

Productive Unionism

Matthew Dimick*

Do labor unions have a future? This Article considers the role and importance of labor union structures to the future of labor unions, in particular the degree of centralization in collective bargaining. Centralization refers primarily to the level at which collective bargaining takes place: whether at the workplace, firm, industry, or national level. The Article examines the historical origins of different structures of bargaining in the United States and Europe, the important implications that centralization has for economic productivity, and the ways that various labor law rules reinforce or reflect different bargaining structures. Most critically, the Article contends that greater centralization of collective bargaining entails a broader, more “universal” representation of worker interests, has a stronger impact on unions’ ability to lower income inequality, and, through its positive effects on economic productivity, reduces employer opposition to unionization in the long run. Although centralized bargaining is a medium- to long-term goal for the American labor movement, the Article proposes ways that unions can change their own organizational structures, bargaining objectives, and organizing tactics to position themselves for future changes in bargaining structure and to avoid the pitfalls of the decentralized bargaining structures of the past.

Introduction	680
I. Collective Bargaining in Comparative and Historical Perspective.....	682
A. History and “Initial Conditions” Behind Different Collective Bargaining Structures.....	682
B. Brief Comparative Analysis of Collective Bargaining Structures.....	689
II. Why Union Structures Matter.....	691
A. Responses to Risk in the Labor Market.....	691
B. Productivity Investments.....	693
1. Physical Capital.....	695

* Associate Professor, SUNY Buffalo Law School. Many thanks to Catherine Fisk for her comments and the invitation to present at the “Reimagining Labor Law” symposium. Also, many thanks to Katherine Stone for serving as discussant at the symposium and for several insightful comments. I would also like to thank participants at the symposium, as well as Christine Bartholomew, Cynthia Estlund, Marty Malin, Tony O’Rourke, Michael Oswald, Jessica Owley, César Rosado Marzán, Benjamin Sachs, and Judith Scott for thoughtful questions and suggestions.

2. Human Capital.....	696
C. Employer Opposition	697
D. Income Inequality and “Taking Wages Out of Competition”.....	698
E. Macroeconomic Benefits	701
III. Labor Law and Union Structures	702
A. Exclusive Representation, Union Security, and Employer Domination	702
B. Representation Elections and Bargaining Units	706
C. Subjects of Bargaining.....	708
D. Restrictions on Economic Action	711
IV. Productive Unionism.....	716
A. Reorganizing Unions: The Link Between Union Organization and Bargaining Structure.....	717
B. Proportional Representation: Breadth, Not Depth.....	719
C. Two-Tier, or Bifurcated, Bargaining: Less is More.....	721
D. Labor Law Reform?	722
Conclusion.....	723

INTRODUCTION

Do labor unions have a future? This Article contends that if they are to have one, then unions must adjust to some fundamental economic imperatives. Critics of labor unions have long argued that labor unions advance the interests of particular workers at the expense of employers and the larger economy—even at the expense of other nonunion workers. The critique states that both in how they bargain and in what they bargain over, unions erect multiple obstacles to economic change and growth. In this Article, I concede that the critics are correct—to a point. The critics err because the issue is not whether labor unionism by itself is good or bad. Rather, it is the specific form of organization and bargaining that unions adopt that is decisive for their impact on economic performance.

The problem is fundamentally one of union *structure*, and in particular the degree of union and collective bargaining *centralization*. By centralization, I refer primarily to the level at which collective bargaining takes place. In the United States, most collective bargaining takes place at the workplace level and, in some cases, at the firm level.¹ In contrast, in Europe, collective bargaining tends to be more centralized, taking place at a higher level, typically at the industry or sector level.² It is possible for bargaining to become even more centralized, with bargaining

1. See Michael Wallerstein & Bruce Western, *Unions in Decline? What Has Changed and Why*, 2000 ANN. REV. POL. SCI. 355, 364, 366 tbl.3 (2000).

2. Lucio Baccaro, *Centralized Collective Bargaining and the Problem of “Compliance”: Lessons from the Italian Experience*, 53 INDUS. & LAB. REL. REV. 579, 580 (2000).

embracing all industries at a national level, as has occurred in some countries over quite significant periods of time.³

The level of centralization has multiple and diverse implications for how unions affect economic output, productivity, efficiency, and growth. As will be elaborated in the Article, the level of centralization influences the nature and content of bargaining subjects in ways that have critical consequences for economic productivity. Union structures also affect firms' incentives to invest in productive capital, as well as how much training firms provide to their workers. Centralization even has potentially positive macroeconomic implications for inflation and unemployment. However, and perhaps most critically, it is through these economic consequences that centralization affects whether and how much employers oppose unionization. Thus, one could legitimately object that the goals of unionization are not economic and instrumental (for instance, to enhance productivity) but rather are normative (for instance, to ensure a fair division of the economic pie). But, in my argument, these two objectives are inseparable: unions can only robustly sustain their normative and distributive mission if they can solve the problem of employer opposition. And employer opposition can best be reduced (if never completely eliminated) by adopting structures of bargaining and organization that enhance, rather than detract, from the demands of economic productivity. Ultimately, therefore, the level of centralization also determines how effective unions are in achieving their fundamental objective of a just and fair economy. To put this more critically, not only do the prevailing structures of U.S. unions induce wasteful economic harm and vociferous employer opposition, but they also fundamentally fail to "deliver the goods" to the vast majority of workers. Fortunately, as this Article contends, unions really can have their cake and eat it too. Indeed, empirically, the more centralized wage bargaining is, the more collective bargaining reduces income inequality.

Nevertheless, although greater centralization of wage bargaining has much to offer employers, this is not to say that employers will welcome it with open arms. This is because greater centralization entails daunting coordination problems. Greater bargaining centralization will be rational for individual employers only if most, perhaps all, employers participate. Hence, to be clear, I do not propose that unions must somehow limit or minimize their demands for economic fairness in order to conform to the supposedly ineluctable forces of globalization and technological change. Nor do I suggest that if merely the culture or attitudes of U.S. unionism change—by acting, for example, more "cooperatively"—that employers will learn to embrace labor unions. Rather, to emphasize the point, the required changes are fairly and deeply organizational and structural. Thus, ultimately, the revitalization of unions is still a matter of power against potentially strong and

3. See Douglas A. Hibbs, Jr. & Håkan Locking, *Wage Dispersion and Productive Efficiency: Evidence for Sweden*, 18 J. LAB. ECON. 755, 756 (2000) (observing that national "peak level" bargaining prevailed without interruption in Sweden from 1956 to 1983).

oppositional interests. Yet, notwithstanding the recognition of the importance of power, I will also suggest that *how* that power is allocated matters a great deal, and it is the resolution of this issue that will determine whether unions and collective bargaining can be put on a more stable, long-run, “productive” path.

Part I of this Article defines and explicates the concept of centralization through a brief comparative and historical analysis of the origins and persistence of different collective bargaining structures across developed countries. The main insight provided in this Part is that differences in bargaining structure between the United States and parts of Europe have to do with different historical “initial conditions.” In particular, the presence of democratic or authoritarian governments (including the initial legal response to unionization) as well as the timing of industrialization played important roles in shaping the structure of collective bargaining in the now developed part of the world. Part II of the Article explains the consequences of centralization and why it matters for unions, employers, and any future for collective bargaining. This Part focuses on how different bargaining structures shape unions’ responses at the bargaining table to risk in the labor market, influence employers’ investments in physical and human capital, and ultimately determine in large part to what extent employers oppose unions. Part II will also explain why greater centralization also has a larger impact on income inequality than more decentralized bargaining. Part III considers the legal context for centralization and the extent to which American labor law encourages decentralization or impedes centralization. In this Part, I suggest that particular legal provisions of the National Labor Relations Act contribute to more decentralized collective bargaining, but that, for the most part, U.S. labor law is more a reflection of the dominant structures of collective bargaining rather than the reverse. This is in some ways good news, since it suggests at once both a more focused and a less demanding agenda for labor law reform. Finally, Part IV examines the normative and policy implications of collective bargaining structure and suggests possible paths to change in the U.S. context. Admittedly, changing the structure of bargaining seems like a distant long-range, or at best, a medium-range goal of the labor movement. Nevertheless, this Part will argue that thinking about bargaining structure does dictate some important ways unions should organize both themselves as organizations and new workers in the present day.

I. COLLECTIVE BARGAINING IN COMPARATIVE AND HISTORICAL PERSPECTIVE

A. History and “Initial Conditions” Behind Different Collective Bargaining Structures

It will be easier to understand and grasp the overwhelming importance of the collective bargaining structure when examined in its comparative and historical context. Basically, in a familiar path-dependence type of story, the initial conditions for union organization were different between northern and continental Europe

and the United States (and other Anglo-American countries). These different initial conditions led to different forms of collective bargaining structures.⁴

In countries that industrialized early, such as the United Kingdom and the United States, the first form of labor unionism that emerged was what is generally described as craft unionism.⁵ Craft unions organized a specific—often quite narrow—skill or trade and advanced their members’ interests by reserving access to job markets for workers the union had trained while rigorously excluding all others.⁶ Control over a specific skill, furthermore, required extending control over the organization of work.⁷ Craft unions aimed, and were often successful, at imposing on employers a division of labor—ably captured by the philosophy of “job control”: job demarcations, job territories, rules against job dilution, and so forth—tailored to fit the union’s skill.⁸ Such objectives often entailed the opposition to the introduction of new technologies or new organizations of work. The “crowning achievement” of craft unionism was the closed shop, which required employers seeking to employ labor of a particular skill to hire only members of the union that controlled that skill.⁹ Organizing on the basis of skill or occupation, craft unions often transcended workplace boundaries.¹⁰ However, because craft unions often exerted control through their skill monopoly (rather than through strikes and collective bargaining)¹¹ and because of the more local nature of early markets, collective bargaining, to the extent it existed at all, was weak and highly decentralized. This is seen most evidently in the historical American Federation of Labor, which raised union autonomy to a fundamental principle.¹² Narrowness and exclusivity, social as well as economic, was the hallmark of craft unionism.

4. Much of the following discussion relies on the research of Wolfgang Streeck. See Wolfgang Streeck & Anke Hassel, *Trade Unions as Political Actors*, in INTERNATIONAL HANDBOOK OF TRADE UNIONS 335 (John T. Addison & Claus Schnabel eds., 2003); Wolfgang Streeck, *The Sociology of Labor Markets and Trade Unions*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 254, 266–68 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005) [hereinafter Streeck, *Labor Markets*]; Wolfgang Streeck, *Skills and Politics: General and Specific*, in THE POLITICAL ECONOMY OF COLLECTIVE SKILL FORMATION 317, 317–52 (Marius R. Busemeyer & Christine Trampusch eds., 2012) [hereinafter Streeck, *Skills and Politics*].

5. Streeck, *Labor Markets*, *supra* note 4, at 266.

6. *Id.*

7. *Id.*

8. *Id.*

9. Streeck, *Skills and Politics*, *supra* note 4, at 319.

10. *Id.* (explaining that by imposing the same organization of work across employers within their jurisdiction, craft unions could ensure “that union members could exercise their skills in a large number of workplaces, making such skills transportable across employers”).

11. Streeck, *Labor Markets*, *supra* note 4, at 266 (observing that craft unions “operated much like cartels of small business firms” and “often unilaterally set prices for specified jobs, rather than negotiating wages with employers”); Streeck, *Skills and Politics*, *supra* note 4 at 318 (stating similarly that craft unions “continued to behave like business cartels, and where they became powerful they were able to dictate to employers on a wide range of subjects”).

12. See ROBERT FITCH, SOLIDARITY FOR SALE 72–75 (2006) (arguing that “[t]he very creation of the AFL represented a revolt against union solidarity in favor of separation over unity and local autonomy over concerted national action”).

The formation of the Congress of Industrial Organizations in 1935 is supposed to have marked the end of craft unionism and the emergence of industrial unionism in the United States.¹³ But the break that occurred was—fatally, it now seems—incomplete. As Wolfgang Streeck observes, industrial unions in “craft-dominated environments adapted elements of the *modus operandi* of their predecessors,”¹⁴ “relying on seniority rights and promotion ladders as functional equivalents of skill and apprenticeship, on the union shop as a substitute for the closed shop, and on internal rather than external labor markets.”¹⁵ As much, if not more, a feature of craft unionism, industrial unions sought to impose on employers through collective agreement an elaborate and detailed system of job control. “The common tendency everywhere,” writes David Brody of the postwar industrial unions, “was toward an ever greater expansion of the contractual net, from the great body of umpire rulings compiled in the 517-page *Steelworkers Handbook on Arbitration Decisions* (1960) to the innumerable specifics incorporated into the local agreements that increasingly supplemented the master contracts in multiplant firms.”¹⁶

Industrial unionism, as it developed in other European countries, took a very different course.¹⁷ As a consequence of both late industrialization and a relative absence of democracy, industrial unionism in Europe never had to contend with the overhang of a craft-union environment.¹⁸ A more restrictive and authoritarian legal environment had abolished the guilds, which prevented the development of craft unionism from these closely-analogous institutional forms.¹⁹ Skill-based trade union organization made little sense to the technology and organization of production that came with late industrialization, which was characterized by larger factories and greater complements of unskilled and semiskilled workers.²⁰

Given these different origins and organizational forms, the objectives of later-industrializing industrial unions were also quite different from their craft union counterparts. Because these unions were comprised of workers of varying skills, their memberships were more heterogeneous.²¹ Consequently, such unionism

13. Christopher L. Tomlins, *AFL Unions in the 1930s: Their Performance in Historical Perspective*, 65 J. AM. HIST. 1021, 1021 (1979) (“[H]istorians have generally agreed that the 1930s [following the founding of the Congress of Industrial Organizations] saw the ascendancy of industrial over craft unionism.”).

14. Streeck, *Labor Markets*, *supra* note 4, at 267.

15. Streeck, *Skills and Politics*, *supra* note 4, at 319.

16. DAVID BRODY, *WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE* 201–02 (1980).

17. Streeck, *Labor Markets*, *supra* note 4, at 267.

18. *Id.*

19. *Id.* (explaining that authoritarian political regimes in Europe “refused unions a right to organize, in the name of rapid modernization of their societies and anxious not to fall behind in international economic and military competition” (citation omitted)).

20. *Id.* (“As the beginnings of unionization coincided with the arrival of large factories, unions organized on a class or industrial basis, encompassing workers of all skills and trades and thereby redistributing and equalizing bargaining power between stronger and weaker sections of the workforce.”).

21. *Id.*

embraced broader and more universal definitions of worker interests than the narrow and exclusive craft unions.²² Industrial unions sought to equalize the pay and employment status of workers within and across firms. To quote Wolfgang Streeck at length:

Organizing across trades, [industrial unions] had little use for job control; and organizing industry-wide across employers, they preferred centralized collective bargaining to make the economic situation of workers as independent from that of their employer as possible. Rather than challenging the right of employers to reorganize work and introduce new technology, industrial unions defended the occupational skills of their members through involvement in industrial training and public labor market policy²³

Thus, if anything, industrial unions sought to accommodate their members' interests to the demands of their capitalist employers, rather than impose their own limiting and restrictive rules on employers' deployment of technology and labor. In one particularly interesting example, Swedish trade union economist Gösta Rehn described the policy goals of Sweden's inaugural version of its famous active labor market policy.²⁴ The purpose (as it remains in contemporary versions of active labor market policy today) was to enhance the ability of workers to change jobs, rather than to protect their current jobs.²⁵ Rehn described this policy as offering the "safety of wings," as opposed to the "safety of the snail's shell."²⁶

In sum, different historical "initial conditions" gave rise to different organizations of unions and collective bargaining between Europe and Anglo-American countries. In particular, early industrialization and a fairly tolerant legal regime allowed craft unionism to flourish in the United States and her sister Anglophone countries.²⁷ Craft unionism existed as localized and very loosely federated organizations of occupations, relying on skill monopoly, restrictive practices, and job control as its organizational repertoires.²⁸ When larger-scale industrialization came, industrial unionism took root in craft-dominated labor markets and correspondingly adopted functionally equivalent practices to their predecessors.²⁹ In contrast, trade unionism came later, with more rapid

22. *Id.* at 268.

23. *Id.*

24. Lennart Erixon, *The Rehn-Meidner Model in Sweden: Its Rise, Challenges and Survival*, 44 J. ECON. ISSUES 677, 681 (2010) (arguing for "[s]ecurity by wings" consisting of mobility-enhancing policies and unemployment benefits as opposed to "security under shells" consisting of laws and collective agreements on job security).

25. *Id.*

26. PETER A. SWENSON, CAPITALISTS AGAINST MARKETS 275 (2002); *see also* Erixon, *supra* note 24, at 681 (rendering the translation as the "security of wings" to the "security under shells").

27. Michael T. Hannan & John Freeman, *The Ecology of Organizational Founding: American Labor Unions, 1836–1985*, 92 AM. J. SOC. 910, 927 (1987).

28. Streeck, *Labor Markets*, *supra* note 4, at 267, 269.

29. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 253–54 (1985).

industrialization, a less tolerant legal regime, and the absence of a craft-union “overhang.”³⁰ The consequence was a weakness of union organization at the local level coupled with an organization of work and technology that dictated broader and more universal trade union repertoires. Ultimately, this led to a strong and adversarial “shop floor” orientation in American unions that was resistant to employer prerogatives over technology and the organization of work.³¹ In Europe, unions were more accommodating to what is described nowadays as “functional labor market flexibility.”³²

Readers familiar with Europe’s high level of employment protection legislation and firm-level forms of workplace representation (such as Germany’s works councils)³³ may read the assertions of Europe’s greater workplace flexibility with some skepticism. However, it is quite easy to misinterpret the European reality and to project parochial aspirations onto “other” models. First and most importantly, focusing on employment protection misses the critical distinction between *functional* and *external-numerical* labor market flexibility.³⁴ Employment protection legislation primarily concerns external-numerical flexibility, which refers to the flexibility employers have in hiring and firing workers.³⁵ In contrast, functional flexibility refers to the ability employers have to transfer and move employees between different tasks and activities within the firm.³⁶ It is this latter kind of flexibility that is the main focus of the contrast described above and implicated by the practices of internal labor markets, seniority, job classifications, and the whole panoply of job control measures. Several observations bear out the surprisingly higher level of functional flexibility found in some European, as compared to American, establishments.³⁷ One confirmation of the rigidity of American internal labor markets is given by looking at earnings profiles based on tenure across countries with different levels of bargaining centralization.³⁸ Pay increases based on length of

30. See COEN TEULINGS & JOOP HARTOG, CORPORATISM OR COMPETITION? 130–62 (1998).

31. *Id.*

32. Vassilis Monastiriotis, *Labour Market Flexibility in UK Regions, 1979–1998*, 39 AREA 310, 310–22 (2007).

33. *Id.*

34. The distinction was introduced in JOHN ATKINSON, FLEXIBILITY, UNCERTAINTY, AND MANPOWER MANAGEMENT 11–12 (1984). In fact, Atkinson defines two other forms of flexibility, internal-numerical flexibility and financial or wage flexibility, in addition to external-numerical and functional flexibility. See *id.* Internal-numerical flexibility is the flexibility achieved in being able to adjust working hours and schedules, for instance as through part-time or over-time work, for current employees. See *id.* Financial or wage flexibility refers to the degree of variability in workers’ wages and compensation according to individual or market criteria. See *id.* at 12.

35. *Id.*

36. *Id.*

37. Streeck, *Skills and Politics*, *supra* note 4, at 321 (writing that “German industry was apparently much better than its Anglo-American competition at absorbing technological change and work reorganization and at industrial restructuring in general” and that the level of training of German manual workers was so high that “they were easy to retrain and redeploy in internal labor markets, while at the same time they were highly mobile in the external labor market because of their certified portable skills”).

38. TEULINGS & HARTOG, *supra* note 30, at 37 tbl.1.2, 41–42.

service are a key feature of internal labor markets.³⁹ The Dutch economists Teulings and Hartog find that the “tenure related wage growth in noncorporatist [i.e., decentralized] countries is easily two to three times as large as in the corporatist [i.e., centralized] countries.”⁴⁰

Second, it should be noted that high levels of employment protection in Europe are of relatively recent vintage, and came possibly as a response to the wave of industrial restructuring that followed the monetary and economic crises of the late 1960s and 1970s.⁴¹ Prior to this period, one only need read a few cases regarding personal dismissals in Sweden to realize that, at precisely the same time American unions were consolidating control over internal labor markets and defending “just cause” dismissal rules, Swedish employers enjoyed an astonishing level of both functional and external labor market flexibility.⁴² Finally, one must also acknowledge that, even given the relatively recent constraints on external flexibility, the amount of employment protection varies significantly between countries.⁴³ For instance, Denmark has had for some time highly organized and centralized bargaining coupled with low employment protection (and generous unemployment insurance and active labor market policies as substitutes).⁴⁴

It is likewise misleading to see European works councils as an overriding constraint on employers’ deployment of labor and technology.⁴⁵ Works councils fill a “representation gap” left by the more universalizing, and therefore less

39. See KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 53–56 (2004). In the ideal-typical internal labor market, jobs are arranged by seniority, with hiring from the external market only for entry-level positions at the bottom of the scale. Promotions to higher positions, with higher pay, are made to employees who stay with the firm. *Id.* at 53. Thus, tenure-related pay differentials have little to do with merit, productivity, or what the employee could get on the external labor market. Economists’ rationale for this arrangement is that tenure-related pay increases are actually a form of deferred compensation, meant to incentivize the worker to stay with the firm so that employers will be able recoup the investment in training her. *Id.* at 54–55.

40. TEULINGS & HARTOG, *supra* note 30, at 41.

41. This latter claim appears at least to be true for Sweden. See JONAS PONTUSSON, *INEQUALITY AND PROSPERITY: SOCIAL EUROPE VS. LIBERAL AMERICA* 125–26 (2005) (“In the context of severe industrial adjustment problems, the Swedish labor movement embraced employment protection in the 1970s, but this was essentially a defensive move.”). Moreover, employment protection legislation for other large European countries also dates from the same period. See, e.g., ROGER BLANPAIN ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW* 571, 635 (2d ed. 2012) (identifying 1969 and 1973 as the years in which Germany and France passed unjust dismissal legislation).

42. Erixon, *supra* note 24, at 681.

43. See Margarita Estevez-Abe et al., *Social Protection and the Formation of Skills: A Reinterpretation of the Welfare State*, in *VARIETIES OF CAPITALISM* 145 (Peter A. Hall & David Soskice eds., 2001).

44. See generally Per Kongshøj Madsen, *The Danish Model of “Flexicurity”: Experiences and Lessons*, 10 *TRANSFER: EUR. REV. LAB. & RES.* 187 (2004) (describing the Danish model of “flexicurity,” built on the “golden triangle” of a flexible labor market, generous unemployment insurance, and extensive job training and retraining policies).

45. See, e.g., Joel Rogers & Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, in *WORKS COUNCILS* 3, 11–20 (Joel Rogers & Wolfgang Streeck eds., 1995) (highlighting the historically ambivalent attitude toward works councils by both unions and employers).

particularizing, industry-level representation of workers' interests by unions.⁴⁶ In fact, as in the case of Germany, works-council legislation was passed by a conservative government as a way to limit the influence of unions at the workplace level.⁴⁷ Works councils often enjoy only the rights to be consulted by the employer, the right to be heard, and sometimes a right to veto particular employer decisions.⁴⁸ But rarely do they impose a full right of negotiation or duty to bargain on employers.⁴⁹ Even where they do, as in Germany, corresponding rights of a works council to strike are forbidden.⁵⁰ Thus, works councils often establish a much "weaker" level of worker representation than American unions do at the workplace level. Accordingly, it is better to see works councils as a kind of "company union" or "employee representation plan," which is why proposals for an American version of works councils that frequently appear in American discussions typically run afoul of the National Labor Relations Act (NLRA) section 8(a)(2) ban on employer-dominated unions.⁵¹ This is not to say that works councils are completely without legitimacy for workers. Even the right to be heard is significant and the lack of strong rights may, perhaps surprisingly, contribute to a more cooperative and

46. See BLANPAIN ET AL., *supra* note 41, at 597 (contrasting sectoral representation by unions with the "institution of works councils," which provide "a mechanism for individualizing the relationship between the employer and employee at each workplace").

47. See *id.* (explaining that while "there is a long history of various laws dealing with works councils, the 1952 Industrial Relations Regulation Act was enacted by a conservative government with the goal of keeping unions off the shop floor and limiting their influence to sectoral bargaining").

48. This is the case in France, for example. See *id.* at 661 (distinguishing French works councils, or employee representation committees, from the German version, and noting that in France an employer is obligated to "provide information and consult with the committee before implementing mergers, worker transfers, employee dismissals, layoffs, and employee training," but that French works councils "were never empowered by law to participate in management decisions as are works councils in Germany").

49. As compared to the French version, German works councils have much stronger legal rights. "On some issues, the works council only has a right to information and to be heard; on some issues, the works council has a right of approval and veto; and on others, there is a right to codetermination [i.e., right to bargain]." *Id.* at 599. The number of subjects over which German works councils have codetermination is impressive: scheduling work hours, temporary work reductions, increases in overtime, when and where wages are paid, vacation policies, introduction of new technical control systems affecting employment, workplace safety rules, employees benefits (such as cafeterias), and the overall salary structure. *Id.*

50. *Id.* at 598 (explaining that a works council "cannot call a strike and must remain neutral during one, but members of the works council may themselves participate as individuals in legal strikes called by the union"). An exception is the case of Spain. See Modesto Escobar, *Spain: Works Councils or Unions?*, in WORKS COUNCILS, *supra* note 45, at 153, 164 ("While works councils in other European countries typically have no legal recourse to the strike, Spanish councils do."). Of course, with the Spanish Civil War and the Franco dictatorship, the history of the Spanish labor movement contrasts significantly from other European labor movements. It is notable that stronger works councils coincide with practices that tend to converge with more American features. *Id.* (explaining that Spanish councils exercise significant control over managerial decisions, participate in the governance of internal labor markets, disfavor functional or geographic mobility, and, on the basis of these practices, can transform a plant into a de facto closed shop in situations where there is a dominant union). Thus, the exception tends to prove the rule.

51. See, for example, the historical and legal discussion in Joel Rogers, *United States: Lessons from Abroad and Home*, in WORKS COUNCILS, *supra* note 45, at 375, 389–402.

collaborative, but certainly no less meaningful, form of worker participation. In all, works councils probably lend to workplace and technological change an extremely valuable due process dimension. But incipient soviets they are clearly not.

B. Brief Comparative Analysis of Collective Bargaining Structures

For readers wanting a more analytically precise picture of how collective bargaining structures differ across countries, Table 1 and Figure 1 provide some comparative, cross-country data on collective bargaining and union centralization. Table 1 lists several different measures of centralization by country, with countries grouped, for expositional convenience, by Esping-Andersen's welfare-state typology.⁵² As in Esping-Andersen's argument, this three-fold division of countries represents important historical divergences between countries, such as those mentioned in the previous section, Part I.A.⁵³ The first two data columns ("Centralization" and "Coordination") capture two related but slightly different aggregate measures of centralization.⁵⁴ The final three columns ("Level," "Authority," and "Concentration") are disaggregated measures of the first two. "Level" measures the predominant level at which collective bargaining takes place (firm, industry, or nation) in the country,⁵⁵ while "Authority" measures the allocation of authority within union organizations⁵⁶ and "Concentration" refers to the proportion of union members within a particular affiliate or federation, while taking into account both the number of affiliates and federations.⁵⁷

52. GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 22–23 (1990).

53. *Id.*

54. Two measures are provided only because, while I believe the first measure—Centralization—is more accurate than the second, it covers only the years 1973–1993. The Coordination score covers the years 1960–2010.

55. "Level" provides a basic measure of bargaining centralization and gives the average, dominant level at which wage bargaining takes place in a particular country over the years 1960 through 2010, with higher scores indicating greater centralization. Bargaining is more decentralized when it takes place at a lower level, for example, when wage bargaining is conducted by a local union and a single company or even workplace. Bargaining is more centralized when it occurs between, for example, a single industry-wide union and an employer's association representing employers in the same industry. An even more centralized organization of bargaining happens when a federation of unions covering different industries and an equivalent employer's association bargain at a national level.

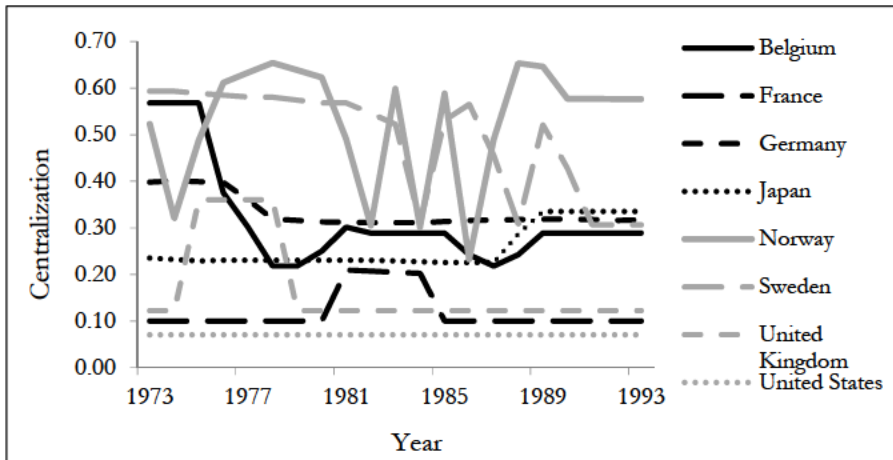
56. This concept is distinct from bargaining centralization. Rather than referring to the level at which bargaining *between* firms and unions takes place, it instead measures the allocation of authority *within* union organizations. The index is an average for each country over the years 1960 through 2010 and includes several different measures of authority, such as a national union's control (vis-à-vis a local union) over finances, strike funds, appointment of workplace representatives, and its veto power over a local union's decision to strike or make a company-level agreement. The index also captures the level of union authority at both federation and national affiliate level. Thus, a more centralized union is one where key decisions over strikes, finances, and appointments are concentrated at a higher level, at national affiliates rather than local unions, or at federations rather than national affiliates. For further discussion of these measures, see Visser, *infra* note 58 and accompanying text.

57. The "Concentration" index builds on the "Authority" index by adding a measure of union concentration to the measure of the allocation of authority within union organization. Union concentration refers to the proportion of union members within an affiliate or federation, while taking

It is worth highlighting a few patterns that emerge from Table 1. First, the United States stands out as having particularly decentralized union structures. In every measure, the United States ranks at the absolute bottom. The single exception is for Japan's score on the Authority 1 index. Second, levels of centralization also appear to be associated with different welfare regimes. According to any index, the mean level of centralization is higher in Social Democratic countries than in Conservative countries, and higher in Conservative countries than in Liberal countries.

To complement the synchronic picture of Figure 1, Table 1 ("Wage Bargaining Centralization") gives a more diachronic perspective. Figure 1 tracks the aggregate level of bargaining and union centralization (the "Centralization" index from the first data column of Table 1) across the years 1973 through 1993 for selected countries. As in Table 1, this figure reveals the large amount of diversity in the degree of centralization across countries. However, it also demonstrates the large extent of variation that can occur even within individual countries over time. Thus, although centralization remained uniform in the United States during this period, both Norway and Sweden experienced large changes. Of course, union and bargaining organization in both countries remain much more centralized than in the United States.

Figure 1: Wage Bargaining Centralization



into account both the number of affiliates and federations. Thus, union concentration will be higher when there are *more* members within *fewer* national unions or federations. Overall, the Concentration measure includes both union concentration and the centralization of authority at both federation and affiliate levels, again for the years 1960 through 2010.

Table 1: Indices of Union Centralization⁵⁸

	Centralization	Coordination	Level	Authority	Concentration
<i>Liberal</i>	0.19	1.73	1.61	0.27	0.28
Australia	0.47	2.73	2.63	0.43	0.51
Canada	0.07	1.24	1.18	0.32	0.28
United Kingdom	0.17	1.80	1.63	0.17	0.21
United States	0.07	1.16	1.00	0.16	0.13
<i>Conservative</i>	0.28	3.65	2.96	0.54	0.46
Austria	0.44	4.45	3.31	0.77	0.96
Belgium	0.32	4.20	3.59	0.55	0.46
France	0.12	2.16	2.02	0.52	0.21
Germany	0.33	4.00	2.94	0.47	0.44
Italy	0.17	2.94	2.84	0.38	0.32
Netherlands	0.37	4.08	3.59	0.71	0.54
Switzerland	0.28	3.65	2.96	0.54	0.46
<i>Social Democratic</i>	0.48	4.09	3.75	0.63	0.51
Denmark	0.46	4.04	3.02	0.63	0.53
Finland	0.42	3.96	3.90	0.45	0.39
Norway	0.53	4.27	4.12	0.78	0.58
Sweden	0.49	4.08	3.75	0.63	0.51
Japan	0.26	3.76	1.00	0.12	0.22
<i>Overall Mean</i>	0.31	3.27	2.71	0.47	0.42

II. WHY UNION STRUCTURES MATTER

The brief comparative and historical analysis provided in Part I explains why the level of bargaining centralization differs so markedly across countries, with the United States occupying one end of the spectrum. This Part explores more fully the implications of bargaining structures: Why does union centralization matter? What consequences does it have for unions and their social and economic objectives? As the discussion that follows will show, the reasons union structures matter are many, with some reasons better understood than others.

A. Responses to Risk in the Labor Market

One important consequence of bargaining structure follows most directly from the historical and comparative discussion. This consequence is that different bargaining structures trigger different union responses to labor market risk. Labor

58. Data, compiled by the author, are from Jelle Visser, *ICTWSS: Database on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts in 34 countries between 1960 and 2010*, AIAS (April 2013), <http://www.uva-aias.net/208>.

market risk—the threat of job loss or demotion produced variously by technological change, the reorganization of work, or fluctuations in product markets and the larger economy—is of course ubiquitous in capitalist economies dominated by wage and salaried employment.⁵⁹ When union structures are highly decentralized, the rational and optimal response of unions to such risk is a strategy of job control.⁶⁰ Precisely because of their decentralized structure, these unions do not have the institutional or organizational means to influence labor market conditions beyond their firm or narrow jurisdiction. Without such influence, a union's best strategy for addressing labor market risk is to protect the current jobs of its members: seniority-based layoff policies, job definitions and demarcations, internal labor markets, rules limiting employer discretion over technology, manning and staffing requirements, and so forth.

In contrast, the rational response to risk is very different for centralized unions. Job control may be one way of protecting workers from the vicissitudes of economic uncertainty and change, but it may come at a significant cost to workplace productivity.⁶¹ More centralized union organization and collective bargaining, which covers a broader and more diverse range of workers, will feel the “negative externalities” of job-control policies—higher unemployment and lower wages in different workplaces or in related, but “downstream” industries—more acutely than decentralized unions.⁶² In addition, more centralized union organization and collective bargaining will have the institutional means—for example, a greater ability to solve coordination problems—to transcend narrow job-control tendencies.⁶³ Thus, more centralized unions will have both the interest as well as the means to bargain for broader responses to labor market risk. Such responses include wage compression (which by reducing the variance of wages, reduces the uncertainty and risk associated with workers' reemployment prospects) and employer-based job training and retraining, as well as a panoply of more comprehensive public policy solutions, such as more generous unemployment insurance benefits and active labor-market policies.⁶⁴

This risk explanation for the contrasting negotiation objectives of unions in

59. For a general discussion of risk in the labor market and in particular how it is related to social welfare policy, see Estevez-Abe et al., *supra* note 43.

60. Although the response of unions to risk has been analyzed abundantly, the general argument pursued in this subsection—that different union structures induce distinct policy responses to labor market risk—is novel.

61. Streeck, *Skills and Politics*, *supra* note 4, at 319.

62. This idea is an extension of the popular insight of Mancur Olson. See Michael Wallerstein & Karl Ove Moene, *Does the Logic of Collective Action Explain the Logic of Corporatism?*, 15 J. THEORETICAL POL. 271, 271–72 (2003) (explaining how, according to Mancur Olson's theory of collective action, broader and more inclusive “encompassing” organizations will internalize negative externalities and therefore not advocate for policies that increase the level of public bads).

63. For the idea that more centralized or more coordinated labor unions will be more effective at shaping public policy, see generally Joel Rogers, *Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws,”* 1990 WIS. L. REV. 1 (1990).

64. See *supra* note 60 and accompanying text.

centralized and decentralized bargaining relationships also helps explain why industrial unions in “craft-dominated environments,” such as in the United States, responded so differently to risk than European industrial unions in Europe. To the extent it has existed at all, industry-level bargaining in the United States has been found, with varying levels of success, only in industries such as steel, coal, and trucking.⁶⁵ Unions and the workers covered under such agreements were therefore small islands in a sea of firms and jobs that either had more traditional craft unions or were completely unorganized.⁶⁶ The existence of both presented dim prospects for workers facing the possibility of job loss under industry agreements. Skill requirements and the variety of job control measures erected stiff barriers to entry in the craft sector, while low wages and poor job quality made the unorganized sector a very unattractive place to work.⁶⁷ Under these circumstances, the rational response for the few unions pursuing legitimately sector-level bargaining was to reproduce the job-control equivalents of craft unionism. As in Europe, a broader, political response to labor market risk would have required a much greater coverage of workers in all different industries and a much more coordinated strategy among industrial unions—such as a stronger, more centralized union confederation or at least all (or most) unions following the same, universalizing political strategy.⁶⁸

Thus, where decentralized unions favor job-control strategies as a way to address labor-market risk, centralized unions prefer broader, universal, and more “political” solutions. The key implication of these alternatives is their different consequences for workplace productivity. Job-control strategies restrict the employer’s ability to adopt new technologies or reorganize jobs and the workplace, while more universal strategies give employers more discretion over these decisions.

B. Productivity Investments

Centralized bargaining influences workplace productivity in several additional ways beyond those created by different labor-market risk policies. One of the most frequent arguments in favor of the productivity-enhancing consequences of central bargaining is that it reduces what economists call “opportunism” or the “hold-up” problem.⁶⁹ In general, the problem is as follows. Productive assets—machinery,

65. Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 INDUS. & LAB. REL. REV. 3, 3, 11 (1993) (comparing the “relatively decentralized” United States and United Kingdom to countries with more centralized bargaining and identifying the decline of multiemployer bargaining in steel, coal, and trucking in the United States).

66. Recall that at its peak, union density in the United States never exceeded forty percent of the workforce. Furthermore, unlike industry bargaining in Europe, the coverage of union contracts remained closely tied to the level of union membership.

67. See generally Marc L. Silver, *Rethinking Craft Administration: Managerial Position, Work Autonomy, and Employment Security in the Building Trades*, 5 SOC. F. 241, 244 (1990) (discussing the autonomy of those in craft unions in the construction industry to choose the method of their work).

68. See Marick F. Masters, *Federal-Employee Unions and Political Action*, 38 INDUS. & LAB. REL. REV. 612, 624, 627 (1985) (discussing the political lobbying unification and centralized nature of several federal worker unions).

69. The “opportunism” problem was first introduced and analyzed by the institutional

tools, skills—often have a certain level of specificity: they are good for one or few uses, but not others.⁷⁰ For instance, a dedicated piece of machinery may be useful for assembling electronic devices, but it is not much use for doing anything else. Similarly, a computer programmer may be highly skilled in her trade, but her knowledge is of little use in chemistry or commercial design. Such “asset specificity” presents a contractual problem when both sides of the bargain need to commit something to the enterprise.⁷¹ The problem presented by specific assets is that once one party commits, the other may seek to extract additional concessions.⁷² For instance, once one side acquires special machinery, the other side may feign a change in business circumstances requiring a higher share of the gains from the venture.⁷³ Since the assets are specific, the party being “held up” cannot simply walk away from the demand, and is best off conceding.

At this point, a problem of opportunism seems simply unfair. But there are larger concerns. If parties anticipate holdups or opportunism, then this will make them less willing to acquire or invest their specific assets.⁷⁴ This reduces the overall investment in specific assets and therefore makes everyone worse off.⁷⁵ In other words, not only is opportunism unfair, but it also lowers economic output.

Though opportunism is present in many kinds of contracting relationships, it is also pervasive in the employment relationship. The employment relationship is potentially long-term, exchanges are not “spot market” or simultaneous, and the future of the relationship is uncertain—particularly when an at-will presumption prevails.⁷⁶ Employers’ physical investments are often specific, as are workers’ skills—human capital cannot be diversified. As such, opportunities for holdups abound on both sides. Employees may strike or quit at inopportune times for the employer, demanding extra concessions in order not to do so. Employers may withhold pay or training—or employees’ jobs themselves—in order to extract asset-specific rents.

Given the existence and pervasiveness of these holdup problems, the argument is that centralized wage bargaining can ameliorate them. To illustrate this, I will analyze two such opportunism scenarios; the first involves a firm’s capital investment, and the second, employees’ skills.

economist Oliver Williamson and will be further elaborated below. For discussions, see WILLIAMSON, *supra* note 29, 114–15; OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 47–48 (1996).

70. WILLIAMSON, *supra* note 69, at 47–48.

71. *Id.* Both sides may bring specific assets to the table, but it is sufficient that only one side’s assets be specific.

72. *Id.*

73. *Id.*

74. This aspect gets particular attention in the formal literature. *See, e.g.*, Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119, 1122–25 (1990) (illustrating through example how asset-specific problems of opportunism can reduce investment and economic efficiency).

75. *Id.*

76. *See, e.g., infra* note 77 and accompanying text.

1. *Physical Capital*

The greatest potential for holdup over an employer's investment in physical or productivity investments would appear to be the case where a union bargains with only that firm's or plant's employees.⁷⁷ An individual employee's threat to quit after the company's installation of a new machine unless the company pays her more may not be terribly credible, unless that employee is the only person that can run the machine. When all employees can strike, however, the threat is quite real. Thus, firm-level collective bargaining presents a particularly acute potential for opportunism.

Central wage bargaining overcomes this problem.⁷⁸ When a union bargains for the workers of multiple employers, the resulting wage will be some average of productivity across firms.⁷⁹ One firm's investment will only partly influence this average, so the bargained wage will not change much as a response.⁸⁰ The firm can be assured that it will be able to recoup the majority of its investment. If the number of firms is large enough, then the wage in effect becomes independent of each employer's investment.⁸¹

Timing also matters. Note that the holdup problem only exists to the extent that the opportunistic party can renegotiate *after* the investment has been made.⁸² If wages or other terms are fixed for a long enough period before a firm makes an investment decision, then these terms will not change once the investment is made, and the firm will face no disincentive to invest.⁸³ Similarly, firms are unlikely to make their investment decisions all at the same time, so it may be useful to think of central wage bargaining as occurring before investment decisions are made, which again removes the holdup problem.

There is some evidence that bargaining structure does influence the investment and productivity decisions of firms.⁸⁴ Making a comprehensive review

77. For the first formal analyses of the holdup problem in the context of physical capital investments and firm-union bargaining, see Paul A. Groot, *Investment and Wages in the Absence of Binding Contracts: A Nash Bargaining Approach*, 52 *ECONOMETRICA* 449 (1984); and Simon Anderson & Michael Devereux, *Trade Unions and the Choice of Capital Stock*, 90 *SCANDINAVIAN J. ECON.* 27 (1988).

78. For analysis along the lines of this paragraph, see K.O. Moene et al., *Bargaining Structure and Economic Performance*, in *TRADE UNION BEHAVIOUR, PAY BARGAINING, AND ECONOMIC PERFORMANCE* 63, 109–14 (R.J. Flanagan et al. eds., 1993).

79. *See id.* at 111–12.

80. *See id.* at 113.

81. *See id.*

82. *See* PIERRE CAHUC & ANDRÉ ZYLBERBERG, *LABOR ECONOMICS* 411–14 (William McCuaig trans., The MIT Press 2004) (2001) (showing formally that the existence of the holdup problem is equivalent to supposing that investment decisions are made before wage bargaining, and its absence to supposing that investment decisions are made after wage bargaining).

83. *See* Groot, *supra* note 77, at 450–51 (contrasting the cases of the United States, which enforces collective bargaining agreements, and the United Kingdom, which does not, and predicting that investment under the U.S. rule will be higher, all else being equal, because unions in the United Kingdom can strike and renegotiate the agreement at any time due to its lack of enforceability).

84. Following the theoretical analyses of the investment holdup problem described above, several studies support the view that unionization in countries with decentralized bargaining is

of forty separate empirical studies of the impact of unions on innovation, the economists Naercio Menezes-Filho and John Van Reenen report that North American (mostly U.S.) studies “find consistently negative impacts of unions on [research and development spending].”⁸⁵ In contrast, unions in Europe do not appear to reduce spending on research and development.⁸⁶

2. Human Capital

Investments in human capital face a similar dilemma, but with some different and very interesting implications. Intuitively, we think of the employee as contemplating the critical investment, and of the firm using its bargaining power to extract more of the workers’ productivity at a lower wage cost. If this is the scenario, employees will be less willing to bear the costs of education and training if they cannot reap all of the gains from doing so. In addition, we also typically think of the education and skills in question as more or less specific. If this is not the case, and the skills in question are general—they can be employed in any or most firms—the employee can simply quit and work for another employer. The special requirement of the holdup problem—asset specificity—does not exist in the case of general human capital.⁸⁷

However, if there are some imperfections in the labor market, the dilemma of human capital investment actually extends beyond the specific case.⁸⁸ Any problem that would prevent a worker from obtaining her marginal productivity in her next

associated with lower investment in research and development and/or physical capital. See Stephen G. Bronars et al., *The Effects of Unions on Firm Behavior: An Empirical Analysis Using Firm-Level Data*, 33 *INDUS. REL.* 426 (1994) (finding that unionization is associated with less investment in durable assets, such as research and development, in the United States); Robert A. Connolly et al., *Union Rent Seeking, Intangible Capital, and Market Value of the Firm*, 68 *REV. ECON. & STAT.* 567 (1986) (finding that unionization is associated with lower investment in research and development in the United States); Kevin Denny & Stephen J. Nickell, *Unions and Investment in British Industry*, 102 *ECON. J.* 874 (1992) (finding that unionization is associated with lower investment rates in the United Kingdom); Barry T. Hirsch, *Firm Investment Behavior and Collective Bargaining Strategy*, 31 *INDUS. REL.* 95 (1992) (finding that unionization is associated with lower investment in research and development and physical capital in the United States); Cameron W. Odgers & Julian R. Betts, *Do Unions Reduce Investment? Evidence from Canada*, 51 *INDUS. & LAB. REL. REV.* 18 (1997) (finding that unionization is associated with lower net investment rates in Canada).

85. Naercio Menezes-Filho & John Van Reenen, *Unions and Innovation*, in *INTERNATIONAL HANDBOOK OF TRADE UNIONS*, *supra* note 4, at 293, 328.

86. *Id.* at 328. A somewhat related study shows that wage compression associated with centralized wage bargaining in Sweden was consistent with increases in productive efficiency as long as it focused on reducing wage inequalities between firms and did not compress within firm wage differentials too greatly. Hibbs, Jr. & Locking, *supra* note 3, at 755.

87. See generally Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 *J. POL. ECON.* 9, 17–25 (1962) (discussing extensively the effect of specific, on-the-job training on job turnover and decisions to quit and fire).

88. See generally Daron Acemoglu & Jörn-Steffen Pischke, *The Structure of Wages and Investment in General Training*, 107 *J. POL. ECON.* 539 (1999) (discussing the necessity of labor market imperfections, which imply that trained workers do not get paid their full marginal product when they change jobs, to induce the possibility of firm-sponsored general training).

best employment opportunity would create a holdup problem even for general skills. A number of possibilities could generate such imperfections.⁸⁹ One example is the presence of search frictions in the labor market. If finding a new job is uncertain, costly, or time consuming, the worker will not be able to obtain her marginal productivity immediately upon leaving her present job. This presents a problem of opportunism the employer can take advantage of.

Apart from this problem of opportunism, it would seem that centralized bargaining would only make problems worse. Since centralized wage bargaining not only raises wages for workers vis-à-vis firms and profits but also compresses wage differentials across firms and workers, this would, as reigning economic wisdom dictates, create worse incentives for workers to acquire skills. In the unreal but illustratively useful case of an identical wage rate for any level of skill, it would seem that workers would have absolutely no incentive to pay for training or education.

However, while this logic is true for employees, it is not true for employers.⁹⁰ If wages become less variable with respect to skill differences, then employers will now be sharing a larger gain in any productivity improvements of their employees. In effect, employers now become the residual claimants on their employees' skills. Now, employers have an incentive to pay for the training of their employees. Even more interestingly, if labor markets are imperfect or if employees are credit constrained, then the level of employee skill in the economy may be higher under centralized wage setting and a more compressed wage structure when the employer undertakes the cost of training its employees.

Since the reasoning applies to general skills as much to specific skills, this surprising outcome contravenes another basic tenet of human capital theory.⁹¹ Precisely because general skills can be used across a variety of employment settings, the theory says that employees rather than employers should (as a predictive matter) pay for them.⁹² Conversely, employers rather than employees should pay for specific skills.⁹³ Yet, a significant amount of evidence suggests precisely the opposite and confirms the predicted effect of labor market imperfections.⁹⁴

C. Employer Opposition

The preceding arguments can also help us understand another crucial consequence of wage-bargaining centralization. It is commonly argued that employers will oppose unionization of their workplaces to a greater extent when

89. *See id.* at 554–66.

90. *See id.* at 541.

91. *Id.*

92. *See* Becker, *supra* note 87, at 12–17.

93. *See id.* at 17–25.

94. *See* Daron Acemoglu & Jörn-Steffen Pischke, *Why Do Firms Train? Theory and Evidence*, 113 Q.J. ECON. 79 (1998) (providing theory and evidence that firms provide training for workers in general skills, and not just firm-specific skills).

collective bargaining is decentralized.⁹⁵ The reasoning is simple and follows the previous logic. If a single unionized employer has to pay a higher wage than other employers in the industry, then it will be placed at a competitive disadvantage.⁹⁶ On the other hand, if all employers in the industry are unionized and bargain with a single union to pay a uniform wage, then none is particularly disadvantaged compared to the others.⁹⁷ Accordingly, employer opposition should be less intense when industry bargaining prevails.

This basic logic is fundamentally correct, but I believe it misses an important part of the story. Think about the problem this way. Under which scenario does an employer stand to gain the most from defeating an incumbent union? When it is the only unionized employer in the industry, or when all employers in the industry are unionized? Arguably, the largest gains can be had when all other employers are unionized, and one employer is able to operate as the only nonunion employer. For certain, an employer does not want to be the only higher cost firm in the industry. But it would profit even more if it were the *only low-cost* employer in the industry. Thus, it seems plausible that employer opposition to unions would be greater under industry-level bargaining than under firm-level bargaining. For this reason, I do not believe the basic reasoning is fully adequate to explain why intuitively, as well as empirically, employer opposition to unions appears to be less in countries with more centralized bargaining.

What is needed to complete the story is something about the additional benefits that centralized bargaining brings to employers. As argued above, these include the productivity gains from greater workplace flexibility and higher investment in human and physical capital that follows the mitigation of holdup problems. Most of these benefits vanish if an employer resists the union and extracts itself from a multiemployer bargaining structure. Thus, in addition to the *disadvantages* presented by firm-level bargaining, one also needs to acknowledge the *advantages* of industry-level bargaining for employers in order to understand why employer opposition to unions recedes with greater wage-setting centralization. Nevertheless, the critical conclusion remains that greater centralization can explain why employers tend to oppose unions more in the United States than in many European countries.

D. Income Inequality and “Taking Wages Out of Competition”

There is typically a strong economist’s presumption of a trade-off between equality and efficiency.⁹⁸ The previous sections of this Part explained why greater centralization in collective bargaining is likely to have positive impacts on economic

95. See Rogers, *supra* note 63, at 37–38.

96. *Id.*

97. *Id.*

98. See ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 1 (1975); see also Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994).

productivity and why more decentralized bargaining is likely to have negative impacts. As this section will explain, greater centralization also reduces income inequality more effectively and extensively than decentralized bargaining. Rather than facing a trade-off between equality and efficiency, wage-setting centralization remarkably appears to be able to deliver both.

All kinds of collective bargaining reduce income inequality, but centralized bargaining has a larger effect than decentralized wage bargaining. Decentralized bargaining reduces inequality primarily by compressing wages within firms.⁹⁹ In addition, but to a lesser extent, decentralized bargaining also reduces inequality between firms through a kind of “union threat” effect: when organization of the workforce seems like a reasonable possibility, employers will keep wages relatively high in order to stave off unionization.¹⁰⁰ In comparison, centralized bargaining also reduces income inequality through both these channels, but with a more direct impact on the between-firm channel, since agreements apply to all employers in the industry.¹⁰¹ Overall, centralized bargaining reduces income inequality to a dramatically greater extent than decentralized bargaining. Figure 2 reveals the relationship between centralization and income inequality, as measured by the ratio of earnings of the fiftieth percentile in the income distribution to the earnings of the tenth percentile. As is shown, the relationship is strongly negative: greater centralization is associated with lower income inequality.¹⁰²

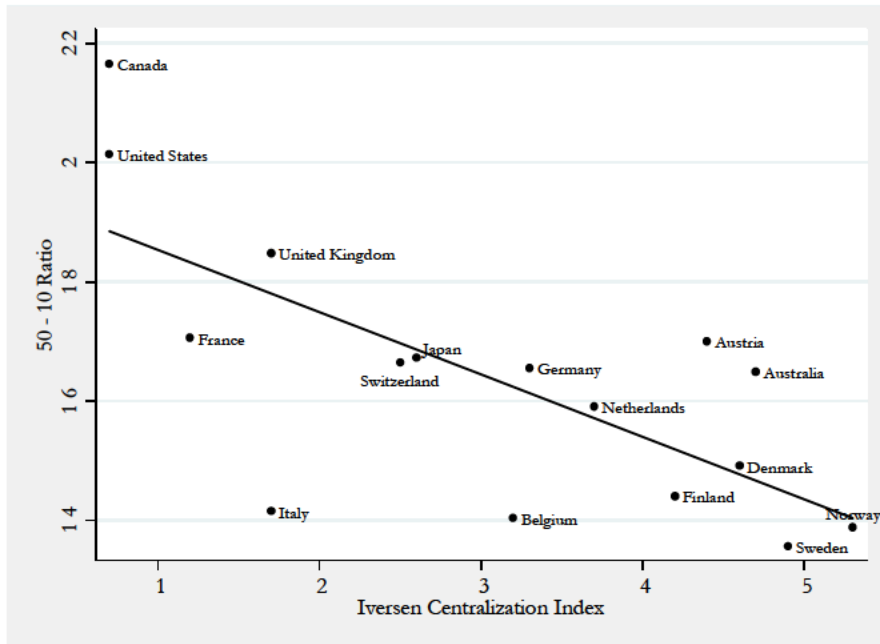
99. See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 79–82 (1984) (providing evidence that union wage policies lower inequality of wages within firms).

100. See Henry S. Farber, *Nonunion Wage Rates and the Threat of Unionization*, 58 INDUS. & LAB. REL. REV. 335 (2005); Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 517 (2011).

101. See Michael Wallerstein, *Wage-Setting Institutions and Pay Inequality in Advanced Industrial Societies*, 43 AM. J. POL. SCI. 649 (1999) (finding that wage-bargaining centralization is the most important factor explaining variation in earnings inequality across developed countries, with other economic and political factors having little impact); see also Hibbs, Jr. & Locking, *supra* note 3 (discussing the effects of centralized bargaining on between-firm and within-firm wage inequality).

102. There is a similar negative association between centralization and the ratio of income at the ninetieth percentile to the income at the tenth percentile, which is a broader measure of inequality. However, the impact of centralization on the 50-10 ratio is significantly stronger than on the 90-10 ratio, indicating that centralization (1) has a larger impact on the lower half of the income distribution than on the upper half and (2) reduces inequality by raising income at the bottom more than reducing income at the top. See generally Jonas Pontusson et al., *Comparative Political Economy of Wage Distribution: The Role of Partisanship and Labour Market Institutions*, 32 BRIT. J. POL. SCI. 281 (2002) (discussing the ways different labor market institutions, including centralized wage bargaining, affect the distribution of income in a country).

Figure 2: Centralization and Earnings Inequality



The impact of centralization on income inequality demonstrates that differences between firms are an important source of income inequality.¹⁰³ Nevertheless, the capital versus labor share of income remains an important driver of inequality.¹⁰⁴ Critical to its impact on reducing both sources of inequality is the ability of centralized bargaining to “take wages out of competition.”¹⁰⁵ When producers compete in similar product markets, raising wages for one of them increases that producer’s costs.¹⁰⁶ Increased costs will lead the producer either to reduce output or raise prices.¹⁰⁷ In the case of a price increase, buyers will substitute away from that producer and purchase the cheaper goods from other producers.¹⁰⁸ With either an output reduction or a price increase, the result is a reduction in the

103. *Id.*

104. See Tali Kristal, *The Capitalist Machine: Computerization, Workers’ Power, and the Decline in Labor’s Share Within U.S. Industries*, 78 AM. SOC. REV. 361 (2013) (studying the effects of changes in workers’ “positional power” and technology on the decline of labor’s share of income within different U.S. industries).

105. See Rogers, *supra* note 63, at 40, 85, 90, and 106.

106. The analysis in this and the following paragraph is consistent with the arguments of the standard models of union-oligopoly wage bargaining. See, e.g., Steve Dowrick, *Union-Oligopoly Bargaining*, 99 ECON. J. 1123 (1989); Amrita Dhillon & Emmanuel Petrakis, *A Generalised Wage Rigidity Result*, 20 INT’L J. INDUS. ORG. 285 (2002).

107. See, e.g., Dowrick, *supra* note 106, at 1130–31.

108. *Id.*

number of workers employed by the firm.¹⁰⁹ Of course, this is a situation the union would like to avoid. Indeed, one possible response of the union in this case is to lower its wage demands. This makes the employer's product relatively less costly, and saves unions jobs, but at the cost of higher wages. A union that is unable to continuously raise wages is probably one seen as little deserving of its members' loyalty or support.

The natural—and indeed historical—response of unions to the wage constraining effects of product-market competition is to attempt to organize all employers in the relevant product market.¹¹⁰ By coordinating their bargaining demands, unions at each employer can avoid undercutting one another's wages. The consequence is a wage level higher than any one union at a single employer would have been able to achieve. Of course, higher wages at all employers also reduces product demand.¹¹¹ But wage coordination avoids the specific substitution effect caused by buyers switching between the goods of different employers. The aggregate wage-employment bargain reached by coordinated bargaining is better for unions than what they could achieve separately.

By taking wages out of competition, unions are able to exert greater control over a central union objective. Greater centralization is critical for reducing income inequality both between firms as well as between capital and labor. Any labor movement that wants to have a serious impact on income inequality needs to pursue greater bargaining centralization.

E. Macroeconomic Benefits

Finally, the consequences of differences in union structures extend beyond the microeconomic dimensions of investments, productivity, and the rules and institutions governing the workplace. In fact, much of the early discussion and analysis about bargaining structure had to do with its effects on unemployment and inflation.¹¹² I will not dwell on this topic much now, since by this point the reader should see clearly enough the importance of bargaining centralization through its varied effects on functional flexibility, physical and human capital investment, employer opposition, and income inequality. Suffice it to say, centralized bargaining can help prevent inflationary wage-price spirals, such as occurred in the late-1970s United States, and consequently further encourage investment and increase employment.¹¹³ This feature of centralized bargaining is particularly important as a

109. *Id.*

110. Many of the famous, pre-Wagner Act American labor law cases involved situations where unions were attempting to bargain with firms on a broader, more coordinated basis. *See, e.g.,* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1398 (1971).

111. Dowrick, *supra* note 106.

112. For the starting point of a large literature on the macroeconomics of wage-bargaining centralization, see Lars Calmfors & John Driffill, *Bargaining Structure, Corporatism, and Macroeconomic Performance*, 3 ECON. POL'Y 13 (1988).

113. *See generally* Erixon, *supra* note 24 (describing the inflationary and macroeconomic implications of centralized wage bargaining as understood by Swedish trade union economists Gösta

complement to government full-employment policies.¹¹⁴ As such, this complementarity deserves much more study and discussion than can be offered in this Article.

III. LABOR LAW AND UNION STRUCTURES

How do rules of labor law relate to structures of bargaining? Are particular features of American labor law causes or consequences of highly decentralized bargaining in the United States? As this Part will argue, it is not difficult to find, perhaps unsurprisingly, several homologies between the structure of American collective bargaining and particular provisions of the National Labor Relations Act (NLRA). A much more challenging issue is attempting to parse out cause and effect. I do not claim to arrive at any final conclusions, but as the inquiry will reveal, my tentative conclusions suggest that provisions of the NLRA have more often been products of the bargaining structures they govern, rather than the reverse. Even if this is the case, one could also ask whether the law reacts back upon bargaining structures in a constraining way. In response, the following analysis will suggest that the law's recursive role is not overwhelmingly determinative either. These conclusions, though tentative, are mostly good news because the implication is that currently existing labor law probably does not place that many constraints on efforts to reform the nature of union and bargaining organization.

A. Exclusive Representation, Union Security, and Employer Domination

Critical to the functioning of both labor law and the American model of labor unions is the general principle of exclusive representation,¹¹⁵ as well as the more specific permission of union security agreements (in non-“right-to-work” states)¹¹⁶ and the prohibition against employer domination of labor organizations.¹¹⁷ All of these provisions have roughly the same effect, namely to maximize union power within firms and, consequently, to concentrate that power at a more decentralized level.¹¹⁸ The result is a union structure that is weaker both at industry and national levels as well as overall, since it is less able to make fundamental changes in the labor market.¹¹⁹

Rehn and Rudolf Meidner, the architects of what is now called the “Rehn-Meidner model” of economic policy).

114. See ROBERT POLLIN, *BACK TO FULL EMPLOYMENT* 154–55 (2012) (explaining that full employment and effective unions, as complimentary means for achieving rising working- and middle-class living standards, can play a central role in managing inflationary pressures in an economy committed to full employment).

115. Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle*, 20 *COMP. LAB. L. & POL'Y J.* 47, 47 (1998). Exclusive representation is established statutorily in section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (2012).

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

117. 29 U.S.C. § 158(a)(2).

118. See *infra* notes 120, 130, 133 and accompanying text.

119. See *infra* notes 120, 130, 133 and accompanying text.

The principle of exclusive representation is set forth in section 9(a) of the NLRA.¹²⁰ That section declares that unions “designated or selected” by a majority of employees in an “appropriate” bargaining unit “shall be the exclusive representatives of all employees” for the purposes of collective bargaining.¹²¹ Union security refers to an agreement the union makes with an employer wherein the employer promises to retain in employment only those employees who are members of the union.¹²² In essence, this means that all workers in a bargaining unit must financially support the labor union.¹²³ Although section 8(a)(3) prohibits employers from discriminating among employees on the basis of their membership (or nonmembership) in a union, that section contains a proviso that allows an employer to agree to a union security clause.¹²⁴ Finally, section 8(a)(2) prohibits employers from dominating or interfering with the formation or administration of a labor organization or contributing financial or other support to it.¹²⁵

Exclusive representation—essentially unique to the Wagner model of labor law¹²⁶—grants the labor union a representational monopoly. In origin, exclusive representation had a dual purpose: “to minimize conflicts between rival labor organizations and to prevent employers from fostering company unions and playing off one group of employees against another.”¹²⁷ Rival labor conflicts are only possible where several (decentralized) unions are competing over narrow jurisdictional boundaries.¹²⁸ Further, minimizing the role of employers in the representation of workers’ interests is plainly derived from the philosophy of job control, which seeks to limit and contain the employer’s control over the allocation of technology and the organization of work.¹²⁹ Exclusive representation is thus a fundamental component of decentralized job-control unionism.

Similarly, union security is also directly related to the objectives of job-control unionism. As was seen, the closed shop was fundamental, even the “crowning

120. 29 U.S.C. § 159(a).

121. *Id.*

122. Many versions of union security exist. A closed shop requires an employer to hire and maintain in employment only union members. A union shop allows an employer to hire any employee, regardless of union affiliation, but requires the new hire to become a union member within a certain period of time, such as thirty days, as a condition of employment. Finally, an agency shop is similar to the union shop, except that it only requires employees to make financial contributions to the union, rather than full, formal membership. *See* Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 350 & n.160 (2012).

123. 29 U.S.C. § 158(a)(3) (permitting union security agreements as long as they only require employees to “tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership”).

124. *Id.*

125. 29 U.S.C. § 158(a)(2).

126. Bok, *supra* note 110, at 1397.

127. *Id.* at 1426.

128. *See* Donald R. Colvin, Comment, *Jurisdictional Disputes*, 20 WASH. L. REV. & ST. B. J. 217, 217–18 (1945).

129. *See supra* note 8 and accompanying text.

achievement” of craft unionism in its purest form.¹³⁰ Similarly, the union shop served basically identical objectives.¹³¹ A higher proportion of members in a bargaining unit essentially means more power for the union.¹³² Union membership implies exposure of the worker to the union’s viewpoint and worldview. And even if this does not increase support for the union, dues paid even by dissenting members still constitute resources the union can use to strengthen its position. With this power, the union is better able to control the flow of work and jobs within the enterprise.

Finally, the prohibition on employer domination likewise fits extraordinarily well with a form of unionization and collective bargaining that seeks to influence the basic contours of the organization of work through job control and exclusive representation. Senator Wagner, the architect of the NLRA, often argued that an employer dominated or influenced organization could not adequately represent workers’ interests.¹³³ Furthermore, the constraints that section 8(a)(2) place on potentially collaborative relationships between unions and employers are by now well recognized.¹³⁴ Thus, along with exclusive representation and union security, the company-union ban comports nicely with the union philosophy of job control.

By comparison, the contrast to Europe could not be more striking. Exclusive representation is virtually unknown.¹³⁵ As a formal legal matter, the prevailing rule appears to be proportional representation.¹³⁶ Nominally, unions only bargain for their members, although in practice employers nearly always extend the agreement’s terms to all employees.¹³⁷ Nevertheless, a complementary legal rule also appears to prevail, which makes it illegal for union agreements to apply exclusively to union members.¹³⁸ In addition, in several countries, the closed shop and other union

130. See Streeck, *Skills and Politics*, *supra* note 4, at 319.

131. *Id.*

132. See *infra* note 153 and accompanying text.

133. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1445 (1993).

134. See Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994).

135. Virtually, because although Clyde Summers originally identified exclusive representation as a “unique” principle of labor law, see Clyde W. Summers, *Exclusive Representation By The Majority Union: A Unique Principle of American Law*, in HEDENDAAGS ARBEIDSRECHT 304 (1965) (Festschrift honoring Professor Marius G. Levenbach), he later argued that lack of competition between unions for members and certain legal procedures to designate “most favored” unions acted as functional equivalents for exclusive representation, see Summers, *supra* note 115.

136. For example, in Germany, “[b]y its terms, the [collective] agreement does not cover employees who are not members of the union.” See BLANPAIN ET AL., *supra* note 41, at 585.

137. Again, in Germany, “[u]sually, the employer will, nevertheless, apply the terms of the agreement to all employees, even those who are not members of the union.” *Id.*

138. *Id.* (explaining that the German Federal Labor Court has held that German labor law “includes a so-called negative freedom of association, so that provisions such as ‘closed shop agreements, shop agency agreements and even agreements which are intended to reserve advantages exclusively for trade union members’ are forbidden”). Swedish labor courts have arrived at a similar rule. See RONNIE EKLUND ET AL., SWEDISH LABOUR AND EMPLOYMENT LAW: CASES AND MATERIALS 27, 70–82 (2008).

security devices are prohibited.¹³⁹ Even in the countries where union security agreements were historically not formally prohibited,¹⁴⁰ unions agreed to an open shop clause.¹⁴¹ Currently, under European law, all of the European Union is “right to work.”¹⁴² Clearly, the result of the combination of all of these rules’ results in a kind of legally-supported—not just permitted—free-rider dilemma for unions. Yet, I would suggest that the effect also weakens unions’ representational monopoly at the local level and hence undermines any incipient job-control tendencies. Finally, as the discussion of works councils above made clear, employer domination at the workplace level is much more extensive in Europe than in the United States in unionized contexts.¹⁴³

How important are exclusive representation, union security, and the employer-domination prohibition for the maintenance of a decentralized collective bargaining regime in the United States? Each factor probably plays some role in sustaining such a regime, but it seems unlikely that their removal alone would dramatically change the structure of unions and collective bargaining. For many years Great Britain had no legal procedures for government certification of labor unions, including the absence of any provision for exclusive representation.¹⁴⁴ Yet Britain has retained a relatively decentralized collective bargaining structure.¹⁴⁵ A similar story could be told for union security. For example, even in American states that prohibit union security agreements, the difference between workers covered by a collective agreement and union membership is not terribly large.¹⁴⁶ Even unionized workplaces in right-to-work states have impressive *firm-level* union density.¹⁴⁷ Finally,

139. See, e.g., EKLUND ET AL., *supra* note 138, at 70–82.

140. In 2006, the European Court of Human Rights declared that union-security agreements were incompatible with the principle of freedom of association under the European Convention. See *Sørensen & Rasmussen v. Denmark*, 2006-I Eur. Ct. H.R. 3, 27–28 ¶ 65, 29–30, 30 ¶ 76–77, 32 (2006). Thus, in countries where union security had been absent because unions had agreed voluntarily to the open shop, European law prohibits union security.

141. Dimick, *supra* note 122, at 355 (noting that the union agreement to a general ban on the closed shop had existed in Sweden since 1906).

142. See *Sørensen & Rasmussen*, 2006-I Eur. Ct. H.R. at 27–28 ¶ 65, 29–30, 30 ¶ 76–77, 32 (referencing the right not to join a trade union per Article 11 of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms).

143. See *supra* notes 45–51 and accompanying text.

144. See OTTO KAHN-FREUND, *LABOUR AND THE LAW* 166 (2d ed. 1977); see also CHRIS HOWELL, *TRADE UNIONS AND THE STATE: THE CONSTRUCTION OF INDUSTRIAL RELATIONS INSTITUTIONS IN BRITAIN, 1890–2000*, at 84 (2005).

145. There has been a notable level of decentralization in Britain during the last few decades, starting from a comparatively low level of centralization, and labor law reform more recently has moved closer to the Wagner model. See HOWELL, *supra* note 144, at 128. But this appears more like a case of law following collective bargaining organization than the reverse.

146. The Bureau of Labor Statistics provides data on both union membership and the number of workers represented by a union. For instance, in Alabama, a right to work state, in 2012 the percentage of workers represented by a union was 10.5% while union density was 9.2%—not unimpressive in a state that does not permit union security agreements. News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, *Union Members—2013* (Jan. 23, 2013), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

147. Certainly union security matters for other union objectives. Unions defend union security

the prohibition of employer-domination of unions likewise may have a marginal effect on the structure of unions and bargaining, but it seems very unlikely that its absence alone would produce any notable change. Thus, the historical structure and organization of collective bargaining probably explains more about American labor law than the reverse.

B. Representation Elections and Bargaining Units

Other procedures ordained by the NLRA, in particular representation elections and the creation of “appropriate” units of bargaining, also influence the structure of union organization and collective bargaining. To become the certified bargaining representative, section 9(c)(1) requires that a union prevail with a majority of the votes in a NLRB-supervised “election by secret ballot,” which the Board will direct after the filing of a petition (typically by the union) and a finding that a “question of representation exists.”¹⁴⁸ Directing an election also requires finding an appropriate bargaining unit.¹⁴⁹ The statute gives little guidance for what constitutes “appropriateness,” but a healthy body of Board case law has developed to address this issue.¹⁵⁰ In this inquiry, the principal concern in evaluating a proposed bargaining unit is whether the employees share a “community of interest.”¹⁵¹

This first important point to make is the way these two inquiries interact. For some time, the Board has tended to express a preference for smaller bargaining units. Nominally, the justification for this is that “the smaller unit assures greater homogeneity of employee interest and maximizes employee self-determination.”¹⁵² Formally, the Board is not tasked with encouraging unionization, but rather with giving full freedom to workers’ preferences over unionization.¹⁵³ Clearly, however, a policy that assures greater homogeneity of employee interests is likely one that will encourage greater unionization.¹⁵⁴ Whatever the rationale, however, the

with great intensity and right-to-work legislation probably makes unionization more difficult. But these are separate questions from how union security affects the degree of union centralization.

148. National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1) (2012).

149. *Id.*

150. 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 641 (John E. Higgins, Jr. et al. eds., 5th ed. 2006).

151. *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (“The Board’s principal concern in evaluating a proposed bargaining unit is whether the employees share a ‘community of interest.’”).

152. ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 234 (15th ed. 2011).

153. See Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 656 (2010) (“Federal labor law aims to ensure that employees have a choice on the question of unionization.”).

154. Henry S. Farber, *Union Success in Representation Elections: Why Does Unit Size Matter?*, 54 INDUS. & LAB. REL. REV. 329, 330 (2001) (“[I]t has always been the case that unions have been less likely to win NLRB-supervised representation elections in large units than in small units . . .”). For an interesting historical analysis of internal Board policy change that supports this view, see JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994*, at 171–72 (1995), explaining that in 1962, in the decision of *Saw-On Drugs, Inc.*, 138 N.L.R.B. 1032 (1962),

consequence is the same: small bargaining units and greater decentralization.¹⁵⁵ Notice as well the consequence of *forms* of worker representation. As we saw, the greater heterogeneity of interests represented by European industrial unions does not mean that these unions have necessarily been less successful at representing their members.¹⁵⁶ On the one hand, they have been forced to find and advocate for broader, more universal definitions and policies of worker interests.¹⁵⁷ On the other hand, alternative forms of workplace representation, such as works councils, have developed to fill the representation gap left by broad industry-level bargaining.¹⁵⁸

The Board's bargaining unit determinations also more directly impact the question of bargaining structure. This can be observed in the Board's policy toward multiemployer bargaining units. Unlike other bargaining units, units covering more than one employer must be established *consensually*.¹⁵⁹ Accordingly, the Board itself may not direct an initial union representative in a multiemployer unit.¹⁶⁰ If employers are likely to agree to bargain on a multiemployer basis only if all relevant employers agree to do so, then this policy essentially gives a single employer veto power over the whole multiemployer unit. In effect then, the policy discourages multiemployer bargaining.

As with exclusive representation, union security, and the employer-domination prohibition, representation elections are unknown in Europe and, even more narrowly, appear only in countries such as the United States, Canada, and to a lesser extent the United Kingdom as features of the American and peculiar Wagner model of labor law.¹⁶¹ Given the analysis of bargaining structure and employer opposition in Part II.C, it is not surprising that where union recognition would be a particularly contentious issue, legal procedures would be adopted to referee this issue. It is interesting to note that the creation of a statutory method of recognition in the United Kingdom came after a period of further decentralization of collective bargaining.¹⁶²

As in the case of exclusive representation and union security, I suggest that it is unlikely that representation elections and bargaining-unit determinations exercise a strong sway over the structure of bargaining. True, the Board's influence over

“the Board overturned a long-standing rule that the appropriate unit for collective bargaining in retail chain store operations should include employees of all stores within an employer's administrative division or geographic area” and that “the old rule, by requiring very large units, had impeded employees' statutory right to self-organization.”

155. *Id.*

156. *See supra* note 21 and accompanying text.

157. *See supra* note 22 and accompanying text.

158. *See supra* note 46 and accompanying text.

159. 1 THE DEVELOPING LABOR LAW, *supra* note 150, at 715–16.

160. COX ET AL., *supra* note 152, at 253.

161. *See* BLANPAIN ET AL., *supra* note 41, at 240–41 (describing union recognition procedures in Canada). The United Kingdom has only had statutory recognition procedures, including the possibility of a secret ballot, since 2000; consequently, most recognition occurs voluntarily—ninety-four percent—which was the traditional method of recognition before labor law reforms. *Id.* at 517–18.

162. HOWELL, *supra* note 144, at 86–130.

bargaining-unit determinations is quite extensive and the implications are significant, as the history of policy conflict in this area indicates.¹⁶³ But this role seems small if it is the case that having any form of government supervised recognition elections and bargaining-unit determinations is closely correlated with decentralized bargaining structures. Furthermore, one can again point to the case of the United Kingdom, which for many years had no recognition procedures or government-ordained unit determinations, and yet has had relatively decentralized collective bargaining.¹⁶⁴

C. Subjects of Bargaining

Since the structure of bargaining influences the subjects of bargaining, an investigation into the legal doctrines governing this area provides some illuminating insight into the nature of American unionism. This area is one that has always been fraught with legal difficulty.¹⁶⁵ First, and on the one hand, the Act is clear in imposing a duty to bargain on both union and employer.¹⁶⁶ However, as courts have held, almost from the outset, this duty does not compel any party to concede to any particular term.¹⁶⁷ Rather, parties only have an obligation to meet and confer and bargain in “good faith” over terms and conditions of work.¹⁶⁸ Second, the duty to bargain applies only to wages, hours, and other conditions of employment.¹⁶⁹ From this language of the Act, labor law has developed the distinction between “mandatory” and “permissive” subjects: mandatory referring to those subjects that parties must consider and over which they have a legal right to bargain to impasse, and permissive referring to those subjects that may be discussed but that no party may insist be considered.¹⁷⁰

163. See GROSS, *supra* note 154.

164. See *supra* notes 144–45, and accompanying text. The relatively recent adoption of formal recognition procedures only reinforces the argument, since they followed, rather than preceded, even further decentralization of collective bargaining in the United Kingdom. See *supra* note 162 and accompanying text.

165. See 1 THE DEVELOPING LABOR LAW, *supra* note 150, at 820 (“The reciprocal duty of an employer and the representative of its employees to bargain ‘in good faith’ is among the most unruly of the obligations imposed by the [NLRA].”).

166. National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (2012); *id.* § 158(b)(3), (d).

167. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46 (1937) (explaining that the NLRA does not compel agreement and only encourages a free opportunity for negotiation to bring about adjustments and agreements); see also 1 THE DEVELOPING LABOR LAW, *supra* note 150, at 823 (describing history and legislative intent that the NLRA does not compel parties to reach an agreement).

168. 29 U.S.C. § 158(d) (defining the duty to bargain as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith”).

169. *Id.* (stating that the duty to bargain applies “with respect to wages, hours, and other terms and conditions of employment”); see also *id.* § 159(a) (stating that collective bargaining applies “in respect to rates of pay, wages, hours of employment, or other conditions of employment”).

170. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349–50 (1958) (endorsing the Board’s distinction between mandatory and permissive subjects of bargaining); see also *Wooster Div. of Borg-Warner Corp.*, 113 N.L.R.B. 1288, 1292 (1955); 1 THE DEVELOPING LABOR LAW, *supra* note

Much American legal commentary has been captivated by the way important Supreme Court decisions have (seemingly) arbitrarily narrowed the range of mandatory subjects by importing “values and assumptions” outside the text of the NLRA.¹⁷¹ In particular, James Atleson declares that judicial interpretations of the duty to bargain represent one of the “stronger and clearer” ways the U.S. Supreme Court has imported into the NLRA “the almost-never-stated goal of protecting inherent managerial prerogatives *from* collective bargaining.”¹⁷² A leading case in this area is *Fibreboard Paper Products v. NLRB*.¹⁷³ The Supreme Court held in *Fibreboard* that the employer was obligated to bargain about its decision to subcontract work to an independent firm, as well as about the effects of such a decision on employees.¹⁷⁴ The underlying reasoning of the decision emphasized the absence of capital investment and the lack of impact on the employer’s right to manage the company.¹⁷⁵ Thus, although the Court concluded that the employer *did* have a duty to bargain over the issue of subcontracting, subsequent legal scholarship has emphasized how the language of capital investment and managerial rights has limited the scope of the Act.¹⁷⁶

Yet, rather than seeing these decisions as narrowing the range of mandatory subjects, the truly startling finding is just how broad this range is comparatively speaking. Sweden and the other Nordic countries, where union density tends to be highest among developed countries, provide surprising contrasts to American assumptions about managerial rights and the duty to bargain.¹⁷⁷ Section 38 of Sweden’s Joint Regulation Act specifically addresses subcontracting, and with significant exceptions, obligates employers to negotiate with the union about decisions to contract out work.¹⁷⁸ First, it should be noted that the Act’s use of the

150, at 829–32 (describing the development of the distinctions between mandatory, permissive, and illegal subjects of bargaining).

171. See generally JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) (arguing that courts have imported employer-friendly doctrines inapposite to the intent and purpose of federal labor statutes); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004) (discussing how the Supreme Court used nineteenth-century doctrinal discourse to present, in strong and clear terms, five core values regarding American labor law—including continuity of production, employee control, imposition of a “limited status” on employees in the management of the enterprise, management ownership of the common enterprise, and limitation of rights for management—which predate the statute and have remained substantially unaltered in statutory and common law).

172. ATLESON, *supra* note 171, at 114.

173. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

174. *Id.* at 210–17.

175. *Id.* at 213.

176. ATLESON, *supra* note 171, at 124–35 (criticizing the Supreme Court’s decision for emphasizing factors extraneous to the text of the NLRA such as managerial decisions that “lie at the core of entrepreneurial control”).

177. Dimick, *supra* note 122, at 332–35 (comparing rates of union membership, or union densities, across countries, and showing the union density is highest in the Nordic countries of Denmark, Finland, Norway, and Sweden).

178. In Sweden, under section 4 of the 1936 Act on the Right to Organise and Negotiate, both unions and employers are under a general duty to negotiate. See EKLUND ET AL., *supra* note 138, at 118–

term “negotiation” is more aptly described as “consultation.”¹⁷⁹ A duty to consult obligates the employer to inform the union and gives the union a right to be heard, but is otherwise notably weaker than a good-faith duty to bargain.¹⁸⁰ Nevertheless, section 39 of the same Act also permits the union to veto any employer decision that “violate[s] the law or the collective agreement applicable to the work or that such action would otherwise contravene generally accepted practices.”¹⁸¹ In European practice, a veto right sits somewhere between mere consultation rights and a good faith duty to bargain.¹⁸² But what is particularly interesting is what this veto right may *not* be used for: section 40 says that the veto is not applicable if the union lacks a reasonable basis for its position and specifically that the veto may not be exercised “to reserve the job opportunities—when the work in question will be performed by members of another union—to the union’s own members.”¹⁸³

Thus, to put the contrast most sharply, in the United States, unions have a right to bargain with employers over subcontracting decisions only when they affect their members, while Swedish unions have a (weaker) right to veto, and only when subcontracting decisions do *not* affect their members. In essence, the veto is a mechanism to prevent the employer from evading its legal (e.g., tax and social security fees) and already agreed-upon contractual obligations, not a means of advancing particular union members’ interests.¹⁸⁴ In other words, the veto protects general labor market standards, not particular workers’ jobs. This contrast in legal responses to subcontracting captures very nicely the fundamentally different nature of collective bargaining in decentralized and centralized regimes. Few better

26. However, the Swedish duty is substantially weaker than in U.S. labor law. The duty requires little more than the appearance at negotiations and the signing of an agreement, if one is reached, and thus does not even contain a good faith requirement as in the United States. *Id.* Section 11 of the Joint Regulation Act also imposes on employers subject to an existing collective agreement a duty to bargain with the union about decisions “regarding significant changes in work or employment conditions.” *Id.* at 205 (quoting § 11 LAG OM MEDBESTAMMANDE I ARBETSLIVET (Svensk författningssamling [SFS] 1976:580) (Swed.)). This duty arguably encompasses a broader range of mandatory subjects than does American labor law. *See generally* Timothy A. Canova, *Monologue or Dialogue in Management Decisions: A Comparison of Mandatory Bargaining Duties in the United States and Sweden*, 12 COMP. LAB. L.J. 257 (1991) (comparing American and Swedish labor laws involving the duty of employers and unions to negotiate over decisions affecting working life). However, the Joint Regulation Act’s use of the term “negotiation” is more aptly described as “consultation,” which imposes a significantly weaker duty than a good faith bargaining requirement. *See infra* note 179 and accompanying text.

179. EKLUND ET AL., *supra* note 138, at 205 (writing that the Swedish Joint Regulation Act “uses the term ‘negotiation’ with regard to a procedure that more aptly can be termed ‘consultation’”).

180. *See* BLANPAIN ET AL., *supra* note 41, at 661 (contrasting “consultation” rights in the French case with “codetermination,” or bargaining, rights in the German case).

181. EKLUND ET AL., *supra* note 138, at 239.

182. *See* BLANPAIN ET AL., *supra* note 41, at 661 (situating “approval and veto” rights between rights of consultation and rights of codetermination in the case of German works councils).

183. EKLUND ET AL., *supra* note 138, at 240.

184. *Id.* at 239 (citing the Swedish Minister of Labor’s remarks on the objectives of the veto right, which include preventing an employer’s “[e]vasion of collective agreements and legislation [e.g., tax and social security fees]” by contracting out work).

examples of the differences between job-control and industrial-political unionism, and their reflection in law, could be found.

One could conjecture that the legally imposed limits on mandatory subjects of bargaining could have an effect of *discouraging* union decentralization. For instance, if carving out the “core of entrepreneurial control”¹⁸⁵ from the domain of mandatory subjects makes it more difficult for unions to advance a particularistic job-control agenda, then one could think that American unions would be forced in response, like their European counterparts, to develop broader and more universal goals and collective action repertoires.

Yet, not least for the reasons just given, my belief is that the law governing mandatory and permissive subjects has had very little such effect.¹⁸⁶ First, as I have argued, in comparative perspective the range of mandatory subjects appears, if anything, broader than in other countries. The state of the law thus gives unions ample room to pursue job-protective strategies. Second, it is extremely unclear where the line between mandatory and permissive subjects lies.¹⁸⁷ As long as the union is able to press its case, the law’s uncertainty can only fail to limit the unions’ bargaining demands.¹⁸⁸ Third, besides being conceptually hard to distinguish, the difference between mandatory and permissive subjects is relatively easy to evade in practice. Since nothing prohibits consensual bargaining over permissive subjects, there is always scope for unions to negotiate over such subjects by conceding on a mandatory term over which the union has a right to bargain to impasse. Finally, even where the law has limited the duty to bargain over matters of managerial concern, it has never questioned the duty to bargain over the *effects* of these managerial decisions.¹⁸⁹ Since effects bargaining surely produces costs, the difference between bargaining over the exercise of a managerial right (permissive) and bargaining over the effects of its exercise (mandatory) creates yet another elusive distinction from the employer’s economic point of view.

D. Restrictions on Economic Action

Finally, this section will consider the relationship between limitations on the ability to strike and the structure of collective bargaining. Several different labor laws governing strikes are relevant to bargaining structure. Perhaps most directly

185. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 213 (1964).

186. This view is supported elsewhere. See ATLESON, *supra* note 171, at 115–16 (arguing, despite his critique of the judicial limitations on mandatory subjects, that “heretical though it may be for a law professor to assert, . . . these basic rules do not necessarily affect bargaining”).

187. *Id.* at 120 (describing the mandatory/permissive distinction as “inherently vague,” and that because “no guidelines exist to determine where the mandatory/permissive line should be drawn[,] . . . [t]his should lead to the most serious objection to the dichotomy”).

188. *Id.* at 115 (“For instance, a relatively strong union or employer may find some way to get the other side to discuss a permissive term.”).

189. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 681 (1981) (“There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the ‘effects’ bargaining mandated by § 8(a)(5).”).

relevant is section 8(b)(4)(A) of the NLRA, which prohibits the use of concerted work stoppages where the objective is “forcing or requiring any employer or self-employed person to join any labor or employer organization.”¹⁹⁰ Although added as part of the Taft-Hartley amendments to the NLRA,¹⁹¹ this prohibition is consistent with other parts of the Act and its interpretation. “The Board has always held that multiemployer bargaining is consensual on both sides of the bargaining table” and an attempt to coerce the other side into multiemployer bargaining violates the duty to bargain under sections 8(a)(5) and 8(b)(3).¹⁹² In any case, these rules would appear to limit the ability of unions to use strikes to goad employers into broader, industry-wide bargaining structures.

Other restrictions on unions’ economic action have also been argued to limit a broader, more universalistic unionism. Infamously, the Taft-Hartley Act, in addition to section 8(b)(4)(A)’s prohibition, banned secondary activities.¹⁹³ Secondary activity is the use of economic pressure against an employer with whom the union does not have a dispute in order to compel that employer to cease doing business with another employer with whom the union does have a dispute.¹⁹⁴ Since secondary activities require a certain level of coordination across employers, it is easy to draw the conclusion that their ban also inhibits the emergence of more coordinated unions and bargaining. For instance, in his legal history of the formation of the American labor movement, William Forbath sees pre-Wagner Act prohibitions of secondary and sympathetic strike actions as part of a broader set of legal constraints that contributed to the formation of a narrow, bread-and-butter or “business” union movement in the United States.¹⁹⁵

How significant have these prohibitions been for arresting the growth of more coordinated or centralized unions and collective bargaining? In this case, the conclusion I draw is more ambiguous than in the other areas of labor law. First, the Taft-Hartley prohibitions that directly prohibit strikes for the object of compelling an employer to join a multiemployer unit are easily evaded. However, while one can question Forbath’s class-based interpretation of the secondary boycott, it may

190. National Labor Relations Act § 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A) (2012).

191. *Id.*

192. Douglas L. Leslie, *Multiemployer Bargaining Rules*, 75 VA. L. REV. 241, 242 (1989).

193. 29 U.S.C. § 158(b)(4)(i)(B).

194. The Taft-Hartley-amended NLRA makes the prohibition in as general terms as possible. The language prohibits concerted work stoppages where the object is “forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.” *Id.*

195. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 1–8 (Harvard Univ. Press 1991) (1989). Forbath argues that nineteenth-century labor law played a pivotal role in shaping the labor movements strategic and ideological thinking and producing a narrow, “pure and simple” business unionism that was “job conscious” rather than “class conscious.” *Id.* One example was the use of the “labor injunction,” which was used primarily to enjoin secondary boycotts, sympathy strikes, and organizing activities. *Id.* at 59–60. For Forbath, boycotts in particular were significant because “they mobilized whole working-class populations—broad networks of workers (and their families) not linked to individual workplaces or particular unions.” *Id.* at 83.

nevertheless play an indirect role in encouraging employers to bargain with unions on an industry-wide basis.

The direct prohibition of strikes with multiemployer bargaining objectives is easily evaded because unions can resort to other legal tactics to encourage employers to bargain on an industry-wide basis. For example, consider “whipsaw” strikes.¹⁹⁶ A whipsaw strike is a strike where a union selectively and successively strikes against only certain employers in the same product market.¹⁹⁷ Because only one employer is struck while its competitors are still operating, this poses far more damage to the struck employer than if the union had struck all employers simultaneously.¹⁹⁸ Obviously, such tactics place unions in a position of greater advantage vis-à-vis employers. By the same token, such tactics also encourage employers to respond collectively: multiemployer lockouts are a common response tactic to the whipsaw strike.¹⁹⁹ More importantly, employers are better off bargaining on a multiemployer basis rather than allowing themselves to be targeted, one after the other, by the union.²⁰⁰ Thus, as long as unions do not demand that employers join a multiemployer bargaining association, whipsaw strikes are an effective way to encourage employers to do so without violating the express provisions of the Act.

The connection between whipsaw strikes and industry bargaining is not just an American story. In Sweden, broad, industry-wide—and later multi-industry wide—centralized bargaining began in the engineering (machinist) industry, where employers resorted to the multiemployer “sympathy” lockout for identical reasons as in the United States.²⁰¹ Specifically, unions’ “cheap pressure-point tactics could be extraordinarily effective in whipsawing employers, picking them off one at a time (*lönesaxning*).”²⁰² By whipsawing employers, a large union treasury “could comfortably fund a small number of strikes indefinitely.”²⁰³ In response, a multiemployer lockout could trigger “a quick and massive bloodletting of union strike funds,”²⁰⁴ in addition to the other benefits cited above. Multiemployer lockouts grew into multi-industry lockouts as employers strove to hammer unions

196. In any discussion of multiemployer bargaining, the issue of “whipsaw” strikes is likely to follow, suggesting that multiemployer bargaining is primarily an employer response to such union tactics. To take just one example, in one of the central Supreme Court cases dealing with multiemployer bargaining rules, the use of a whipsaw strike figured prominently. *See* Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 410, 423–24 (1982).

197. Leslie, *supra* note 192, at 242 & n.14.

198. *Id.*

199. *Id.*; NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 94, 97 (1957) (finding that a multiemployer lockout in response to a whipsaw strike does not violate the National Labor Relations Act).

200. COX ET AL., *supra* note 152, at 252 (“Many employers believe that they have greater bargaining power when they can face a potential strike as a group, unlike when the union bargains with competing companies one at a time threatening each with a strike while the others are filling the needs of their customers.”).

201. *See* SWENSON, *supra* note 26, at 71–82.

202. *Id.* at 74.

203. *Id.*

204. *Id.*

into submission.²⁰⁵ In fact, multiemployer lockouts were so effective that employers “opposed anti-union legislation in 1911 on the grounds that restricting unions’ ability to use boycotts, blockades, and sympathetic strikes, which also hit innocent third parties, would undermine the legitimacy of lockouts.”²⁰⁶ For all that, on the unions’ side, it appears that “sympathy strikes were fairly rare and unimportant” in Sweden.²⁰⁷ Surprisingly, it was employer collective action, more than employee collective action, that led to centralized bargaining in Sweden.²⁰⁸

All of this raises questions about the place of secondary boycotts in building more coordinated union organizations and collective bargaining. Given what we have said before, unions’ most effective tactic is *not* to extend the strike to multiple fronts and employers, but rather to concentrate economic pressure on a single employer at a time, and (for once) let market competition work for the unions. Certainly, a simultaneous strike action against multiple employers could serve important, expressive (rather than instrumental) objectives. But these goals can be accomplished with general, political, or sympathy strikes, which, unlike the

205. *Id.* at 80–82. It is interesting to note what employers were able to achieve with their coordinated lockout tactics. In 1905, the Swedish Engineering Employers’ Association and the Swedish Metal Workers’ Union concluded the “first industry-wide multi-employer wage settlement for any industry in the country.” *Id.* at 78. Included in that agreement was the union’s promise of “no restrictions on managerial rights regarding the introduction and manning of machinery or hiring of unskilled workers and apprentices.” *Id.* at 79. In addition, the union agreed to the open shop, “thereby eliminating any residual possibility of imposing restrictive work rules by controlling the supply of labor.” *Id.* In short, job-control unionism was eliminated. One year later, the Swedish Employers’ Confederation imposed on unions, as well as member employers, the terms of the “December Compromise.” *Id.* at 80–81. The famous “paragraph 23” of that agreement prohibited closed-shop agreements and union control over managerial decisions involving hiring, firing, and supervising work. *Id.* at 81. Paragraph 23 also required the inclusion of “an iron-clad managerial rights clause” in every collective agreement. *Id.*

206. *Id.* at 75.

207. *Id.* at 81.

208. This conclusion raises the question: Why have American employer responses been so different from those of Swedish employers? Although clearly some employers have responded collectively to coordinated “whipsaw” strikes in order to discipline rather than destroy them, the dominant employer response in the United States, both historically as well as today, has been to bust or break unions. Indeed, Swenson characterizes the employer response in the United States as one of “strikebreaking,” which was “especially suited to destroying” unions; in Sweden, employers’ goal was “to tame unions, not destroy them.” *Id.* at 82. To explain the difference, Swenson points to differences in firm size, rates of enterprise formation, country size, and immigration and emigration patterns. *Id.* But one could also highlight differences in internal union organization. Indeed, when in 1900 American employers associated with the National Metal Trade Association attempted to make a multiemployer agreement with the International Association of Machinists in what is now called the “Murray Hill” Agreement, the bargain was undermined by a national union strike over a disagreement on wage increases. *Id.* at 53. In response, employers declared war on the unions. As Swenson writes, employers “slammed the door shut for all time [on centralized bargaining], because union militants used the strikes to impose the closed shop . . . and rules prohibiting men from operating more than one machine at a time, working for piece rates, and instructing unskilled workers.” *Id.* The national Machinists’ leadership appeared incapable, even fearful, of containing local militancy. *Id.* at 53–54. This is consistent with weak internal union centralization. See *infra* Part IV.A and accompanying text.

secondary boycott ban, are not prohibited outright.²⁰⁹ Instead, secondary boycotts are likely effective because they are a means of bringing yet additional economic pressure on a *single* employer establishment, albeit through a secondary employer.²¹⁰

Given this conclusion, it is possible to see the secondary boycott as playing a complicated, dual role. On the one hand, given their single-firm focus, the secondary boycott is entirely consistent with a relatively decentralized form of union organization, one that seeks to extract the maximum share of rents from single employers or establishments.²¹¹ On the other hand, inasmuch as unions use the boycott in a whipsaw like fashion, against successive employers in the industry, it could be a strategy of further encouraging employers to bargain on a multiemployer basis. The important question, I would argue, is how unions respond to employers' collective, multiemployer response. Do unions accept full industry-level bargaining, with all important terms set at the level above individual firms? Or do unions continue to attempt a whipsaw strategy, seeking to extract maximum rents from individual firms, and coordinating across firms only to achieve such firm-level gains?²¹² Unions' short-term interests may indeed be the latter, but if this choice undermines employers' commitment to true industry-level bargaining, employers' only available response may be to seek to destroy the union.²¹³

In conclusion, the direct ban of strikes with the objective of establishing a multiemployer bargaining unit is easily evaded by a whipsaw strategy, which

209. The more pressing legal problem that sympathy actions typically confront is the existence of a no-strike clause in the relevant collective bargaining agreement.

210. Several years ago, Derek Bok reached a similar conclusion: a secondary boycott can only be used in a dispute that is capable "of being confined to a single firm, or a few firms at most, for it is generally impossible to blockade an entire industry." See Bok, *supra* note 110, at 1442.

211. Bok also argues that secondary boycotts are associated with more decentralized forms of collective bargaining:

Moreover, a boycott becomes necessary only if the employer can defeat a strike by hiring replacements or by managing in some other fashion to keep his plant in operation. Thus, in countries where economic strikes are generally conducted on a multi-employer basis, the boycott is not only impractical, it is also unnecessary, for associations of employers will never be able to attract enough qualified replacements to fill their collective needs

Id. at 1442–43. Note that once employers have committed to a multiemployer lockout strategy, the best response of unions is to preempt such a move by launching a multiemployer strike, rather than continuing with a whipsaw strategy. Even though more financially costly, it gives the union a strategic advantage by putting the union in the first-mover position. However, this requires a sufficiently coordinated and centralized union organization. See *infra* note 212 and accompanying text.

212. One should therefore not simply distinguish between decentralized and centralized bargaining, or envision a simple monotonic relationship between them, but distinguish a third, intermediate form of collective bargaining, what one might call "coordinated" bargaining. This strategy seeks to maximize employee gains at each firm, using cross-firm coordination only to strengthen bargaining at the local level. For an interesting and formal examination of such a threefold typology of bargaining structures, see Justus Haucap & Christian Wey, *Unionisation Structures and Innovation Incentives*, 114 *ECON. J.* C149 (2004) (defining differences between decentralized, coordinated, and centralized wage bargaining and finding that coordinated bargaining creates the worst incentives for firm innovation compared to the less centralized (decentralized) and more centralized (centralized) bargaining regimes).

213. See *supra* note 26.

encourages employers to bargain on a multiemployer basis. In comparison, the secondary boycott has conflicting effects on more centralized bargaining. On the one hand, if used in a coordinated fashion, it can also create incentives for employers to move toward industry-wide bargaining. On the other hand, if unions continue to use the boycott to extract gains from specific firms, this will undermine employer support for industry bargaining. In this case, secondary boycotts will contribute to greater decentralization in bargaining even as it requires greater union coordination across different firms.

IV. PRODUCTIVE UNIONISM

What can be learned from this discussion that can be applied to reimagining the future of labor unions and labor law? I hope readers take away two fundamental points: first, bargaining structures matter tremendously, and second, the need for fundamental labor law reform may be less crucially important to reorganizing bargaining structures than might be supposed. Taken together, these two points mean that unions ought to concentrate more on reexamining their own practices and structures of organization and less on an attempt to revive a now outdated and possibly harmful legal regime of collective bargaining.

In many ways, trying to shift toward a more centralized structure of bargaining may seem at best a medium-term and perhaps more likely a long-term objective of labor movement revitalization.²¹⁴ At around six percent density in the private sector,²¹⁵ unions must have someone to bargain for before they can talk about how to bargain. Nevertheless, thinking about how collective bargaining ought to be conducted, even if this seems a distant possibility, does have some important implications for how unions can organize, win objectives for workers, and grow their organizations in the here and now. As will be discussed in this Part, unions should reorganize their own internal organizations, seek to bargain on a broader, but “members only” or proportional basis, and reduce the scope of their collective bargaining agenda. As already implicated in the previous Part, I argue more extensively below that labor law reform is a less crucial objective, but I highlight areas of labor law that are most likely implicated by a shift in bargaining and organizational structure.

214. Margaret Levi, *Organizing Power: The Prospects for an American Labor Movement*, 1 PERSP. ON POL. 45, 47 (2003). Levi's approach, also informed by a comparative perspective, largely confirms the analysis made here. She writes that a “comparative perspective on labor unions reveals that the best of all worlds for the workers—and, as it turns out, for the economy—is coordinated [i.e., centralized] bargaining at the national level and significant rank-and-file engagement at the local level.” *Id.* However, she also adds, “But the achievement of national and coordinated bargaining is an unrealistic goal in the foreseeable future in the United States. What American labor can do, however, is to become once again a social movement.” *Id.* On the issue of engagement at the local level, see *infra* notes 228–29 and accompanying text.

215. See News Release, Bureau of Labor Statistics, *supra* note 146, at 1.

*A. Reorganizing Unions: The Link Between Union
Organization and Bargaining Structure*

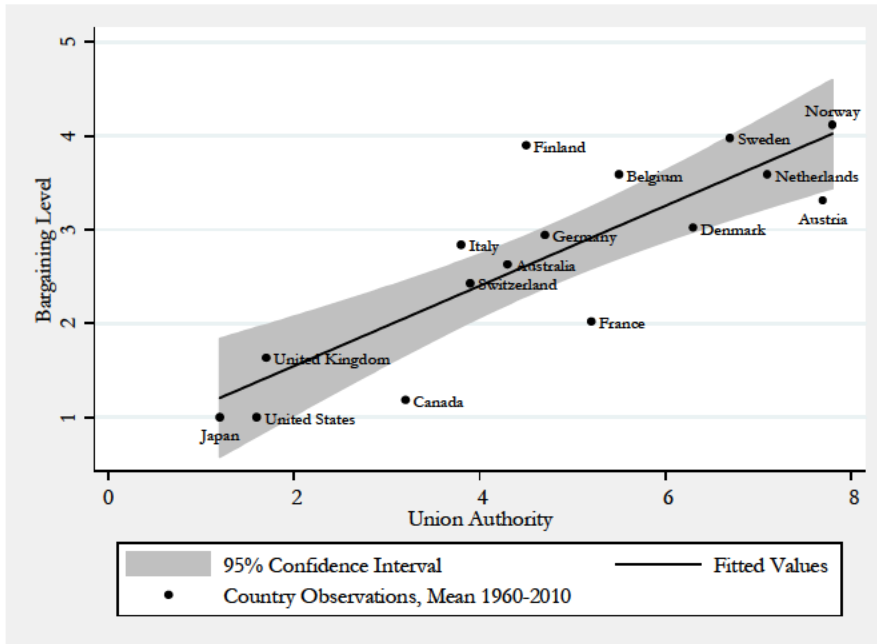
One of the most important things unions can do to position themselves to change the structure of bargaining is to change their own internal organizational structures. Up until now, this Article has overlooked the distinction between the structure of internal union organization and the structure of collective bargaining. Both can be described as more or less centralized, but the distinction between them is important. Centralization of union organization refers to the location of decision-making authority within the organization. For example, where within the union are decisions made for such fundamental tasks as political representation, collective bargaining, and decisions to undertake strikes or other economic actions? In more centralized unions, these decisions rest at a higher level: at the federation rather than at the national affiliate, or at the national affiliate rather than the local union organization. By bargaining centralization is meant the level at which collective bargaining between unions and employers takes place.²¹⁶ Beginning at the least centralized level, does collective bargaining take place at the workplace, the firm, the industry, the sector, or even across sectors and industries?

To illustrate the distinction between union and bargaining centralization, collective bargaining could, for example, take place at an industry level between an industry union and a counterpart employer association. But local affiliates of the union confederation could still retain the authority—spelled out in the industry union’s constitution—to strike, to engage in political representation, or to collectively bargain on their members’ behalf without permission or fear of sanction from the confederation. This would be a case of bargaining centralization being greater than union centralization.

As Figure 3 illustrates, union centralization and bargaining centralization tend to correlate very highly. As can be observed in that graph, the higher the centralization of authority within the umbrella of union organizations, the higher the level at which collective bargaining takes place. In this graph, the “Union Authority” measure includes several different indicia of authority, such as, for example, a national union’s control over finances (vis-à-vis a local union), strike funds, appointment of workplace representatives, and its veto power over a local union’s decision to strike or make a company-level agreement. The index also captures the level of union authority at both federation and national affiliate level. On the other axis, the “Bargaining Level” measure refers to the level at which bargaining takes place (local, industry, or nation) and whether lower level supplementary bargaining is permitted in the latter two cases.

216. Wallerstein, *supra* note 101, at 655.

Figure 3: Union Authority and Bargaining Level



It is not difficult to fathom the reasons for this correlation. Centralization within union organization is most likely an essential condition for a higher level of bargaining centralization. For example, industry bargaining may be attractive to high-productivity employers wanting to keep wage costs in line with the rest of the industry. But if industry unions permit separate local negotiations that either increase wages (“wage drift”) or decrease wages (“chiseling”) beyond the industry agreement, this objective will be undermined.²¹⁷ Similarly, union support for industry bargaining can likewise erode, for instance, if union members in lower-productivity firms or industries see their wages stagnate because of defections from unions and employers in higher-productivity industries or firms. By extension, when local union leaders are accountable only to local members, when local unions control their own finances or strikes funds, or when local unions can decide whether or not to engage in a strike, it will be more difficult to influence the outcome of collective bargaining at the local level. Centralization of internal union authority is thus essential to bargaining centralization.

Reorganizing the internal structure of labor unions is no easy task. Labor union leaders of national union affiliates to the American Federation of Labor and Congress of Industrial Organizations and Change to Win federations are undoubtedly invested in their autonomy; the same goes for local union leaders

217. See *supra* note 101.

within their own affiliates. But organizational change is part of the essential history of the American labor movement. Change to Win, the Congress of Industrial Organizations, the Knights of Labor, the Industrial Workers of the World, and even the American Federation of Labor itself all represent the responsiveness of American unions to organizational change. Some of these reorganizations were successful, some were not, but all have left their mark. Union reorganization could come from within existing union structures, or it could come through an entirely new founding. But certainly there is no reason why a fundamental change in union organization should not be possible. Moreover, consider the alternatives: Labor unions may not be able to control the outcome of proposed legislation in Congress or dictate the behavior of employers, but union organization is one thing unions should be able to control for themselves.

B. Proportional Representation: Breadth, Not Depth

Currently, labor unions in the United States attempt to grow by organizing all workers at a given employer or workplace, an achievement formalized through the recognition of the union as the exclusive bargaining representative, either through a National Labor Relations Board (NLRB) representation election or a card-check recognition agreement.²¹⁸ Instead, I propose that unions seek to represent a “critical mass” of workers on a “members only,” or proportional, basis and actively avoid exclusive representation and the NLRB certification process. Importantly however, unions should pursue this objective simultaneously across many different employers and workplaces. More controversially, this strategy may also imply a rejection of union security in any of its current manifestations. In short, unions’ approach should be one of favoring representational breadth over depth.

The advantage of this approach is that it will reduce the excessive formalities, the high stakes, and the limited all-or-nothing menu of collective bargaining options that plague and generate obstacles at too many points along the current representation process. The greater resources required for cross employer organizing will be balanced against the resource savings of fighting a costly and drawn out battle for Board certification and exclusive representation.

A common concern raised about members only bargaining is that it generates a level of workplace organization that is too weak to generate the kind of collective bargaining gains to which unions are historically accustomed.²¹⁹ However, seeking membership depth before breadth may be a self-defeating strategy. Union success is ultimately about power, the ability of unions to be able to impose their demands on employers. But critically important, and almost completely unrecognized, is the issue of how union power ought to be allocated. Consider the argument of the Dutch economists Teulings and Hartog.²²⁰ While unions in centralized bargaining

218. Pope, *supra* note 171, at 544–50.

219. TEULINGS & HARTOG, *supra* note 30, at 21.

220. *Id.*

will cooperate with employers and seek to maximize the joint surplus between them, “[u]nions in decentralized economies aim for maximizing the share of their members, not the joint surplus.”²²¹ Furthermore,

To be able to pursue this strategy they have to be strong in the firms for which they negotiate a collective agreement. Being strong requires a high membership within these firms. The easiest and most visible way to gain high membership is to pursue the share-maximizing strategy for their members. But because of this strategy, employers in non-unionized firms will have maximum incentives to avoid being unionized. Union membership will be highly dichotomous: close to 100 per cent in unionized firms, zero everywhere else. In decentralized labour markets we see a distinction between a union sector and a non-union sector, with employers trying to hold the line; in corporatist [i.e., more centralized] labour markets, unions are spread out all over the labour market and employers do not fight unionization.²²²

As this preceding example illustrates, the issue of power and membership resources is much more complicated than the simple distinction between “weak” American unions and “strong” European unions would imply. Labor union advocates would do well to think more deeply about how power is allocated *within* the labor movement. This may imply seeking to avoid the temptations presented by exclusive representation, union security, and a myopic opposition to employer-influenced forms of workplace representation. These may help unions enhance their power at the local level, but produce greater employer opposition and a weaker labor movement in the aggregate. The paper presented in this conference by Fisk and Sachs proposes members-only bargaining as a kind of second best adaptation to the reality of right-to-work legislation.²²³ But my argument carries this implication much further: perhaps the labor movement should fundamentally reexamine its unwavering devotion to union security. Labor unions remain implacably opposed to right-to-work legislation.²²⁴ Yet Europe is quite literally a right-to-work continent.²²⁵ Which union movement is doing better?

It is worth noting that the American labor movement is already taking steps to organize in this way, if more by force of circumstance than by conscious design. The current efforts to organize both fast-food and Wal-Mart workers are distinguished by their broader, multiemployer or at least multiestablishment

221. *Id.* “Maximizing the share of their members” would include, but go beyond the kind of “job control” benefits this Article has described.

222. *Id.*

223. Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right to Work Law*, 4 U.C. IRVINE L. REV. 857, 858–59 (2014).

224. See Monica Davey, *Limits on Unions Pass in Michigan, Once a Mainstay*, N.Y. TIMES, Dec. 12, 2012, at A1 (quoting Craig Becker, general counsel of the A.F.L.-C.I.O., saying “you can’t be in favor of collective bargaining and what collective bargaining represents for ordinary people . . . and still support right-to-work legislation”).

225. See Sørensen & Rasmussen v. Denmark, 2006-I Eur. Ct. H.R. 3, 27–28 ¶ 65, 29–30, 30 ¶ 76–77, 32 (2006).

strategy, a rejection of the NLRB certification process, as well as a willingness to make wage or other workplace demands before the establishment of an exclusive bargaining representative. It is precisely this kind of organizing strategy that will develop into broader, more inclusive bargaining, provided that local demands and interests are subsumed to the central organizations of unions and employers.

C. Two-Tier, or Bifurcated, Bargaining: Less is More

As we have already seen, decentralized collective bargaining creates incentives for unions and workers to attempt to address every aspect of the workplace. Instead, unions should dramatically scale back the extent of their demands. They should focus on core issues, such as wages, and collaborate, possibly with employers, on “political” solutions to health care, job security and unemployment insurance, pensions, and job training and workforce development.

This strategy is recommended, not only because incentives will be better aligned, but because it can also reduce the high stakes that the present Wagner regime raises for unions and employers. Reducing the stakes should make union organizing easier. As it stands now, employers expect the full array of job control, share-maximizing unionism to follow the certification of a union in an NLRB-supervised election. For all the reasons outlined above, this gives employers maximum incentive to oppose unionization. An all-out employer campaign in turn requires maximum dedication, loyalty, and solidarity from employees if the unionization drive has any hope of succeeding. By demanding less from employers, unions can reduce employer opposition and increase the rate of unionization.

Many questions could be raised at this point. Does not this proposal leave unaddressed some important workplace concerns of employees? What about the role of unions in giving workers a “voice” on the job? Even setting aside the classic aim of workplace, or industrial, democracy, does a highly centralized labor movement that focuses distantly on a small range of worker issues create its own grave democratic deficit?²²⁶

My response to this is that these tasks are best left to alternative and distinct workplace institutions, such as works councils or employee representation committees, established consensually by unions and employers or by enabling legislation.²²⁷ These “dual” forms of representation can perform two functions. First, they provide a way to address workers’ interests and concerns at the local level. Second, this bifurcated mode of worker representation can also address the democratic deficit that may be created by greater centralization in collective

226. The issue of “union democracy” is an extremely important and contentious subject within labor movement circles. See Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 DENV. U. L. REV. 1, 1–4 (2010).

227. The idea of works councils being established in the United States is not an impossibility. Volkswagen and the United Auto Workers are in talks about establishing a works council at the company’s assembly plant in Chattanooga, Tennessee. See Jack Ewing & Bill Vlasic, *VW Plant Opens Door to Union and Dispute*, N.Y. TIMES, Oct. 11, 2013, at B1.

bargaining. Workplace representation, whether union or nonunion, can be an important point of access of unions to the workplace. Workplace forms of representation that are closer to workers' daily and individual concerns give workers a collective organization with which to stay engaged with the labor movement. Developing dual forms of representation can therefore also provide a kind of democracy-enhancing form of "secondary association."

However, even more than this, centralized union structures are very likely an important precondition for these "dual" forms of worker representation to be meaningful and effective. To understand this assertion, consider the analysis of works councils by Freeman and Lazear.²²⁸ As their analysis illustrates, the establishment of a works council is a perfect example of a two-sided holdup problem mentioned above. On the one hand, given their intimacy to the process of production, workers have information and ideas that can be used to increase the productivity of the workplace.²²⁹ A works council can be a way of transferring this information to management and of generating new ideas and information through its collaborative structure. However, while workers stand to benefit from any gains in productivity in the workplace, they do not have any particular guarantee that they will share in any of these rewards. More than that, information about how workplace productivity could be increased could come at the expense of particular workers and jobs. Employers face a similar dilemma. The employer will also stand to gain from productivity improvements, but any organization of workers gives them a certain measure of power and control in the workplace, however informal, which could be used to extract rents from the employer. Thus, both employers and workers have something to gain and to lose from the institution of a works council. Given these strategic dilemmas, the stability of works councils is highly fragile.

Once again, industry-level collective bargaining can help solve these firm-level works council holdup problems. Industry bargaining takes the wage-setting process out of the individual firm, and thus helps assure the employer that a works council will not be used to extract rents from the firm. Likewise, the forms of employment security that exist at the labor-market level provide a form of insurance to workers who lose from workplace changes elicited by works councils.

D. Labor Law Reform?

This Article's analysis has several implications for the question of labor law reform. In particular, it can help address two separate questions. First, and more specifically, should labor law be reformed to encourage greater bargaining centralization? Second, and more generally, what role should labor law reform play in revitalizing the labor movement?

228. Richard B. Freeman & Edward P. Lazear, *An Economic Analysis of Works Councils*, in *WORKS COUNCILS*, *supra* note 45, at 27.

229. *Id.* at 44–48.

The implication for the first question follows fairly straightforwardly from the analysis of the relationship between labor law and structures of collective bargaining provided in Part III. The major conclusion drawn there is that, while certain features of the NLRA complement the more decentralized bargaining in the United States, it seems unlikely that labor law causes decentralized bargaining. Rather, Part III suggested that the reverse is more likely true: that the law is a consequence of the prevailing structures of American collective bargaining. If this conclusion is correct, then at the very least it is unlikely that labor law reform could encourage greater centralization of bargaining by removing the particular labor law rules mentioned in that Part.

What of the more general issue of the role of labor law reform in revitalizing labor unions? The common refrain one hears within labor movement circles is that labor law reform is essential to any future for labor unions. In the more familiar explanation, employer opposition is the chief culprit in the decline of unions in the United States.²³⁰ In turn, high levels of employer opposition are traced to weak and underenforced labor laws.²³¹ Yet, as this Article has contended, strident employer opposition to unionization is at least also, if not mainly, a product of a decentralized bargaining structure. This Article would therefore sound two notes of caution before committing to labor law reform as a top priority. First, if labor law reform does not fully address the underlying sources of employer opposition rooted in the structure of collective bargaining, then such reforms will be treating the symptom rather than the disease. Second, another danger is that labor law reform will end up reinforcing the old, decentralized model of collective bargaining, setting the labor movement up for future backlash and decline. My conclusion then is that even if labor law reform is desirable, in some form and measure, it should perhaps not be the focus of union revitalization efforts.

CONCLUSION

Labor unions face a paradox. While the rate of union membership has decreased in the United States for the past several decades, income inequality continues to grow and has now reached discomfoting levels. Thus, although union membership is in decline, labor unions are more necessary and relevant now than at any time in the past several decades. How can unions confront this decline and meet the challenge of rising income inequality? This Article has paid close attention to the issue of collective bargaining structure and in particular to the level of centralization in collective bargaining. Bargaining structure varies greatly across countries, and this variation has much to do with the extent of industrialization and the legal and constitutional structures that prevailed at the time the labor movement

230. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769–74 (1983); see also PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 118 (1990).

231. WEILER, *supra* note 230, at 121–28, 241–45.

in each country was founded. In addition, the level of bargaining centralization has important implications for issues of economic productivity in the workplace. For the reasons described in this Article, decentralized bargaining tends to worsen productivity, while more centralized bargaining can enhance it. Most critically, it is these effects on productivity that largely dictate employer responses to unionization, and this can explain why employer opposition to unions is higher in countries with decentralized bargaining while less in countries with more centralized bargaining. Because of its central role in explaining employer attitudes toward unionization, labor-movement activists must consider bargaining structure in any proposal for union revitalization. Finally, even if changing the structure of bargaining is a medium- or even long-term goal, thinking in terms of these goals does have distinctive consequences for how unions should be organizing workers in the here and now.