## 1AC Part 3

### Solvency---1AC

Plan:

The plan permits workers and employers to bargain below the federal floor.

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Oren Cass, “A Better Bargain: Worker Power in the Labor Market,” American Compass, 09-21-2021, https://americancompass.org/a-better-bargain-worker-power-in-the-labor-market/.

To give workers and employers greater control over their own workplaces and expand the scope of bargaining in ways attractive to both sides, federal policymakers should also permit broad-based collective bargaining agreements to depart from federal regulatory standards. Today, federal regulation serves as the floor atop which any bargaining must occur. It should instead provide the default, in effect wherever workers lack the power to bargain collectively, but accepting of departure where workers and employers on equal footing might agree on some other approach.

This paper explains the advantages of broad-based bargaining, the key parameters that policymakers must establish, and the gradual process of experimentation by which it could gain prevalence in the American economy.

Introduction

The American labor movement has been in decline for decades. In 2020, collective bargaining agreements covered just 7% of private-sector workers. A lower share, 6%, were union members themselves.

Some economists and commentators theorize that an efficient labor market renders collective representation unnecessary, because the market’s self-regulating forces will ensure that individuals receive compensation commensurate with the value they create. Adam Smith did not share this view. “Upon all ordinary occasions,” he warned in The Wealth of Nations, employers “have the advantage in the dispute, and force [workmen] into a compliance with their terms.” Likewise, John Stuart Mill, a favorite of libertarians, lamented that without sufficient union strength, “the laborer in an isolated condition, unable to hold out even against a single employer … will, as a rule, find his wages kept down.”

Smith and Mill were correct. The American Compass Better Bargain Survey shows that, absent collective representation, employers largely dictate labor-market outcomes. Two-thirds of workers have not requested and achieved a significant change to their compensation, benefits, or some other term or condition of their employment in the last five years; for most, the last time this occurred was “never.” Employers surely respond over time to competitive and regulatory pressures, but markets do not move by magic, they move through the push and pull of offer and counteroffer, leverage and concession. If workers are unable to engage effectively in that process, they will not fare well.

Flourish logoA Flourish chart

And indeed, they have not. While GDP per capita rose 92% from 1979 to 2019 and corporate profits per capita rose 77%, wages for nonsupervisory workers rose only 9%, according to the Bureau of Labor Statistics. Over the same period, average compensation for CEOs at the 350 largest, publicly traded U.S. firms went from being roughly 30 times larger than the average worker’s to being 300 times larger. Nor has the rise in national wealth and productivity translated for the typical worker into the sort of secure employment that policymakers and their staffs take for granted. The American Compass Better Bargains Survey finds that less than one-third of nonsupervisory workers in July 2021 held secure jobs, defined as annual income of $40,000 or more, predictable earnings, steady hours, and health benefits. Among workers without college degrees, that figure falls to one-in-five.

Union density has been low for decades because employers have every incentive to fight it. The plan solves by giving employers an incentive to permit unionization and come to the table. It’s a win-win.

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Third, to the extent a union is capable of creating a more flexible and less costly workforce by agreeing to derogate from legal entitlements, employers might be more willing to moderate their resistance to unionization. This could conduce toward the strengthening of union density that would inure to the benefit of the workforce over time.

These reasons have been invoked in both the U.S. and Germany to justify the capacity of unions to bargain the law away. 12 What these laws do is sketched in below.

IV.Dispossession Law in Comparative Context

A.The United States

The system of collective bargaining in the United States is one of exclusive representation by majority rule. There is a “bargaining unit,” either agreed-to by the employer and the union or defined by the government agency that administers the Labor Act, the National Labor Relations Board (NLRB). The bargaining unit consists of the cluster of jobs the incumbents in which share such a “community of interest” – as determined by common employment policies, working conditions, tasks, skills, training, supervision, and the like – to warrant having them select a union to bargain for them. The union must be independent of the employer – it is a violation of the law an employer to “dominate” or provide unlawful financial or other “support” to the union – and it must have the support of a majority of the workers in the unit. If a union secures majority support, it represents all the workers in the unit exclusively: those who refuse to join the union or do not support it have no alternative right to be represented either individually (self-representation) or through another union; but, the collective bargaining agreement binds all members of the unit irrespective of non-membership or non-support. As a corollary of exclusive representation, the United States Supreme Court has fashioned a “duty of fair representation” the union owes to all whom it represents irrespective of membership. The United States Supreme Court has also made clear that the states and, by extension, those municipalities with power to act under their state laws to enact labor protective ordinances, relationship has changed. Unions must be presumed to carefully consider members’ interests and thus there are no serious reservations to permitting collectively agreed derogations.

Stein Evju, Imperative Law, derogation and collective agreements in FESTSCHRIFT FÜR ROLF BIRK 61, 68 (2008). Note that the justifications offered in Norway have been operative in the U.S. and Germany: that the unions are representative of the workers; that the unions have countervailing power; and that trade-offs responsive to worker concerns and managerial interests should be facilitated. But, one consideration argued to in the United States and Germany does not apply to Norway: the need to bolster union representation. From 1999 to 2011/12, union density in Germany declined from 25 to 18% and in the U.S. from 13 to 11%; but density in Norway remained constant, at over 54%. Stephanie Lucie, LABOR MOVEMENTS: GLOBAL PERSPECTS Table 1.1 at 8-9 (2014). Electronic copy available at: https://ssrn.com/abstract=3460120 7 are free to enact laws that provide a floor of labor rights below which unions cannot derogate. Such measures do not disrupt the federally-created system of collective bargaining insofar as the law applies to all, whether represented or not. For example, a state can mandate that employersponsored group health insurance plans must provide coverage for mental health even if a bargaining unit of unionized employees would rather not have that more expensive coverage and would rather devote the funds saved by reduced coverage to some other compensatory end.13 However, state law can allow a collective bargaining agreement to derogate from the statemandated floor. The state, for example, may mandate severance pay in the event of plant closing; but, allow unions to substitute negotiated severance plans, the public mandate being, for the unionized, a default rule.14 The U.S. Supreme Court has made clear that the Labor Act is not hostile to labor protective provisions exempting union contracts from their reach 15; and several states and cities do.

These opt-outs cluster under the theoretical justifications discussed above: (1) where the law is arguably ill-suited to local conditions, i.e. where there is need felt by management or the workers or both for greater flexibility; (2) where the provision confers a benefit that can be used by the union to trade-off for something more desired; and (3) where the waiver can be of such economic advantage to the employer as to render the employer more amenable – or less resistant – to the unionization of its workforce.

Flexibility. The earliest provision for union waiver is found in the 1949 amendments to the federal Fair Labor Standards Act of 1938, which had set a national minimum wage and required payment of a fifty percent premium on the hourly rate for work in excess of a forty-hour 13 Metropolitan Life Ins. Co. v. Commonwealth of Mass., 471 U.S. 724 (1985). 14 Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987). 15 Livadas v. Bradshaw, 512 U.S. 107 (1994). Electronic copy available at: https://ssrn.com/abstract=3460120 8 work week. The 1949 amendment was intended to allow “for greater flexibility” in required overtime compensation for those workers covered by “annual employment plans established by bona fide collective bargaining agreements.”16 Along this line, Alaska exempts individual workers from overtime payment under state law when part of a “voluntary flexible work hour plan” subject to state certification; but, it also exempts work performed under “a flexible work hour plan if the plan is included as part of a collective bargaining agreement”17 which is subject to no test of voluntariness and to no state oversight. The need for “voluntariness” is eclipsed by union agreement; the need for state oversight is eclipsed by an assumption of union presence and power in the workplace. Some states allow collective bargaining agreements to make provision for meal breaks that differ from those established by law18; Massachusetts restricts this allowance to specified continuous process work, 19 an obvious situation calling for adjustment to those circumstances. Trading Material. Federal law does not permit a union to waive overtime premium pay other than the circumstances set out in the FLSA. But state wage and hour law may cover employees to whom the federal law does not apply; and some states – Oregon20 and Nevada21 - allow broadly for collective opt out; to that extent, these offer some potential economic advantage to employers that could be used as an offset by unions for other worker benefits depending on the usage of overtime and the importance employees attach to it. 16 H.R. Rep. No. 1453, 81st Cong., 1st sess. (1949) at p. 18 explaining 29 U.S.C. § 207(b). 17 Alaska Stat. § 23.10.060(d)(13) and (14) (italics added). 18 N.D. Admin Code § 46-02-07(5); 820 ILCS 140/3 [Illinois]; Or. Admin. Rules § 839-020-0050(7) and § 839-020- 0025(3) allowing collective agreements to provide for employers to deduct cost of meals from wage payment; Minn. Stat. § 177.253. 19 Mass. Gen. Laws Ann. ch. 140, § 101. 20 Or. Rev. Stat. § 652.020(7). 21 Nev. Rev. Stat. § 608.018(3)(e). Electronic copy available at: https://ssrn.com/abstract=3460120 9 The payout of accrued benefits – vacation pay, sick pay – on an employee’s departure can aggregate into significant amounts for an employer. Even so, it may be that some work groups do not attach much if any value to these benefits, the work is too casual or intermittent to allow for much, if any, vacation time let alone its accumulation.22 Illinois allows a collective agreement to waive the payment of accrued vacation pay on an employee’s termination23 and Arizona does the same for accrued sick pay.24 In contrast to the Massachusetts law that disallowed any opt-out from mandated group medical plan coverage for mental health,25 Washington, which requires group medical plans to provide for chiropractic care, allows collective bargaining agreements to forego that coverage. 26 These laws create tradeable public goods.

Deepening Unionization. By far, the dispossession that has drawn the most attention in the United States concerns the minimum wage. Employers of workers paid at or just above the federal minimum wage – in fast food service, hotel and leisure, janitorial, retail, and other services – also tend to be among the most resistant to unionization, these employees tend to be the least unionized. However, these employers are also subject to state and local minimum wage increases well above the non-waivable federal minimum; and several of these laws, especially in California, have allowed opt-outs by collective agreements. The agreement to opt out could be a quid pro quo for some other possibly more economically advantageous term, a reduction in medical insurance costs, for example27; but it also could serve as a strong economic incentive for those employers to be favorable toward union representation, for a union opt-out would give them an advantage over their non-union competitors who have no means of paying below the level set by the law. The irony of unions pleading for legislation for higher wages for the worst paid whilst simultaneously seeking the power to relinquish workers’ rights to that pay has not passed unnoticed. 28 The opt-out has been the subject of sharp criticism as well by organized business interests.29

B. Germany The system of collective bargaining in Germany is one of “members only” representation: unions represent those who have chosen to join them; there are no bargaining units nor does the government play the role in the selection of union representation that it does in the U.S. Because the union represents those who have feely chosen to join it, the American concept of “fair representation” is unknown, indeed, would be discordant inasmuch as the dissident is free to “vote with her feet” and, technically, opt out of union representation. According to section one of the Law on Collective Agreements (Tarifvertragsgesetz) (TVG), a collective agreement performs two functions: it establishes the right and duties of the parties to it – the “obligatory” part; and it sets out collective norms that, like legislation, govern the member’s terms and conditions of employment – the “normative” part. However, in order to make a collective agreement with legally binding normative effect the union must have the capacity to contract, it must have Tariffähigkeit. Whether it does or not can be adjudicated in the Labor Court which would look to such indicia as the size of the organization’s membership, its finances, its independence of the employer, its record of militance, to decide whether it possesses 28 Jana Kasperkevic, LA unions call for exemption from $15 minimum wage they fought for, The Guardian (April 12, 2016); Peter Jamison, Outrage after big labor crafts law paying their members less than non-union workers, latimes.com (April 9, 2016); Peter Jamison, Why union leaders want L.A. to give them a minimum wage loophole, latimes.com (July 27, 2015). 29 U.S. Chamber of Commerce, LABOR’S MINIMUM WAGE EXEMPTION: UNIONS AS THE “LOW-COST” OPTION (2016 update). Electronic copy available at: https://ssrn.com/abstract=3460120 11 and has exercised real power – sociale Mächtigkeit or soziale Durchsetzungsfähigkeit – on its members’ behalf. In some cases, work groups with strategic situation in the workplace have manifested sufficient militance and power, Tariffähigkeit, to force bargaining with them – the pilots of Lufthansa, for example. But a collective bargaining agreement made with a union that lacks the capacity to contract lacks legal validity. German unions bargain on a narrow range of issues – primarily wages and hours – usually with employer associations on a sectoral basis. Much that American unions do on the shop floor or in the office is done in Germany by works councils (Betriebsräte) selected by the workforce. They are legally independent of the unions and have the capacity to make contracts – plant agreements – with their employers within the works councils’ legal remit. The German legislation also addresses specific workplace issues, sometimes in exacting detail. Invariably, these establish minima to which derogation for the benefit of employees, upward, has been allowed and commonly exercised. However, some laws allow for derogation downward by collective agreement made with a union or, in some cases, by plant agreement with the works council. These have been discussed and analyzed in the academic literature under the general head of collectively disposable labor law – Tarifdispositives Arbeitsrecht – the justifications for which track those in the United States. Flexibility and trading material. Section 622 of the Civil Code (Bürgerliches Gesetzbuch) (BGB), sets out a period of notice for ordinary dismissals from employment depending on length of service. Subsection (4) allows for lesser period of notice by collective bargaining agreement. The Act on the Continuation of Payment in the Case of Sickness and Public Holidays (Entgeltfortzahlungsgesetz) (EFZG), provides in section (4), subsection (4), for a downward Electronic copy available at: https://ssrn.com/abstract=3460120 12 deviation by collective agreement in the method of calculation of remuneration in specified cases. The Law on Working Time (Arbeitszeitgesetz) (ArbZG), regulates working time, rest periods, on-call work and more. Section 7 provides for derogation by both unions and agreements made with works councils to change work hours and notice of work assignment, use of on-call work and more in an extensive list of derogations from the provisions of the law, each concerning specific circumstances that would allow the parties to act. The Federal Law on Holidays (Bundesurlaubsgesetz) (BUrbG), sets out the right to various entitlements to vacation time, but section 13 gives discretion for collective agreements to depart from them. Under the Part-Time and Fixed Term Employment Law (Teilzeit-und Befristungsgesetz) (TzBfG), room for derogation by collective agreements is allowed at several points. For purposes here it is useful to observe that one of the more controversial aspects of the law was to require employers to accommodate individual employee demands to be given part-time work; the employer must give the employee good business reasons, in writing, to decline to accommodate her request, the merits of which could be litigated in the Labor Court. However, section (8), subsection (4), allows a collective bargaining agreement to supply the reason for refusal. Deepening unionization. The most controversial derogations allowed in German labor law, analogous to these laws allowing opt-outs from the minimum wage in the United States, are – or, possibly, were – contained in the Temporary Employment Act, the Arbeitnehmerüberlassungsgesetz (AÜG). It deals with the situation of a worker – a Leiharbeiter – who has a contract of employment with a lending company. The lending company provides the worker to a using company (or “borrower”), supposedly for short periods of time. The Electronic copy available at: https://ssrn.com/abstract=3460120 13 Leiharbeiter works under the direction and control of the borrower, but is paid by the agency which takes its fee from the borrower. The borrower gains in flexibility as its decision to discontinue the agency worker is not a dismissal subject to notice or to the fair dismissal law. The AÜG provided that agency workers should be paid equally with the borrowing company’s regular employees and capped the period of use by the borrower, i.e. the extent to which short term contracts could succeed one another with the same borrower. By a complicated cascade of law a temporary worker who works for the borrower in excess of the time restriction for such work becomes a regular employee of the borrower entitled to all the rights attached to that status. But, the AÜG provided that union collective bargaining agreements with the leasing company could derogate from the equal pay principle. It also allows union collective bargaining agreements with the borrower to extend the period over which the agency worker could work. Allowing opt-out by collective agreements with the lending company was thought, akin to allowing union opt-outs from local minimum wage ordinances in the United States, to encourage unionization; that is, it would encourage employers to join the sectoral employers associations, membership in which has been eroding, that have secured such derogations.30 This experiment failed. In fact, the allowance of derogation from the equal pay obligation resulted in something of a scandal.31 Outside the largest German trade union federation, the DGB, which consists of eight unions with a membership of about six million, is the much smaller Christian Trade Union Federation. It and two other small unions joined in the Collective Agreement on Temporary Employment and Service Agencies (CGZP) which granted generous concessions to service agencies derogating from the equal pay principle – agreeing to what in the 30 I am indebted to Rüdiger Krause (Göttingen) for pointing this aspect out in colloquy on the paper in Porto. 31 Monika Schlachter & Melanie Klauk, Tarifdispositivität – eine Zeitgemäße Regelung?, AuR 2010, 354. Electronic copy available at: https://ssrn.com/abstract=3460120 14 U.S. would be called “sweetheart” agreements.32 In other words, the allowance of an opt-out facilitated a race to the bottom on wages33 allowing these companies to enjoy a competitive advantage over their competitors whose collective agreements were with DGB – Tarifgemeinschaft-Zeitarbeit – which required equality in wages. The capacity of these Christian unions to make these “sweetheart” contracts, their Tariffähigkeit, was successfully challenged on the basis of their lack of militance in defense of the workers they represented; these agreements were held invalid. Apart from that, some unions, I G Metal, for example, sought to correct for those wage equality opt-outs by securing collective agreements whereby companies that used temporary workers from service agencies agreed that they would contract only with those lending companies that adhere to wage equality or, if in derogation from it, to derogations in accord with DGB agreements.34 In 2017, the AÜG was overhauled in significant regards, but of relevance here is the capping of the period during which a union may agree to less than equal pay, no more than the 15 months, and to the period for which they may allow temporary work, to eighteen months.35 However, the former has been avoided in some cases by means unrelated to the opt-out allowance under the AÜG, by releasing temporary workers just short of the time trigger and securing others on which the clock starts afresh or by “swapping” longer-term temporary workers with other employers to the same effect. The latter is more complicated. A mainstream 32 Heiner Dibbusch & Peter Birke, supra n. 8 at 8. This drew press notice as early as 2007. Was sich hinter den christlichen Gewerkschaften verbirgt, Report Mainz, SWRide (Dec. 10, 2007). Ordinarily, only members of a union are bound by the normative provisions of collective agreements; but, quite understandably, employers could extend those terms to non-members. Not without criticism, that notion has been applied even when the union contract waives a legal right it is allowed to waive, allowing the employer to require the non-members to accept those terms. 33 Eva Völpel, Lohndrücker im Namen Gottes, taz (Dec. 24, 2009). 34 E.g., Agreement between Southwestern Metal [employer association] and IGMetal Baden-Württenberg § 5.3 (Dec. 16, 2018). 35 The background and charges were explained in the legislative report. Deutscher Bundestag, Entwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze, Print 18/9232 (20 July 2016). Electronic copy available at: https://ssrn.com/abstract=3460120 15 union that engages in collective bargaining with employers desirous of using temporary workers would seek to preserve the work of its core constituency. It may bargain about the use of these workers just as U.S. unions bargain over the subcontracting of unit work. The allowance of derogation under the AÜG has been used to accommodate the employers’ demands for flexibility – and, possibly, as a quid pro quo on other issues – to extend the period of temporary work, in some cases to a maximum of 48 months.36 C. Legal Constraint on Collective Disposition Union dispossession of legal protection has been allowed on the assumption that a union, itself a generator of collective goods, could be trusted either to drive toward the purpose for which the protection was enacted more flexibly or efficiently, to substitute for it some other collective good more valued by the workers, or for something of greater value to the union as an institution. The allowance for dispossession proceeds on an assumption that any possible abuse of that power could be corrected by existing restraints the law imposes on union action. As we have seen, in Germany in order for a union to make a collective bargaining agreement, it must have Tariffähigkeit. The law is rich in the judicial and academic discussion of this multi-factored test: the extent of the organization’s membership; the solidity of its finances; its independence; the democratic nature of its governance; its possession and exercise of power including its willingness to strike; and more.37 A union that gives away the shop, that makes a “sweetheart agreement” that concedes to employer demands to derogate downward from 36 E.g. agreement supra n. 34, § 2.3 (subject to other conditions regulating the purposes for which temporary workers can be contracted-for). 37 See generally, Otto Kemper & Ulrich Zachert (eds.), TARIFVERTRAGSGESETZ §2 ¶s 13-68 (4th ed. 2006) (examining each of these extensively). Electronic copy available at: https://ssrn.com/abstract=3460120 16 legislated terms with little or no offsetting advantage to the employees would lack Tariffähigkeit; the agreement would be void.38 The United States also requires unions to abide by democratic rules of governance and to be independent of employers, but it has no analogous requirement for union strength and militance: a “sweetheart contract” is enforceable so long as the union is not dominated or financially supported by the employer. 39 However, as a corollary to its status as exclusive representation, the union owes a “duty of fair representation” to all those it represents which applies to the terms it negotiates. The doctrine originates in an agreement by a white union to displace black workers (who were ineligible for union membership) and bears the imprimatur of wrongful discrimination as the core of the doctrine’s concern: the union may not act with hostile discrimination, in bad faith, or arbitrarily toward any group it represents. 40 Even so, as the U.S. Supreme Court has made clear, The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.41 Where a union negotiated the recall rights of laid-off pilots that left them worse off than if it had made no agreement at all the U.S. Supreme Court held the union had not breached its 38 Id. More recently, BAG 26.6.2018, 1 ABR 13/16, AuR 2019, 93. 39 Where a union sought an employer not to oppose its campaign to unionize its workers, offering in return an accommodative framework for negotiations should the union secure majority support that included a “no strike” pledge, the agreement was held not to violate the Labor Act. Dana Corp., 356 NLRB No. 49 (2010). A management lawyer was quick to condemn it as a “sweetheart” contract despite its legality. Jon Human, NLRB to permit “sweetheart” contracts, Ohio Employer Law Blog (Dec. 20, 2010). Inasmuch as the union traded its capacity to strike, which today is rarely actually exercised, in return for a conditions conducive to its securing an institutional presence in the workplace, the criticism seems to be rooted more in the critic’s distress over the effectiveness of the agreement to secure union recognition than in any genuine solicitude for the workers. 40 See generally Robert Gorman & Matthew Finkin, LABOR LAW: ANALYSIS AND ADVOCACY Ch. 30 (2013)(“The Union’s Duty of Fair Representation”). 41 Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). Electronic copy available at: https://ssrn.com/abstract=3460120 17 duty fairly to represent them: the agreement was within the “wide range of reasonableness” a union is allowed in bargaining; even a “bad settlement” might prove its value in the long run.42 In sum, the comparative framework is this: In Germany, a fatally feeble union can make no collective agreements; but a powerful union, one that has Tariffähigkeit, is permitted to exercise the power to dispossess employees of rights they would possess were there no union agreement. The law considers the union’s internal political process to be an adequate safeguard for those employees adversely affected by its agreements.

In the United States as in Germany where the legislation allows for it a union may dispossess groups of legislated public goods. As in Germany, the terms of a collective agreement are subject to judicial scrutiny and potential invalidation, not by any measure of the union’s militance, but in consideration of the nature of and reasons for the action adverse to the group dispossessed of the good.43 However, inasmuch as the legislature will have made the public good dispossessable by union action – the loss of access to chiropractic care, for example – it no less than any other “individual advantage” may go in as a contribution to the collective result under federal law of collective bargaining.44

IV.The Paradox A paradox is a self-contradictory proposition that might be true. The legislatures in Germany and the United States have entitled workers to public goods – entitlements workers are unable to achieve by individual bargains and which they cannot agree to waive – whilst allowing their unions by agreement with management to dispossess the workers of them. This seems self- contradictory. The allowance for dispossession rests first on the policy justifications offered for it, and, second, on an assumption that a union can be entrusted with that power. The policy justifications and the underlying assumption were addressed by Professor Stewart Schwab.45 He treats the former in detail. Of the latter, however, he treats the union as simply a go-between, a “broker,” between a company’s management and the union’s membership. He acknowledges the alignment of the interests of the membership and the leadership may be an issue, 46 and he acknowledges that the union has institutional interests independent of the immediate interests of its members47; but, for the most part, the union is conceived of as an intermediary, even if one with interests of its own, 48 for howsoever the union resolves itself on a disposable right the outcome will be part of a brokered deal. More needs be said. Attending to the deeper political realities puts what is at stake in the power to derogate from the law in sharper focus, even if the normative conclusion about the value of allowing it might or does remain largely unchanged. Ronald Ehrenberg and Robert Smith have emphasized that which is only tacit in Schwarb’s account: they see three parties at the bargaining table, not two: company management, union membership, and the union leadership, each with distinctive interests of their own.49 As Ehrenberg and Smith emphasize, the leadership’s perception of the union’s institutional interests in the longer run – and its own 45 The Union as Broker, supra n. 3. 46 Id. at 265. 47 Id. at 264 (emphasis added): “when it is less clear that workers value the right so highly, or the right clearly costs management a great deal to provide, the union may gain if the statute permits a brokering role.” 48 Id. at 266: “The union as a collective body is less susceptible to the particular weaknesses of the individual – a union has the power and resources to broker a right in favor of employees into even greater value for the workers it represents, the employer it bargains with, and society as a whole.” 49 Ronald Ehrenberg & Robert Smith, MODERN LABOR ECONOMICS 500 (6th ed. 1997). Electronic copy available at: https://ssrn.com/abstract=3460120 19 interests in remaining in power – have a role, sometimes, a key role to play.50 But even this account is oversimplified. The American scene was captured by Clyde Summers some years ago In negotiating an agreement, the union must accommodate the overlapping and competing demands of varied interest groups, surrendering or compromising some demands to achieve others. Relative advantages and disadvantages of different proposals to the various groups must be weighed both singly and in combination. The package put together represents not only a bilateral compromise between the union and the employer, but also a multilateral compromise among interest groups within the union.51 Schwab speaks of the union’s brokerage role as striving to reflect the interests of its “median members,”52 as if the location of the memberships’ center of gravity were all that is involved, were it readily to be ascertainable. For the reasons Summers sets out, the trope is inaccurate and misleading. 53 As much has been observed of Germany as well: Union leadership is constantly caught between attempting to provide comprehensive representation for all the interests of its working class constituency and being limited in 50 As an historical example of the latter one could point to how the autocratic president of the coal miners’ union, John L. Lewis, approached the issue of the mechanization of the mines: Lewis promoted modernization principally because he felt it better for the industry to support 200,000 wellpaid miners than 500,000 destitute ones. Yet his arrival at this policy was eased by the realization that the UMW’s strength would not suffer with a decline in membership. Lewis recognized that increased productivity would actually increase the income of the welfare and retirement fund, because it was based on a per ton royalty and not a payroll tax. Moreover, he knew that well-paid miners could afford higher dues and assessments than poorer men. And finally, even if fewer miners worked, the union would still retain control of all the jobs in and around the mines. Modernization, in short, did not threaten the UMW’s power base. Melvyn Dubofsky & Warren Van Tine, JOHN L. LEWIS: A BIOGRAPHY 505-6 (1997). 51 Clyde Summers, The Individual Employee’s Rights under the Collective Agreement: What Constitutes Fair Representation?, in THE DUTY OF FAIR REPRESENTATION 60, 64 (J. McKelvey ed. 1977). 52 The Union as Broker, supra n. 3 at 265. 53 In one case, a union representing a unit of several hundred security officers at a private hospital – a small group ostensibly sharing an uncomplicated community of interest – bargained not only for an across-the-board increase in wages and benefits, but also for provisions attending to the needs of specially situated work groups – shift differentials, differentials for those on dispatch duty, and the like. The bargaining history was summarized by an arbitrator: The entire package was put to a vote of the Union membership. The proposed collective agreement included three or four contentious items. The package was voted down. That had happened before; it was not unusual. The Union went back to the bargaining table, a new package was ironed out and put to a vote. Unusually, this time that, too, failed because, [the Union’s negotiator] testified, different groups were dissatisfied with different portions of it. Again, the Union went back to the table…. The result was a series of side agreements, Memoranda of Understanding (MOU), on these issues. The MOUs were made by the leadership, they were not put to a vote. [—] Hospital & Medical Center, (M. Finkin Arb., 2018) (unpublished). Electronic copy available at: https://ssrn.com/abstract=3460120 20 its ability to find a formula that reconciles these partly contradictory interests without endangering their internal acceptability and/or external negotiability.54 The justifications offered for union dispossession can usefully be viewed with this now more sharpened focus in mind. Flexibility. Allowance for a union to derogate from meal or break times in certain work settings – continuous production, for example – may, just as Schwab terms it, be a “win-win” proposition for management and for the workers involved.55 The same could be so of variations in overtime rules in the U.S. and many of the derogations regarding part-time work and work hours in Germany, more finely tuning the legal objective to local conditions and needs. Trading material. This is more complicated than achieving mutually desired flexibility, depending on what is being traded-away, for what in return – from and for whom. Some cases seem quite simple: Washington state’s requirement that chiropractic care be included in a group health plan could reflect more a successful product of lobbying by organized chiropractors than any deep desire for access to that treatment by prospective patients; it could be the case that relatively few workers deeply cherish chiropractic care and that the majority of workers are largely indifferent to it and are happy to forego that coverage in return devoting that portion of the medical premium to a bit more in the wage fund. However, other cases may be far more politically freighted: the use of supplied workers on temporary contracts in Germany is an example. The mainstream DGB unions, to protect the jobs of their core workers in the borrower companies, might insist on the lending companies’ adherence to pay equality; but they might also see advantage in allowing for a cushion of disposable jobs held by agency workers on temporary contracts. In addition, the unions might also see those workers as potential members, 54 Claus Offe & Helmut Wiesenthal, Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form, 1 Pol. Power & Soc. Theory 67, 83 (1980). 55 The Union as Broker, supra n. 3 at 264. Electronic copy available at: https://ssrn.com/abstract=3460120 21 which they would more likely to become under German law if their temporary work exceeds the statutory time limit, which limit, however, the unions are allowed to exceed by collective agreement. The allowance for this derogation presents the union with a dilemma, possibly a zerosum game to which there is no “win-win” solution, just a tension-laden compromise. The crucial and vexing question is whether the legal entitlement should be subject to dispossession by majority rule. Schwab recognizes the conundrum, but it is more intractable than the example he gives, of union disregard of groups protected by anti-discrimination in employment law. 56 These laws constrain union as well as managerial action as does the union’s cognate duty of fair representation. Apart from these already legally insulated groups, as Summers emphasized, the constituency a union represents is a dense patchwork of groups each with discrete and sometimes conflicting interests. It is difficult to conceive of any metric, any principled ground to guide legislative judgment, when one of these groups has been endowed with a public good, on when dispossession should be allowed. It may well be, for example, that a union’s leadership is in full accord with the majority of the membership’s repugnance for the recreational use of drugs and would be quite willing to accede to management’s desire to truncate what they both see as unnecessary and obstructive provisions in state drug testing law. The question for the legislature is not whether the leadership will faithfully represent their “median members’” desires; it is whether an individual’s privacy should depend on the vote of a majority of her co-workers. 57 As disposability puts power in the union’s hands, Schwab seems to regard it as irrational that a union might wish the law to deny it that power. He takes the U.S. Supreme Court’s 56 The Union as Broker, supra n. 3 at 265. 57 Conn. Gen. Stat. § 31-51aa provides: “No provision of any collective bargaining agreement may contravene or supersede any provision of [state drug testing law] so as to infringe the privacy rights of any employee.” Electronic copy available at: https://ssrn.com/abstract=3460120 22 decision in 14 Penn Plaza LLC v. Piatt, 58 as a case in point. The Court held that a union could agree that any claim of violation of civil rights law – age or sex or race discrimination – be heard exclusively via the arbitration provisions of its collective bargaining agreement. The union local whose predecessor leadership had made that contract asked the Court not to enforce it. Schwab was incredulous: Why would unions want to eliminate the possibility of trading rights? Under the perspective of this chapter, this is like asking when unions might willingly blind themselves to the mast like Odysseus.59 Perhaps, he suggests, the trade-off might be too difficult to educate the membership to accept? That is one possibility; but in the event, the union saw the deal as imposing an unacceptable burden on it, putting it in the unenviable position of being the sole and exclusive guarantor of its members’ civil rights.60 That is one odyssey a union may well wish not to embark upon and for which a legislated preclusion of derogability would be a welcome prophylactic against the siren calls of management. In sum, it cannot be assumed that an allowance for collective dispossession of a public good is an unalloyed good in itself. As the experience in Germany and the United States suggests, legislatures need to exercise considerable care in deciding whether to subject a public good to private collective disposition: whether the matter should be made subject to trade-offs that will or, at least, may advantage some at the expense of others. This take-away is common to both jurisdictions; it transcends their legal differences. V. Dispossession as a Means of Union-Building 58 556 U.S. 247 (2009). 59 The Union as Broker, supra n. 3 at 264. 60 On how the union sought its way ‘round that see Abdullayeva v. Attending Homecare Servs., LLC, 928 F.3d 218 (2d Cir. 2019). Electronic copy available at: https://ssrn.com/abstract=3460120 23 On this point, the differences between the two legal systems become incommensurate. In the United States, the allowance for union derogation from local minimum wages, and, in Germany, the allowance of continued wage inequality for Leiharbeiters under the AÜG, rest on the role these derogations could play in deepening union density. But in Germany, a dispossessory contract can only be made by a union that enjoys strong financial support, that is militant, and has the respect of management as an independent force to be reckoned with. Consequently, when a German worker sees a union bargaining her legal rights away, she sees what Stefan Greiner called a “caricature of a union” (das Zerrbild einer Gewerkshaft). Why, Greiner asks, should a person ever join such an organization?61

The U.S. Chamber of Commerce has essayed a similar critique of opt-outs from state and local minimum wage law: it depicts the worker as duped into being enrolled in a union she did not want to join and which “might otherwise not have won [employer] recognition [as the worker’s bargaining agent].”62 In the United States, however, employer resistance is a powerful barrier to unionization. Unions succeed in securing a first collective agreement in only one of five organizing drives; half that number if the employer commits unfair labor practices to blunt the organizational effort.63 A union newly established in an enterprise must earn the support of the workers it represents and, by virtue of the power of that support, secure the respect and cooperation of management. Absent a union’s deception of its members in the making of it, 64 a collective agreement that dispossesses workers of a higher minimum wage could be made to secure employer recognition of the union as the employees bargaining representative, that is, to gain the union a foothold in the workplace in hope of building a strong institution over time. 65 That this might actually come about would seem to be the real basis of the Chamber of Commerce’s angst.

In comparative perspective, the take-away here is this: in Germany, a union must be strong in order to make a contract that dispossesses workers of their rights. In America, the union may have to make a contract that dispossesses workers of their rights in order to be strong. [Footnote 65] 65 In 1932, the Ladies’ Garment Workers Union called a strike in Philadelphia whose manufacturers has been adamantly anti-union. The union made a collective agreement, but achieved only a small wage increase. As a meeting called to ratify the agreement, a worker loudly remonstrated that what she got was not a living wage. The union’s president replied, “what I brought you is not wages but a union.” David Dubinsky & A.H. Raskin, DAVID DUBINSKY: A LIFE WITH LABOR 111 (1997) (italics in original). [End FN]

The union form is key. It uniquely flips employers to supporting.

Corbett 24 – Endowed Professor of Law, LSU; peer-reviewed by several other labor law professors, incl. Estlund

William R. Corbett, Frank L. Maraist, Wex S. Malone & Rosemary Neal Hawkland Professor of Law, Paul M. Hebert Law Center of Louisiana State University, and reviewed by Profs. Cynthia Estlund, Matthew W. Finkin, Stewart J. Schwab, and Steven L. Willborn, “The Case for Waivable Employee Rights: A Contrarian View,” 72 Buff. L. Rev. 179 (2024), available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol72/iss1/3

A second argument in favor of an expanded system of waivable rights is that it could break down, to some extent, the labor law/employment law dichotomy that has been detrimental to U.S. law regulating the workplace.301 Under this fractured regime, employees represented by unions have been able to bargain through representatives, trade rights, and receive in exchange terms and conditions more precisely tailored to their workplaces, while unrepresented employees have received terms and conditions that Congress has been willing to bestow on covered employees and impose on covered employers.302 Some measure of this bifurcation could be reduced. If waivable rights were expanded to include labor rights and employment rights, and the rights could be waived/traded only by unions, more employers may see mutual benefit in collective bargaining and become more supportive of, or at least less resistant to, union organizing efforts.303 Given the low union density in the U.S., however, I prefer a system in which unions would be the first option for collective representation, bargaining, and waiver, but not the sole option. Any system of expanded waivable rights, whether limited to union-represented employees or expanded to other options, could increase employee representation, voice, and participation in workplace governance.

304 It also could break down barriers and create a more unified and coherent body of law. Such a system could integrate to some extent the labor law of representation and collective bargaining and the employment law consisting of the common law of individual contracts and statutory minimum rights. The next argument is related. 302 See Schwab, supra note \_\_\_, at 248. 303 Finkin, supra note \_\_, at 5; Becker, supra note \_\_, at 173-80; Davidov, supra note \_\_, at 500. 304 See Estlund, supra note \_\_, at 443 (positing that waivable rights could be “potential leverage for the promotion of better forms of workplace governance in which employees have a real voice”). Electronic copy available at: https://ssrn.com/abstract=4322051 75

I think the most compelling argument for developing an expanded system of waivable rights is to empower workers in the U.S. There is general agreement that most workers are poorly informed regarding the law and their rights, they have little to no voice and participation in governance of their workplaces, and they do not have sufficient leverage to bargain for the terms and conditions of employment that they need and/or want. They get the rights/protections that lawmakers confer on them, and they cannot trade those rights no matter how poorly or well- suited the rights are to their particular workplaces and no matter what they may be able to get from their employers in an exchange. 305 This is not the best way to meet the needs of employers and employees.306 Moreover, most workers do not know of many of the protections/rights they have. 307 Even when they know of their rights, the enforcement mechanisms associated with the minimum rights law do not result in robust enforcement.308 If a system could be devised that overcame workers’ deficits in information and bargaining power, waivable rights could become valuable bargaining chips that empower workers. 309 It is hard to imagine more worthwhile objectives for labor law than to empower workers, to inform them of their rights, and to give them participation and voice in workplace governance.

For such a system to accomplish those objectives to any appreciable extent, it is necessary to craft a proposal that includes constraints/conditions on waiver that can be administered efficiently and fairly at reasonable cost, depending, in large part, on self-compliance/enforcement. 310 Such a system would be unlike the approach applied under current U.S. law to noncompetes and mandatory arbitration/waivers of class and collective claims.311