S. system. Union participation in unemployment insurance policy promotes cooperative employment relations by generating efficiencies that reduce employer hostility. In Denmark in particular, unions and employers are able to achieve a positive-sum tradeoff by exchanging income security for employment flexibility. While workers receive generous unemployment insurance benefits, unions cede 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 policymakers.<sup>24</sup> This Article contends that union-employer agreements over wages and unemployment insurance, as produced under the Ghent system, are more efficient than agreements over wages and employment protection rules.<sup>25</sup>

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23. See *infra* Part II.C.

24. EUROPEAN COMM’N DIRECTORATE-GEN. FOR EMP’T, SOC. AFFAIRS AND EQUAL OPPORTUNITIES, *EMPLOYMENT IN EUROPE 2006*, at 3 (2006), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1031&context=intl>.

25. The emphasis on the Ghent system does not suggest that it is the *only* institution available for resolving these dilemmas in Denmark and Sweden. As will be recognized in Part II.A.2 *infra*, differences in the structure of collective bargaining are also important—



In addition to the key claim that the Ghent system resolves important dilemmas by giving actors the appropriate incentives, this Article has two other descriptive and explanatory goals. First, it examines and rejects widely held preconceptions about the nature of labor law in the United States and Scandinavia. While there are great differences—political and cultural, perceived and real—between the liberal United States and social-democratic Denmark and Sweden, the case selection has been made precisely because one would expect these Scandinavian countries, as apotheoses of the corporatist welfare state, to exhibit the heavy hand of state-mandated rules and procedures in labor law.<sup>26</sup> By contrast, the United States has typically been viewed as a laggard in this regard, with the NLRA establishing a framework that overemphasizes private negotiations between labor and capital with only a minimal role for the state.<sup>27</sup> This Article will demonstrate that the opposite is true, at least with respect to the three dilemmas defined above. In Denmark and Sweden, for example, union-security agreements are virtually nonexistent; government-supervised and regulated representation elections are entirely absent; workers' rights to form, join, and assist labor unions are not significantly more protected than in the United States; and the duty to bargain is either missing entirely (Denmark) or weaker (Sweden) in Scandinavian labor law than in the United States.<sup>28</sup>

A second additional goal of this Article is to disentangle the relationship between the Ghent system and union density. Union density is the percentage of union members in a country's workforce.<sup>29</sup> It is a key measure of labor union power and influence, and the main concern of the American labor movement is to reverse

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so important that they deserve fuller and more complete treatment than this Article can provide. Accordingly, this Article will stress the importance of the independent and significant effects of the Ghent system.

26. Reinhold Fahlbeck, *The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307, 311 (1994) (explaining that "the heavy dose of government intervention in the labor market that is characteristic of U.S. labor law" would be suited to a country like Sweden).

27. Catherine Fisk, *Still "Learning Something of Legislation": The Judiciary in the History of Labor Law*, 19 LAW & SOC. INQUIRY 151, 152 (1994) (claiming that the "heart of American labor law is collective bargaining—the notion, often called voluntarism, that the conditions of labor are best regulated not by state mandates but by private agreement between employers and unions").

28. See *infra* Parts II.A.2 and II.B.2.

29. Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LAB. REV., Jan. 2006, at 38, 38 ("Union membership, relative to the potential of those eligible to join a labor union, is the most commonly used 'summary measure' for evaluating the strength of trade unions.").

its decades-long decline.<sup>30</sup> In the social science literature, the positive, empirical correlation between the Ghent system and union density is a well-known and oft-confirmed finding.<sup>31</sup> Less attention has been directed to identifying the causal mechanisms for *why* such a relationship exists.<sup>32</sup> The literature has emphasized the Ghent system's solution to the free-rider problem. This Article defends the hypothesis that the Ghent system raises density by resolving two other dilemmas: the recognition and adversarial problems.

In addition to these positive claims, the Article draws some normative conclusions.<sup>33</sup> What kinds of policy lessons can American observers learn from the Ghent system? Here comparability concerns again present themselves, but the Ghent system is in many ways a conservative method of allocating unemployment insurance and was not the first choice of labor movements when unemployment insurance systems were introduced in the early twentieth century. More pointedly, the legislative and political constraints on the passage of Ghent-type legislation may be less binding than current attempts to reform the NLRA, like the EFCA. Federal labor law has become "ossified," or impervious to change, both at the federal level and, because of preemption, at the state level as well.<sup>34</sup> Under the federal Social Security Act, by contrast, the federal government leaves states with some discretion to determine conditions for eligibility and the amount and duration of benefits for public unemployment insurance programs. In states where labor unions hold more favor and influence, state-level Ghent systems could be adopted and serve as examples and catalysts for change elsewhere. Such reforms present the possibility of a "progressive-federalist" strategy for revitalizing the labor movement.

If in practice political barriers prevent such progressive-federalist reforms, there is still much to be learned from the Ghent system

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30. Union density in 2003 was 78% in Sweden, 70.4% in Denmark, and 12.4% in the United States. *See id.* at 45 tbl.3.

31. *See infra* Part I.B.

32. Understanding these causal mechanisms is crucial for two reasons. First, a theory can only be empirically validated when it has clear, testable hypotheses; elaborating causal mechanisms generates these kinds of testable claims. Second, a specification of causal mechanisms, which allows one to peer into the "black box," provides the kind of close and detailed knowledge that allows policymakers to design the most effective, context-specific policy prescriptions. On the role of causal mechanisms in social science generally, see Peter Hedström & Richard Swedberg, *Social Mechanisms: An Introductory Essay*, in *SOCIAL MECHANISMS* 1–31 (Peter Hedström & Richard Swedberg eds., 1998).

33. *See infra* Part III.

34. The term is from Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

experience.<sup>35</sup> The Ghent system's voluntary and partially privatized nature draws on principles of voluntarism and self-help that have been as deeply held by the American labor movement as by Ghent system trade unions. Indeed, what the success of the Ghent system really suggests is that unions ought to return to their mutual aid roots, preferably in ways that solve certain problems for employers as well as employees. Generalizing from the Ghent system, unions should aspire to produce and deliver private (i.e., excludable) benefits that are nevertheless generally available to all workers and whose provision generates gains for employees and employers alike. This Article evaluates a series of contemporary, homegrown innovations that embody this Ghent-type principle, including the Freelancers Union, the AFL-CIO's Working America program, unions acting as workforce intermediaries, and worker centers.

Movements in the direction of mutual aid could potentially transform the labor movement. One of the tragic ironies of the current situation is that, despite its shrinking proportional influence in the U.S. workforce, in absolute terms, the labor movement still possesses considerable human and financial resources.<sup>36</sup> To take just one example, unions have accumulated considerable experience and assets by administering health and pension benefits.<sup>37</sup> Those resources ought to be consolidated, redirected, and leveraged toward benefiting the workforce as a whole, regardless of whether employees currently belong to an exclusively-represented, employer-recognized, and government-certified bargaining unit. The implications of this structural shift are profound. It might build in the United States "a labor movement that is 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."<sup>38</sup>

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35. See *infra* Part III.B.

36. Margaret Levi, *Organizing Power: The Prospects for an American Labor Movement*, 1 *PERSP. ON POL.* 45, 47 (2003). On this phenomenon, Ron Blackwell, director of the AFL-CIO's corporate affairs, stated, "In absolute terms, we are the strongest labor movement in the world. . . . Relative to employers, political parties, and governments, however, we are the weakest labor movement in the industrialized world." *Id.*

37. JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 17-20, 27 (3d ed. 2000) (quoting in part Peter Drucker, *Pension Fund "Socialism"*, 42 *PUB. INT.* 3, 3-6, 44-46 (1976)).

38. 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 (Jonathan Zeitlin & David M. Trubek eds., 2003). The use of this quotation generalizes from a conclusion about the benefit of union and employer collaboration in worker training programs. See *infra* Part III.C.

Part I of this Article provides a brief overview of the Ghent system, including its history, institutional characteristics, and a summary of the empirical research on the impact of the Ghent system on union density. Part II conducts a comparative institutional analysis of U.S. labor law and the Ghent system, which is organized in terms of the three-part dilemma defined in the introduction. Part III addresses the normative questions of whether, how, and in what form the Ghent system or Ghent-type governance principles can be and are being adopted in the United States.

## I. THE GHENT SYSTEM

### A. *Characteristics and History of the Ghent System*

The Ghent system was first instituted in 1901 when the Ghent municipal authority in Belgium began to subsidize trade union unemployment insurance programs with public funds.<sup>39</sup> Since that time, the Ghent system has evolved to embody a series of characteristics that distinguish it from the public and compulsory unemployment insurance systems found in the United States and most other developed countries. First, under the Ghent system the unemployment insurance system is administered by labor unions. This most frequently takes the form of unions running their own unemployment insurance funds, which are financially segregated from other union revenues.<sup>40</sup> In Denmark and Sweden in 2007, there were thirty-two and thirty-seven, respectively, different union-run insurance funds an employee could join, distinguished primarily by industry or occupation.<sup>41</sup>

Second, most Ghent systems have a voluntary component. By comparison, in the United States the unemployment insurance program is entirely financed with tax revenues, and all workers are entitled to benefits—hence, it is termed a compulsory system.<sup>42</sup>

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39. BRUCE WESTERN, *BETWEEN CLASS AND MARKET* 51 (1997).

40. *Id.* at 51, 55–56. Historically, so-called “labor exchanges” dispensed benefits while also providing job placement services to workers. *Id.* at 51–54.

41. Jochen Clasen & Elke Viebrock, *Voluntary Unemployment Insurance and Trade Union Membership: Investigating the Connections in Denmark and Sweden*, 37 *J. SOC. POL’Y* 433, 439 tbl.3 (2008). The thirty-two Danish funds include one nonunion, “Christian” unemployment fund, which is open to workers across industrial and occupational sectors, and three other funds open to workers without regard to employment or educational background. *Id.* at 440–41.

42. *Id.* at 433–35; see also Bo Rothstein, *Labor-Market Institutions and Working-Class Strength*, in *STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE*

Employees in the typical Ghent system 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.<sup>43</sup> Belgium is the exception, where the system is compulsory but benefits are administered by labor unions.<sup>44</sup> In a voluntary Ghent system, government-regulated and licensed insurance funds are able to receive up to ninety-five percent of their financing from the government, with the balance from voluntary contributions.<sup>45</sup> This voluntary aspect of the Ghent system might raise a concern about the share of workers covered or receiving benefits, but in fact Ghent systems tend to perform *better* on these scores than comparable compulsory systems.<sup>46</sup> This is almost certainly a result of heavy subsidization of funds by tax revenues, low fees for membership in a fund, and the generosity of benefits.<sup>47</sup>

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.<sup>48</sup>

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ANALYSIS 33, 39–40 (Sven Steinmo et al. eds., 1992) (defining both compulsory and voluntary unemployment insurance systems).

43. Clasen & Viebrock, *supra* note 41, at 433–35. In Denmark, for instance, an employee must be a member of a fund for twelve months in order to be eligible to receive unemployment benefits. *Id.* at 439 tbl.3.

44. WESTERN, *supra* note 39, at 54 tbl.4.1.

45. Clasen & Viebrock, *supra* note 41, at 439 tbl.3. Swedish union unemployment funds received ninety-five percent of their financing from government revenues until 2007 when a center-right government passed legislation that substantially increased the balance from membership fees. See generally Anders Kjellberg, *The Swedish Ghent System and Trade Unions Under Pressure*, 15 TRANSFER 481 (2009) (discussing these 2007 changes to the Swedish Ghent system and their impact on union membership rates).

46. Clasen & Viebrock, *supra* note 41, at 437–38, 438 tbl.2 (showing that in "2005, both the coverage ratio (share of workforce included in unemployment insurance) as well as the benefit ratio (share of unemployed in receipt of unemployment insurance benefits) were considerably higher in Denmark and Sweden than in Germany or the UK, two countries with compulsory unemployment insurance schemes").

47. *Id.* at 438 (explaining that coverage problems under the Ghent system are "avoided by relatively generous benefits and low direct costs, both of which make membership in voluntary funds attractive"); see also Kjellberg, *supra* note 45, at 482 (demonstrating how low fund membership fees increase coverage levels by showing that participation in union-run unemployment funds has declined with legislated increases in fund membership fees).

48. Each of the current Ghent countries—Belgium, Denmark, Finland, and Sweden—is considered to be corporatist or to 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) & 5(b) (1999). Denmark and Sweden exhibit corporatist participation in unemployment insurance policy. See Jens Blom-

Soon after the first municipal scheme was established in 1901, versions of the Ghent system could be found in many European localities.<sup>49</sup> Ghent systems became more centralized when provincial governments began to subsidize municipal funds.<sup>50</sup> The first nationalized Ghent system appeared in France in 1905, followed by Norway and Denmark a few years later.<sup>51</sup> The Netherlands (1916), Finland (1917), Belgium (1920), Switzerland (1924), and Sweden (1934) each adopted their own national voluntary unemployment plans over the next three decades.<sup>52</sup> The Great 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.<sup>53</sup>

Other European countries took a different path. Following Britain's lead, Italy (1919), Austria (1920), Ireland (1923), and Germany (1927) adopted fully public systems of unemployment insurance.<sup>54</sup> The next development in unemployment insurance provisions saw the passage of control from unions to the state. Shifts from union to state control occurred in Norway, the Netherlands, France, and Switzerland.<sup>55</sup> Thus, by the close of the twentieth century, only four European countries had retained the Ghent system: Belgium, Denmark, Finland, and Sweden.<sup>56</sup>

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."<sup>57</sup> Moreover, at the time that

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Hansen, *Organized Interests and the State: A Disintegrating Relationship? Evidence from Denmark*, 39 EUR. J. POL. RES. 391, 398 (2001); Jens Blom-Hansen, *Still Corporatism in Scandinavia? A Survey of Recent Empirical Findings*, 23 SCANDINAVIAN POL. STUD. 157, 159-60 (2000). 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.

49. WESTERN, *supra* note 39, at 51.

50. *Id.*

51. *Id.*

52. *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 Flora & Arnold J. Heidenheimer eds., 1981)).

53. *Id.*

54. *Id.* at 52.

55. *Id.* at 52-53.

56. *Id.* at 53.

57. *Id.* at 52.

unemployment insurance systems were first instituted, labor movements did not perceive the Ghent system as the ideal or favored form. As Bo Rothstein points out in his historical comparison, “[v]oluntary systems seem above all to have been favored by Liberal governments, while Labor governments have, with one exception, introduced compulsory schemes.”<sup>58</sup> That is, the individual responsibility and self-help features of the Ghent system resonated more with classical liberal ideology, while compulsory and publicly provided social insurance as a right of citizenship accorded better with labor philosophy.<sup>59</sup> 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.<sup>60</sup> The four countries with the highest levels of union density in those years either had compulsory or no publicly funded unemployment insurance at all.<sup>61</sup> Further, the mean union density for countries with compulsory systems was slightly higher than for those with a Ghent system (33% compared to 25%).<sup>62</sup> Thus, the Ghent system was neither ideologically preferred by labor movements nor was it the result of labor-movement strength.

### B. *The Ghent System and Cross-National Union Density*

Research in the social sciences has shown that the Ghent system has a considerable impact on a country’s union density, the proportion of union members in a country’s workforce. Union density is an important measure of union strength and influence, as well as the extent to which employees are represented in the workplace, society, and politics.<sup>63</sup> Its steady, decades-long decline in the United States is the central concern for labor movement leaders, activists, and supporters. Understanding how the Ghent system influences union density—especially compared to other, regulatory tools for addressing union density—is therefore important.

Table 1 ranks various member countries of the Organization for Economic Cooperation and Development (“OECD”) by their

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58. Rothstein, *supra* note 42, at 44.

59. *Id.*

60. *Id.* at 43.

61. *Id.*

62. *Id.*

63. Visser, *supra* note 29, at 38.

average net union density over the years 1960 to 2008.<sup>64</sup> As show in the table, there is a large degree of variation in mean density among countries. Denmark and Sweden top the list with 76.1% and 70.3% of their workforces, respectively, belonging to unions. The United States is close to the bottom at 19.9%, although many are surprised to learn that the U.S. density exceeds that of France, which, at 14.7%, is found at the very bottom of the list. A variety of factors could explain this very large degree of variation in union density. Given the vast differences in culture and ideology that divide countries such as Denmark, Sweden, and the United States, cultural and political explanations are the most commonly cited.<sup>65</sup> Yet, however salient these cultural determinants of union density are, research has shown that *institutional* mechanisms, such as the Ghent system, are also extremely important.<sup>66</sup>

*Table 1: Union Density and the Ghent System*<sup>67</sup>

Country	Mean Density (1960–2008)	Mean Density (1998–2008)	Ghent System
Sweden	76.1%	76.7%	Yes
Denmark	70.3%	72.0%	Yes
Finland	64.1%	72.5%	Yes
Norway	56.4%	54.7%	No
Austria	50.9%	35.8%	No
Belgium	49.7%	51.8%	Yes

64. “Net” union density is the share of union members, less unemployed and retired union members, among wage and salary earners in employment.

65. See, e.g., Fahlbeck, *supra* note 26, at 307 (highlighting cultural factors, such as “Americans’ traditional distrust of government intervention, suspicion of concerted activity and collectivism in general, and hostility to compulsory membership in organizations,” to explain the decline of collective bargaining in the United States).

66. See generally WESTERN, *supra* note 39 (highlighting institutional factors, defined as “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 emphasized); Ebbinghaus & Visser, *supra* note 48 (same). For more on the nature of institutions, see DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3–10 (1990).

67. Author’s estimates are based on OECD data. For further details on data sources and data-collection methodology, see JELLE VISSER, SÉBASTIEN MARTIN & PETER TERGEIST, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, TRADE UNION MEMBERS AND UNION DENSITY IN OECD COUNTRIES, 1–8 (2011), available at <http://www.oecd.org/dataoecd/37/2/35695665.pdf>.



Ireland	46.3%	37.1%	No
New Zealand	43.5%	23.4%	No
Australia	39.7%	24.1%	No
United Kingdom	38.7%	29.9%	No
Italy	37.6%	34.4%	No
Canada	31.5%	28.3%	No
Germany	30.8%	23.4%	No
Netherlands	30.2%	22.3%	No
Japan	28.3%	20.7%	No
Switzerland	26.0%	20.5%	No
United States	19.9%	13.0%	No
France	14.7%	8.5%	No
* Mean density (1970–2008)			

Scholars highlight the extent of centralization in union organization and collective bargaining, the duration and frequency with which a pro-labor political party is in government, and the Ghent system as key institutional variables affecting union density.<sup>68</sup> The relationship between high union density and the Ghent system emerges very clearly in Table 1. As Table 1 illustrates, all of the Ghent system countries are in the top six for highest levels of union density. If one looks at more recent history and takes average union density between 1998 and 2008 from the third column of Table 1, the relationship is stronger. Only Norway (a non-Ghent country) barely surpasses Belgium (a Ghent country) for the fourth-highest level of union density in the recent decade. Finally, if unemployed and retired union members are included in the union membership figures, the relationship is stronger still.<sup>69</sup> As Rothstein concludes from a similarly simple observation of union-density comparisons: “[W]e can say that it is possible to have a fairly strong union movement without a Ghent

68. See generally WESTERN, *supra* note 39 (analyzing how various institutional variables affect union density).

69. Michael Wallerstein & Bruce Western, *Unions in Decline? What Has Changed and Why*, 3 ANN. REV. POL. SCI. 355, 358 tbl.1 (2000). Unemployed workers in Ghent system countries are more likely to retain union membership. See *infra* notes 211–13 and accompanying text.

system, but that in order to have really strong unions, such a system seems necessary.”<sup>70</sup>

Strong statements about the importance of the Ghent system, such as Rothstein’s, hold up under more rigorous scrutiny. When one controls for the other institutional factors just mentioned, cross-sectional analyses estimate that Ghent system countries have union densities approximately seventeen percentage points higher than non-Ghent countries.<sup>71</sup> Lyle Scruggs argues that the Ghent system effect is even more profound and explains eighty-two percent of the change in diverging densities across European countries in recent decades.<sup>72</sup> More sophisticated analyses reinforce the conclusion that the Ghent system positively impacts union density.<sup>73</sup>

Some simple case comparisons demonstrate the importance of the Ghent system while loosely “controlling” for cultural differences and similarities. For example, Sweden has the Ghent system, but Norway does not. Despite similarities in union organization, industrial relations, political institutions, language, geography, and culture, Sweden’s union density has tended to exceed substantially that of Norway’s.<sup>74</sup> Union density has also differed significantly between two Benelux countries—Belgium, which has the Ghent system, and the Netherlands, which does not.<sup>75</sup> In both comparisons, the Ghent country’s density exceeds that of the non-Ghent country by an average of nearly twenty percentage points between 1960 and 2008.<sup>76</sup>

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 scholars cite the Ghent system’s amelioration of the free-rider problem.<sup>77</sup> On the other hand, labor legislation is also

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70. Rothstein, *supra* note 42, at 42.

71. WESTERN, *supra* note 39, at 93.

72. Lyle Scruggs, *The Ghent System and Union Membership in Europe, 1970–1996*, 55 POL. RES. Q. 275, 286–90 (2002).

73. David Brady, *Institutional, Economic, or Solidaristic? Assessing Explanations for Unionization Across Affluent Democracies*, 34 WORK & OCCUPATIONS 67, 89 (2007) (using a multilevel empirical analysis and finding a positive Ghent system relationship with union density); Daniele Checchi & Jelle Visser, *Pattern Persistence in European Trade Union Density: A Longitudinal Analysis 1950–1996*, 21 EUR. SOC. REV. 1, 9 (2005) (using a longitudinal empirical analysis and showing a statistically significant and positive correlation between the Ghent system and union density).

74. WESTERN, *supra* note 39, at 58.

75. *Id.* at 57–58.

76. Author’s calculation based on OECD data. See VISSER ET AL., *supra* note 67.

77. See, e.g., Rothstein, *supra* note 42, at 36–37; Scruggs, *supra* note 72, at 290–92.

assumed to play a complementary role in supporting higher levels of union density. In particular, Western's main argument links union density with pro-labor political power "through key events, such as a change in a labor law or an intervention in collective bargaining."<sup>78</sup> 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 . . . ."<sup>79</sup>

Thus, the causal effects of the Ghent system on union density, as well as the purported influence of labor law, remain undeveloped in scholarly literature. By explicitly comparing how the Ghent system and regulatory labor law address three different problems in collective employment relations—the recognition problem, the free-rider problem, and the adversarial problem—this Article will begin to explore how different institutional alternatives influence union density. As will shortly be seen, not only does the Ghent system contribute to union density by helping resolve two problems—the recognition and adversarial problems—that have proved intractable for countries relying on regulatory systems, but it also addresses these dilemmas without a substantial, state-based regulatory system of labor law.

## II. REGULATORY AND GOVERNANCE APPROACHES TO THREE PROBLEMS IN EMPLOYMENT RELATIONS

How does the Ghent system provide governance answers to problems in employment representation, and how do these answers compare to more traditional regulatory approaches under the NLRA? This Part delves into these questions by comparing each approach's answer to a set of three interrelated but analytically distinct employment relations problems that unions everywhere confront. These problems are labeled the recognition problem, the free-rider problem, and the adversarial problem. This list of problems may not be exhaustive, but these problems certainly have bedeviled collective employment relations in the United States. They also reflect underlying issues that the EFCA was designed to address.

For many readers, casting the NLRA as a regulatory strategy may be somewhat puzzling. After all, the NLRA is in many ways a governance device for addressing workplace problems in that it contains few substantive provisions and relies on private parties

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78. WESTERN, *supra* note 39, at 66.

79. Rothstein, *supra* note 42, at 38.

(unions and employers) and economic pressure (rather than coercive state power) to generate terms in privately negotiated agreements. Yet, as this Part demonstrates, the NLRA looks more regulatory once placed in a comparative perspective. In part, this validates this study's choice of a comparative analytical strategy. Views about the nature of the NLRA have been framed by domestic comparisons with other areas of law. A different picture is presented when the NLRA is compared with labor laws of other countries.

### A. *The Recognition Problem*

The central dilemma that collective employee representation faces, and the main problem that the EFCA was intended to address, is the recognition problem. Social movements and their organizations, such as labor unions, are defined by the fact that they produce, provide, or secure collective goods for their beneficiaries, constituents, or members.<sup>80</sup> One public policy justification for collective employment representation through labor unions is that workplace collective goods are underprovided in the labor market.<sup>81</sup> Unions, however, do not produce the collective goods they provide. Rather, these goods are secured through negotiation and bargaining with firms, which requires that these firms concede to such negotiations and recognize unions as legitimate counterparts.<sup>82</sup>

#### 1. Comparative Analysis

The current NLRA regime officially endorses a regime of employee choice with respect to the question of whether to be represented by a labor union.<sup>83</sup> Under this regime, the default rule is that there is no union representation,<sup>84</sup> but the NLRA also ordains

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80. DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* 1–4 (1991) (describing the goals of the environmental, peace, civil rights, and women's rights movements as public goods). Note that "public" goods are distinct from "collective" goods, although the distinction is not relevant to this Article's analysis. *See infra* note 156.

81. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 3–11 (1984).

82. The problem of recognition has been most noted in the study of social movements. *See, e.g.*, WILLIAM A. GAMSON, *THE STRATEGY OF SOCIAL PROTEST* 31–34 (1975) (discussing the four main indicators of acceptance); SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 7 (2d ed. 1998) (commenting that, in general, the outcome of any social movement is dependent upon recognition of and reaction to that movement).

83. Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 656–57 (2010).

84. *Id.* at 658–59.

procedures for union recognition when employees express a preference for representation.<sup>85</sup>

The current legal framework governing union recognition in the United States works in the following way. First, a labor union will petition the National Labor Relations Board (“NLRB”) to conduct a representation election among a group of employees after it secures signed “authorization cards” from thirty percent of the workers.<sup>86</sup> It is important to note that signing an authorization card does *not* constitute membership in the union but is merely the employee’s acknowledgement that she would like to have a representation election in the workplace.<sup>87</sup> If a union prevails with fifty percent-plus-one of the vote, then the NLRB certifies the union as the exclusive bargaining agent of the employees under section 9(a) of the NLRA.<sup>88</sup> 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).<sup>89</sup>

Recently, Benjamin Sachs has argued that when there is uncertainty about which default rule (in this case, union or nonunion representation) best maximizes the statutory objective (in this case, employee choice); one solution is to adopt a process that mitigates any impediments that hinder departure from the default setting.<sup>90</sup> In his analysis, the current NLRA procedure for union recognition fails to meet this standard because it does not sufficiently contain employer interference and opposition to union representation.<sup>91</sup> For instance, once a petition for a certification election is filed, workers must wait an average of forty-one days before the election is held,<sup>92</sup> a

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85. *Id.* at 664 & n.24.

86. National Labor Relations Act § 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A) (2006). Where the NLRA requires a “substantial” showing of interest, the “Board by rule defines ‘substantial’ to mean at least thirty percent.” See THE DEVELOPING LABOR LAW, *supra* note 1, at 542–44. For strategic reasons, unions in practice typically seek a much larger showing of interest. See John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. REL. REV. 3, 4–5 (2008).

87. See CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 83 (2005) (distinguishing authorization cards used merely to secure a representation election from membership cards).

88. National Labor Relations Act §§ 9(a), (c)(1)(A), (c)(3) (stating in section 9(a) that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees”).

89. National Labor Relations Act §§ 8(a)(5), 9(a).

90. See Sachs, *supra* note 83, at 659.

91. *Id.* at 660.

92. Ferguson, *supra* note 86, at 10 n.9.

period that gives the employer ample opportunity to mount a fierce resistance to the unionization drive. 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;<sup>93</sup> unions have no corresponding right or effective opportunity.<sup>94</sup> In addition, the Supreme Court has declared that employers’ property rights trump union organizers’ rights of access to employees in the workplace.<sup>95</sup> Section 8(a)(3) is supposed to prevent employers from firing, disciplining, or otherwise discouraging workers from seeking union membership and representation. However, “[t]he current system of unfair labor practice remedies has proved powerless to contain [employer] intimidation or to undo its effects.”<sup>96</sup> Current remedies are limited to compensatory damages—specifically, compensation for the mitigated loss of earnings—and reinstatement.<sup>97</sup> Even a union victory in a representation campaign is no guarantee of success. In cases where unions prevail in NLRB elections, only slightly less than fifty-six percent achieve a first collective agreement due in part to employer recalcitrance, resistance, and dilatory or bad-faith bargaining, despite the employer’s duty to bargain with a certified representative.<sup>98</sup>

EFCA’s primary goal was to address this recognition problem and its attendant legal defects. EFCA would have substituted card check recognition for a secret ballot election administered by the

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93. See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 557–58 (1993).

94. See Matthew T. Bodie, *Information and the Market for Union Control*, 94 VA. L. REV. 1, 23 (2008).

95. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992). See generally Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994) (criticizing the Supreme Court’s *Lechmere* decision and advocating for a more limited employer property right with respect to union organizers’ access).

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

97. National Labor Relations Act § 10(c), 28 U.S.C. § 160(c) (2006); *Alaska Pulp Corp.*, 326 N.L.R.B. 522, 523 (1998), *aff’d in part, rev’d in part sub nom. Sever v. NLRB*, 231 F.3d 1156 (9th Cir. 2000); 2 THE DEVELOPING LABOR LAW 2750–61 (John E. Higgins, Jr. et al. eds., 5th ed. 2006). In the typical case of employee discharge or discrimination for union activity, “the Board normally orders reinstatement of the employee, with back pay, and issues a cease-and-desist order proscribing similar misconduct in the future.” *Id.* at 2750.

98. Ferguson, *supra* note 86, 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 Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 354 (1984) (“Only slightly more than 60% of newly certified units achieve a [first] collective agreement . . .”).

NLRB.<sup>99</sup> The goal of card check is both to expedite the election process and deprive the employer of its information privilege during the election “campaign.”<sup>100</sup> Sachs also considers “rapid secret-ballot elections” as an alternative to card check that would similarly lower barriers to departure from the nonunion default rule.<sup>101</sup> EFCA would also have levied treble damages against employers who discriminate against union supporters, making it costlier for employers to intimidate and threaten workers.<sup>102</sup> Finally, by providing the opportunity for binding arbitration in order to ensure a first contract, EFCA sought to impose a stronger remedy against employers who flout their duty to bargain.<sup>103</sup>

One might think that with pro-labor, 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. The “rather startling phenomenon” is that there is no formal procedure for union recognition in either of these countries.<sup>104</sup> Representation elections are entirely absent in Swedish labor law.<sup>105</sup> Presumably this absence exists in Denmark as well, since Danish collective-bargaining law does not discuss the subject of representation elections.<sup>106</sup>

Like the United States, 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

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99. Employee Free Choice Act, H.R. 1409, 111th Cong. § 2(a) (2009). For an explanation of the card check recognition process, see Sachs, *supra* note 83, at 668 (“Under a card check regime, employees would register their choice on the question of unionization by signing a card indicating that they want a union to serve as their agent for purposes of collective bargaining with the employer.”).

100. See Sachs, *supra* note 83, at 657–59.

101. *Id.*

102. H.R. 1409 § 4.

103. *Id.* § 3.

104. Reinhold Fahlbeck & Bernard Johann Mulder, *Sweden, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 19-1, 19-53 (William L. Keller & Timothy J. Darby eds., 3d ed. 2008).

105. *Id.*

106. *Id.* at 19-52 to -53 (“From a comparative law perspective, this [absence of a recognition procedure] is a rather startling phenomenon, but Sweden shares it with its fellow Nordic countries.”).

organization, and (4) to work to establish such an organization.”<sup>107</sup> Arguably, the NLRA’s broad prohibition against union membership discrimination protects an identical list of activities.<sup>108</sup> Current law in Sweden makes a transgressing employer liable for compensatory as well as—and this is the important distinction—punitive damages.<sup>109</sup> However, the enactment of these stronger remedies is too recent to explain Sweden’s high level of union density. Workers’ associational rights are now codified in the 1976 Co-Determination Act.<sup>110</sup> Prior to this act, statutory rights to association were originally established in 1940 by amendment to the 1936 Act on the Rights of Association and Negotiation.<sup>111</sup> Those 1940 amendments made compensatory damages, including damages for “personal suffering”—but not punitive damages—available to aggrieved workers.<sup>112</sup> Therefore, prior to 1976, the remedy for violating workers’ associational rights was perhaps stronger than in the United States, but only marginally so.

In Denmark, statutory law also protects workers’ freedom of association, declaring that “an employer is not allowed to let an employee’s decision to join or not to join a union influence decisions regarding employment or termination.”<sup>113</sup> An employee who is discriminated against is entitled to compensation, which is not to exceed twenty-four months’ salary and is based on the employee’s seniority and circumstances of dismissal.<sup>114</sup> Punitive damages or statutory penalties are not available as remedies. In fact, the statutory vintage of associational rights in Denmark is even more recent than in Sweden.<sup>115</sup> In Danish law, union membership statutory rights were

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107. *Id.* at 19-50.

108. The bedrock grant of rights under the NLRA is quite broad and gives to employees the rights to “self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” National Labor Relations Act § 7, 29 U.S.C. § 157 (2006). The NLRA further makes it an unfair labor practice for an employer “to interfere with, restrain or coerce employees” in the exercise of those rights. *Id.* § 8(a)(1). In addition to protecting the rights to join or form unions, the Act also protects employees who work for labor unions as professional organizers. See *NLRB v. Town & Country Elec.*, 516 U.S. 85, 98 (1995).

109. Fahlbeck & Mulder, *supra* note 104, at 19-51.

110. *Id.* at 19-50.

111. FOLKE SCHMIDT, *THE LAW OF LABOUR RELATIONS IN SWEDEN* 128, 251-52, 256-57 (1962).

112. *Id.* at 256-57.

113. Jacob Sand, *Denmark*, in 2A *INTERNATIONAL LABOR AND EMPLOYMENT LAWS*, *supra* note 104, at 12-1, 12-27 to -28.

114. *Id.* at 12-28.

115. OLE HASSELBALCH, *LABOUR LAW IN DENMARK* 193-96 (2005). Prior to this, it appears that workers’ freedom of association was established by collective agreement,



first codified in the Dismissals on Grounds of Union Membership Act.<sup>116</sup> This 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.<sup>117</sup> Therefore, in neither Denmark nor Sweden can stronger remedies for associational rights violations—to the extent that they are stronger at all—explain their higher densities, which were already 73.9% in Sweden in 1976 and 79.9% in Denmark in 1981.<sup>118</sup>

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 United States<sup>119</sup>—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 requirement [unlike U.S. labor law].<sup>120</sup>

Damages are available where there is a violation of the duty to bargain, 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."<sup>121</sup> The duty to bargain, therefore, appears to be *stronger* in the United States than in Sweden. In other words, freedom of contract in collective bargaining is better

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rather than by statute. *Id.* at 194–96. The importance of the distinction is that, prior to codification, workers' freedom of association was a *consequence*, not a *cause*, of union strength and density in Denmark.

116. *See id.* at 193–94. In addition, "from 1992 a general Act on Implementation of the European Convention on Human Rights sets the basis of protection of the right to organize according to Article 11 of the Convention." *Id.* at 193. The Dismissals on Grounds of Union Membership Act has been superseded by the 2006 Act on Protection against Discrimination Due to Membership or Nonmembership in a Union. *See Sand, supra* note 113, at 12-27 to -28.

117. HASSELBALCH, *supra* note 115, at 193–94.

118. ORGANISATION FOR ECON. CO-OPERATION AND DEV., TRADE UNION DENSITY, [http://stats.oecd.org/Index.aspx?DataSetCode=UN\\_DEN](http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN) (next to "Change data selection," follow the "Time" hyperlink and then select the desired date range) (last visited Jan. 1, 2012).

119. *See Weiler, supra* note 98, at 357–59.

120. Fahlbeck & Mulder, *supra* note 104, at 19-56.

121. *Id.*

regarded in social-democratic Sweden than in the free-market United States. Unlike either Sweden or the United States, a legal duty to bargain appears to be entirely absent in Danish labor law.<sup>122</sup>

## 2. The Ghent System and the Recognition Problem

How then does Sweden or Denmark resolve the recognition problem without a stiff regulatory regime of representation elections, strong formal protections (historically in Sweden) against employer coercion, or a strong duty to bargain? In Scandinavia, one of the most important factors reducing employer opposition and encouraging union recognition is more centralized wage bargaining. In the United States, collective bargaining tends to take place between local unions and individual firms, establishments, or plants.<sup>123</sup> In Scandinavia, as in much of Western Europe, by contrast, bargaining takes place between a union and employer association representing an entire industry or sometimes the whole nation.<sup>124</sup> More centralized collective bargaining is said to “take wages out of competition.”<sup>125</sup> Since all employers in an industry pay the same or similar wage, none is particularly disfavored relative to the others by collective bargaining. This practice also tends to be associated with more “authoritative” organizations of union and employer associations, which prevent

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122. Neither HASSELBALCH, *supra* note 115, nor Sand, *supra* note 113, mentions a duty to bargain in Danish labor law. A quite prominent feature of Danish industrial relations is the use of compulsory conciliation. See Steen Scheuer, *Denmark: A Less Regulated Model*, in CHANGING INDUSTRIAL RELATIONS IN EUROPE 146, 151 (Anthony Ferner & Richard Hyman eds., 2d ed. 1998). During new contract negotiations, Danish labor law gives the government’s Conciliation Service the right to demand that a work stoppage (strike or lockout) be postponed or suspended for fourteen days, as well as to make recommendations, although the conciliator has no authority to impose a final agreement. See HASSELBALCH, *supra* note 115, at 276–79. Despite the larger role of the conciliator, however, this procedure is not so different than the sixty-day cooling-off period imposed by the NLRA’s duty to bargain. See National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (2006). Furthermore, since it restricts work stoppages, it is not so clear that this procedure benefits unions or union density. Finally, although similar procedures also exist in Sweden, in most instances mediation is at the request of one of the parties to the dispute, and mediators cannot make recommendations, which again suggests it has limited impact on union density. See Fahlbeck & Mulder, *supra* note 104, at 19–72; Anders Kjellberg, *Sweden: Restoring the Model?*, in CHANGING INDUSTRIAL RELATIONS IN EUROPE 74, 91 (Anthony Ferner & Richard Hyman eds., 2d ed. 1998) (calling the “voluntary and informal Swedish mediation machinery . . . weak by Nordic standards”).

123. Wallerstein & Western, *supra* note 69, at 364.

124. *Id.* at 364, 366 tbl.3.

125. See Joel Rogers, *Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Laws*, 1990 WIS. L. REV. 1, 106 (arguing that standardizing wages across an industry removes “the most important source of employer objection to unionization”).

“defections” of local unions or individual employers that may have an interest in circumventing the industry-wide agreement, but in doing so risk undermining the existence of industry-level coordination and their attendant benefits.<sup>126</sup>

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.<sup>127</sup> As will be discussed in the next Section, participation in union-administered plans induces an obligation—as a social norm, if not a legal duty—that workers become union members.<sup>128</sup> 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.<sup>129</sup> These resources give the union de facto power to induce voluntary (i.e., nonlegal) recognition from employers. Government-supported recognition procedures are unnecessary. In this way, the Ghent system helps sustain a “critical mass” of union supporters, which encourages employer recognition of the union and contributes to further gains in union membership.<sup>130</sup>

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126. See Erik Olin Wright, *Working-Class Power, Capitalist-Class Interests, and Class Compromise*, 105 AM. J. SOC. 957, 976 (2000) (arguing that greater associational power among workers and unions can prevent defections by individual firms or unions in strategic-choice situations that pose dilemmas to cooperative gains). See generally John S. Ahlquist, *Building Strategic Capacity: The Political Underpinnings of Coordinated Wage Bargaining*, 104 AM. POL. SCI. REV. 171 (2010) (finding that more unequal membership levels across unions inhibit the centralization of the authority over strike powers, and that centralization of strike powers is a strong predictor of more coordinated wage bargaining).

127. Clasen & Viebrock, *supra* note 41, at 445 (describing the Ghent system as a “recruitment tool” for Danish and Swedish labor unions).

128. See *infra* notes 196–201 and accompanying text.

129. See Cheol-Sung Lee, *Labor Unions and Good Governance: A Cross-National, Comparative Analysis*, 72 AM. SOC. REV. 585, 587–90 (2007) (describing unions’ “abundant human and material resources” and the ways that labor unions forge “associational ties” among members and between unions and other social organizations); see also Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 70 (2000) (“[U]nions actively cultivate solidarity, egalitarian values, and democratic practices, and they multiply opportunities for constructive interaction among coworkers through the vehicles of union governance and collective bargaining.”).

130. On the role of the “critical mass” in collective action, see generally GERALD MARWELL & PAMELA OLIVER, *THE CRITICAL MASS IN COLLECTIVE ACTION* (1993) (arguing for the importance of “tipping points” or the “critical mass” in overcoming collective action problems). While traditional collective action theory generally assumed a static framework for decision making, Marwell and Oliver show how in a dynamic model (“sequential interdependence”) the decisions of early participants influence those of later participants. *Id.* at 9–11, 32. The general idea is that people are more likely to engage in collective action when they observe others already doing so, rather than when everyone

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 functional equivalent, collective agreement “extension” procedures.<sup>131</sup> Even when broad, industry-level recognition is obtained by unions for wage bargaining, countries such as France or Germany frequently rely on statutory means for securing representation of employee interests through nonunion channels in workplace bargaining.<sup>132</sup> Although the institutional details are more complex than can be fully explored here, both of these countries have legislatively mandated forms of “works-council” representation at the workplace level.<sup>133</sup> In fact, unions in both countries, where union density is lower than in Denmark or Sweden, have come to depend on these institutionally distinct works-councils to bolster their presence at the workplace level.<sup>134</sup> In contrast, works-councils are redundant in Denmark and Sweden, where in addition to the unions’ higher, industry-level presence, they are also able to secure strong workplace

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makes a simultaneous decision to participate or not without the ability to observe others’ commitments or contributions.

131. Extension, or *erga omnes*, provisions in labor law establish procedures for extending collective agreements to cover employers in the same industry who have not agreed to its terms individually or through its relevant employers’ association. See Greg J. Bamber et al., *Collective Bargaining: International Developments and Challenges*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 609, 635 (Roger Blanpain ed., rev. ed. 2010). Danish labor law features extension procedures, but they are “used only to transpose the contents of EU Directives.” Franz Traxler & Martin Behrens, *Collective Bargaining Coverage and Extension Procedures*, EIRONLINE (Dec. 18, 2002), <http://www.eurofound.europa.eu/eiro/2002/12/study/tn0212102s.htm>.

132. See generally M. Biagi & M. Tiraboschi, *Forms of Employee Representational Participation*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES*, *supra* note 131, at 523 (giving a comparative analysis of “representational participation” in the private sector of industrialized market economies).

133. Works-councils are organized bodies for representational communication between a single employer and the employees of a single plant, enterprise, or workplace, as distinct from an industrial sector or territorial region. They represent all workers at a given workplace, irrespective of whether they are union members, and may discuss and negotiate over a wide range of workplace matters, from compensation to production, depending on national and legislative circumstance. For a more detailed definition and typology, see Joel Rogers & Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, in *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 3, 6–11 (Joel Rogers & Wolfgang Streeck eds., 1995).

134. See Biagi & Tiraboschi, *supra* note 132, at 542–43.

representation through their local organizations, the “clubs.”<sup>135</sup> Indeed, Sweden experimented with an additional system of works-councils for several years, which proved superfluous and was later abandoned.<sup>136</sup> Arguably, the Ghent system can explain these differences in workplace representation. Thus, the Ghent system provides a tool for recruiting workers into unions and raising union density. This greater membership density helps sustain recognition of union organization in the workplace.

The Ghent system approach to union recognition contrasts markedly with the American approach. As noted previously, under U.S. labor law the default rule is that workers will not be represented by a union.<sup>137</sup> In contrast, in Denmark and Sweden the question of whether the default rule for employee representation should be union or nonunion is a nonissue. Rather, all the action takes place at the level of the employee’s decision to join the union, rather than the employer’s decision to recognize the union. In that respect, Danish and Swedish law reflects a preference for union membership, if not a formal preference for union representation of workers, by subsidizing union insurance funds.

The attention the Ghent system gives to the union-member relationship, as distinct from the union-employer relationship, helps avoid some difficulties surrounding the recognition problem that arise under the NLRA. One difficulty is the willingness of workers to remain committed to the union.<sup>138</sup> Under the Ghent system, unions are able to establish and develop relationships with workers that exist independently of the employer’s recognition of the union.<sup>139</sup> In the United States, 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.<sup>140</sup> But, because the ultimate outcome for union membership is itself uncertain—since in practice employees do

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135. See *id.* at 525–32; Kjellberg, *supra* note 122, at 104–06.

136. Biagi & Tiraboschi, *supra* note 132, at 546. This does not imply that Swedish union-based forms of workplace representation are without legal cognizance. See Rogers & Streeck, *supra* note 133, at 9.

137. See *supra* text accompanying note 84.

138. See DAN CLAWSON, *THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS 2–12* (2003) (portraying the importance and difficulty of building worker commitment to the union in two contrasting organizing campaigns).

139. See Clasen & Viebrock, *supra* note 41, at 440–41.

140. See CLAWSON, *supra* note 138, at 9–10 (contrasting “business union” organizing, which contemplates minimal worker participation and involvement, with “union building” organizing, which helps develop workers’ own talents and capacities and builds on the preexisting networks of their work groups); Sachs, *supra* note 83, at 664–65.

not become union members until after a successful representation campaign—this can be a difficult task.<sup>141</sup> Furthermore, employers have the right to hold “captive audience” meetings on company premises and to exclude organizers from company property; there are no corresponding opportunities for the unions,<sup>142</sup> so the employer holds advantages that make it more difficult for unions to cultivate enduring attachments to workers prior to a successful election.

Building union membership through the employer’s recognition of the union, rather than through a direct union-employee connection as under the Ghent system, also creates substantial disincentives for unions during the recognition process. When membership recruitment follows recognition, a union can recuperate its organizing expenditures only after a successful organizing (really, recognition) drive.<sup>143</sup> In addition, given that recognition is a dichotomous “yes” or “no” determination, the union will either represent none or all of the members of the bargaining unit following the election.<sup>144</sup> 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 for the employer to resist the union.<sup>145</sup>

Even the EFCA would have done nothing to shift the focus of the recognition problem from the union-employer relationship to the union-member relationship. Certainly, one goal of the EFCA is to minimize the role of the employer’s attitude toward unionization by expediting the election process through card check recognition.<sup>146</sup> But even advocates recognize that card check or rapid elections would not completely “deprive management of its ability to mount an argument against unionization.”<sup>147</sup> As such, it is likely that employers would

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141. See MORRIS, *supra* note 87, at 184–88 (arguing that more worker commitment could be established if unions changed their organizing practices and asked workers to become union members prior to a representation election).

142. See *supra* text accompanying notes 93–94.

143. Workers typically do not join the union until after the union prevails in a representation election. See *supra* text accompanying notes 86–88.

144. This follows from the majoritarian rule for representation under the NLRA. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (2006). A proportional representational rule could yield different results. See *infra* text accompanying note 152.

145. This is probably a reason why unions on the whole continue to devote too little resources to organizing. When John Sweeney assumed the presidency of the AFL-CIO, he recommended that unions dedicate twenty percent of their budgets to organizing, yet only a handful of unions come close to meeting this benchmark. Richard Freeman & Joel Rogers, *A Proposal to American Labor: Let’s Create “Open-Source Unions,” and Welcome Millions into the Movement*, NATION (N.Y.C.), June 6, 2002, at 18, 20.

146. See Sachs, *supra* note 83, at 657–58.

147. *Id.* at 662.

continue to seek to influence the outcome and adapt accordingly in the new card check environment just as they did under the current representation procedure, which itself was initially favorable to unions.<sup>148</sup> Finally, since the central purpose of card check is to expedite the recognition process, this may cause unions to invest even less time and resources into forming pre-recognition bonds with workers.

The sequence of union recognition flowing from member recruitment under the Ghent system is nearly the same as what recent labor law scholars have called “minority” or “members-only” organizing.<sup>149</sup> The practice refers to union representation of a proportion of the workforce less than the majority required to prevail in an NLRB election or of only those workers who become members of the union, in contrast to an entire Board-certified, exclusively represented bargaining unit.<sup>150</sup> In fact, members-only organizing was the American practice prior to the passage of the Wagner Act, as well as during its early history.<sup>151</sup> As under the Ghent system, union representation under minority-union organizing does not depend on prevailing in a certification election; rather, recognition is often an organic process flowing from the accretion of union members. Further cementing the similarity, union representation in Denmark and Sweden is, at least as a legal matter, proportional while union representation under the NLRA is majoritarian and exclusive.<sup>152</sup> That is, Danish and Swedish unions legally represent only their members, while American unions represent the entire bargaining unit certified by the NLRB, whether or not workers are union members.

The only salient difference between proposals for a return to members-only organizing and organizing under the Ghent system is the absence of a tangible benefit for new union members under the former. Enrollment in an unemployment insurance fund provides that benefit under the Ghent system.<sup>153</sup> Otherwise, collective bargaining gains from an employer are likely to be slight when the union represents only a minority of the workforce.<sup>154</sup> Thus, the up-front

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148. See MORRIS, *supra* note 87, at 81–88.

149. See *id.* at 1–13; Freeman & Rogers, *supra* note 145, at 18.

150. See MORRIS, *supra* note 87, at 1–13.

151. See *id.* at 81–88.

152. Fahlbeck & Mulder, *supra* note 104, at 19–53.

153. See *supra* text accompanying note 40.

154. Although Freeman & Rogers, *supra* note 145, at 18 as well as MORRIS, *supra* note 87, at 191, rightly insist that even a small, members-only unit can serve important functions, these benefits are slight compared to the hours, compensation, and other terms that full contract bargaining entails.

benefits that come under the Ghent system greatly enhance the effectiveness of proportional representation and members-only organizing.

Once contrasted with the Ghent system, it then appears strange that a system of labor law, such as the one established by the NLRA, would make the employee's 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."<sup>155</sup>

### *B. The Free-Rider Problem*

The collective nature of many of the goods unions provide to workers poses another pervasive dilemma for labor unions: the free-rider problem.<sup>156</sup> Whenever 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.<sup>157</sup> Yet, if too many members free ride, the collective goods or the organizations that provide them are unlikely to emerge at all.<sup>158</sup> Since many of the benefits that unions provide are collective in practice, the free-rider problem is pervasive for labor unions.<sup>159</sup>

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155. This is the standard language the AFL-CIO used to advocate for the EFCA. See AFL-CIO, *EMPLOYEE FREE CHOICE ACT: KEY FACTS 1* (Jan. 2009), available at [http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/keyfacts\\_0209.pdf](http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/keyfacts_0209.pdf).

156. The classic statement of the free-rider problem and the provision of public and collective goods remains MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 76 (Schoken Books 1971) (1965). For a critical elaboration of Olson's theory of collective action, see generally MARWELL & OLIVER, *supra* note 130 (relaxing some of Olson's stronger assumptions in order to demonstrate that collective action may be more likely than Olson's original analysis predicted). Collective goods are distinct from public goods. See *supra* note 80. Both public and collective goods are "nonexcludable," meaning that it is not possible to exclude a person from consuming them. It is this feature that creates the free-rider problem and drives this Article's analysis. The difference between public and collective goods is that pure public goods are "nonrivalrous," meaning that one person's consumption of the good does not affect another's consumption of that good. See MARWELL & OLIVER, *supra* note 130, at 41–42. Clean air might be the best example of a pure public good. Collective goods, on the other hand, are "rivalrous." *Id.* at 42–43. Wage increases or grievance adjustments are good examples of collective goods, since the resources of the firm or union upon which these goods draw are clearly subject to such rivalrous crowding.

157. See OLSON, *supra* note 156, at 11, 27–28, 33–36.

158. *Id.* at 44.

159. Labor unions occupied a central place in Olson's original analysis. See *id.* at 66–97.



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

U.S. labor law addresses the free-rider problem through statutorily authorized union-security agreements. A union-security agreement—such as a closed shop, union shop, or agency shop—obligates the employee to contribute some form of support to the union as a condition of continued employment.<sup>160</sup> Several federal courts have held that union-security agreements are contractual agreements between private actors,<sup>161</sup> and, in that strict legal sense, they do not constitute a regulatory response to the free-rider problem. Nevertheless, other courts have held that the NLRA's authorization of union-security agreements does in fact transform such agreements into state action.<sup>162</sup> Furthermore, both the statute and the Board's administrative case law play an exceedingly large role in establishing the permissible contours of union-security agreements.<sup>163</sup> In addition, union-security agreements are, in practice, intimately related to—even conditioned by—the Board's certification of unions as employees' exclusive representatives as well as to its procedures for determining bargaining units, both quintessentially legal-administrative acts.<sup>164</sup>

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160. 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; 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. *See* 2 THE DEVELOPING LABOR LAW, *supra* note 97, at 2102, 2104–05, 2143–44.

161. *See, e.g.,* Kolinske v. Lubbers, 712 F.2d 471, 480 (D.C. Cir. 1983); Price v. UAW, 722 F. Supp. 933, 936 (D. Conn. 1989); Abrams v. Commc'ns Workers, 702 F. Supp. 920, 923 (D.D.C. 1988), *aff'd*, 884 F.2d 628 (D.C. Cir. 1989).

162. *See, e.g.,* Linscott v. Millers Falls Co., 440 F.2d 14, 16 (1st Cir. 1971) (finding that a union-shop agreement under the NLRA constituted government action because “[t]he federal statute is the source of the power and authority by which any private rights are lost or sacrificed” (quoting Ry. Emps.' Dep't v. Hanson, 351 U.S. 225, 232 (1956))).

163. *See infra* text accompanying notes 165–78.

164. While the NLRA grants to employees “the right to bargain collectively through representatives of their own choosing[,] . . . [t]he Act also establishes [the representation election as the] procedure through which employees may choose a bargaining representative,” and vests in the Board “the broad duty of providing election procedures and safeguards.” 1 THE DEVELOPING LABOR LAW, *supra* note 1, at 472–73. Unions can only bargain for union-security agreements after they have been designated as bargaining representatives, and the Board's certification procedures have historically been the primary means by which designation is achieved. *Id.* at 639–40. Even more important,

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.<sup>165</sup> 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.<sup>166</sup> 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.”<sup>167</sup>

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,<sup>168</sup> a union-security agreement in which the employer agrees to hire only union members, and nominally endorsed the union shop,<sup>169</sup> which allows the employer to hire anyone but obligates the employee to become a union member thirty days after her employment begins.

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establishing unions as *exclusive* representatives gets unions halfway toward a union-security agreement, and the NLRA's and Board's role in this decision has been explicitly construed as state action. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944) (holding that “the Railway Labor Act imposes upon the *statutory* representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates” (emphasis added)). Also, under the NLRA, the Board has the authority to determine “whether the unit of employees in which the petitioner seeks an election is an ‘appropriate unit’ for collective bargaining.” 1 *THE DEVELOPING LABOR LAW*, *supra* note 1, at 640. “The bargaining unit provides the formal arena of the *entire* collective bargaining process,” *id.* at 639 (emphasis added), and decisions about the size and composition of the bargaining unit “can determine whether the union is entitled to representative status,” *id.* at 640, and hence whether a union can bargain for a union security agreement.

165. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158 (2006).

166. *Id.*

167. *Comm'ns Workers v. Beck*, 487 U.S. 735, 748 (1988) (citing 93 Cong. Rec. 4887 (1947)).

168. 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. Taft-Hartley Act, ch. 120, sec. 101, § 8(a)(3), 61 Stat. 136, 141 (1947).

169. Although the language of the union shop is frequently used to refer to the Taft-Hartley change, the legal effect was to allow only the agency shop. 2 *THE DEVELOPING LABOR LAW*, *supra* note 97, at 2104–05, 2143–44; *see infra* text accompanying notes 170–72.

Union membership under Taft-Hartley, however, required little more than paying one's dues. 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 the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."<sup>170</sup> The consequence of this second proviso in Supreme Court jurisprudence has been to make "membership" in section 8(a)(3)'s first proviso mean little more than its "financial core."<sup>171</sup> That is, an employee cannot be terminated for losing her membership after not participating in a strike, not regularly attending union meetings, or otherwise failing to meet the nonmonetary obligations of membership.<sup>172</sup>

Subsequent Supreme Court decisions have in turn narrowed the scope of this financial core obligation. In *Communications Workers v. Beck*,<sup>173</sup> 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."<sup>174</sup> Consequently, *Beck* raised the question of whether unions could spend dues paid by union dissenters on "activities such as organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events."<sup>175</sup> Political<sup>176</sup> and organizing<sup>177</sup> expenditures in particular have been the subject of fierce judicial debate.

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170. National Labor Relations Act § 8(a)(3).

171. NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963).

172. *In re Elec. Auto-Lite Co.*, 92 N.L.R.B. 1073, 1078 (1950) (deciding that union members are not subject to discharge for not paying fines assessed for infractions of internal union rules), *enforced per curiam*, 196 F.2d 500 (6th Cir. 1952).

173. 487 U.S. 735 (1988).

174. *Id.* at 745.

175. *Id.* at 735.

176. *See, e.g.*, *Lenhart v. Ferris Faculty Ass'n*, 500 U.S. 507, 513 (1991); *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 294–95 (1986); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 439 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223–24 (1971).

177. *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 771 (9th Cir. 2002) (holding that dues charged to dissenting agency-shop members should include the cost of organizing workers outside of the bargaining unit). For a fuller discussion of the use of dissenters' dues for union organizing, see generally Christopher David Ruiz Cameron, *The Wages of Syntax: Why the Cost of Organizing a Union Firm's Non-Union Competition Should Be Charged to "Financial Core" Employees*, 47 CATH. U. L. REV. 979 (1998).

Finally, and most infamously for labor-union supporters, Taft-Hartley amended the NLRA to authorize states to prohibit collective agreements from having any form of union-security agreement.<sup>178</sup> This prohibition has resulted in the passage of so-called “right-to-work” legislation in nearly half of the states (currently twenty-two).<sup>179</sup> Employees who receive the benefits of union representation in right-to-work states have no obligation, financial or otherwise, to support the union as a condition of continued employment.

Limitations on 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.<sup>180</sup> Under an agency shop or union shop agreement, the employer can hire anyone and can, therefore, hire from a much larger pool of potential workers.<sup>181</sup> 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 agency shop, and, therefore, increasing substantially the benefits of union membership.<sup>182</sup>

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, organizing, and other actions.<sup>183</sup> “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 the civic community a union provides.<sup>184</sup>

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178. National Labor Relations Act § 14(b), 29 U.S.C. § 164(a) (2006).

179. *Right to Work States*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., <http://www.nrtw.org/rtws.htm> (last visited Jan. 1, 2012).

180. *Beck*, 487 U.S. at 760 (quoting Senator Taft during debates over the Taft-Hartley Act that the main difference between the closed shop and the union shop is that under the latter “a man can get a job without joining the union or asking favors of the union”).

181. *See id.*

182. *See id.*

183. Kim Voss & Rachel Sherman, *Breaking the Iron Law of Oligarchy: Union Revitalization in the American Labor Movement*, 106 AM. J. SOC. 303, 313 (2000) (describing the importance of greater member participation in union organizing efforts).

184. Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1341–42 (1997) (viewing labor unions as one of the few “institution[s] of community” available to workers in the United States).

The effect of right-to-work legislation has received an enormous amount of empirical investigation.<sup>185</sup> A number of studies have concluded that right-to-work legislation has had significant negative effects on unions.<sup>186</sup> Several studies show that the level of free riding is higher in right-to-work states, implying that the legislation hinders union growth in these states because of the increased costs borne by those who would otherwise prefer union representation.<sup>187</sup> Other studies cite right-to-work legislation as an important factor in the decline of private-sector national union membership.<sup>188</sup> The argument is that right-to-work legislation slows the growth rate of unions not only in adopting states, but also in union shop states, as capital migrates from the latter to the former in search of cheap labor.<sup>189</sup> 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 there would be little qualm in obligating all workers who enjoy the benefits of unions to support the union financially and otherwise. However, one might then be surprised to learn that Sweden and Denmark are both more deferential to individual rights than the United States (at least in the labor law context), and that, in fact, there is no obligation in either country to join a union as a condition of employment. Until very recently, union-security clauses were legally permissible in Sweden but, in practice, were “virtually nonexistent.”<sup>190</sup> The same holds for Denmark, where union-member “preference” clauses appeared only in collective agreements made with the scant group of employers who were not members of an employers’ association (and therefore not party to an industry or sector agreement).<sup>191</sup> In 2006, the European Court of Human Rights declared that union-security agreements were

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185. See generally William J. Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445 (1998) (reviewing the vast literature published since the 1980s studying the effect of right-to-work legislation on a number of areas, including unionization, free riding, union organizing activities, and successes in representation elections, wages, and state industrial development).

186. See *id.* at 449–53 (reviewing studies finding that right-to-work laws reduce union density or the likelihood that a worker will be a union member).

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

188. Moore, *supra* note 185, at 450–51.

189. See *id.*

190. Fahlbeck & Mulder, *supra* note 104, at 19–54.

191. HASSELBALCH, *supra* note 115, at 196–97.

incompatible with the principle of freedom of association under the European Convention.<sup>192</sup> At least partly in response to this decision, in 2006 the Danish Parliament passed the Act on Protection against Discrimination Due to Membership or Nonmembership in a Union, which prohibited union preference clauses in collective agreements.<sup>193</sup>

However, the “extreme rarity”<sup>194</sup> 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 was not originally the result of legislative prohibition but was instead a product of mutual consent between unions and employer associations that 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.<sup>195</sup>

One, therefore, confronts a rather anomalous result. Right-to-work legislation and other statutory and judicial restrictions on union-security agreements almost certainly make it more difficult to overcome the free-rider problem 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-administered unemployment insurance arguably solves the free-rider problem for Swedish and Danish unions by furnishing an alternative “selective incentive” for workers to join a union.<sup>196</sup> 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

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192. Fahlbeck & Mulder, *supra* note 104, at 19-54; see Sørensen & Rasmussen v. Denmark, 2006-I Eur. Ct. H.R. 3, ¶¶ 65, 76-77 (2006). Specifically, the court termed the union-security agreement under discussion as a *closed-shop* agreement, although it is clear from the court’s discussion that a union shop agreement, which requires an employee to become a union member after being hired, was the actual form of agreement contemplated. See *id.* ¶¶ 9-10.

193. See Sand, *supra* note 113, at 12-28.

194. Fahlbeck & Mulder, *supra* note 104, at 19-54.

195. *Id.*; see PETER A. SWENSON, *CAPITALISTS AGAINST MARKETS* 80-81 (2002).

196. See, e.g., Ebbinghaus & Visser, *supra* note 48, at 143; Rothstein, *supra* note 42, at 36-37; Scruggs, *supra* note 72, at 290-95.

or organizations that produce them).<sup>197</sup> A union-security clause is one kind of selective incentive in that the employee is threatened with the loss of a job if she does not join or contribute to the union.<sup>198</sup> Union-administered unemployment insurance is another kind of selective incentive in that, since the unemployment insurance scheme is voluntary, the worker will only receive the benefit if she joins and contributes to the program.<sup>199</sup>

However, another of the Ghent system's surprises is that a worker is not required to become a member of a labor union in order to participate in a union's unemployment insurance plan. Generally, this is the contemporary rule, although historically unions could require membership.<sup>200</sup> How then does the Ghent system actually encourage union membership and prevent free riding? There are probably both "negative" and "positive" forms of motivation that supply the answer to this question. Political scientists have posed the negative aspect. That is, since unions make the "street level" determinations of eligibility, participants fear that their union membership status will influence their chances for receiving benefits.<sup>201</sup>

In addition to the concerns about being designated ineligible, it seems likely that workers have more prosaic and positive motivations for joining unions. For instance, a union-provided service could evoke a reciprocal incentive for workers to join the union. That is, workers may be more inclined to join a union, when given a choice, as a way

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197. OLSON, *supra* note 156, at 51.

198. *See id.* at 66-97.

199. Clasen & Viebrock, *supra* note 41, at 435-36 (stating that voluntary unemployment insurance is a "selective incentive" because, unlike wage bargaining, "which works to the advantage of all workers within a particular industry or region, unemployment insurance restricts benefits to members only").

200. *Id.* at 434 (stating that the requirement of dual membership in union and unemployment insurance fund was abolished). The rule may not have been strictly that dual membership was required, but that if a worker wanted to join an insurance fund but not the corresponding union, she would have to pay a higher membership fee. *See id.* at 440 (reporting that a 1969 reform in Denmark removed the option of unions to charge "up to 40 per cent higher [insurance-fund] membership fees from members who were not affiliated to the relevant trade union").

201. *See* Rothstein, *supra* note 42, at 40-41 (arguing that a union's ability to determine what is a "suitable" job—a job whose offer of employment would terminate an unemployed workers' eligibility for continued benefits—provides a selective incentive in favor of union membership); Scruggs, *supra* note 72, at 291-92 (describing how, despite legal regulation of eligibility requirements, union administration of the funds still gives union personnel some "street-level" discretion on eligibility claims).

of repaying it for providing unemployment insurance.<sup>202</sup> On this view, the *voluntary* aspect of some Ghent systems would play a key role in enhancing legitimacy and support for unions and union membership. Indeed, this could be one reason why the voluntary Ghent systems (Denmark, Finland, and Sweden) have higher union densities than the “hybrid,” compulsory Ghent system found in Belgium.<sup>203</sup> However, there could be programmatic differences, such as coverage and benefit generosity, as well as historical contrasts in labor organization that would also account for this divergence.

The Ghent system may also reduce some of the transaction costs of maintaining union membership. Going to the union to enroll in an insurance plan or collect unemployment benefits may simply make it much easier to simultaneously join the union since the insurance funds and unions usually share the same personnel and even are “often located within the same building.”<sup>204</sup> Finally, if union membership historically was required to participate in the plans, a social norm encouraging union membership may be a legacy of that rule.<sup>205</sup> Thus, the mere fact that unions administer unemployment insurance probably encourages workers to become union members.

Union-provided unemployment insurance and union-security agreements are alternative ways of addressing the free-rider problem, but the effectiveness of union-provided unemployment insurance in addressing that problem far surpasses that of union-security agreements. This is because union membership sustained by a union-security regime is particularly vulnerable in the face of job turnover.<sup>206</sup> Under a union security agreement, union membership is conditioned on being employed in a union-represented bargaining

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202. Clasen & Viebrock, *supra* note 41, at 445–46 (suggesting that joining the “unemployment insurance fund but not the respective trade union might be regarded as a sign of disloyalty towards fellow employees and their representation in the local workplace”).

203. For density comparisons, see *supra* Table 1. On the Belgian Ghent system, see generally Kurt Vandaele, *A Report from the Homeland of the Ghent System*, 12 TRANSFER 647 (2006) (discussing the historical development and institutional details of the Belgian Ghent system, which is compulsory but administered by labor unions).

204. Clasen & Viebrock, *supra* note 41, at 446.

205. See *id.* at 445–46 (reporting that, despite the “formal separation between trade union and insurance fund,” there remains a “traditionally strong and widespread identification” between them).

206. Jelle Visser, *Why Fewer Workers Join Unions in Europe: A Social Custom Explanation of Membership Trends*, 40 BRITISH J. INDUS. REL. 403, 418 (2002) (providing evidence that job turnover reduces membership rates in Europe). Because job turnover tends to be higher in the United States, the argument would seem to apply with even greater force.



unit.<sup>207</sup> A represented employee's entire relationship to a labor union will, therefore, typically end when she leaves her job as a result of being unemployed through dismissal or layoff; 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.<sup>208</sup> Consequently, labor movements whose memberships are supported by union security agreements are struck particularly hard during economic recessions.<sup>209</sup> Indeed, union density has fallen to greater depths as a result of the current economic recession in the United States. For the first time ever, because of job losses in heavily unionized industries such as manufacturing, construction, and transportation, more public sector workers belong to labor unions than do private sector employees—although private sector employment dominates the public sector five to one.<sup>210</sup>

Job turnover has entirely the opposite effect on union density in the Ghent system. Given that workers are more likely to become union members when they join an unemployment insurance plan, one would expect union density to increase whenever workers face an increasing risk of unemployment.<sup>211</sup> 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.”<sup>212</sup> 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.<sup>213</sup>

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207. National Labor Relations Act § 8(a)(3)(i), 29 U.S.C. § 158(a)(3)(i) (2006) (permitting union-security agreements only where “such labor organization is the representative of the employees as provided in section 9(a) . . . in the appropriate collective-bargaining unit covered by such agreement when made”).

208. See Visser, *supra* note 206, at 418. On the Supreme Court's doctrine of union successorship, see generally *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

209. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2010 1 (Jan. 21, 2011), <http://www.bls.gov/news.release/pdf/union2.pdf>; see Mike Hall, *Job Crisis Takes Toll on Union Membership*, AFL-CIO NOW BLOG (Jan. 22, 2010), <http://blog.aflcio.org/2010/01/22/job-crisis-takes-toll-on-union-membership/>.

210. News Release, *supra* note 209, at 1.

211. WESTERN, *supra* note 39, at 56.

212. Scruggs, *supra* note 72, at 289.

213. See *id.* at 294 (finding that union membership rates among unemployed workers in two Ghent countries, Belgium and Denmark, are “very high”).

The effect of the Ghent system on union membership across job transitions acquires an even greater significance as job transitions become an increasingly important reality in the modern workplace. Katherine Van Wezel Stone has recently written about the upheaval in employment relations caused by shorter job tenures, the dismantling of firms' internal labor markets, and a general move away from long-term attachments between firms and workers in recent decades.<sup>214</sup> 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 . . . ."<sup>215</sup> The Ghent system clearly works in this fashion as it forms an attachment between worker and union that exists independently of any single employer. Thus, as job transitions have become an even more prominent feature of the new, boundaryless workplace, so the salience of the Ghent system increases.

### C. *The Adversarial Problem*

It is common to divide national systems of labor relations into two types: adversarial and cooperative.<sup>216</sup> The distinction is, of course, hardly discrete, but there seems to be little dispute that the United States falls into the former category.<sup>217</sup> 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.<sup>218</sup> In cooperative labor relations, trust and the absence of industrial conflict are more likely

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214. See generally KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67-116 (2004) (documenting and discussing the evidence for a transformation away from long-term, full-time employment and theorizing the emergence of a new, contingent, and "boundaryless" employment relationship).

215. *Id.* at 218.

216. 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 4-5 (ILR Press 1991) (1965).

217. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1388 (1993) (acknowledging the United States' "adversarial mode of industrial pluralism . . . hardened during and after World War II").

218. See Zeitlin, *supra* note 216, at 405-09.

to prevail.<sup>219</sup> Employers are more likely to view unions as playing an essential, contributing role in the governance of labor, and as “social partners” with whom they are engaged in a “social dialogue.”<sup>220</sup> It is more difficult to grow union membership in adversarial environments. Adversarial employment relations make the recognition problem harder because employers are more likely 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.<sup>221</sup> As contrasting examples of this approach to union-management relations, this Part examines the reactions of unions in the United States 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.<sup>222</sup>

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

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219. *See id.* at 406.

220. Both unions and employer associations in Denmark use language like “social partners” and “social dialogue.” *See, e.g.*, CO-INDUSTRI, FLEXICURITY: A DANISH TRADE UNION VIEW 12–13, 16–18, 26, 30 (2007), available at <http://www.lo.dk/english%20version/~media/LO/English/Congress2007/Flexicurity%20%20%20a%20Danish%20trade%20union%20view.ashx>.

221. *See* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 84, 85 fig.3.8 (1999) (finding that 63% 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% would prefer an organization “that had more power, but management opposed”; union-member workers gave almost identical responses).

222. National Labor Relations Act § 1, 29 U.S.C. § 151 (2006). Senator Wagner also hoped that cooperative labor relations would result from his legislation. *See* Barenberg, *supra* note 217, at 1390 (“Wagner’s quasi-utopian mission was to ‘build[] . . . a cooperative order’ designed to reintegrate a class-riven society and to replace or at least legitimate asymmetric power relations.”).

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.”<sup>223</sup>

Yet, despite this broad policy goal of the NLRA, labor relations in the United States typify the adversarial model. As an example of the adversarial model in action, consider employers’ recent drive toward greater flexibility 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 (“ILM”) model.<sup>224</sup> 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.<sup>225</sup> 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.<sup>226</sup> However, labor unions in the United States have been slow to adapt themselves, if at all, to the new, post-ILM environment. Unions continue to press for traditional ILM “rigidities,”<sup>227</sup> while management candidly expresses its desire to avoid a union presence for fear of losing “control” of the workplace.<sup>228</sup> 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.

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223. Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 DENV. U. L. REV. 1, 33–38 (2010); Fahlbeck, *supra* note 26, at 311 (referring to the “the heavy dose of government intervention in the labor market that is characteristic of U.S. labor law”).

224. See STONE, *supra* note 214, at 67–116 (2004) (documenting and explaining the transformation of the employment relationship during the past three decades).

225. *Id.* at 53–63 (discussing the theory of internal labor markets).

226. *Id.* at 87–99 (specifying elements of the “new employment relationship”).

227. *Id.* at 196–216 (exploring tensions between unionism and the “boundaryless” workplace).

228. Alec MacGillis, *Union Bill’s Declining Chances Give Rise to Alternatives*, WASH. POST, Mar. 29, 2009, at A5 (expressing employers’ belief that passage of EFCA would “force them to give up control over how they run their business”).

It is possible (and common) to view the NLRA as occupying the governance side of the governance-regulation spectrum since it is short on specifying substantive labor standards and merely governs the process establishing and supervising collective-bargaining relationships.<sup>229</sup> Yet, when viewed against Scandinavian labor law, the NLRA looks decidedly regulatory.<sup>230</sup> Parts II.A and II.B of this Article have already examined the limited role of Danish and Swedish labor law addressing the recognition and free-rider problems. However, the extent of self-regulation goes further, where even the process governing the establishment and supervision of collective bargaining is largely the result of private agreements between unions and employers. Writing about Denmark, for example, Ole Krarup states:

The whole system is almost totally based upon the collective agreements made by the parties themselves. Not only the concrete rights and duties in the industrial relations (payment and working conditions), but the normative system itself—that is to say the regulation of the terms of establishing the concrete agreements for the labour market (which in other countries have been created through legislation)—is a result of collective bargaining. Even the legislation by which the Labour Court (which is a state court) was established was derived from the parties' agreements.<sup>231</sup>

This view holds for Sweden as well, particularly from a historical perspective, where it is clear that the Swedish trade unions frequently eschewed the opportunity to seek implementation of more extensive labor legislation.<sup>232</sup> In the absence of a legislative framework for industrial peace, one might think that demands by Nordic employers

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229. Estlund, *supra* note 34, at 1528–29.

230. It is interesting that a Swede is one of the few legal scholars to observe that American labor law has a “heavy dose of government intervention.” See Fahlbeck, *supra* note 26, at 311. In contrast, American scholars view the NLRA as relying, perhaps inordinately, on a high level of “private ordering.” See Estlund, *supra* note 34, at 1528–29 (describing American collective bargaining as a “third way” between “individual contract” and “regulation”); Fisk, *supra* note 27, at 152 (explaining that the “heart of American labor law is . . . private agreement”).

231. Ole Krarup, *Free Bargaining or State Coercion? Labour Conciliation in Denmark*, in REFLEXIVE LABOUR LAW: STUDIES IN INDUSTRIAL RELATIONS AND EMPLOYMENT REGULATION 301, 302 (Ralf Rogowski & Ton Wilthagen eds., 1994); see Scheuer, *supra* note 122, at 149–51.

232. SCHMIDT, *supra* note 111, at 31 (expressing the preference of unions and employer associations for solving problems through collective agreement and their “mutual desire to avoid public interference” as “characteristic feature[s] of the history of labour relations in Sweden”); see Kjellberg, *supra* note 122, at 79–80.

for workplace “flexibilization” would collide violently with powerful labor unions.<sup>233</sup>

One may 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 of workplace flexibility. Employers in Denmark enjoy an ease in hiring and firing that is among the least restrictive in Europe.<sup>234</sup> 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 thirty percent of the workforce changing jobs each year.<sup>235</sup> Job tenure in Denmark is also relatively low, with average lengths closer to the United States and the United Kingdom than to the much longer average job tenures in Greece, Italy, Japan, or Portugal.<sup>236</sup>

Flexibility has also historically characterized the Swedish labor market, although this has changed since the late 1970s. Originally, the Swedish employment relationship was at-will.<sup>237</sup> Also as part of the 1906 December Compromise mentioned above, the famous “Paragraph 23” of the written accord gave employers the untrammelled right to hire or fire.<sup>238</sup> Decisions of the Swedish Labor Court in subsequent decades attest to the breadth of managerial discretion in this area.<sup>239</sup> 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.’”<sup>240</sup> Indeed, labor market policy in these decades explicitly aimed at *enhancing* the mobility of

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233. 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. See Robert Kilroy-Silk, *The Royal Commission on Trade Unions and Employers' Associations*, 22 *INDUS. & LAB. REL. REV.* 544, 544, 550, 556 (1969) (conveying the findings of British Commissioners that the voluntary, informal, and autonomous nature of the British system of industrial relations was the cause of unofficial strikes).

234. Per Kongshøj Madsen, *The Danish Model of “Flexicurity”: Experiences and Lessons*, 10 *TRANSFER* 187, 192 (2004).

235. *Id.* at 190–91.

236. *Id.* at 191.

237. Alan C. Neal, *Employment Protection Laws: The Swedish Model*, 33 *INT’L & COMP. L.Q.* 634, 638–39 (1984).

238. SWENSON, *supra* note 195, at 80–81.

239. RICHARD B. PETERSON, *THE SWEDISH LABOR COURT VIEWS MANAGEMENT RIGHTS* 29 (1968) (detailing the breadth of employers’ right to hire and fire, irrespective of length of service or the individual competence of the employee, which are key variables when considering “just cause” for dismissal for employees working under collective agreements in the United States).

240. JONAS PONTUSSON, *INEQUALITY AND PROSPERITY* 125 (2005).

workers across firms and sectors.<sup>241</sup> Employment protection was legislated only in the 1970s as a reaction to severe industrial adjustment problems.<sup>242</sup> Despite increased levels of employment protection, even today the Swedish labor market appears to rely on the external, rather than the internal, labor market for hiring, training, retraining, placement, and a variety of other employment practices.<sup>243</sup>

What do unions and workers receive for such little job protection, currently in Denmark, and historically in Sweden? Unlike the United States, 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 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.<sup>244</sup> Hence, just as the official slogan of Swedish Social Democracy proclaimed in the 1950s and 1960s, Denmark’s model of flexicurity is described as providing “employment security, not job security.”<sup>245</sup>

As a consequence, unemployment insurance serves as a labor market substitute to job protection regulation. At around 70%,

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241. SWENSON, *supra* note 195, at 274–75 (describing the development of “active labor market polic[ies],” such as subsidies for job retraining and geographic relocation, as efforts to “promot[e] mobility” and “enhance workers’ freedom by increasing their ability to change jobs”).

242. PONTUSSON, *supra* note 240, at 125–26.

243. Fahlbeck & Mulder, *supra* note 104, at 13.

244. Madsen, *supra* note 234, at 189 (including employment flexibility as one of the three critical elements, along with generous unemployment benefits and active labor market policies, that constitute the “golden triangle” of flexicurity).

245. Joshua Cohen & Charles Sabel, *Flexicurity*, PATHWAYS, Spring 2009, at 10, 12, available at [http://www.stanford.edu/group/scspil/\\_media/pdf/pathways/spring\\_2009/CohenSabel.pdf](http://www.stanford.edu/group/scspil/_media/pdf/pathways/spring_2009/CohenSabel.pdf).

Denmark has one of the highest average replacement rates—the percentage of the unemployed worker’s former wage that is paid in unemployment benefits—among OECD countries.<sup>246</sup> In the United States, the average replacement rate is 36%.<sup>247</sup> 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% in 1993 to 4.3% in 2001<sup>248</sup> and 1.7% in 2008<sup>249</sup>) and an increase in the employment rate to 75%, one of the highest in the OECD.<sup>250</sup> More importantly, despite greater mobility and shorter tenures, Danish workers 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.<sup>251</sup> Arguably, the level of benefits provided by unemployment insurance contributes to this sense of security, as does the higher job mobility rate and lower unemployment rate, which makes it easier to find or switch jobs and reduces the length of the unemployment spell.

Finally, and most crucially, the Danish combination of flexible employment relations and generous unemployment benefits arguably generates efficiency gains that underwrite greater trust and cooperation between employers and unions. Flexibility enhances workplace productivity by allowing employers to select and retain the most productive workers for the job. Generous unemployment benefits improve workers’ welfare by cushioning the blow of job loss. Greater workplace productivity also redounds to the benefit of employees as workers share in productivity gains through collectively bargained wage and benefit increases. Addressing these matters through collective bargaining, rather than through legislation, also helps strike a more efficient agreement.<sup>252</sup> Direct collective bargaining

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246. Madsen, *supra* note 234, at 193–94.

247. LORI G. KLETZER & HOWARD F. ROSEN, BROOKINGS INST., REFORMING UNEMPLOYMENT INSURANCE FOR THE TWENTY-FIRST CENTURY WORKPLACE 12 (2006), available at <http://www.brookings.edu/views/papers/200609kletzer-rosen.pdf>.

248. Madsen, *supra* note 234, at 188.

249. Liz Alderman, *Denmark Starts Trimming Its Admired Safety Net*, N.Y. TIMES, Aug. 17, 2010, at B4.

250. Madsen, *supra* note 234, at 190.

251. *Id.* at 192.

252. Ton Wilthagen & Frank Tros, *The Concept of “Flexicurity”: A New Approach to Regulating Employment and Labour Markets*, 10 TRANSFER 166, 178–79 (2004) (arguing



between employers and unions over a range of employment-related matters offers a greater opportunity for making tradeoffs and compromises.<sup>253</sup> Employment policy does not become a legislative lobbying war over narrow, zero-sum matters of, for instance, employment protection or minimum wages. All of these efficiencies create the “mutual gains” that make greater trust and cooperation possible.<sup>254</sup>

### III. LEARNING FROM THE GHENT SYSTEM

What normative conclusions can be drawn from the preceding comparative analysis of the NLRA and the Ghent system? Applying any policy lesson from the Scandinavian experience to the vastly different American context may seem like a prospect fraught with difficulties. Without ignoring these concerns, this Part suggests that more possibilities are open than may at first be presumed. First, the federal Social Security Act, which establishes unemployment insurance in the United States, creates a cooperative federal-state program that allocates funding responsibility to the federal government and authority to the states for administration of benefits and the establishment of eligibility criteria. Accordingly, a strategy of “progressive-federalist” reform appears possible. Second, labor unions can draw on the Ghent system experience themselves without requiring legislative change, either state or federal. The Ghent system, after all, is a modern version of union “mutual aid”;<sup>255</sup> mutual aid is part of a self-help philosophy that has pervaded the history and practice of the American labor movement as much as any other. To demonstrate such Ghent-type, mutual aid possibilities, this Part will also discuss several contemporary and domestic examples of traditional and nontraditional labor unions that instantiate, in greater or lesser degrees, Ghent-type principles.

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that flexicurity tradeoffs are more likely where there are “corporatist systems or other traditions of social partnership, consultation and coordination” between unions and employers).

253. *Id.* at 179 (discussing how extending the scope of collective bargaining can increase the range of possible tradeoffs between flexibility and security).

254. *Id.* (arguing that the greater likelihood of reaching agreements enables “mutual gains to be achieved and a more optimal way of dealing with the double requirement of flexibility and security”).

255. SAMUEL BACHARACH, PETER A. BAMBERGER & WILLIAM J. SONNENSTUHL, *MUTUAL AID AND UNION RENEWAL* 35–36 (2001).

A. *A Progressive-Federalist Strategy for Union Revitalization*

As was shown above, the positive effects of the Ghent system on union density are distinguishable from cultural causes, and the adoption of the Ghent system is not the product of 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.<sup>256</sup> 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.<sup>257</sup> Thus, union-administered unemployment insurance holds tremendous promise as an institutional basis for revitalizing union strength.

One reason the Ghent system can be imported into the United States is 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.<sup>258</sup> Concerns about constitutionality drove the framers of the Social Security Act to create a cooperative federal-state program rather than a purely federal program.<sup>259</sup> Therefore, these broad principles of the Act appear consistent with state-level changes in administration and eligibility determination that would permit adoption of a Ghent system arrangement.

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256. See *supra* notes 58–62 and accompanying text.

257. See Rothstein, *supra* note 42, at 46–51 (detailing the legislative history of the Ghent system in Sweden).

258. Amy B. Chasanov, *Clarifying Conditions for Nonmonetary Eligibility in the Unemployment Insurance System*, 29 U. MICH. J.L. REFORM 89, 89 (1996) (describing the American unemployment insurance program as “a federal-state 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, 314 (1994) (explaining that the Social Security Act “does not set up a federal system,” but rather “create[s] incentives for states to establish their own unemployment compensation plans, but leave[s] the questions of who contributes to the fund, the amount and duration of the benefits, and requirements for eligibility completely in the hands of the states”).

259. Wilbur J. Cohen, *The Development of the Social Security Act of 1935*, 68 MINN. L. REV. 379, 399–403 (1983) (stating that the “need to create an Act that would survive any constitutional challenge directly influenced the shape and content of the Social Security Act,” including its cooperative federal-state design); see also EDWIN E. WITTE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 111–21 (1963) (presenting the debates among social security architects and administrators over whether the unemployment compensation provisions of the social security bill should establish an exclusively federal or a cooperative federal-state system).

A U.S. version of the Ghent system can therefore constitute a “progressive-federalist” strategy of union revitalization.<sup>260</sup> Such an alternative offers promise since Congress is arguably the largest obstacle to labor law reform.<sup>261</sup> Outside of Congress, in the agencies or states, federal labor law reform is likewise hampered because rulemaking at the NLRB has become ossified and because federal labor law preempts reformation at the state level.<sup>262</sup> However, since unemployment insurance falls outside the purview of federal labor law, new reform possibilities are available.<sup>263</sup> Strategically, unions can promote the Ghent system in states where unions are strongest and most highly regarded. Following those successes, with renewed vigor and image, unions could then begin to advance in territory where they have been less welcome.

While the federalist principles of the Social Security Act would appear to accommodate the adoption of state-level Ghent plans, the text of the Social Security Act places significant constraints on states’ design of unemployment insurance systems. The first, and perhaps most important, textual issue is whether states would be allowed to let labor unions administer unemployment insurance. 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

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260. 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. eds., 2007).

261. See Estlund, *supra* note 34, at 1530.

262. *Id.* at 1530–31.

263. The general rule under the NLRA is that states may not regulate conduct that is “arguably” protected or prohibited under federal law. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244–45 (1959). Traditionally, labor law scholars have “consistently expounded the view that states should never be free to enforce laws that reflect ‘an accommodation of the special interests of employers, unions, employees or the public in employee self-organization, collective bargaining, or labor disputes.’” Michael Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 *YALE J. ON REG.* 355, 355 n.2 (1990) (quoting Archibald Cox, *Labor Law Preemption Revisited*, 85 *HARV. L. REV.* 1337, 1356 (1972)). Since an American Ghent system would “arguably” “accommodate” unions’ interests in recruiting members, this would raise a preemption concern. However, precisely in the unemployment insurance context, the Supreme Court has recognized an exception to the general preemption rule because Congress has indicated that it intended states to have free choice over eligibility requirements for unemployment insurance. See *N.Y. Tel. Co. v. N.Y. Dep’t of Labor*, 440 U.S. 519, 544 (1979) (“The omission of any direction concerning payment to strikers . . . implies that Congress intended that the States be free to authorize, or to prohibit, such payments.”).

unemployment compensation solely through public employment offices *or such other agencies as the Secretary of Labor may approve . . .*”<sup>264</sup> The legislative history suggests that the meaning of “such other agencies” was open to interpretation. The original bill required that compensation be paid through public employment offices.<sup>265</sup> 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.”<sup>266</sup> The conference committee revised the language into its present form.<sup>267</sup>

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<sup>268</sup> and were intended to provide job referral and other employment services that “bear no relation to the administration of an unemployment compensation law.”<sup>269</sup> No case law appears to construe 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 . . .”<sup>270</sup> Thus, while it is doubtful that nonpublic agencies were actually ever contemplated as possible forms of administration, the statutory language does not appear to prohibit such alternatives.

Since most Ghent systems are voluntary,<sup>271</sup> and because this voluntary component may play an important role,<sup>272</sup> a second important textual issue is whether states would be allowed to adopt this feature. That is, if labor unions were allowed to administer publicly financed unemployment insurance, could states require beneficiaries to join and make minimal contributions to a labor-run plan before benefits could be collected? The statutory language suggests some challenges, stating that “compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with his work, fraud in connection with a

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264. Social Security Act § 303(a)(2), 42 U.S.C. § 503(a)(2) (2006) (emphasis added).

265. WITTE, *supra* note 259, at 135.

266. *Id.*

267. *Id.* at 135–36.

268. Fin. of State Pub. Emp’t Offices Under Section 302(a) of the Soc. Sec. Act, 39 Op. Att’y Gen. 229, 231–32 (1941).

269. *Id.* at 231.

270. U.S. Emp’t Serv.—Approval of State Emp’t Serv. Plans, 39 Op. Att’y Gen. 181, 184 (1941).

271. *See supra* text accompanying note 42.

272. *See supra* text accompanying notes 202–03.

claim for compensation, or receipt of disqualifying income.”<sup>273</sup> Clearly, benefits cannot be entirely conditioned on workers participating in a voluntary unemployment insurance plan.

Given this language, architects of an American Ghent system might contemplate two alternatives. First, voluntariness, as the case of Belgium demonstrates, is not an essential characteristic of the Ghent system.<sup>274</sup> A state may thus be able to adopt a “hybrid” Ghent system, while remaining aware that its impact on union membership rates may be weaker. Alternatively, states might be able to adopt a voluntary system alongside a compulsory one. Since the statutory language only prohibits “total reduction” of benefits,<sup>275</sup> states could offer less generous benefits to all workers, while granting more generous benefits to workers who joined a union-run insurance fund. Indeed, most Ghent countries appear to offer such alternative minimum benefits to workers who are not part of a union-run plan or whose benefits expire or are terminated for other reasons.<sup>276</sup>

While the two most important textual issues are union administration and plan voluntariness, many other details about an American version of the Ghent system should be considered. It is not this author’s intention to fully explore those details in this Article, but a few matters are worth mentioning. For example, to allay fears about financial impropriety, state governments should establish a set of regulations setting forth criteria under which union insurance plans can be licensed to receive public funds.<sup>277</sup> An important element in that arrangement should require labor unions to establish financially segregated unemployment insurance plans. Another issue is the institutional locus for fund establishment. Following Ghent practice, funds should not be created at an overly decentralized level but rather organized by industry or occupation. Alternatively, given the federal structure an American Ghent system might follow, funds could be created at the state level. 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 well suited for administering such plans.

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273. 26 U.S.C. § 3304(a)(10) (2006).

274. *See supra* text accompanying note 44.

275. § 3304(a)(10).

276. *See, e.g.,* Madsen, *supra* note 234, at 193–97 (describing how workers are able to receive less generous social assistance when they have exhausted their unemployment benefits under the entitlement period).

277. A system of regulation through licensure is how the Ghent system is typically organized. *See* Rothstein, *supra* note 42, at 48.

*B. Domestic Examples of Ghent-Type Governance*

Applying Ghent system insights is not limited to state-subsidized unemployment insurance, although such subsidies certainly increase the effectiveness of these programs. Drawing on their own resources and experiences, labor unions can fashion similar benefits on their own. Indeed, such “mutual aid” strategies of encouraging union membership and building networks of solidarity among workers have been a prominent feature of the history and practice of the American labor movement. Following a discussion of mutual aid and a generalization of the Ghent system, this Section will also evaluate several contemporary examples of innovation within the labor movement that have certain Ghent-type features. It remains for the labor movement to consolidate and expand these experiments in order to more fully capitalize on their potential.

*1. A Return to Mutual Aid?*

Historically, the provision of benefits such as unemployment insurance was one way unions, in the United States and elsewhere, initially attracted and retained new members. Early British trade unions were often established first as “friendly societies” and only later became collective-bargaining organizations.<sup>278</sup> Speaking of the American labor movement’s mutual aid benefits, Samuel Gompers, the 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.<sup>279</sup>

Accordingly, the notions of self-help and mutual aid have been central organizing principles for U.S. labor unions and were “instrumental in the coalescence of the American labor movement.”<sup>280</sup>

Viewed in the light of mutual aid, it is possible to generalize about the Ghent system. Thus, a social program based on the Ghent

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278. SIDNEY WEBB & BEATRICE WEBB, *THE HISTORY OF TRADE UNIONISM* 22–23 & n.1 (1907).

279. BACHARACH ET AL., *supra* note 255, at 36.

280. *Id.* at 35.

model would exhibit at least three characteristics. First, in addition to the collective goods unions provide to workers—that is, those benefits that workers receive regardless of affiliation or the choice of participation—they should also aspire to produce and deliver private benefits from which nonparticipants can be excluded. This aspect would address the free-rider problem. While the preceding analysis has shown why unemployment insurance is a good, possibly ideal, benefit to offer, union-provided private benefits need not be limited to this example. Unions could provide health insurance, job training or retraining, legal advice, consumer discounts, or any number of possibilities. Second, while nonparticipants should be *excludable*, such benefits emphatically should not be *exclusive*. That is, they should be generally available to all workers so long as they choose to participate and not be limited to labor market “insiders,” like those employees who receive benefits because they are fortunate enough to be members of a bargaining unit at a workplace exclusively represented by a labor union. This aspect of the program would seek to draw in as many workers as possible and would help unions create the critical mass required to overcome the recognition problem. Finally, such programs ought to simultaneously serve the needs not only of employees but also of employers. This feature of the program would address the adversarial problem. The actual Ghent system exhibits just one other criterion: where possible to obtain it, public subsidization will also enhance the attractiveness and effectiveness of these benefits. Where tax financing cannot be obtained, it may be possible to secure employer funding as will be illustrated below.

To some extent, the mutual aid philosophy remains a core feature of traditional labor unions. Unions played a well-known role in constructing the so-called employer-based welfare state by negotiating with employers for health and pension benefits and funds. Yet such benefits remain privileges, not even of union members, but of only those workers who are (or were for a long enough period) members of a Board-certified bargaining unit.

Nevertheless, other contemporary examples of efforts exist that exhibit, in greater or lesser degree, these components of the Ghent system. These examples are considered and evaluated next.

## 2. The Freelancers Union

The Freelancers Union (“Union”) is a non-profit organization that seeks to represent the needs and interests of “independent” workers: freelancers, consultants, and independent contractors, as well as temporary, part-time, contingent, and self-employed

workers.<sup>281</sup> The Union has nearly 100,000 members in New York State, where it was started in 2003, and almost 150,000 members nationwide.<sup>282</sup> The Union's primary function is to provide benefits to its members: health, dental, life, and disability insurance, as well as retirement plans.<sup>283</sup> As of 2007, more than 14,000 freelancers in New York had bought the Union's health insurance, "generally for about \$300 a month, some 40 percent below what they would normally pay elsewhere."<sup>284</sup> By virtue of its membership, the Union is able to use its group purchasing power to negotiate discounted rates for these benefits. Membership in the Union is free, while the organization finances itself by earning modest commissions on the benefits its members purchase.<sup>285</sup> The group benefits are available to any independent worker.<sup>286</sup> Since the benefits come from the union, rather than the employer, they are portable across the freelancer's current employment arrangement.

In addition to providing these benefits, the Freelancers Union seeks to foster community, collaboration, and knowledge sharing by establishing networks among members through seminars, workshops, and events.<sup>287</sup> It also engages in advocacy through research and representation in legislative and policymaking fora.<sup>288</sup> However, it does not bargain with employers, which is a key aspect distinguishing it from traditional labor unions.<sup>289</sup> Nevertheless, the Freelancers Union is clearly a union in a more traditional sense: a mutual aid or

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281. For more information about the Freelancers Union, see *About Us*, FREELANCERS UNION, <http://www.freelancersunion.org/about/index.html> (last visited Jan. 1, 2012).

282. *Id.*

283. *What We Do*, FREELANCERS UNION, <http://www.freelancersunion.org/about/what-we-do.html> (last visited Jan. 1, 2012).

284. Steven Greenhouse, *Labor Union, Redefined, for Freelance Workers*, N.Y. TIMES, Jan. 27, 2007, at A11.

285. *Id.*

286. The Freelancers Union website states:

You're good to go if you're a freelancer, an independent contractor, a temporary worker who gets work through an employment agency, self-employed, employed part-time, or working for multiple companies at the same time. You can't, at the time you submit this application, work full-time (at least 35 hours per week) as a W-2 employee, unless you 1) work for an employment agency or payroll service, or 2) are hired to work for 18 months or less.

*How to Apply*, FREELANCERS UNION, <http://www.freelancersunion.org/benefits/how-to-apply.html> (last visited Jan 1, 2012).

287. Greenhouse, *supra* note 284.

288. *Id.*

289. The Freelancers Union does not aspire to collectively bargain with employers, although some members prefer that it would. *See id.*



friendly society.<sup>290</sup> Traditional unions are studying the progress of the Freelancers Union to determine whether its ideas can be borrowed.<sup>291</sup>

The Freelancers Union's provision of health and other benefits thus fulfills many of the Ghent-type criteria. Benefits are private, and this fact certainly reduces free riding on the Freelancers Union's collective advocacy efforts. At the same time, benefits are available to all freelance workers, not just to those who have voted for a union in a representation election. The enhanced portability of benefits probably benefits employers by keeping talent in the industry, if not at the particular employer, where presumably short-term relationships are preferred. The only real differences are the absence of direct financial subsidies and the lack of collective-bargaining representation. By adding that final element to a similar benefit scheme, traditional labor unions could invent a new role for themselves as well as an entirely different way of building relationships with workers.

### 3. Working America

A somewhat similar program to the Freelancers Union comes from within the mainstream labor movement. This is "Working America,"<sup>292</sup> the AFL-CIO's "associate membership"<sup>293</sup> organizing effort initiated in conjunction with its "Union Plus" program.<sup>294</sup> Begun in the 1990s, this program "offered unorganized workers and unemployed members a reduced form of membership."<sup>295</sup> Associate members pay lower dues and are eligible through Union Plus for certain benefits, such as low-interest credit cards, health care, legal services, and a variety of other consumer discounts.<sup>296</sup>

Like the Freelancers Union and the Ghent system, the benefits provided under the Union Plus program are private and generally available to all workers, giving workers some incentive to become associate union members rather than free riding. In fact, two-thirds of those contacted by Working America organizers joined the organization.<sup>297</sup> And after three years of operation, Working America

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290. *Id.*

291. *Id.*

292. Richard B. Freeman & M. Marit Rehavi, *Helping Workers Online and Offline: Innovations in Union and Worker Organization Using the Internet* 6 (Nat'l Bureau of Econ. Research, Working Paper No. 13850, 2008).

293. STONE, *supra* note 214, at 218.

294. Freeman & Rehavi, *supra* note 292, at 13.

295. STONE, *supra* note 214, at 217-18.

296. *Id.* at 218; Freeman & Rehavi, *supra* note 292, at 13.

297. Freeman & Rehavi, *supra* note 292, at 10.

had two million members, “making it one of the fastest growing groups in US labor history.”<sup>298</sup> Nevertheless, Working America faces some substantial limitations. First, being administered by the AFL-CIO itself, the Union Plus benefits may be located at *too* high an institutional level. At this level, it is too difficult to use the incoming membership as a way to form a union nucleus in an industry or occupation, let alone in a workplace, as a way of overcoming the recognition problem. Moreover, the provision of benefits is unconnected with collective bargaining or other employer relationships that could address the adversarial problem. Rather, Working America is in many ways more similar to a political lobbying organization, such as AARP.<sup>299</sup> A second problem is that the array of benefits provided may be too broad and shallow to attract and retain most workers.<sup>300</sup> A more concentrated and focused benefit, such as unemployment insurance, may be more effective.

#### 4. Unions as Workforce Intermediaries

A variety of nonprofit and public organizations have emerged in recent decades to address the lack of opportunities for employees at the bottom of the labor market, as well as the dearth of access and advancement for those in slightly better employment conditions, while serving the needs of both workers and employers.<sup>301</sup>

A central focus of many of these intermediaries is on skills and training. As just one example, consider the Culinary & Hospitality Academy of Las Vegas (“CHA”). Established in 1993 by a consortium of local hotel casinos and unions to provide job training to union members, the CHA has had marked success in lowering turnover and training costs for employers.<sup>302</sup> For workers, training is free (the CHA is funded almost entirely by employer contributions), and employment prospects following training are high, since employers treat the CHA as their main source of entry-level hiring (even nonunion employers seek to hire academy trainees).<sup>303</sup>

Like the Ghent system, the union plays a crucial role in providing and coordinating a tangible benefit for workers (both skills and high

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298. *Id.* at 10–11.

299. *Id.* at 10; STONE, *supra* note 214, at 218.

300. Freeman & Rehavi, *supra* note 292, at 11, 13 (noting that membership attrition is a problem in Working America and that Working America treats the Union Plus benefits as “minor add-ons rather than selling points of membership”).

301. Dresser & Rogers, *supra* note 38, at 266.

302. *Id.* at 277–78.

303. *Id.*

employment prospects). Since the CHA works closely with the union's hiring hall, the provision of the benefit helps reduce the free-rider problem. Because "everyone qualifies" for the training, the benefit is open and serves as a constant source of recruitment for new union members. The constant flow of new members sustains density and hence recognition in the industry.<sup>304</sup> Employer subsidization of the program serves as an analog to state subsidization in the Ghent system. The benefits to employers increase the joint gains that help sustain trust and cooperation.

In this case, the absence of public finance subsidies is the only major difference from a Ghent-type arrangement. Its success should encourage unions to undertake similar efforts elsewhere.

### 5. Worker Centers

The final example of a Ghent-type experiment in the American labor market probably shares the least similarity with the Ghent system. Workers' rights centers ("worker centers") can also be considered nontraditional labor organizations.<sup>305</sup> Worker centers have a community orientation, often representing immigrant workers, and engaging in advocacy, service, and organizing activities, frequently asserting claims for wage-and-hour violations.<sup>306</sup> As the name indicates, there is perhaps a greater emphasis on the vindication of substantive rights than on the provision of benefits in order to mold incentives for achieving other representational objectives. Indeed, within the labor and employment "New Governance" literature, worker centers have been construed primarily as private forms of regulatory enforcement.<sup>307</sup> This is a governance solution, as opposed to a regulatory one, in the sense that private organizations have stepped in to fill an enforcement void left by the state.

Nevertheless, worker centers often also provide benefits generally to a defined group of workers, and as such, bear a similarity to the Ghent system. There is substantial variation in the kind of benefits that worker centers dispense. At a minimum, most worker

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304. It is interesting to note that Nevada is the only right-to-work state with union density above the national rate. Union density in the United States was 11.9% in 2010 and union density in Nevada was 15% in 2010. News Release, *supra* note 209, at tbl.5. At 11.4%, Iowa is the right-to-work state with the next highest union density. *Id.* A list of right-to-work states can be found at *Right to Work States*, *supra* note 179.

305. See generally JANICE FINE, *WORKER CENTERS* (2006) (detailing the history of worker centers).

306. *Id.* at 2.

307. ESTLUND, *REGOVERNING*, *supra* note 9, at 106–07, 181–85.

centers help inform and educate workers about their legal rights.<sup>308</sup> Others are more ambitious and provide both job training and job placement services to workers.<sup>309</sup>

Yet, while such services may be an attraction to workers, worker centers may provide them in a self-limiting way, since it is not often clear that workers are expected to contribute anything in return.<sup>310</sup> Thus, such service provisions may fail to surmount the free-rider problem or generate a sustainable membership base.<sup>311</sup> This seems a consequence of worker centers' orientation toward "justice" rather than mutual aid. This is not to say that unions or worker centers should refrain from such orientations, but rather that an exclusive focus on remedying workplace injustices may neglect another role of labor organizations—the provision of mutual aid.

### *C. Toward a New Labor Movement*

Incorporating Ghent-type and mutual aid principles back into the labor movement can have potentially enormous transformative effects. Through a Ghent-type system, labor unions provide a benefit that is available to all workers, not conditioned on being a member of a government-certified bargaining unit, and not conditioned on securing a victory in an 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, quoted at the beginning of the Article, 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.<sup>312</sup>

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308. FINE, *supra* note 305, at 73.

309. *Id.* at 92.

310. *Id.* at 232.

311. *Id.* at 234–36; ESTLUND, *REGOVERNING*, *supra* note 9, at 181–82.

312. Dresser & Rogers, *supra* note 38, at 289.

## CONCLUSION

EFCA—the most important labor law reform proposal in a generation and the labor movement's central revitalization strategy—sought to strengthen and reinvigorate the U.S. regulatory model of labor law established by the NLRA. However, recent research and experience suggests that regulatory approaches to resolving social problems are being superseded by governance methods. Governance methods move away from state-mandated and top-down substantive prohibitions and coercive enforcement and, instead, elicit the participation of regulated entities collaboratively, dynamically, and reflexively. Rather than dictating behavior, governance approaches also attempt to shape actors' behavior indirectly by molding their incentives. This Article has taken a comparative perspective to derive governance insights from the practice of the Ghent system. The Ghent system helps unions solve three basic problems of increasing union membership: the recognition problem, the free-rider problem, and the adversarial problem. U.S. labor law attempts to resolve these same dilemmas but with obvious inadequacy. Further, union-determined and union-administered unemployment insurance is efficient and establishes a positive-sum tradeoff between a form of security in the labor market and a flexible workplace. In addition to these positive insights, this Article has considered what policy lessons can be learned from the Ghent system. Most ambitiously, the absence of federal constraints in the Social Security Act opens up reform possibilities at the state level that are currently absent at the federal level. By recharging and building on Ghent-system principles and domestic experience, labor unions can also do much to resolve central dilemmas they confront without legislative change.