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# Toward a “Tender Offer” Market for Labor Representation

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# Toward a "Tender Offer" Market for Labor Representation

Aneil Kovvali* & Jonathan R. Macey**

American workers are not sharing in the robust growth of the economy. Traditionally, large numbers of workers sought to improve their lot by bargaining collectively through unions. But the strategy does not seem to be working for enough workers. Despite some renewed recent activity, private sector unionization rates remain below 10%, and the unions that are in place have struggled to perform well, either in avoiding scandals or in delivering significant returns to workers in the form of job security or wage growth. This Article proposes a radical fix to the problem of declining unions. Drawing inspiration from corporate governance and its success in delivering financial returns to shareholders, the Article proposes allowing pro-worker investors to offer workers cash upfront for the right to represent them. If an investor succeeds in persuading a majority of workers in a workplace, the investor would be certified as the exclusive bargaining representative for the workers, and would be entitled to a percentage of any wage gains it obtained for the workers through collective bargaining. The resulting market for union representation would deliver cash to workers upfront, allow investors to demonstrate their capacity for delivering concrete results to workers, and attract resources to the cause of improving workers' conditions of employment. The proposal's new methodological approach also provides a lens for a constructive reevaluation of the objectives and tactics of American labor law.

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## Introduction

For decades, corporate America has succeeded delivering ever higher profits for shareholders by squeezing workers.[1] Whether the basic driver is labor monopsony,[2] or a lack of worker power to capture economic profits at corporations,[3] or increasingly ruthless business and legal practices,[4] there appears to be a fundamental power imbalance between workers and the providers of financial capital.[5] The result has been rich financial returns and stratospheric stock prices for shareholders, and increased economic and personal misery for workers.[6]

Labor unions are supposed to be the answer to these problems. Instead of having to bargain with an employer on her own, a worker can engage in concerted action with other workers. The labor union is an organizational form intended to exercise that collective power.[7] If a sufficient number of workers in a workplace petition for it, the National Labor Relations Board ("NLRB") will schedule an election.[8] A majority of workers can then cast votes that determine whether a union will be certified as their representative.[9] If the union is certified, it can advocate for

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1 *E.g.*, Anna Stansbury & Lawrence H. Summers, The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy, Brookings Papers on Econ. Activity (2020).

2 *E.g.,* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536 (2018) (discussing labor market monopsony and potential remedies under antitrust law); Zohar Goshen & Doron Levit, *Common Ownership and the Decline of the American Worker*, Colum. L. & Econ. Working Paper No. 653 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832069 (suggesting that common ownership by large institutional investors may suppress investments that would boost employment, having effects comparable to labor monopsony).

3 Stansbury & Summers, *supra* note __ at __.

4 David Weil, The Fissured Workplace (2014).

5 Steven Greenhouse, *New Poll: Americans See Big Power Imbalance in the Workplace*, On Labor: Workers, Unions, Politics (May 14 2020), https://onlabor.org/new-poll-americans-see-big-power-imbalance-in-the-workplace/ ("69 percent of likely American voters said workers have too little power, a view shared by over three-quarters of Democrats and nearly six in ten Republicans. The survey also found that 64 percent of respondents agreed with the statement that "on the whole, employers have too much power over workers," including more than three quarters of Democrats and more than half of Republicans.").

6 Henry Blodget, *Profits Just Hit Another All-Time High, Wages Just Hit Another All-Time Low*, Business Insider (Apr. 11, 2013), https://www.businessinsider.com/profits-at-high-wages-at-low-2013-4 (corporate profits hit an all-time high, while wages as a percent of the economy just hit another all-time low).

7 Susan Dynarsky, *Fresh Proof That Strong Unions Help Reduce Income Inequality*, The N.Y. Times (July 6, 2018), https://www.osaunion.org/news/aug18/unionsinequality.pdf

8 NLRB v. Gissel Packing Co., 395 U.S. 575, 607 (1969) (if employer does not voluntarily recognize union, union must have support of 30% of workers to trigger election); 29 U.S.C. § 159(c)(1)(A) (union can trigger election upon showing that "substantial number of employees . . . wish to be represented").

9 National Labor Relations Board, Your Right to Form a Union, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/your-right-to-form-a-union.

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worker interests, and the employer must bargain with it in good faith.[10] By acting collectively through unions, workers are supposed to be able to demand higher wages and better working conditions.[11]

But the once-mighty American labor movement is in disarray. Only about 6% of private sector workers in the United States belong to a union.[12] This diminished scale is a profound impediment to unions' ability to improve outcomes. Employers are free to replace workers who strike to obtain economic benefits, so a union that represents only a handful of workers in the relevant labor market has little leverage.[13] Employers are also reluctant to make concessions that would put them at a competitive disadvantage, so a union will make little headway in negotiations with an employer unless it can credibly promise that it will force the same terms on the employer's competitors.[14] And scale is necessary for effective advocacy in the political arena. As a result, the diminished size and influence of

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Union certification is the determination by the National Labor Relations Board or a state agency that a particular union qualifies as the bargaining unit for a company's or an industry's workers because it has the support of a majority of the workers. It is also termed as certification of bargaining agent. https://definitions.uslegal.com/u/union-certification/.

[10] 29 U.S.C §§ 158(a)(5), (b)(3), (d) (describing employer and union's mutual obligation to bargain collectively in good faith); National Labor Relations Board, *Collective Bargaining, (Section 8(d) & 8(b)(3))*, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/collective-bargaining-section-8d-8b3 ("A union must bargain in good faith on behalf of employees it represents, and it is unlawful for a union to fail to do so. Examples of failing to do so include insisting to impasse on a nonmandatory subject of bargaining, or reaching a collective-bargaining agreement with an employer but then refusing to sign it.").

[11] Dynarsky, *supra* note __; Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, Nat'l Bur. Econ. Research (rev. May 2021), https://www.nber.org/system/files/working_papers/w24587/w24587.pdf (U.S. income inequality has varied inversely with union density over the past 100 years).

[12] Bureau of Labor Statistics, *Union Members Summary* (Jan. 22, 2021), https://www.bls.gov/news.release/union2.nr0.htm#:~:text=The%20unionization%20rate%20for%20private,drop%20in%20private%2D%20sector%20employment (reporting that the "union membership rate of public-sector workers (34.8 percent) continued to be more than five times higher than the rate of private-sector workers (6.3 percent)").

[13] *See* NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345-46 (1938); National Labor Relations Board, The Right to Strike, https://www.nlrb.gov/strikes ("If the object of a strike is to obtain from the employer some economic concession such as higher wages, shorter hours, or better working conditions, the striking employees are called economic strikers. They retain their status as employees and cannot be discharged, but they can be replaced by their employer.").

[14] *E.g.*, Samuel Estreicher, *"Think Global, Act Local": Employee Representation in a World of Global Labor and Product Market Competition*, 4 Va. L. & Bus. Rev. 81, 87 (2009) ("The theory underlying labor's traditional objectives was that, although unionism did indeed create additional costs that outweighed productivity gains for firms, these costs need not have harmed the competitive position of unionized firms. This assumes that these increased costs could be imposed on all competitors operating in the same product market, through a combination of industry pacts, extension laws, and immigration and tariff barriers.").

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unions translates directly into a diminished capacity to drive better outcomes for workers.

The power imbalance between workers and capital seems unlikely to change without significant reforms to the process. One major problem is that labor unions appear to lack credibility with American workers. Academics view unions as glamorous. Many workers do not. For example, a recent high-profile drive to unionize Amazon employees in Bessemer, Alabama, a cradle of the American labor movement, resulted in an embarrassing defeat after a lopsided majority of workers voted to reject the union.[15] While there have been some recent small-scale victories, including at a Starbucks in Buffalo,[16] it remains to be seen whether the small number of workers affected will continue to support their union in the face of likely setbacks and disappointments.[17]

Unionized workers do not seem particularly enthusiastic. In a recent bright spot for American labor, workers at John Deere went on strike and forced the

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[15] Noam Scheiber, *Union Loss May Bring New Phase of Campaign Against Amazon*, N.Y. Times (Apr. 9, 2021), https://www.nytimes.com/2021/04/09/business/economy/amazon-labor-unions.html (describing "lopsided vote" against union at Amazon warehouse, and highlighting persistent headwinds to unionization). The NLRB has found that Amazon violated labor law in the election and ordered a second election, but it is not clear that the underlying dynamics have changed. Sebastian Herrera, *Amazon Union Push Faces Hurdle as Many Workers Leave Too Quickly to Organize*, Wall St. J. (Dec. 29, 2021), https://www.wsj.com/articles/amazon-turnover-presents-organizing-challenge-for-expected-alabama-election-11640775602 (noting that 71% of workers voted against the union in the first election, and that various unfavorable dynamics have continued or intensified). *But see* Noam Scheiber & Karen Weise, *Amazon Warehouse in Alabama is Set to Begin Second Union Election*, N.Y. Times (Feb. 4, 2022), https://www.nytimes.com/2022/02/04/business/amazon-alabama-union-election.html (noting that some unfavorable dynamics such as high turnover remain in place, but suggesting that "the circumstances of the second election do appear to differ from those of the first election in some key respects"); Sebastian Herrera, *Amazon Workers at Alabama Facility Poised to Vote a Second Time on Union Bid*, Wall St. J. (Feb. 2, 2022), https://www.wsj.com/articles/amazon-workers-at-alabama-facility-poised-to-vote-a-second-time-on-union-bid-11643797809 (same).

[16] *E.g.* Noam Scheiber, *Starbucks workers at a Buffalo store unionize in a big symbolic win for labor*, N.Y. Times (Dec. 9, 2021), https://www.nytimes.com/2021/12/09/business/economy/buffalo-starbucks-union.html.

[17] This is not to slight the efforts to unionize Starbucks locations, but merely to point out that there remain substantial obstacles between a union achieving certification and achieving stability by delivering better outcomes for their workers. *E.g.* Paul C. Weiler, Governing the Workplace 111 (1990) (noting that an employer that fails to prevent a union from winning a certification election can "simply carry on its resistance at the next stage by stonewalling at the bargaining table, forcing the union members out on strike, and hiring permanent replacements to fill their jobs"); Paul Weiler, *Striking New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351, 352 (1984) (observing that an employer can prevent a new union from fully establishing itself by preventing the union from successfully negotiating a first contract).

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company to improve wages and other conditions.[18] But the result belied the enormous distrust of unions revealed along the way. The striking workers twice rejected the deals that the United Autoworkers ("UAW") union had negotiated on their behalf before finally accepting the third contract presented to them. Striking workers denounced their union representatives to the media throughout the process, dismissing them as out of touch, corrupt, overly defensive, and eager to stifle dissent.[19] The UAW faced similar issues during a strike at a Volvo plant in Virginia, where workers refused to ratify three consecutive contracts before finally ratifying the third contract on a repeat vote.[20] And the issues are not limited to the UAW. Striking workers at four Kellogg plants overwhelmingly rejected a contract negotiated by their union, the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union,[21] before finally accepting a deal that ended the strike. While Americans seem to approve of unions in the abstract,[22] they appear deeply skeptical about trusting unions to make decisions about their own livelihoods, and with some justification.[23]

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[18] JeAnne Whalen, *John Deere Factory Workers Approve New Contract, Ending Historic Strike*, The Washington Post (Nov. 17, 2021), https://www.washingtonpost.com/us-policy/2021/11/17/deere-strike-contract-vote/.

[19] Stephen Rodrick, *'A Way of Life Is At Stake.' Striking John Deere Workers Defy the Company, and Their Union, to Tell Their Stories*, Rolling Stone (Nov. 5, 2021), https://www.rollingstone.com/politics/politics-features/john-deere-strike-american-labor-uprising-1252205/; Noam Scheiber, *Union for John Deere Workers Reaches Tentative Deal to End 2-Week Strike*, N.Y. Times (Nov. 3, 2021) https://www.nytimes.com/2021/10/30/business/john-deere-workers-strike.html; Noam Scheiber, *John Deere Workers Strike in Contract Dispute*, N.Y. Times (Oct. 14, 2021), https://www.nytimes.com/2021/10/14/business/economy/john-deere-strike.html; *see also* Liz Skeen, *Only Democracy Can Save One of America's Greatest Unions*, The Nation (Nov. 18, 2021), https://www.thenation.com/article/society/uaw-elections-union-democracy/.

[20] UAW, UAW Volvo Mack Truck Members in Dublin Virginia Vote, Overall & Hourly Agreements Ratify, Salary Contract Voted Down; Strike Will End (July 14, 2021), https://uaw.org/uaw-volvo-mack-truck-members-dublin-virginia-vote-overall-strike-will-end/.

[21] Noam Scheiber, *Kellogg Workers Prolong Strike by Rejecting Contract Proposal* (Dec. 7, 2021), https://www.nytimes.com/2021/12/07/business/kellogg-workers-strike.html.

[22] Megan Brenan, *Approval of Labor Unions at Highest Point Since 1965*, Gallup (Sep. 2, 2021), https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx (reporting poll results showing that unions have a 68% approval rating among Americans).

[23] Jonathan R. Macey, *Agency Costs, Corporate Governance, and the American Labor Union*, 38 Yale J. on Reg. 311 (2021); *cf.* Matthew T. Bodie, *Information and the Market for Union Representation*, 94 Va. L. Rev. 1 (2008) (noting that workers may struggle to evaluate union performance, making it difficult to evaluate the credibility of union claims without more information than a representation campaign might elicit). This is not ill-founded. For example, the UAW has been embroiled in a corruption scandal that included misappropriation of union funds and bribes to union officials from employers. *See, e.g.*, Skeen, *supra* note __; Consent Decree, *United States v. Int'l Union, United Automobile, Aerospace, and Agricultural Implement Workers of Am.*, 2:20-cv-13293-DML-RSW, Dkt. No. 10 (Jan. 29, 2021) ("The defendant union acknowledges that there have been criminal convictions, allegations, sworn testimony, and judicial findings of past problems with fraud,

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Resources are also a meaningful constraint. As matters stand, unions must make difficult and contentious decisions about how best to allocate scarce financial capital.[24] The funds available for organizing are limited, and place unions at a disadvantage vis-à-vis employers. The largest labor federation, the AFL-CIO, had *total* spending of $123 million in the fiscal year ending in 2019; of this, less than 10% was dedicated to organizing.[25] By contrast, employers spend $340 million per year on union avoidance consultants.[26] Given that employers already have powerful tools at their disposal to frustrate organizing, including the ability to restructure their operations or to require workers to attend meetings to hear anti-union messages, the disparity in financial resources is an important constraint.

A broad range of solutions have been proposed, but they generally only address part of the problem. For example, policymakers have suggested reforms that would make it easier for unions to win certification elections, including by eliminating various advantages enjoyed by hostile employers.[27] But such measures would neither increase unions' credibility with workers nor increase the resources available for organizing. Others have suggested reforms to internal union processes[28] or new models for competition between unions.[29] While these measures could increase the credibility of workers' representatives, they would not increase available resources. A final model of reform would seek to empower workers directly by having government mandate terms for employment and increasing government benefits.[30] But while this approach has promise, it would only have a limited impact on workers' ability to bargain collectively, and mandatory universal terms cannot provide the full set of benefits potentially available from agreements customized to the status of particular firms and employees. The existing proposals

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corruption, and criminal conduct by certain officials within the UAW and certain of its related entities.").

[24] For example, conflicts over spending priorities were a major cause of disputes between the AFL-CIO and the Change to Win Coalition, with the AFL-CIO prioritizing political lobbying and the Change to Win Coalition prioritizing new organizing efforts. *See, e.g.*, Keith J. Gross, *Separate to Unite: Will Change to Win Strengthen Organized Labor in America?*, 24 Buff. Pub. Int. L. J. 75, 100-01 (2006); Noam Scheiber, *After Trumka's Death, A.F.L.-C.I.O. Faces a Crossroads*, N.Y. Times (Aug. 8, 2021), https://www.nytimes.com/2021/08/08/business/economy/afl-cio-labor-unions-trumka.html (describing conflict between labor leaders who focus on political efforts and support for local unions and labor leaders who focus on building the labor movement and organizing additional workers).

[25] Hamilton Nolan, *AFL-CIO Budget Is a Stark Illustration of the Decline of Organizing*, Splinter (May 16, 2019), https://splinternews.com/afl-cio-budget-is-a-stark-illustration-of-the-decline-o-1834793722.

[26] Gordon Lafer & Lola Loustaunau, *Fear at Work: An inside account of how employers threaten, intimidate, and harass workers to stop them from exercising their right to collective bargaining*, Economic Policy Institute 5-6 (July 23, 2020), https://files.epi.org/pdf/202305.pdf.

[27] *See infra* Part I.A.

[28] *See infra* Part I.A, I.B.

[29] *See infra* Part I.B.

[30] *See infra* Part I.C.

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thus do not solve the problem of ensuring vigorous, effective, and well-resourced collective action on behalf of workers by well-motivated representatives.[31]

But the basic problem has already been solved, at least for shareholders and corporations. Much like workers, shareholders have much to gain from successfully overcoming the collective action problems that they face,[32] and much like workers, shareholders have much to lose if their collective representatives fail to advance their interests.

Corporate law and the market for corporate control largely solved shareholders' agency problem, with the result that shareholders have enjoyed outsized returns — and an enormous advantage in dealing with their dispersed counterparties in labor. This suggests the potential for a "policy arbitrage," in which mechanisms and innovations that have made corporate governance successful for shareholders are imported into the market for human capital in order to make labor law better serve the interests of workers, on whose behalf the unions exist in the first place.[33]

This Article draws inspiration from the market for corporate control.[34] It is well known that if corporate officers and directors fail to deliver adequate returns to

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[31] This problem in general is the well-known agency problem which is that unions often underperform in carrying out their responsibilities as agents of their principals, the workers. Work by Eugene Fama, Michael Jensen, and William Meckling made the agency problem the dominant paradigm for understanding, evaluating, and improving corporate law. *See, e.g.*, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. Pol. Econ. 288 (1980); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & Econ. 301 (1983); Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 4 J. FIN. ECON. 305 (1976). For an influential critical account of this paradigm, *see* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 Va. L. Rev. 247 (1999).

[32] *Cf.* Stephen F. Befort & John W. Budd, Invisible Hands, Invisible Objectives: Bringing Workplace Law and Public Policy into Focus 32 (2009) (noting that stockholders unite in corporations and select common representatives to attend to their collective interests much as workers seek to do through unions); Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & Contem. Probs. 65 (2019) (noting that antitrust law has evolved to permit stockholders to coordinate economic activities through firms, while reflecting continued skepticism of workers' attempts to coordinate).

[33] Macey, *supra* note __ at 315; *cf.* Hiba Hafiz, *Labor's Antitrust Paradox*, 86 U. Chi. L. Rev. 381, 383 (2019) (proposing "regulatory sharing" between labor law and antitrust).

[34] The market for corporate control is also known as the takeover market. Corporate takeovers present a unique opportunity to ameliorate the agency costs that exist between shareholders and managers. James F. Cotter & Marc Zenner, *How Managerial Wealth Affects the Tender Offer Process*, 35 J. Fin. Econ. 63, 64 (1994). The proposal we make in this Article similarly provides a unique opportunity to ameliorate the agency problems that exist between unions and workers. The mechanism we propose also has a resemblance to corporate vote-buying, in which a stockholder agrees to vote their shares in a specific way in exchange for some consideration. But it differs in that the investor would also be acquiring a meaningful economic stake in the workers' wages. For a broader discussion of vote-buying, see *infra* notes __ to __ and accompanying text.

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shareholders, an outside investor can make an offer to buy shares directly from the shareholders. If enough shareholders tender their shares, the outside investor will gain bargaining power over management and can wield the collective power of shareholders to manage the company better. To prevail, the investor must offer more than the current market price of the shares because without such a premium, shareholders would have no reason to tender. And to earn a return on the purchase of its shares, the outside investor must be able to manage the company in a way that increases returns even above the returns associated with the tender offer premium. While managers now have powerful tools to flummox a hostile tender offer,[35] it remains an important disciplining force.[36] Even managers who are not the subject of a takeover are acutely aware that if they fail to deliver returns to shareholders an outside investor could emerge to wrest away control. As such, the manager of any public company with sufficiently broad shareholder dispersion are under constant threat of replacement.

A similar market mechanism could revitalize labor organizing.[37] If there is a lot of room for improvement in workers' wages, an entrepreneurial outside investor could offer to ***pay workers*** for their votes in a certification election. Put another way, under our proposal the law would be changed to allow investors to pay for the right to represent workers in exchange for the right to bargain on their behalf. If a majority of workers agree, an investor should be able to wield the collective power of the workers by being certified as the workers' exclusive bargaining representative. Of course the outside investor requires a return on its payment to the workers, and this return would come in the form of a percentage of any wage increase it secured. To prevail, the investor would have to make a meaningful offer, putting cash in the pockets of workers immediately. Such a payment would send a strong signal of the wage increases it believes it can generate. And to profit, the investor would have to proceed to negotiate a meaningful wage increase for workers.

The new market would bring significant new resources and scale to the task of organizing workplaces.[38] Traditional labor unions would be armed with new tools to organize workplaces and attract investment. And a broad range of new players — including private equity funds and other sophisticated investors, drawing on the skillsets of activist investors and litigation financiers — could invest in the space.

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[35] Delaware law gives corporate directors and officers the ability to deploy takeover defenses if a takeover poses a threat. *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011) (approving board's use of takeover defenses in light of the "threat" that shareholders would accept a tender offer at an inadequate price).

[36] A board's decision to defend against a tender offer is subject to "exacting judicial scrutiny by a judge who will evaluate the actions taken by, and the motives of, the board." *Id.* at 54.

[37] *See infra* Part II.

[38] *See infra* Part III.

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Each would have a financial incentive to identify workplaces where workers are underpaid, intervene, and drive wages up. The mechanism would also create new competition and accountability for traditional unions by giving workers in all companies a sense of how much traditional collective bargaining should be able to deliver.

Exploring the mechanism can also shed light on broader issues.[39] Corporate experience could be a rich source of ideas for labor law reforms. But corporate ideas also serve as a useful provocation. Corporate governance was successful in delivering financial returns to shareholders in part because its objective was consciously narrowed to focus exclusively on delivering financial returns to shareholders.[40] We recognize that focusing labor law on the narrow goal of delivering wage increases is likely to be controversial for two reasons. First, our approach might be seen as diminishing the significance of non-wage issues such as working conditions and worker safety. As we note below, policymakers concerned about these issues could adopt tailored modifications to incentivize an investor to address these issues.[41] More fundamentally, such concerns are best addressed through vigorous regulation and enforcement under statutes like the Occupational Safety and Health Act.[42] Relying on unions with limited coverage and capacity to negotiate improvements is unlikely to be the best course. Second, our approach does not address the political and social dimensions of labor organizing in the way that traditional union organizing was arguably supposed to do. We realize that this is a significant step.[43] But the current state of wages, income disparities, and American labor unions demands a reconsideration of traditional approaches to improving the lot of the American worker.

The Article proceeds as follows. Part I discusses prior proposals to improve the lot of American workers and the functioning of labor unions. Part II turns to our proposal for a takeover market for union representation, explaining its key components and defending our design choices. Part III evaluates the plausibility of

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39 *See infra* Part IV.

40 *E.g.* Daniel L. Greenwald, Martin Lettau & Sydney C. Ludvigson, *How the Wealth Was Won: Factors Shares as Market Fundamentals*, NBER Working Paper No. 25769 (rev. Apr. 2021), https://www.nber.org/system/files/working_papers/w25769/w25769.pdf (finding that 44% of the increase in American equity values from 1989 to 2017 is attributable to the reallocation of rewards from stakeholders like workers to stockholders).

41 *See infra* Part II.B.2.

42 *See* Occupational Safety and Health Administration, Workers' Rights, https://www.osha.gov/sites/default/files/publications/osha3021.pdf; Aneil Kovvali, *Essential Businesses and Shareholder Value*, 2021 U. Chi. Legal F. 191, 205-07 (noting the value of universally applicable government regulations on worker safety issues, but highlighting systemic weaknesses of government responses).

43 For a broader discussion of this set of concerns, *see infra* Part IV.A.

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the proposal, addressing the structure's potential scope and feasibility. Part IV considers broader implications.

## I. Prior Proposals

The struggles of workers and labor unions have prompted various reform proposals. These include (a) proposals to improve union-related processes, with the goal of making it easier for unions to win certification elections and represent workplaces; (b) proposals to encourage competition between different unions and between different models of organizing, with the goal of prompting innovation and improvements; and (c) proposals to empower workers directly, with the goal of improving their lot and reducing the demands placed on collective bargaining.

Many of the prior proposals have significant merit, and some inform particular facets of our own proposal. But these prior proposals are unlikely to solve the full problem. Despite enormous worker suffering, unions represent only a small fraction of workplaces and often appear unable to attract broad worker support even in high-profile campaigns. To be successful, a reform must improve the ***credibility*** of worker representation, both by creating good incentives for workers' representatives and by allowing them to send powerful signals of their value to workers in non-unionized workplaces. Reforms should also address the gap in resources between the representatives of labor and capital. Prior proposals have fallen short along these dimensions.

### A. Improving Union-Related Processes

There have been various proposals intended to improve unions' ability to prevail in certification campaigns. Academic proposals are legion.[44] There have also been meaningful legislative and executive efforts. Among other changes, the Employee Free Choice Act would allow unions to avoid an election by collecting signed cards from a majority of workers, and would enhance enforcement of legal protections for organizing campaigns.[45] The Protecting the Right to Organize Act ("PRO Act") includes provisions that would bar employers from requiring workers to

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[44] For example, Professor Paul Weiler proposed a system of "instant elections" in which a union could trigger an immediate representation election upon showing some threshold level of support, thus eliminating opportunities for employer interference. Weiler, Governing the Workplace, *supra* note __ at 253-61; Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1804-22 (1983). In a proposal that would combine ease of securing union representation with the benefits of enhanced competition, *see infra* Part I.B.2, Professor Samuel Estreicher has proposed transitioning from the current "hard in, hard out" system in which it is difficult for unions to gain representation rights and difficult for workers to dislodge them to a new "easy in, easy out" system in which elections are held automatically and workers can readily make changes. Samuel Estreicher, *"Easy In, Easy Out": A Future for U.S. Workplace Representation*, 98 Minn. L. Rev. 1615, 1628-30 (2014).

[45] *E.g.* Employee Free Choice Act, S. 560, 111th Cong. (2009).

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attend meetings that discourage union membership, establish penalties for interference with union organizing efforts, and end state right to work laws that allow employees represented by a union to opt out of joining or paying dues.[46] In an early memorandum setting out her priorities, Biden Administration NLRB General Counsel Jennifer Abruzzo suggested an array of potential changes that could be pursued administratively, including requiring an employer to recognize and bargain with a union even without an election unless the employer has a good faith reason for doubting that the union has majority support.[47] But while these measures may provide real benefits, they would do little to address key problems driving the decline in unionization. Specifically, they would not directly increase union credibility, and would do little to increase the resources immediately available to support organizing.

Policymakers could address credibility issues with procedural and governance reforms inspired by corporate and securities law. In prior work, one of us has proposed reforming union governance with a suite of policies drawn from corporate experience: direct election of union leaders, using proxy advisory firms to give workers high quality advice, updating disclosures to focus on potential union corruption, empowering workers to make proposals, and requiring unions to have independent directors.[48] While these proposals would address agency problems within unions, they would do little to address resource concerns, and do not tap a particularly potent tool for demonstrating credibility to unorganized workers: putting real money at stake.

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[46] Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021); Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2020).

[47] Jennifer A. Abruzzo, Mandatory Submissions to Advice, NLRB Office of the General Counsel Memorandum GC 21-04 (Aug. 12, 2021) at 7 (discussing Joy Silk Mills, Inc., 85 NLRB 1263 (1949)). For an earlier academic treatment of this proposal, *see* Brian J. Petruska, *Adding* Joy Silk *to Labor's Reform Agenda*, 57 Santa Clara L. Rev. 97 (2017).

[48] Macey, *supra* note __. Other proposals on disclosure include Bodie, *Information and the Market for Union Representation*, *supra* note __; Matthew T. Bodie, *Mandatory Disclosure in the Market for Union Representation*, 5 Fla. Int'l Univ. L. Rev. 617 (2010); Estreicher, *supra* note __ at 523 (suggesting "a legal regime for all exclusive bargaining agencies and all organizations seeking such authority to post at a designated place on the internet all collective agreements negotiated by the organization in the particular industry, as well as a clear statement of the organization's dues structure and policy on seeking court-imposed fines"). Some of these concepts are beginning to be put into practice. For example, in the wake of major scandals, the UAW voted to adopt a system of direct elections. *See* United Autoworkers, *UAW Statement on Election Referendum Results*, UAW (Dec. 2, 2021), https://uaw.org/uaw-statement-election-referendum-results/ ("Under the direction of the Court-appointed Monitor, UAW members voting in the Referendum opted to change to the direct election method of electing all International Executive Board members."); Macey, *supra* note __ at 337-38 (describing the value of direct elections).

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### B. Encouraging Competition

A different class of proposals has sought to tap the potential benefits of competition, both between individual unions and between different models of organizing. These concepts directly inspire the proposal here.

Several commentators have proposed removing barriers to competition between unions, with the goal of boosting overall competence and credibility.[49] Important legal barriers prevent unions from competing with each other to represent workplaces. Once a union has been certified, it cannot be challenged in another election for one year.[50] If the union reaches a collective bargaining agreement with the employer, it can be shielded for three years, with challengers afforded only a narrow window to trigger a competitive election.[51] These legal barriers are exacerbated by union pacts and policies that prevent unions from raiding each other for members.[52]

Competition spurs innovation and responsiveness, and the unions that survived the process would likely be effective in satisfying worker demands. But labor law's traditional skepticism of competition does have some powerful justifications. It would be difficult for a union to make headway in negotiations with an employer if it was subject to continuous recall by referenda, and battles between unions would drain resources from the battle against employers.[53] Given that less than 10% of private-sector workplaces are unionized, competition between existing unions is unlikely to drive meaningful improvements for workers.

A deeper set of proposals would encourage competition between models for organizing. Across several articles, Professor Samuel Estreicher has proposed loosening legal restrictions that inhibit experimentation with alternative forms of

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[49] Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. Pa. J. Lab. & Emp. L. 651 (2006) (suggesting end to no-raid pacts and other reforms to increase competition between unions); Brian Petruska, *Choosing Competition: A Proposal to Modify Article XX of the AFL-CIO Constitution*, 21 Hofstra Lab. & Empl. L. J. 1 (2005) (suggesting end to no-raid provision in the AFL-CIO constitution); Estreicher, *Deregulating Union Democracy*, *supra* note __ at 520 (suggesting loosening rules on rival bids to permit a more competitive market to emerge).

[50] 29 U.S.C. § 159(c)(3) ("No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held.").

[51] "Under the [NLRB's] current application of the contract-bar doctrine, a valid collective-bargaining agreement ordinarily is a bar to a representation petition during the term of the agreement, but for no longer than 3 years. . . . During this 'contract bar' period, the [NLRB] will dismiss all representation petitions unless they are filed during" a 30-day period prior to the expiration date of the existing agreement. Mountaire Farms, Inc., 370 N.L.R.B. No. 110 (Apr. 21, 2021) (announcing NLRB decision to retain "contract-bar" doctrine after inviting briefing on whether the doctrine should be overturned).

[52] Petruska, *supra* note __ at __; Schwab, *supra* note __ at __.

[53] *Cf.* Petruska, *supra* note __ at 25-27, 38-39.

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labor representation.[54] One key element of this liberalization would be to permit for-profit organizations to represent workers.[55] At present, antitrust laws exempt only labor organizations "instituted for the purposes of mutual help, and not having capital stock or conducted for profit."[56] A for-profit organization that attempted to cartelize labor markets would thus be vulnerable under antitrust law. Loosening the requirement would curb waste by exposing leaders to market discipline and allowing leaders to deploy surplus cash flows productively.[57] Such a reform would be necessary in order to implement our proposal for a market for union control.

But proposals for for-profit unions have foundered on the issue of incentives. As Dean Stewart Schwab has argued:

> Workers would be reluctant to pay an organization whose express goal is to maximize dues less services provided, the difference going to outsiders, when they cannot easily determine the quality of services provided. The incentive would be strong for the bargaining-service firm's managers—whose fiduciary duties lie toward the bargaining-service firm's shareholders rather than to the worker/consumers—to justify high dues with promises of high-quality union services and then deliver something less.[58]

Mapping the mechanics of for-profit corporate governance onto unions has also proven difficult. Unlike shareholders, union members cannot transfer their interest in the enterprise.[59] As a result, potential insurgents cannot simply purchase a

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[54] Samuel Estreicher, *"Easy In, Easy Out": A Future for U.S. Workplace Representation*, 98 Minn. L. Rev. 1615, 1635-36 (2014) (asserting that "it is not entirely clear that workers are well-served by effectively limiting the pool of available bargaining agents to LMRDA-compliant non-profit membership organizations," and suggesting that the emergence of "workers' centers" may suggest the viability of alternative models); Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities For Value-Added Unionism*, 71 N.Y.U. L. Rev. 827, 839 (2006) (proposing "relaxing, ex ante, prophylactic safeguards that inhibit the emergence of alternative approaches to worker representation"); Samuel Estreicher, *Deregulating Union Democracy*, 2000 Colum. Bus. L. Rev. 501 (suggesting that unions be deregulated to allow for profit unions and unions in which participation rights and membership are separated).

[55] Estreicher, *Deregulating*, *supra* note __ at 512-13. *See also* Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. Ill. L. Rev. 367, 395-404 (considering for-profit bargaining services and mechanisms comparable to tender offers and proxy fights, but suggesting that they could not work within dues-paying system with non-transferable membership rights); Donald L. Martin, An Ownership Theory of the Trade Union (1980) (developing concept of a proprietary union).

[56] 15 U.S.C. § 17.

[57] Estreicher, *Deregulating*, *supra* note __ at 513.

[58] Schwab, *supra* note __ at 397; *see also* Petruska, *supra* note __ at 40-41.

[59] Schwab, *supra* note __ at 400-04.

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controlling interest; they must persuade existing members of the union of their superior efficiency.[60]

### C. Empowering Workers

There have also been a number of proposals to empower workers more directly, such as by setting minimum levels of wages and through government programs and regulations or by giving workers the tools to manage their human capital in a manner akin to financial assets. This approach has implications for our proposal.

Policymakers should seek to limit the range of non-wage issues that are subject to negotiation between workers and employers.[61] For example, if health insurance was provided uniformly by the government instead of as an incident of employment, workers would not have to bargain with employers to obtain access to healthcare on favorable terms. Such interventions would change the dynamics of negotiations even under the current labor law regime: there would be fewer issues for workers and employers to bargain over, workers would be less desperate, and employers would not be able to eke out a competitive advantage from developing a special skill in squeezing workers.[62] Such policies would also play a complementary role to the proposal here, by making the tender offer system that we propose, which focuses exclusively on wages (while the government handles other issues such as worker safety and insurance) less problematic.[63] But this approach does entail a break with the basic structure of labor law, which seeks to preserve a space for workers and employers to strike tailored bargains covering multiple, unrelated issues.[64]

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[60] *Id.* at 404.

[61] *E.g.* Brett McDonnell & Matthew T. Bodie, *From Mandates to Governance: Restructuring the Employment Relationship*, 81 Md. L. Rev. --- (forthcoming).

[62] *E.g.* Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice And Power Within American Corporate Governance*, 106 Minn. L. Rev. --- (forthcoming 2022). *But see* Estreicher, *Freedom of Contract*, *supra* note __ at 847-49 (proposing that unions should be able to trade away certain statutory entitlements in exchange for other protections that workers would value more); Stewart Schwab, *The Union as Broker of Employment Rights*, *in* Research Handbook on the Economics of Labor and Employment Law 248-72 (2012) (suggesting that union waivers of otherwise mandatory employment law protections are less problematic than individual waivers, and providing examples where this is already permitted).

[63] *See infra* Part II.B.2 (suggesting that the tender offer system should focus exclusively on improving total pay to workers).

[64] *See* 29 U.S.C. § 158(d) (employer and union must "confer in good faith" on specified topics, "but such obligation does not compel either party to agree to a proposal or require the making of a concession"). The concept that employment arrangements should reflect the preferences of the parties, as expressed in freely-negotiated agreements, is called "voluntarism" and has come under

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Policymakers could also pursue a broader class of interventions designed to allow workers to tap, trade, or diversify their interest in human capital. Payday loans are a crude existing device that allows workers to tap into the value of their next paycheck by borrowing against it. But the tool is severely limited — it cannot be used to diversify risk or tap into more than a few weeks of future income — and it is generally only available on terms that are deeply unfavorable to workers.[65] Workers use payday loans because they are poor and desperate for liquidity, not because such loans permit workers to address risk or to better their positions in some other way.[66] As a result, payday loans provide a cautionary tale of the limited potential for financial schemes to improve worker wellbeing.[67]

A more promising approach might be to allow workers to sell equity-like instruments to fund investments that improve their income. Such "human capital contracts" were first proposed by Milton Friedman and Simon Kuznets in 1945, and have since become a prominent part of policy conversations on funding higher education.[68] Extensions to other areas — such as an exchange that allowed athletes to sell interests in their future income to fans — have also been attempted, with a certain limited success.[69] While the concept informs the proposal here, a market for equity-like interests in worker income would not improve worker incomes on its own.[70]

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increasing pressure over time. Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 St. Louis U. L. J. 415, 417 (2010).

[65] *See, e.g.*, Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 Stan. L. Rev. 1093 (2019); Mehrsa Baradaran, How the Other Half Banks (2015).

[66] *See* Jonathan Macey, *Fair Credit Markets: Using Household Balance Sheets to Promote Consumer Welfare*, 100 Tex. L. Rev. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3781164.

[67] For another, more exotic, proposal, *see* Michael Abramowicz, *Toward Livelihood Insurance*, 2021 U. Chi. Legal F. 17 (proposing system of private insurance in which workers could protect against risk of adverse changes in employment prospects).

[68] See, e.g., Benjamin M. Leff & Heather Hughes, *Student Loan Derivatives: Improving on Income-Based Approaches to Financing Law School*, 61 Vill. L. Rev. 99, 102-05 (2016).

[69] Victoria L. Schwartz, *The Celebrity Stock Market*, 52 U.C. Davis L. Rev. 2033 (2019) (discussing Fantex exchange for athletes, and discussing possibility of broader celebrity equity markets); Shu-Yi Oei & Diane Ring, *Human Equity? Regulating the New Income Share Agreements*, 68 Vand. L. Rev. 681 (2015) (discussing broad range of attempts to sell interests in human capital and arguing against a uniform regulatory approach).

[70] A market for equity-like interests in worker income might have useful second-order effects. For example, it would allow workers to diversify away part of the risk that their income would decrease. That in turn should enable workers to make risky investments that would increase their value, such as developing firm or industry specific skills. An investor in the labor tender offer market could offer similar incentives to workers in an effort to boost returns. *See infra* Part IV.C.

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## II. The Proposal

This Part lays out a market-based solution to the problems of low union uptake and low union credibility. The basic concept is simple. An investor would offer an upfront cash payment to workers in exchange for their votes in a union certification election. If the investor won the election, it would be certified as the exclusive bargaining representative for the workers for a defined period, and would recoup its upfront payments to workers over time by taking a certain percentage of any gains that it secured for the workers by bargaining on their collective behalf.

This approach would produce a healthier environment for collective bargaining and by channeling investors' profit motive, expand the number of potential union organizers. The upfront payments we propose would encourage workers to agree to collective bargaining by allowing them immediately to tap some of its future value, and would give the investor a way to demonstrate its sincere belief in its ability to deliver that value in the form of higher wages. The structure of the backend compensation, in which workers and investors would share in future wage gains, would align the interests of the investor and the workers. The overall system would work to expand, hopefully dramatically, the resources available to identify groups of exploited workers and act to improve their wages, while challenging established unions to do more to retain their market shares in the field of union representation of workers.

This approach would do minimal violence to the basic scheme of labor law, authorizing properly-regulated for-profit labor organizations and payments to workers during certification campaigns, while leaving other features of labor law intact. But each component of the system requires elaboration. As discussed below, there is room for reasonable disagreement on many issues that would affect the operation of the scheme that we propose. In this Article we identify the key issues while surfacing relevant insights from corporate experience. Part II.A discusses the mechanics of upfront offers, including the potential for competing bids and the possibility of mandated disclosure. Part II.B discusses the mechanics of representation by an investor, including the tools available to investors and the need to control conflicts of interest. Part II.C considers how gains achieved for workers during an initial period of representation can be maintained over the longer term.

### A. Upfront Offer Process

Investors would be permitted to make upfront cash offers to workers in exchange for the transfer of their votes in union certification elections and a share of subsequent wage gains to be obtained by the workers' representative in future negotiations. Traditional unions, hedge funds, private equity firms, and new specialist firms could participate in the space as investors. To be effective, the

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system would need to generate a robust flow of offers while maintaining an orderly process that allowed workers to evaluate bids and maximize the value they receive from the investors.

In the modern corporate context, analogous problems are addressed by the board of directors. If an acquirer attempts to purchase a large number of shares from stockholders with a coercive or lowball tender offer, the corporation's board of directors can use takeover defenses like the poison pill to block the effort and force the acquirer into a negotiation.[71] The board can also structure a rational process to test market values, including by shopping the company to other potential bidders, setting up an auction process designed to attract interested bidders, and providing a measure of finality when the process concludes.[72]

The current system is flawed because corporate managers and directors have an incentive to protect their jobs by preventing would-be acquirers from succeeding even if their offers would create superior value for the shareholders. But this perverse incentive is mitigated by robust and interlocking mechanisms of judicially-enforced fiduciary duties, shareholder voting, compensation schemes, and norms among business elites that encourage leaders to do the best they can for stockholders.[73] The existence of a relatively trustworthy board of directors checks the problems associated with a chaotic market-driven process without heavy reliance on government regulation.[74]

The labor context lacks an analogue for the board of directors. Management obviously faces an irreducible conflict, as it represents shareholders whose interests often are directly opposed to workers' interests, particularly when it comes to the issue of workers' wages. As a result, management would prefer no collective

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[71] *E.g.* Air Prods. & Chemicals, Inc. v. Airgas, Inc., 16 A.3d 48, 57 (Del. Ch. 2011) (noting that corporate boards are empowered to resist "threat" of "substantive coercion" from an inadequate bid by using poison pill, even in combination with other defenses like classified board structure).

[72] *E.g.* Guhan Subramanian & Annie Zhao, *Go-Shops Revisited*, 133 Harv. L. Rev. 1215, 1222-23 (2020) (discussing judicial acceptance of "go shop" term in which a board agrees to an acquisition with the condition that it can seek out higher bids, but finding that go shop provisions have lost effectiveness).

[73] *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 Colum. L. Rev. 2563 (2021) (describing system of institutional players that orient corporate governance toward shareholder value maximization); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91, 139-55 (2020) (describing powerful incentives that corporate directors and officers have to maximize shareholder value, even when they have been granted express legal authority to pursue other goals).

[74] The market for corporate control is shaped by some rules, several of which inform our proposals here. *See infra* note __ (discussing requirement that tender offers remain open for 20 days); *infra* note __ (discussing requirement that shareholders make disclosures upon reaching certain ownership thresholds); *infra* note __ (discussing requirement that terms of tender offers be disclosed).

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bargaining, and absent that would prefer to face organizers who will not negotiate too vigorously on the workers' behalves. In unionized workplaces, incumbent unions could conceivably play a constructive role. But unions are present in only a small percentage of private workplaces. And where they are present, they have an obvious incentive to preclude outside efforts to replace them in collective bargaining, and no clear economic incentive to strike a good bargain on behalf of their workers.[75]

As a result, there is a justification for a larger and more direct role for government regulation in the market for labor union control that we propose here than there is in the existing market for corporate control. This section addresses three aspects of upfront bidding that indicate the need for a regulatory backstop for the market. First, it may be appropriate to regulate the structure of bids to ensure that they are straightforward, non-coercive and can be easily evaluated by workers. Second, it may be appropriate to provide a uniform framework for union representation contests in which there are multiple bidders to permit workers to weigh the competing bids. Finally, it may be necessary to provide for disclosure of worker contact information and of investor bids to facilitate the market for union representation.

#### 1. Structure of Offers

At the heart of our proposal is the idea that unions and other firms should be able to offer workers a cash payment in exchange for their votes in union certification elections. Effectuating our proposal would require certain modifications of existing law. Union elections are currently expected to be conducted under "laboratory conditions,"[76] and, under current law, a union cannot offer financial incentives for workers to give their support.[77]

Some issues with bids are best left to competition. Most obviously, different investors should be allowed to offer different amounts of money in exchange for

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[75] *See supra* Part I.B.2 (describing legal and other barriers to competition).

[76] In re Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."); *see also* Med. Ancillary Servs., 212 N.L.R.B. 582, 584 (1974) (Penello, J. dissenting) (observing that "the Board, in General Shoe Corporation, adopted its 'laboratory conditions' rationale"); Michael D. Moberly, *Corrections before Representation Elections: Restoring Laboratory Conditions by Repudiating Unfair Labor Practices*, 4 U. Pa. J. Lab. & Emp. L. 375, 377 (2002) (The NLRB requires that elections be held under "laboratory conditions.").

[77] *See* NLRB v. Savair Mfg. Co., 414 U.S. 270, 277 (1973) (finding violation where union offered to waive initiation fees in exchange for worker's public support, because practice would allow "the union to buy endorsements"); Nestle Ice Cream Co. v. NLRB, 46 F.3d 578, 584-85 (6th Cir. 1995) (union thwarts "employees' fair and free choice" in an election if it offers a benefit whose "influence was to 'purchase' votes or [is] otherwise 'undue'" because it "influence[s] the vote without relation to

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workers' votes. Some investors may be particularly confident of their ability to generate large wage gains, either because they have developed a high level of competence in conducting negotiations or because they have obtained control over many workplaces in the relevant labor market. Such investors should be able to signal their value to workers by making higher offers than their rivals.[78]

Other issues will have to be regulated. As a general principle, it would be worthwhile to regulate issues that might interfere with workers' ability to obtain and rationally weigh competing offers. First, it may be worthwhile to require investors to hold offers open for some minimum period. By rule, corporate tender offers must be held open for at least 20 business days.[79] The rule was introduced to eliminate "Saturday Night Special" tender offers in which the offer was held open for only a brief period, and shareholders were pressured to make a hasty decision before full information was available. The case for a similar deliberative period is particularly strong in the labor context. Unlike the situation for shareholders who sell their shares in a tender offer, workers who sell their votes will be in an ongoing and important relationship with the investor who buys the workers' votes for several years. It is critical to ensure that workers have a meaningful time to deliberate over any and all investor offers.

Second, it would be advisable to prohibit structurally coercive or discriminatory offers. For example, an offer that paid workers more if they tendered early would pressure workers to make an unduly hasty decision. Both corporate law[80] and labor law[81] have analogous principles, and it would be sensible

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the merits of the election"); Owens-Illinois, Inc., 271 NLRB No. 194 (Aug. 24, 1984) (providing jackets with union insignia to employees who had voiced support for union was objectionable conduct).

[78] Investors might also be allowed to decide for themselves whether to make an offer conditional on success. An investor that is very confident of victory and wanted to signal that confidence might offer cash to every worker that signed up. An investor that is less certain might offer to pay cash if and only if it prevailed in the election.

[79] *See* SEC Rule 14e-1(a), 17 CFR 240.14e-1(a); *see also* Securities and Exchange Commission, Tender Offer FAQs https://www.sec.gov/Archives/edgar/data/802481/000119312506199094/dex996.htm#:~:text=A%20tender%20offer%20must%20remain,days%20after%20certain%20material%20changes. ("Every tender offer must be open a minimum of 20 business days. Every offer has an initial expiration date (i.e., the end of the 20th business day), but this expiration date may be extended by the bidder.").

[80] *E.g.* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985) (noting that a two-tier offers in which shareholders who tender early get one form of consideration while squeezed out shareholders get a different form of consideration "are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the transaction," and empowering boards to resist them).

[81] NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973) (forbidding waiving initiation fees for workers who sign union authorization cards because the practice "allows the union to buy endorsements and paint a false portrait of employee support during its election campaign.").

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to utilize them in the context of our proposal. Investors should, of course, also be prohibited from offering different amounts to different workers in the same election based on protected characteristics, such as race or sex. By contrast, varying offers based on other characteristics like years of experience would not be objectionable, as the value of union representation might vary from worker to worker depending on their seniority.

As one element of the prohibition on structural coercion or discrimination, an investor that prevailed in a certification election should be required to take further steps. For example, the successful bidder should also have to treat all workers equally in wage negotiations, regardless of whether some workers declined to sell their votes.

Specific details of the regulatory infrastructure necessary to implement our proposal are discussed below.[82] But it is clear that workers who refuse to sell their votes should be offered compensation when a majority of workers sell their voting rights, and bargaining power shifts to the buyer. For example, a prevailing investor should be required to offer dissenters the same amount that it had offered the majority of workers.[83] In other words, an investor that prevailed in an election by buying 51% of votes for $1,000 each should have to offer $1,000 to each dissenting worker. Other details of the scheme would affect the importance of this point. If the investor wins the right to compel dissenters to join a strike, or is empowered to collect a portion of the dissenters' wage gains, it would be more appropriate to insist on an upfront payment to the dissenters.

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[82] *See infra* Part II.B.1, 3.

[83] For example, in France, individuals or legal entities that come to hold (alone or in concert, directly or indirectly) more than 30% of a listed company's shares or voting rights must immediately inform the company and the federal regulator of securities (the Autorité des Marché Financiers) and must file a tender offer for all the outstanding equity securities. The mandatory tender offer price must be at least the highest price paid by the bidder for securities of the target during the 12-month period preceding the crossing of the 30% threshold. Armand W Grumberg, Arash Attar-Rezvani and Julien Zika, Public Mergers and Acquisitions in France: Overview, Thomson Reuters, Practical Law https://uk.practicallaw.thomsonreuters.com/4-502-1646?transitionType=Default&contextData=(sc.Default)#co_anchor_a323509

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### 2. Competing Bids

Ideally, the system would support a robust flow of offers, and workers would sometimes have the luxury of choosing between competing bids. While competition would help to ensure that workers received full value for the benefits of collective bargaining, it will be necessary to ensure that the competition proceeds in a fair and orderly way.

The regulatory scheme might help by limiting the dimensions of the competition. Substantively, the scheme should require a set of standardized terms, so that bidders are only competing on a very limited number of variables like the amount of the upfront offers. More procedurally, the scheme should require bidders to deliver to workers a simple, standardized disclosure document that cleanly lays out key points about each offer and each bidder's historical performance.[84]

The system should also make allowances for deals between competing investors. If one investor attracts 25% support and another attracts 35% support, the result should generally not be a failure to certify an exclusive bargaining representative. Instead, there should be a deal between the investors and the workers that results in certification. This may call for an additional set of rules to prevent cartels or other forms of strategic behavior. At a minimum, investors should be required to disclose if they are working as a group.[85]

### 3. Mechanics

The system would pose at least two potentially-related mechanical challenges. First, an investor would need some way of identifying and contacting employees. Second, it would be appropriate to require investors to disclose their campaigns, either at the outset or after reaching some threshold level of support.

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[84] Simplicity is an important virtue in disclosures and contracting. *See, e.g.*, Karen Eggleston, Eric Posner & Richard Zeckhauser, Simplicity and Complexity in Contracts, University of Chicago, John M. Olin Program in Law and Economics, Working Paper No. 93, January 19, 2000, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=205391; Omri Ben-Shahar and James J. White, Boilerplate and Economic Power in Auto-Manufacturing Contracts, *in* Boilerplate: The Foundation of Market Contracts 29–44 (Omri Ben-Shahar ed., 2007), Cambridge: Cambridge University Press. Excessively detailed mandatory disclosures are unlikely to be helpful to workers who have finite time and capacity. *See, e.g.* Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted To Know: The Failure of Mandated Disclosure (2014). But a clean and well-designed disclosure can call attention to information that should be relevant to their decision. *See, e.g.*, Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness 192-93 (2008) (describing clean design of mandatory fuel economy stickers for cars, indicating miles per gallon and estimated fuel costs along with benchmarks for comparison). Standardized disclosures would also be helpful to investors, regulators, and researchers seeking to aggregate data for purposes of analysis.

[85] *Cf.* Morales v. Quintel Entertainment, Inc., 249 F.3d 115, 123-24 (2d Cir. 2001) (discussing Exchange Act section 13(d) disclosure requirement for investors acting as a "group").

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Investors would need to be able to contact employees to share information about their offers. At one extreme, the system might make no accommodations. An investor that wanted to organize a workplace might be required to use normal advertising channels, and take other steps such as setting up a physical presence outside of the workplace to attract the necessary level of support. At another extreme, employers might be required to deliver investors' offers to their employees,[86] or to share employee contact information with a qualified investor that had expressed an interest or achieved some threshold level of support, such as by collecting signatures on a ballot.[87]

On balance, the best policy would be for regulation to actively facilitate communication between investors and employees. For example, in the corporate context, activists mounting a proxy fight are generally able to get access to the information required to contact other stockholders.[88] That said, sharing employees' personal contact information with investors would raise serious data privacy issues that call for appropriate regulation. The system should address these issues by incorporating appropriate data privacy and information security rules, and by requiring investors to be appropriately registered with the National Labor Relations Board.

Requiring investors to identify themselves when pursuing a tender offer has distinct benefits. In the corporate context, shareholders are required to make disclosures if they reach certain levels of ownership. For example, an investor or group of investors generally is required to file a Schedule 13D or 13G form within

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[86] Bodie, *Mandatory Disclosure*, *supra* note __ at 638 (suggesting mandatory disclosure regime with short forms provided directly to all employees and further disclosures on a website).

[87] At present, if a union attracts enough support to trigger a certification election, the employer must provide the NLRB's regional director a list of eligible voters with their contact information. The NLRB regional director then provides the list to the union. NLRB v. Wyman-Gordon, 394 U.S. 759, 767 (1969); Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239-40 (1966); 79 FR 74337-74340. The NLRB proposed to change this requirement in July 2020, citing worker privacy concerns, but ultimately failed to take action on the proposal. 85 F.R. 45553 (2020). An analogous requirement here would force employers to share contact information with an investor that had achieved 30% acceptance of its offer. It is unlikely that the system could compel employers to provide investors with physical access to the workplace without just compensation. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (finding that required access was a "taking" under the Fifth Amendment).

[88] *See* 8 Del. C. 220(b)(1); High River Ltd. P'ship v. Occidental Petroleum Corp., 2019 WL 6040285, at *6 (Del. Ch. Nov. 14, 2019) (discussing with approval precedent establishing that a stockholder could access "purely logistical information" about "how to reach stockholders" in connection with a proxy contest, though distinguishing from other information that might be useful in swaying stockholders' votes). Various institutional investors must also regularly file a Schedule 13F which publicly discloses their ownership of public corporations. *See* Alexander I. Platt, *Beyond "Market Transparency": Investor Disclosure and Corporate Governance*, 74 Stan. L. Rev. --- (forthcoming 2022) (discussing the implications of 13F disclosure for corporate governance).

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ten days of acquiring 5% or more of the stock of a public company.[89] Acquirers making a tender offer must immediately disclose information about their offers.[90]

In the corporate space, this type of disclosure can facilitate a more vigorous and orderly competition. If everyone knows that a company is "in play," anyone with an interest can make an appropriate bid, and shareholders are more likely to receive significant value or their shares. Disclosures also allow for a rational weighing of offers, instead of a frantic rush to tender. But there are significant potential costs to this type of disclosure. By reducing the profitability of acquisitions, due to others' ability to see the opportunity and free ride on the initial acquirer's efforts, disclosure will reduce the amount of activity in the space by reducing bidders' incentives to bid in the first place.[91] Disclosure also allows management to take defensive steps to frustrate acquirers, which many commentators believe disserves the shareholders' interests.[92]

These benefits and costs would have analogues in the labor tender offer space. Secret campaigns by competing investors would likely confuse employees, particularly if the competing bids are not presented to workers in an organized or centralized way. A secret process might also mean that an investor could purchase representation rights to a workplace even if some other investor would have been prepared to make a higher offer. Certain limited disclosures would help address the need for investors to get access to employee information. But disclosure could make the process less profitable and thus reduce the incentives of potential investors to make an offer to workers of pay for their votes in union elections. It could also facilitate interference by employers eager to frustrate collective bargaining. Given

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89 *See* 17 C.F.R. § 240.13-d(a) ("Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security . . . is directly or indirectly the beneficial owner of more than five percent of the class shall, within 10 days after the acquisition, file with the Commission, a statement containing the information required by Schedule 13D.").

90 Jonathan R. Macey & Jeffry M. Netter, Regulation 13D and the Regulatory Process, 65 Wash. U. L. Q. 131 (1987) (describing the regulation of tender offers and non-tender offer purchases of significant stock in a target company).

91 Frank Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer,* 94 Harvard L. Rev.1161 (1981) (arguing that resistance by a corporation's managers to premium tender offers, should be proscribed because they decrease shareholder welfare); *cf*. Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Law and Economics of Blockholder Disclosure*, 2 Harv. Bus. L. Rev. 39, 41 (2012) ("tightening disclosure requirements can be expected to reduce the returns to blockholders and thereby reduce the incidence and size of outside blocks as well as blockholders' investments in monitoring and engagement—which, in turn, could well result in increased agency costs and managerial slack").

92 *See* Macey & Netter, *supra* note __ at 133 (criticizing the mandatory disclosure requirements of takeover regulations).

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the strenuous efforts of many employers to avoid unionization today,[93] there is good reason for concern about employer interference with investor efforts.

### B. Representation During the Initial Term

If the investor won a certification election, the investor would be recognized as the exclusive bargaining representative for the workers in the bargaining unit for a stated period of time. In order for the system to succeed, investors would need to have clear incentives to advance worker interests, and meaningful tools to facilitate collective bargaining. This section considers rules that would align investor and worker interests, including (1) accountability through voting, (2) compensation for investors aligned to a metric that reflects worker interests, (3) limits on total compensation to investors, and (4) rules addressing potential conflicts of interest between investors and workers. The section concludes by discussing (5) the powers available to an investor that is certified as the exclusive bargaining representative for a group of workers.

#### 1. Term of Representation

After the investor wins an election, that investor would be recognized as the exclusive bargaining representative for the workers for a finite term. A set term is not strictly necessary to the operation of the scheme. Unions today are largely shielded from efforts to call elections that might dislodge them.[94] This sclerotic, anti-democratic arrangement is justified on the grounds that it promotes stability in labor relations, and is consistent with the broader approach of relying on solidarity instead of competition to motivate appropriate union behavior.

Whatever the benefits of this approach in the context of traditional non-profit unions, it seems intolerable in the context of a market-based system intended to promote healthy competition. Corporate analogies again are instructive. Corporate

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[93] *E.g.* Gordon Lafer & Lola Loustaunau, *Fear at work*, Economic Policy Institute (July 23, 2020), https://files.epi.org/pdf/202305.pdf ("Employers . . . collectively spend $340 million per year on 'union avoidance' consultants who teach them how to exploit [the] weakness of federal labor law to effectively scare workers out of exercising their legal right to collective bargaining."); Weiler, Governing the Workplace, *supra* note __ at 111 (an employer eager to avoid unionization can mount "a vigorous campaign against the union in which management regularly raises the spectre of strikes and job losses, and adds credibility to the threats through selective discriminatory action against key union supporters").

[94] *See, e.g.*, Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. Pa. J. Lab. & Emp. L. 651, 652-53 (2006) (describing "certification bar" preventing successful election petitions for one year after a union is certified, "recognition bar" preventing petitions for a "reasonable" period after a union is voluntarily recognized by the employer on a showing of majority support, and a "contract bar" preventing petitions for up to three years during the term of a valid collective bargaining agreement); Samuel Estreicher, *"Easy In, Easy Out": A Future for U.S. Workplace Representation*, 98 Minn. L. Rev. 1615, 1628-29 (2014) (describing obstacles to elections to removing an ineffective union).

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law relies on a triad of mechanisms for disciplining officers and directors: the market for corporate control, fiduciary duties, and regular accountability in shareholder elections. In some ways, the mechanism of shareholder voting is the most fundamental, and it has proven to be the most durable and vigorously protected by law.[95] Using the mechanism of voting, shareholders recently have had remarkable success in registering their disappointment with the management and boards of directors of major companies.[96] Like the shareholders of major corporations, workers should have regular opportunities to register disappointment with their union representatives and unseat them, while the union representatives should have sufficient time to produce results for the workers whose interests they are supposed to serve.

Thus the term of the representation should balance these competing concerns. The term should be short enough to ensure regular accountability to workers. But it must also be long enough to promote stability and give the investor a real opportunity to advocate for workers successfully. If an employer believes that it can simply wait out a demanding investor, the investor will not have an opportunity to prove the value of collective bargaining, and neither the investor nor workers will be able to realize the benefits of such bargaining..[97]

We believe that a five-year renewable term would balance the need for stability with democratic values. It can take over a year for unions to reach an initial collective bargaining agreement with management, implying that terms must be meaningfully longer for the system to work.[98] A five-year term also should not seem too short to potential investors — private equity firms typically seek exits

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[95] *See* Leo E. Strine, Jr., *The Story of* Blasius Industries v. Atlas Corp.*: Keeping the Electoral Path to Takeovers Clear*, *in* Corporate Law Stories 243 (J. Mark Ramseyer ed., 2009) (describing how Delaware courts removed legal checks to corporate boards' ability to stymie takeover bids, while retaining legal checks on boards' ability to interfere with shareholder voting).

[96] In a recent high profile example, a small hedge fund called Engine No. 1 won three seats on the board of oil giant ExxonMobil by persuading shareholders to back their candidates over management's. Impact investors like Engine No. 1 launch their campaigns with the goal of changing a company's strategy or values. ExxonMobil was vulnerable to a campaign because of its weak response to climate issues and its flagging stock price performance. *See, e.g*. Madeline Ray, Impact Investment in Action: Climate Activists Shake up Exxon's Board, Sage Business Cases (July 6, 2021), https://sk.sagepub.com/cases/impact-investment-in-action-climate-activists-shake-up-exxon-board.

[97] *Cf.* Estreicher, *Deregulating*, *supra* note __ at 526; Weiler, *Striking New Balance*, *supra* note __ at 352 (an employer can prevent a new union from fully establishing itself by preventing the union from successfully negotiating a first contract).

[98] Robert Combs, *How Long Does It Take Unions to Reach First Contracts?*, Bloomberg Law (June 1, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-long-does-it-take-unions-to-reach-first-contracts (finding that new unions take an average of 409 days to negotiate a first contract, with the time period varying by industry).

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after 5.4 years on average,[99] and investors in the market for union control should be comfortable with the need to generate returns within that timeframe. Policymakers might also consider a shorter timeframe, perhaps drawing on the current structure of labor law, which effectively grants a one-year grace period to unions to strike a deal, and a three-year grace period if they do.[100] In setting the timeframe, policymakers might also consider the typical length of a collective bargaining agreement, the typical tenure for a worker, and the possibility of varying terms by industry or by labor market conditions.

#### 2. Choice of Objectives

During its period of representation, the investor should have a clear financial incentive to advance worker interests. But the concept of worker interests is broad and far from self-defining. Workers may have a broad range of concerns — starting with wages, but including working conditions, benefits, scheduling, and dignitary interests — some of which would be difficult to monetize in a transparent way.[101] In designing incentives, policymakers would have to balance the goal of responding to the full range of workers' needs against the goal of keeping the bid sheets for workers' votes simple enough that workers can follow them. Even apart from helping workers to police misconduct, a simple metric would help workers evaluate the usefulness of collective bargaining and to better use investor performance as a benchmark for union performance.

Perhaps the simplest approach would be for the investor to take a percentage of the gain in cash wages that the bargaining unit actually achieved within the term.[102] This structure would ensure that the investor would only profit if the

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[99] Greg Winterton, *Private Equity Holding Periods Reach All-time High in 2020*, Alpha Week (Apr. 22, 2021), https://www.alpha-week.com/private-equity-holding-periods-reach-all-time-high-2020

[100] *See supra* notes __ & __ (describing the one-year certification bar and the three-year contract bar).

[101] *See, e.g.*, Schwab, *supra* note __ at 381-82 (describing array of monetary and non-monetary benefits valued by workers). Labor law acknowledges the range of permissible objectives that workers might have in collective bargaining by requiring employers to engage in good faith with a union on several topics. These mandatory subjects for collective bargaining include rate of pay, but also extend to method of pay, work rules, safety, promotions, order of layoffs, discipline, drug testing, and arbitration and grievance procedures. *See* Allied Chems. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971) (employer must bargain over any "mandatory subject of bargaining," i.e. the "issues that settle an aspect of the relationship between the employer and employees"); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349-50 (1958) (it is lawful to insist upon negotiation of matters subject to mandatory bargaining, i.e., matters that settle a term or condition of employment); 29 U.S.C. § 158(d) (employer and representative of employees must bargain "with respect to wages, hours, and other terms and conditions of employment"); Michael Evan Gold, An Introduction to Labor Law 74-75 (3d ed. 2014).

[102] There are some antecedents in labor union practices. *See* Schwab, *supra* note __ at 382 (describing schemes granting higher pay to union officials when members enjoyed higher pay). This

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workers realized a tangible economic benefit that is easy for the workers to understand and value.

Admittedly, the approach would collapse performance down to one number that may not capture all of the relevant goals in current collective bargaining arrangements.[103] It is difficult to place a monetary value on job security, working conditions, or training, especially given different tastes of workers and changing labor market conditions.[104] But this problem exists not only under our proposed system, but under any system. Wages are highly salient and easy to evaluate. They are bound to become the lodestar measure for evaluating competing bids by prospective collective bargainers. Ultimately, the benefits of our proposal outweigh the costs, particularly in light of the defects with current collective bargaining schemes and the ability of workers to reject any proposal from an investor that they deem insufficient. It is not clear what objectives unions pursue in collective bargaining,[105] and limited accountability mechanisms — the absence of meaningful competition or voting requirements — allow union leaders to pursue objectives that are not tethered to the preferences of real workers.[106]

Existing labor law does help limit the potential for intra-union disputes about goals by focusing attention on appropriate bargaining units: workers with similar jobs are likely to have similar needs and prospects, so they are unlikely to have radically different preferences. But this control comes at a significant cost, as it limits the potential power of collective bargaining and undermines its capacity to benefit workers.[107]

Ultimately, our proposal reduces agency costs and reduces complexity by simply paying workers cash up front in exchange for representation by an investor

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would require a change to antitrust laws, to permit a for-profit organization to organize workers without fear of liability. Estreicher, *Deregulating*, *supra* note __ at 515.

[103] *Cf.* Martin, *supra* at 2 (listing range of maximands for unions that appear in the literature); Estreicher, *supra* at 519 (suggesting that representative might seek authority only on limited issues like wages or pensions, reducing concern about tradeoffs).

[104] Of course, if the system deliberately excludes a matter from the investor's incentives, that matter should not be a subject of mandatory bargaining through the investor – workers and the employer should be free to strike separate deals, whether on an individual or collective basis.

[105] Martin, *supra* note __ at 1-2 (noting "embarrassing number" of proposed answers to the "deceptively simple question . . . 'What do unions maximize?'").

[106] *See* Macey, *supra* note __ at 336-44 (noting hurdles to controlling agency costs in the union context).

[107] For some of the potential benefits of a broader approach, *see infra* Part III.B (describing potential benefits from sectoral bargaining). The narrow approach may also make it difficult for unions to pursue certain value-creating strategies. *See* Estreicher, *Freedom of Contract*, *supra* note __ at 839 (because "unions represent only a fraction of an employer's nonsupervisory personnel . . . the union is encouraged to pursue an agenda that, while it may benefit the represented group, may also detract from the overall economic position of the firm").

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with a narrow mandate. To the extent that workers care deeply about issues other than wages, they can express that preference by refusing to tender unless they are offered a sufficient amount of cash to compensate for these other issues. This does not eliminate the potential for serious conflicts. Even within a small workplace, workers can have widely divergent interests: a long-serving older employee nearing retirement may care deeply about pension and health benefits, while a new younger employee may be more interested in higher wages and family paid leave. Actually reconciling such conflicts is necessarily costly,[108] and it is not clear that existing systems of union democracy are actually effective in finding reasonable or efficient answers. Flattening preferences into a narrow mandate to maximize wages is an efficient approach to improving outcomes for workers, much as corporate managers' narrow mandate to maximize stock returns has driven major gains for shareholders.

That said, some adjustments to a pure wage metric may be appropriate. For example, investors might be given specific financial incentives to press grievances or force employers to eliminate illegal behavior. Investors would already have an incentive to litigate wage and hour violations and labor law violations. If an employer underpays workers or undercounts hours, it would also cut into the investor's returns, and if an employer sabotages labor organizing, it would also damage the investor's business model. This in itself would be meaningful, as employers currently face limited consequences for violations of the Fair Labor Standards Act or the National Labor Relations Act.[109] But investors might also be given financial incentives to press other issues, such as violations of workplace safety regulations or unlawful discrimination. Unions today have a duty of fair representation that encourages them to press grievances identified by workers.[110] The regulatory scheme might adjust investor compensation to provide similar encouragement.[111]

Other adjustments would help to curb destructive gamesmanship. Investors must not be incentivized to bargain away $2 of health insurance benefits for $1 of

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108 *Cf.* Henry Hansmann, The Ownership of Enterprise (2000) (suggesting that employee-owned firms are essentially absent from some industries due to the difficulty of managing competing interests).

109 *See* Anna Stansbury, *Do US Firms Have An Incentive to Comply with the FLSA and the NLRA?*, Peterson Institute for International Economics Working Paper 21-9 (Aug. 2021), https://www.piie.com/sites/default/files/documents/wp21-9.pdf.

110 John H. Fanning, The Duty of Fair Representation, 19 B.C. L. Rev. 813, 813, 814 (1978) ("The doctrine of fair representation imposes upon labor organizations a duty to represent fairly all members of a bargaining unit," workers "are entitled to expect that the union will bargain effectively on their behalf.").

111 The adjustments could be framed as a bounty for successfully litigated issues, a penalty for failing to press an issue that the worker or government later litigated successfully, or a mandate to insure workers against injuries. Apart from incentivizing robust action, the system should also avoid creating a disincentive for investors to organize workplaces where lawbreaking is suspected.

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wages. Adjustments to address these problems can be made easily. For example, the system might look to established markets or actuarial principles to capture the economic value of a Cadillac health insurance plan or retirement benefits, and incorporate that into the calculation. The economic value of any improvements would then be factored into the investor's compensation, in much the same way as an increase in wages.

Another set of adjustments would discourage investors from playing workers against each other. Such adjustments may not be necessary. With a pure wage metric, an investor would not benefit from a zero-sum transfer from one group of workers to another. Reducing one worker's wages by $100 to increase two other workers' wages by $50 each might be a winning tactic for a traditional union seeking to remain in place, as it would purchase two votes at the cost of one vote.[112] But it would not be a profitable strategy for an investor taking a cut of total wage increases, as there would be no improvement in the total. Still, adjustments would affirmatively discourage this type of maneuver. At an extreme, an investor might be deemed ineligible for compensation if any worker's wages decline. Under this approach, investors would not be permitted to bargain for reductions in wages or working conditions, ever. This would insure that no worker is made worse off as the result of a decision to allow workers to sell their votes. A less extreme approach might weight wage reductions more heavily than wage increases.[113]

Depending on the actual operation of the system, policymakers should consider additional adjustments. For example, policymakers might encourage investors to prioritize wage increases for the lowest-paid employees. This would be justified by Rawls's difference principle, which suggests that inequality is only tolerable if it improves outcomes for the worst-off members of society.[114] But the change may have limited benefits.[115] The change may have serious costs.[116] And

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[112] This is not a given. Workers are conscious of tactics designed to divide them, and have cited such concerns in rejecting contracts negotiated by unions. *See supra* notes __ to __ and accompanying text. Still, this type of politicking can occur in less overt forms. For example, a union might prioritize the pensions or job security prized by a contingent of older employees over the wage increases that would be preferred by younger employees.

[113] In the example above, a collective bargaining agreement that caused one worker's wages to decrease by $100 while two workers' wages increase by $50 each would have a total wage increase of $0. With an adjustment, the system might give double weight to declines. Under that approach, the investor would be seen as causing a $100 decline across the three workers ($50+$50-2x$100).

[114] John Rawls, A Theory of Justice (1971).

[115] Inequality across represented workers at a firm may not be significant in comparison to inequality between managers and workers at the firm, or inequality between workers at different firms. Such issues would suggest that inequality is better addressed through external regulation.

[116] It could cost investors credibility among relatively well-paid employees, making it more difficult for them to prevail in certification campaigns. It could also create costs by distorting outcomes away from what would prevail in an ideal labor market.

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the change may be difficult or impossible to implement.[117] Policymakers should consider gaining experience with the system in actual operation before making this type of adjustment to the total wage metric.

Regardless of the metric, it would be necessary to determine a baseline. Should wage gains be measured from the date that the investor won the certification election, or some other time? Measuring from the date of the election would be relatively simple. But it could give employers opportunities for mischief if they respond to a newly launched tender offer by preemptively raising wages.[118] It might be advisable to give the investor credit for gains that occur after a campaign is announced but in advance of the vote.[119] Measuring the baseline as of the date the offer was disclosed[120] would create a clear, bright line rule.

It would also be necessary to decide how to handle changes in the composition of the workforce at a company. If the employer fires a worker making $400 a week and hires a new worker making $500 a week, should the investor be credited with a $100 wage increase? If the employer fires two workers making $400 a week and hires one new worker making $800 a week, should the investor face a penalty, or should the system be indifferent?

These questions go to the basic goals of the system we propose. Is the purpose of a representation to benefit the workers who voted for it, or to effect change in the economy as a whole? Is the goal of the overall system to shift decisions about the manner of production — how many people get hired, what capital investments get made — or simply to ensure that labor gets its fair share of profits? Policymakers might reasonably reach different answers on these questions,

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[117] Among other things, the concept of inequality is not self-defining, and policymakers may struggle to explain which wage differences are objectionable. A new employee may be paid less than a longstanding employee nearing retirement, and an employee with flexible work arrangements may be paid less than an employee with a strict schedule.

[118] Labor law currently prevents employers from conferring a benefit on employees shortly before an election if it would be perceived as an implied promise or threat. *E.g.* NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964) (Section 8(a)(1) of the National Labor Relations Act "prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.").

[119] In the corporate takeover and activism space, an acquirer would benefit if the target took an action that raised the stock price because the acquirer would be able to sell its shares for a profit. It would be problematic if the investor accepted a greenmail-like side payment to go away, but if the investor frightens the employer into making changes that benefit the workers, it has done real work even if it does not win an election or achieve post-election gains.

[120] *See supra* Part II.A.3.

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and indeed might vary their answers over time depending on changing macroeconomic conditions.[121]

One view is that the system should preserve labor market flexibility. Under this conception, investors should not prevent employers from changing the composition of the workforce if doing so creates economic value. Investors should instead seek to ensure that the workforce receives the largest possible share of that value. A natural implementation of this approach would be to base investor compensation on total payroll. Replacing a worker making $400 a week with a new worker making $500 a week would raise total payroll, and the investor could claim a percentage. Replacing two workers making $400 a week each with one new worker making $800 a week would have no impact on payroll, and the investor's compensation would not be directly affected.[122]

Although the investor's compensation would not be directly impacted by changes in the workforce that do not result in wage increases for the workforce as a whole, the investor may still have strategic reasons to try to obtain protection against termination in any collective bargaining agreement with the employer. Investors would have good reason to try to increase the value of a worker to the employer, as it would support further wage increases.[123] Workers with some degree of job security would be more likely to make firm-specific investments in human capital.[124] If the investor hopes to remain in place for a second term,[125] or if it needs

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[121] *Cf.* Martin L. Weitzman, The Share Economy (1984) (suggesting stagflation could be addressed through labor agreements granting workers a share of revenues, so that compensation per worker would go down as employers increased the size of the workforce). Among other things, policymakers might seek to preserve total employment during recessions, even at the cost of some reduction in real wages.

If inflation is a meaningful concern, it may also be appropriate to adopt a cost of living adjustment, so that investors are only rewarded for increases in real wages. But this may not be appropriate. Wages do not automatically rise to keep pace with inflation, so it may be appropriate to reward investors for maintaining real wages in the face of inflation.

[122] This indifference does create a misalignment between the incentives of the investor and workers' likely preference for secure employment. But under certain conditions, the misalignment could help the investor demand higher wages than a union by increasing the credibility of its threats and bargaining positions. Faced with a choice between a high employment – low wage scenario or a low employment – high wage scenario, a traditional union may prefer high employment and low wages while an investor would be indifferent. An employer that states that higher wages will lead to a reduction in employment levels thus has more leverage against a traditional union than an investor.

[123] *Cf.* Estreicher, *Freedom of Contract*, *supra* note __ at 830-31 (describing "voice face" or "value-added" function of unions in bargaining for provisions that have economic value but that would be underproduced in an environment in which workers must bargain individually).

[124] *Cf.* Blair & Stout, *supra* note __ at 250 (suggesting that corporate law empowers boards to protect employee interests as part of a strategy to encourage employees to make firm-specific investments).

[125] *See supra* Part II.B.1.

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worker support for industrial actions like strikes,[126] or if it needs to preserve its reputation in the market to maintain its business model, it will also need to maintain the trust and confidence of workers.

A straightforward total payroll approach would mean that the investor could benefit from wage increases enjoyed by workers who did not vote to be represented by the investor. Within labor law, this might be controversial: 27 states have "right to work" laws that ensure that workers who refuse to join a union do not have to pay union dues.[127] In the public sector, the concept has been elevated to the stature of a constitutional principle.[128] But within corporate law, the need to control free-rider problems is well understood: acquirers can generally "squeeze-out" recalcitrant minority shareholders in exchange for fair compensation, and thus capture the full benefit of their efforts to improve the company.[129] Drawing from the corporate tradition would help ensure the vitality of the labor tender offer market, though it would also call for appropriate measures to prevent abuses.[130]

### 3. Limits on Compensation

It may be appropriate to set limits on the amount that an investor could collect if it wins an election and undertakes a representation. *First*, the system might do nothing, and allow competition to drive compensation down to appropriate levels. An investor who offers $1,000 for a worker's vote and proposes to take 50% of wage gains over the following three years would be undercut by an investor who offers $1,000 for the vote and proposes to take only 20% of wage gains. Leaving the issue to competition has distinct benefits. Limits on the percentage an investor could claim would diminish the incentive to look for workplaces that could be improved through collective bargaining, and the incentive to bargain hard to increase wages after an election had been won.[131]

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[126] *See infra* Part II.B.4.

[127] *See* Scott Neuman, *Missouri Blocks Right-To-Work Law*, NPR (Aug. 8, 2018), https://www.npr.org/2018/08/08/636568530/missouri-blocks-right-to-work-law ("Currently, 27 states and Guam have laws allowing employees in private-sector unionized workplaces to opt out of union membership and union fees"). Federal law currently permits states to adopt right-to-work policies. 29 U.S.C. § 164(b) ("Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."). The proposed PRO Act would bar them.

[128] Janus v. AFSCME, 138 S.Ct. 2448 (2018).

[129] *E.g.* 8 *Del. C.* 253 (permitting a holder of 90% of a company's stock to squeeze out the remaining 10%).

[130] For example, squeezed-out shareholders may be able to obtain a judicial valuation of their shares through an appraisal. *See* 8 *Del. C.* § 262.

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

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In addition, a laissez faire approach may not lead to investors trying to claim 100% of the wage gains they achieve. It is not obvious that investors would want to claim a maximum share of gains, because there are significant benefits to all parties to keeping workers interested in growing their wages. Just like a private equity firm that acquires a company and compensates managers with equity, the investor might want to ensure that workers have a stake in improving performance. Having skin in the game would make workers allies in the effort to drive up wages, encouraging them to invest in skills that increase their productivity and value to their employers, and to cooperate fully in labor actions.

But there are good reasons to think that limits on the percentage of wage gains that investors could take would be beneficial. There are externalities to workers retaining a meaningful stake in wage gains. One goal of the overall regime is to give workers as a group a better sense of what can be achieved through collective bargaining, so that the knowledge can be put to use in other workplaces. That goal would be better served if workers can see a meaningful portion of the impact of collective bargaining in their actual paychecks.

Relying on private ordering to protect worker interests might also be unrealistic in light of the real financial desperation of many American workers. Workers today are often willing to accept extraordinarily high interest rates on payday loans to get access to their earnings a few weeks early.[132] If an investor offers real money today in exchange for a cut of workers' future earnings, workers may not consider or bargain over the fine print.

*Second*, the system might place a ceiling on profitability. Under this approach, investors would be limited to a certain return on their upfront payments to workers. For example, suppose that an investor made $1,000 upfront payments to workers in exchange for 50% of wage gains. In its representation, the investor achieves a $5,000 wage increase, so that workers would ordinarily get $2,500 of the gains and the investor would ordinarily get $2,500 of the gains. The system might limit the investor's returns, perhaps preventing the investor from doing more than doubling its money. Under that restriction, the workers would get $3,000 of the gains and the investor would get $2,000.

Like any restriction, this approach would diminish the potential profitability of a representation, reducing investors' willingness to bid. The approach would also diminish an investor's incentive to seek wage gains past a certain point. In the

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[132] Such loans are often highly detrimental to workers because of their high interest rates. Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?* 62 J. L. & Econ. 485 (2019) ("payday loan applicants barely approved for their first loans file for bankruptcy protection significantly more often than barely rejected first-time applicants").

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example above, the investor would have no direct financial reason to pursue a wage gain of more than $4,000, because any further wage gain would go to the workers. For this reason we would not advocate a cap on investors' returns.

*Finally*, the system might place a ceiling on the percentage of wage gains an investor could claim. For example, the system might specify that investors could claim no more than 20% of wage gains achieved during their period of representation.

This approach would again lower profitability and could reduce potential bids. But it would help simplify and standardize the labor tender offer market, making it easier for workers to weigh competing offers. Instead of comparing a bid of $1,000 for 20% of gains against a bid of $1,000 for 40% of gains, a worker might have to compare a bid of $1,000 for 20% of gains against a bid of $500 for 20% of gains. By flattening the competition into a single monetary value, payable immediately, this approach would improve workers' capacity to weigh competing offers. The approach would also mean that investors had an incentive to seek the best possible deal, though at the cost of allowing a theoretically unlimited transfer of value to investors.[133]

#### 4. Conflicts of Interest

The structure of backend compensation would help align the investor's interests with workers' interests. But the capital markets overlay of the scheme indicates that it will be advisable to adopt additional rules to deal with outside financial interests of investors that could be adverse to the workers.

Some basic hypotheticals can illustrate the concern:

a. An investor that represents important workers at ABC Corp. might try to hedge its interest in the workers' wellbeing by taking a long position in ABC stock. If workers are unable to extract major concessions, the investor might lose on its initial investment in workers, but recoup the loss with gains on its ABC stock. The investor's investment in ABC Corp's shares would substantially diminish its incentive to drive a hard bargain with ABC management.

b. A shareholder activist or other institutional investor with an outside agenda with ABC might launch a labor tender offer for the sole purpose of

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[133] A slight variation would lower the ceiling as wage gains increased, thus forcing the investor to share an escalating portion of wage gains with the workers. For example, an investor might be permitted to claim 30% of the first $2,000 of wage gains, 20% of the next $2,000 of wage gains, and 10% of any additional wage gains.

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pressuring ABC to enact that agenda, as opposed to profiting from its interest in improving worker outcomes.[134]

c. An investor that represents important workers at ABC might take a short position in ABC or a long position in its competitor, DEF Corp. before pursuing an industrial action that has the potential to damage ABC's value. While these positions would at least keep the investor adverse to ABC, they could encourage the investor to pursue or persist in pursuing damaging measures such as strikes even when a more conciliatory approach would be more likely to advance the workers' interests.

Each of these possibilities would alter the intended incentives for investors in perverse ways. Instead of receiving compensation in a form that aligned its interests with workers' interests, the investor would be in a position to profit from actions that did not support workers. At a minimum, investors should be required to disclose any conflicts of interest to workers,[135] and to explain the steps they will take to manage those conflicts. A more fundamental remedy might prohibit investors from taking outside conflicting interests related to a company during the period of its representation of the company's workers.

Other potential conflicts could arise within the labor representation business, and present more ambiguous problems:

d. If an investor represents workers at ABC, it may obtain important inside information on matters like profitability or worker productivity that the investor could put to outside uses. Some outside uses, like trading in ABC's

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[134] Existing corporate and labor law principles could limit the scope of this approach. Under corporate law, shareholders are not permitted to make certain business decisions. The law vests authority in the board of directors, and prevents shareholders from dictating what should be done on various business issues. *See* 17 C.F.R. § 240.14a-8(i)(1) (shareholder proposal can be excluded from proxy if it "is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization"); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1985) ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation."). Similarly, under labor law, management does not need to bargain with labor representatives on "managerial decisions, which lie at the core of entrepreneurial control." Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979) (quoting Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 222 (1964) (Stewart, J., concurring)). As a result, an investor that is eager to shape a business decision but unable to do so in its capacity as a shareholder may also be unable to shape the decision as a representative of the workers.

[135] *See* Estreicher, *Freedom of Contract*, *supra* note __ at 840-41 (proposing that policymakers should relax labor law rules that attack conflicts of interest and instead "facilitate opportunities to poll worker satisfaction after actual experience with the agency"). *Cf.* Henry T.C. Hu & Bernard S. Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. Cal. L. Rev. 811 (2006) (proposing disclosure regime to address analogous problem of institutional shareholders casting votes even after taking outside steps to hedge away an economic interest in the outcome).

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stock, may be objectionable. Other outside uses, like improving the investor's representation of DEF's workers, are appropriate.

e. If an investor represents workers at multiple employers, it may face complex tradeoffs. A strike at one employer may have implications for workers at other employers. At present, unions are barred from conducting secondary strikes, meaning that they could not call a strike at one of ABC's customers in an effort to further pressure ABC to make concessions.[136] Even if this ban remained in place and was extended to investors, there may be a range of available strategic behaviors. For example, witnessing a strike at DEF might frighten ABC's managers into making concessions. If the investor has less to gain from its representation at DEF — perhaps fewer workers are involved, or perhaps DEF's workers are already better paid — it might take an overly aggressive approach at DEF that puts DEF's workers in a difficult position in order to secure gains in its representation at ABC.

It is difficult to guess at the scope and implications of this type of problem without seeing the system in operation. As a result, it may be appropriate to articulate a broad standard and give content to that standard through applications as the system evolved. One potential guiding principle could be that an investor owes fiduciary duties to the workers it represents, much as union officers owe fiduciary duties to workers.[137] This concept may provide some intuitions on the problems above. If the investor uses information it obtained from a representation to further its private interests through securities trading, it would arguably be abusing its position of trust.[138] On the other hand, investors should have broad discretion to pursue actions that are reasonably calculated to improve conditions for workers, including by driving up wages at other employers.[139]

A final set of issues relates to the potential use of capital markets strategies to advance worker interests. Through the use of equity stakes held by pension funds, advocates for labor are increasingly interested in using shareholder voting to

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136 *See* 29 U.S.C. § 158(b)(4). The PRO Act would permit secondary strikes.

137 *See* 29 U.S.C. § 501 ("The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group.")..

138 *Cf.* Brophy v. Cities Service Co., 70 A.2d 5 (Del. Ch. 1949) (conceptualizing insider trading as a breach of corporate fiduciary duty).

139 Corporate law recognizes the need for shareholders' representatives to have discretion by insulating a broad range of good faith decisions from judicial review under the business judgment rule. Labor law similarly recognizes the need for unions to have discretion as they bargain with employers. *See* Air Line Pilots Ass'n, Intern. v. O'Neill, 499 U.S. 65, 78 (1991) ("Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. . . . Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.").

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force corporate boards of directors to adopt worker-friendly positions for their companies.[140] The strategy could map over easily to players in the labor tender offer market. Investors could attempt even bolder strategies, such as buying up debt of a bankrupt company to protect worker interests.[141] A full evaluation of such strategies seems premature. Given the likely relative sizes of the markets, investors are more likely to be tempted to use labor market strategies to advance capital market goals than vice-versa. Companies also have powerful tools for resisting capital market strategies, and may not need any regulatory assistance to maintain an appropriate balance. But policymakers may want to remain alert to new developments.

#### 5. Available Tools for Bargaining

An investor's ability to drive gains would depend in part on the economic weapons available to them. For example, an investor able to call a strike to pressure management would be more effective in bargaining than one that lacked such power.[142] Of course, having an investor call a strike is extremely problematic because they get a portion of the benefits from the strike, but the workers experience all of the costs of the strike.

There are many potential approaches to the issue. *First*, an investor that prevailed in a certification election might be deemed to have the power to require workers to participate in a strike. Courts would then hold any workers who refused liable for damages or enjoin them from working.[143] This is a harsh approach,[144] and

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140 *See, e.g.*, Sanford Jacoby, Labor in the Age of Finance: Pensions, Politics, and Corporations from Deindustrialization to Dodd-Frank (2021); David Webber, The Rise of the Working-Class Shareholder: Labor's Last Best Weapon (2018).

141 *Cf.* Douglas G. Baird, Anthony J. Casey & Randal C. Picker, *The Bankruptcy Partition*, 166 U. Pa. L. Rev. 1675, 1694 (2018) (noting that a bankruptcy judge has the power to "designate" or disqualify the votes of creditors that are cast in "bad faith," i.e., to advance an interest outside of their interest as creditors).

142 The investor would not be completely powerless without this ability, as they would remain the exclusive bargaining representative of the workers and the employers would have a duty to bargain in good faith. *See* 29 U.S.C. § 158(d). In the context of this scheme, these prohibitions would prevent side deals between the workers and the employer that cut out the investor. But the duty to bargain in good faith does not currently require the employer to make any particular substantive concession. *Id.*

143 Permanent replacements hired by the employer would present different problems. In the event of a strike called for economic reasons, the employer can hire replacement workers and is not obligated to terminate the replacements when the strike ends. *See* NLRB v. Mackay Radio & Telegraph, 304 U.S. 333 (1938). Allowing the investor to rely on the ex ante deal to force permanent replacements to join the strike would meaningfully alter the balance of power between labor and management. A less extreme adjustment would be to allow the investor to bargain ex post with the replacements and pay them to join the strike.

144 While this option would limit worker freedom, it is not clear that workers enjoy greater freedom today. Suppose employer Alpha outsources a function and sends the workers performing

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it would raise concerns that should be addressed through additional regulation. Workers should not sign over a right to pull them away from their jobs unknowingly, or without adequate compensation. At a minimum, workers should be told clearly about the potential risks and benefits of delegating the authority to call a strike to the investor. A stronger rule would require an investor to compensate workers while they are on strike, much as unions with healthy strike funds do. The investor's payments to workers would be recouped when it received its share of the wage increases gained through the strike.

*Second*, an investor that prevailed in a certification election might be required to then win the approval of a majority of workers in a strike-authorization vote before calling a strike. While this would be challenging, it should not be impossible if a strike is strategically advisable. Even if the investor takes 20% of wage gains, the workers would retain 80% of wage gains; if the investor has a strong argument that a strike would increase wages, workers would have an incentive to agree.

*Third*, the investor might pay the workers for their agreement in the strike-authorization vote. In this approach, the authorization process would provide a forum for additional discussion and bargaining, in which the investor sought to obtain the workers' agreement using some combination of payments and persuasion about the merits of the strike. This approach would preserve worker freedom, but could cause an investor to reduce its initial bid. If the investor anticipates having to pay workers to go on strike, it will pay less to win the certification election.

### C. Maintenance After the Initial Term

There would need to be a mechanism to preserve and build on the gains achieved by the investor in its initial term as the exclusive bargaining representative for a particular bargaining unit. As discussed above, set terms with regular elections would help impose discipline.[145]

But after a first term by a for-profit investor, it may be difficult for the system to operate without modification. Investors may not be willing to pay workers for a stake in any wage *gain* over the next period. If there were gains to be

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that function to a separate services-provider firm, Beta. Beta then requires the workers to sign agreements that preclude them from working with one of Beta's customers directly if they leave. At that point, Beta controls whether the workers can do Alpha's work. If the contract between Alpha and Beta lapses, Beta can pull the workers away until a new and more favorable agreement is reached. There are good reasons to be skeptical of both outsourcing and noncompete agreements, but the steps do not seem like a radical departure from current practices. Here, the investor would step into Beta's role, and its financial incentive to increase the workers' wages would mitigate some of the concerns these practices normally raise.

[145] *See supra* Part II.B.1.

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had, the initial investor presumably realized the majority of them during the initial period.[146]

There are some potential solutions to the problem.

*First*, the system might allow an investor to take a larger share of any wage gain. For example, suppose that the system operates using a 3-year term, and permits investors to take 20% of wage gains over the initial term, but 40% of wage gains over subsequent terms. An investor makes offers to workers and prevails in an initial election in 2023, then obtains a $1.00 wage gain over the 2023-2026 term. As a result, the investor claims $0.20 in revenue from its representation over the 2023-2026 term. The investor makes a second round of offers to workers and prevails in the second election in 2026, then obtains a $0.50 wage gain over the 2026-2029 term. Due to its higher 40% share, the investor claims $0.20 in revenue from its representation over the 2026-2029 term, even though it only obtained half the wage gain. Because it would expect the same revenues, an investor would be just as eager to bid for a second term as it was to bid for a first.

*Second*, the system might allow different forms of back end compensation during the later terms. Instead of requiring a victorious investor to take a percentage of wage *gains*, the system might allow investors to take a smaller percentage of wages during later terms. For example, suppose that the investor drove wages from $8.50 to $9.50 in its first term as exclusive bargaining representative, so that the investor collected 20% of the $1.00 wage gain, or $0.20. The investor might be allowed to take 2% of wages during the second term, so that it would expect to make $0.20 again if it expected to drive wages to a $10.00 average in the second term. As a result, investors would be willing to bid the same amount for the second term as for the first.

This approach would substantially weaken the investor's incentive to bargain hard in the second and later terms: the investor would make $0.19 per worker hour even if it achieved no improvements after the first term, as opposed to $0.20 if it achieved a meaningful gain. But workers would, at that point, have experience with the system, and would be able to weigh risks and benefits for themselves.

Of course, if the incentive problem was deemed intolerable, the system might adopt a hybrid approach. In the asset management industry, a "2 and 20" fee arrangement — in which managers get 2% of assets and 20% of gains in assets — is

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146 *Cf.* Schwab, *supra* note __ at 386 (identifying reasons why taking over a unionized workplace may be more attractive than organizing a workplace, including workers who are already accustomed to the union process and who have appropriate expectations).

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typical. A similar structure would give investors a reason to stay present while also providing an incentive to do real work to improve outcomes.

*Third*, the system could cede the space to traditional unions. Investors would identify problems that could be quickly remedied, solve the problems during their initial term, collect a return, then depart. If workers believed that collective bargaining had been helpful, they would continue the practice through a traditional nonprofit union funded by dues. If an investor believed that the union was not representing the workers vigorously enough, or that there was room for further gains, it could make another tender offer without special concessions.

This approach also has antecedents in equity markets. Index funds are institutional investors that try to passively track the performance of a fixed index like the S&P 500. Index funds cannot deliver outsized returns to savers or capture the full benefits of governance improvements at firms, so they compete on costs. As a result, they have an incentive to control costs by limiting their efforts at monitoring the firms in their portfolio despite having a huge number of shares in those firms.[147] But other institutional investors are able to deliver outsized returns and can use concentrated positions to capture more of the benefits of a governance improvement. Such institutional investors can engage in "governance arbitrage": monitoring firms to find firms susceptible of improvement, taking a stake in those firms, encouraging shareholders like index funds to vote for improvements, profiting from those improvements, then departing.[148] This approach works in equity markets because the system there supports a diverse ecosystem of players with a balance of objectives. The same might be true of a well-calibrated labor tender offer market.

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[147] E.g., Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 Colum. L. Rev. 2029 (2020).

[148] *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 Colum. L. Rev. 863 (2013) (suggesting that activist investors serve as "governance arbitrageurs" who find and solve problems, eliminating the need for large index funds to monitor for those problems); Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 U.C. Davis L. Rev. 875 (2021) (expanding the concept to sustainability issues).

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# III. Demand and Scale

## A. Potential Investors

To operate successfully, a labor tender offer market would need to attract a robust set of investors. This section demonstrates that participating in a labor tender offer market would be a natural extension of the current operating models of activist funds, litigation funders, and traditional unions, with the goal of showing that there is likely to be significant interest in the space.

### 1. Activist Funds & Litigation Funders

Various players in the financial markets have cultivated competencies and developed strategies that easily could be deployed in the labor tender offer market. The success of shareholder activists and litigation financiers suggests the potential of a labor tender offer business.

Shareholder activists take a concentrated position in a target company and demand changes such as the return of capital or the sale of a business line. Shareholder activism requires skill in identifying companies that are failing to provide adequate returns to shareholders, overcoming the collective action problem that normally prevents shareholders from asserting their interests, and pressuring managers to give in to demands supported by shareholders. Those skills could readily be adapted to support workers instead of shareholders.

Viewing this business model in a less favorable light, successful shareholder activists are very effective pests who find points of vulnerability and squeeze. For example, attempting to block a transaction sought by management is a common strategy for extracting concessions, though its success depends on the legal context and the bargaining power of the activist.[149] The approach would readily map over to the labor context, where leaders similarly seek pressure points and use shame to advance a pro-worker agenda.[150]

Litigation financiers cover some portion of the cost of a civil lawsuit in exchange for a portion of any recovery obtained in the litigation. The business requires skill in identifying legal rights that could be more successfully asserted with the additional resources provided by the litigation financier, determining the financial value of those rights, and finding efficient ways to realize that value

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[149] *See* Edward B. Rock, *Majority of the Minority Approval in a World of Active Shareholders*, *in* Law and Finance of Related Party Transactions 105 (Luca Enriques & Tobias H. Troger, eds. 2019) (collecting and analyzing examples).

[150] *See, e.g.*, Justin Hicks, *How A Beloved Giant Rat Won Free Speech Rights*, NPR (Aug. 6, 2021), https://www.npr.org/2021/08/06/1024315097/how-a-beloved-giant-rat-won-free-speech-rights (discussing the use of "Scabby," a giant inflatable rat placed outside of sites of labor disputes to shame employers).

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rapidly. Financing can empower one-off plaintiffs that would otherwise be structurally disadvantaged in litigation by allying them with deep-pocketed repeat players,[151] and can create meaningful ex ante incentives for the powerful to obey the law.[152] These skills—and their impact on power dynamics and ex ante incentives—would find ready application in a labor tender offer market.

There may also be direct overlaps in the business models, as litigation could be an effective strategy for improving worker wages and increasing investor payouts. Investors would have a direct incentive to challenge wage and hour violations by employers, and could be given incentives to challenge other forms of misconduct that harm workers.[153] Investors in the labor tender offer space may also find it valuable to challenge unfair labor practices by employers, or to bring antitrust challenges to employer efforts to suppress wages.[154] Litigation financiers cultivate the capacity to evaluate and manage such litigation, and could use that capacity as players in a labor tender offer market.

Admittedly, part of the interest in investing in litigation finance stems from the fact that its performance is not correlated with traditional financial products. The value of a lawsuit against a company does not decline when the company's value declines, unless the decline is so severe that the company's solvency comes into question. The relationship between the value of labor representation rights and a company's value would be more complicated, as a decline in the health of the business could make it difficult to wring additional wage gains out of management.[155] But they would represent a markedly different type of claim against the cash flows of a company,

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151 *E.g.*, Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1271 (2011) ("By aligning structurally weak social players who make infrequent use of the courts (one-shotters) with powerful funders who make repeated use of the court system (repeat players), litigation funding may alter the bargaining dynamics between the litigating parties in favor of disempowered parties.").

152 *E.g.*, Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 Vand. L. Rev. 563 (2021) (litigation funding encourages the powerful to follow the law).

153 *See supra* Part II.B.2.

154 *See* Eric A. Posner, How Antitrust Failed Workers 34-44 (2021) (discussing "litigation gap" in which cases challenging monopsony in labor markets are not brought as frequently as cases challenging antitrust violations in product markets).

155 Of course, successfully asserting labor representation rights would decrease the value of a company's shares. *See supra* Part II.B.4.

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### 2. Traditional Unions

Traditional unions could, theoretically, become active players in the labor tender offer market. Indeed, unions would begin with the advantage of experience. This background should help unions to negotiate wage increases where they prevail in an election, and should help unions to estimate the appropriate dollar value for a bid.

Unions would also have good reasons to make bids. Increasing collective bargaining in the nonunion sector would help unions negotiate better deals in the workplaces they already represent.[156] Additional organizing would also increase the political muscle of the labor movement, which could be valuable in obtaining other reforms and changes. These forces have led major unions to devote resources to high profile unionization campaigns.[157] While a union's outside interests might pose other problems,[158] they would create a meaningful incentive for unions to enter the labor tender offer market.

Resources may prove to be more of a challenge. Pension funds may provide one source of financial backing, as there is growing interest in using workers' saved capital to advance workers' interests.[159] But until the labor tender offer market matures and demonstrates robust financial returns, it may not be a suitable investment for capital intended to support workers in their old age.

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[156] *See* Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 Chi. Kent L. Rev. 3, 13 (1993) ("unions could credibly promise unionized firms that they would, in due course, organize all firms in the relevant product market, and hence ensure that any gains at the bargaining table would be imposed on all competitors"); Petruska, *supra* note __ at 41-42 (collective bargaining representative must "eliminate labor market competition in order to safeguard the union scale," either by unionizing entire industry or convincing non-union employers to abide by scale). A representative would only be able to make this type of promise if a company's competitors are also subject to the regime — globalization would undermine the promise. Estreicher, *Labor Law Reform*, *supra* note __ at 13.

[157] For example, the Teamsters have sought to unionize Amazon and to challenge its expansion plans. Julia Love, *Amazon's new union battle: Teamsters go local to snarl expansion*, Reuters (Sep. 1, 2021), https://www.reuters.com/world/us/amazons-new-union-battle-teamsters-go-local-snarl-expansion-2021-09-01/ (describing Teamster efforts to encourage state and local governments to constrain expansion and adopt antitrust regulation); Int'l B'hd of Teamsters, *Teamsters Pass Amazon Resolution* (Jun. 24, 2021), https://teamster.org/2021/06/teamsters-pass-amazon-resolution/ (describing Teamsters decision to pursue comprehensive strategy to challenge Amazon).

[158] *Cf. supra* Part II.B.4 (describing potential conflicts of interest for financial market participants).

[159] *See, e.g.*, Sanford Jacoby, Labor in the Age of Finance: Pensions, Politics, and Corporations from Deindustrialization to Dodd-Frank (2021); David Webber, The Rise of the Working-Class Shareholder: Labor's Last Best Weapon (2018).

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## B. Potential Targets

A labor tender offer market would also require targets. The targets for intervention are likely to evolve over time, as market participants gain experience, demonstrate capacity, and attract resources. A natural starting point would be individual, non-unionized workplaces. But as the market matured, investors would be more likely to take on established unions or to attempt to obtain control over labor across sectors or geographies.

### 1. Non-Unionized Workplaces

Under the system, investors would only profit by rapidly driving wage gains through collective bargaining. It would be natural to focus initially on workplaces where wages had not yet been increased through prior attempts at collective bargaining.

Investors would need to consider other issues. A workplace might be non-unionized because there is little to be gained from collective bargaining. For example, if the relevant labor market is already highly competitive, employers may already be paying wages that reflect the full value of worker contributions. Under those circumstances, a successful effort to force wages upward could cause firms to dial back production or exit the market.[160] Investors would be more likely to drive wages up in environments where employers had enjoyed some form of power over workers, and had used that power to suppress wages. Investors might also focus on larger workplaces, to obtain the benefits of scale.

### 2. Unionized Workplaces

Investors may also decide to challenge existing unions that are not adequately representing the workforce. Unionized workplaces may be attractive to investors for a number of reasons. Unionization may reflect that workers have some measure of power in the relevant labor market, and that power could be converted into higher wages. Workers in a unionized workplace may also be more familiar with collective bargaining, and better equipped to assist in efforts to negotiate higher wages on their behalf.[161]

An investor would only attempt to challenge an existing union — and make upfront payments to workers — if it believed that it could do better than the union.

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160 *Cf.* Posner, How Antitrust Failed Workers, *supra* note __ at 133 (firms will exit if unions set wages above the marginal revenue product of workers). Under certain conditions, the problem might be overcome with creative compensation schemes that provided workers normal wages plus a cut of profits.

161 *But see* Schwab, *supra* note __ at 386 (suggesting that unionized workplaces may be particularly ripe targets because workers and employers are familiar with collective bargaining).

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If the union had already pushed wages as high as they could be pushed, an investor would not be able to drive further wage gains, and would have no incentive to displace the incumbent union.

Despite this limitation, there may be worthwhile opportunities for investors to pursue. Investors may have unique strengths that they could bring to bear in a negotiation,[162] or have the resources to pursue strategies that would be out of reach for a traditional union.[163] Some unions may also be ineffective, corrupt, or captured by the relevant employers, so that they fail to press as hard as a properly-motivated investor would. That said, it may be difficult to identify such opportunities from the outside, at least until investors have developed a track record of performance that unions could be compared to.[164]

#### 3. Sectors

Ambitious investors might attempt to obtain control over broader swathes of the workforce. By organizing all workers in a sector, an investor could dramatically improve its bargaining position: It could promise each employer that its competitors will not get a better deal.[165] An investor that controls more of the relevant pool of labor can also exert more monopoly power against employers, and may be able to exert more political power.[166] From the perspective of an investor, these effects suggest potential returns to scale. [167] If the investor builds a large enough business, it will be better positioned to increase worker wages and thus obtain profits.

Naturally, unions are also aware of these benefits, and might also seek to broaden their influence to attain them. But traditional unions have struggled to organize individual workplaces on a piecemeal basis, and now largely seek to change the legal landscape.[168] Such strategies may be a plausible strategy for

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162 *See supra* Part III.A.1 (various Wall Street business models reward competencies that could be brought to bear).

163 *See infra* Part III.B.3 (well-resourced investors could organize entire sectors or geographies more easily than traditional unions relying on persuasion).

164 *Cf. infra* Part III.C (describing informational infrastructure required for a well-functioning labor tender offer market).

165 *See supra* note __. The rules on conflicts of interest would have to permit this type of offer. *See supra* Part II.B.4.

166 *See* Schwab, *supra* note __ at 385.

167 There may be other returns to scale, such as the ability to spread the cost of strikes over a broader base. *Id.* An investor seeking to spread risk across its portfolio of workplaces would likely seek to represent a different set of workers than an investor seeking to increase its bargaining power. The former strategy would call for representation of a diverse set of different workplaces, while the latter strategy would likely call for concentration within a particular labor market.

168 *See* Andrias, *supra* note __ at 58 (“Recognizing the futility of holding elections at McDonald’s franchise stores on a one-off basis, the Fight for $15 has sought to define McDonald’s as the joint

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countering some forms of "fissuring," in which companies hive off and outsource various labor-intensive functions to legally distinct entities.[169] But they do not provide a likely path to collective bargaining across competitors.[170] And even where successful, this strategy is vulnerable to the sudden reversals in labor law that attend transitions from one presidential administration to the next.[171]

Relying on legal regime change also limits the flexibility and possibilities that might be tapped through innovation. It is not clear what model of consolidation would provide the best results: historically, some unions pursued a "trade" strategy and sought to bargain on behalf of all workers with a particular skillset, while other unions pursued an "industrial" strategy and sought to bargain on behalf of all workers within a given industry.[172] Representing a broad set of workers within a particular locality might also be a useful strategy, particularly in countering employers like Amazon that have an operational need for a large number of low-skilled workers in a wide range of locations across the country. Instead of adopting legal rules that commit the labor movement to one particular model across the economy, it may be preferable to allow private actors to innovate and experiment.

Of course, to achieve the scale required to pursue a sectoral strategy, investors might have to win a large number of representation contests rapidly. While traditional unions have struggled to achieve such victories, an investor using the mechanisms described here may succeed. Building trust and credibility across isolated workplaces is a challenging task for traditional organizing,[173] but may be

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employer of all McDonald's employees."). This has not always been true across all industries. The United Autoworkers "evolved into a national body which represents not only the employees of General Motors, but also the employees of other auto manufacturers and of the many auto parts firms, and, indeed, of businesses in a variety of unrelated industries." Weiler, Governing the Workplace, *supra* note __ at 188.

[169] David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It (2017); Eric A. Posner, How Antitrust Failed Workers 133 (2021) ("Many employers have taken advantage of legal forms that allow them to classify workers as independent contractors . . . or fragment their workforce by operating through franchisees."); Kate Andrias, *The New Labor Law*, 126 Yale L.J. 2, 6 (2016) ("'fissured' corporate structures were adopted by employers in part to reduce labor costs and diminish the potency of the NLRA and employment law").

[170] For example, despite meaningful support from prominent Democrats, it seems unlikely that the federal government will adopt the mechanisms that foreign governments have used to compel sectoral bargaining. *See* Strine, Kovvali & Williams, *supra* note __ at __ (discussing German sectoral bargaining rules and their limits).

[171] *E.g.*, Nat'l Labor Relations Bd., Joint Employer Status Under the National Labor Relations Act, 85 FR 11184 (Feb. 26, 2020) (Trump-era rule reversing Obama-era labor-friendly decision on standard for determining joint-employer status, which in turn reversed earlier standard).

[172] Weiler, Governing the Workplace, *supra* note __ at 194-200 (discussing "trade" model of the American Federation of Labor and "industrial" model of the Congress of Industrial Organizations).

[173] *See* Posner, How Antitrust Failed Workers, *supra* note __ at 133 ("workers have become increasingly isolated from each other as a result of broad economic trends, and this isolation interferes with organization").

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easier for investors that can use hard cash to bridge the gap. Investors attempting a large scale organization could also limit the financial risk to themselves with appropriate conditions on their bids. For example, an investor could make its payment to workers contingent on organizing a sufficient number of employers.

### C. Infrastructure Needed for Scale

To function effectively, a labor tender offer market would require a robust ecosystem in which players like journalists, analysts, and advisory services generate information and analysis that benefits investors and workers. Without such an ecosystem, workers would struggle to evaluate offers and investors would struggle to identify profitable opportunities.

Analogies to corporate law and securities markets are instructive. As one of us has observed, shareholders are not asked to make voting decisions in a vacuum: shareholders can rely on recommendations by proxy advisory services like Glass Lewis and ISS.[174] And shareholders are not asked to make trading decisions in a vacuum: shareholders of major public corporations can generally rely on informationally efficient markets, in which mechanisms like mandatory disclosure, analyst coverage, trading by a small set of well-informed actors, and trading by a large set of less-informed actors cause share prices to reflect all available information about corporate prospects.[175] Workers and investors in the labor tender offer market are likely to make better decisions if they receive an equivalent level of support.

The existence of a labor tender offer market would help foster the development of such an ecosystem by putting real money at play. There would be actual profit potential in identifying oppressed workers or effective labor investment firms. Money chasing those opportunities would also support reporting and analysis. Journalists already appear to take interest in labor issues, and labor tender offer activity would create opportunities for new sorts of coverage of labor issues.

Markets for bargaining representation could be supported by appropriate disclosure requirements for corporations. The government could require companies to disclose information relevant to assessing labor market power, ideally at private as well as public companies, and ideally with sufficient granularity to identify specific bargaining units that could feasibly be organized. Even apart from their

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[174] Macey, *supra* note __ at 344-50.

[175] *See* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549 (1984); Cammer v. Bloom, 711 F. Supp. 1264, 1286 (D.N.J. 1989) (identifying factors suggesting efficient market for a company's shares, including active trading market, analyst coverage, and numerous market makers).

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value to this scheme — helping investors to identify targets — such disclosures would have other potential benefits to workers and to society more generally.[176] And if the labor tender offer market grew into a real threat to corporate profitability, some portion of such disclosures would likely be necessary for public companies. Without it, shareholders would be unable to assess the risks associated with a company's approach to employees.[177]

## IV. Broader Questions and Implications

### A. Policy Arbitrage

The tender offer proposal suggests the potential of a broader "policy arbitrage" approach, in which the mechanisms and insights of corporate law are mined for opportunities to improve labor law.[178] Corporate law has proven both dynamic and effective in advancing its stated goal of delivering financial returns to shareholders. It would be valuable to impart these virtues to labor law, which has been perceived as ossified and ineffective in addressing the needs of workers.[179]

The work has already begun. One of us has previously offered proposals for reducing agency costs within unions that were drawn from mechanisms used to control agency costs within corporations.[180] Other scholars have generated provocative proposals to help the labor movement by tapping corporate law insights about private ordering or securities disclosure.[181]

Continued study is likely to suggest additional opportunities. Corporate law and labor law are both designed to coordinate economic activity and allocate power. Experiences in one field are likely to prove useful to the other. Corporate law

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[176] *See, e.g.*, Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 Stan. L. Rev. 351 (2011); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 Yale J. on Reg. 499 (2020).

[177] Indeed, there have already been thoughtful calls for enhanced reporting on human capital issues, along with enhanced board processes. *See, e.g.*, Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 Iowa L. Rev. 1885 (2021) (discussing an integrated approach to disclosing and managing risks associated with employee, environmental, social, and governance issues). New rules on "Human Capital Management Disclosure" are currently on the Securities and Exchange Commission's regulatory agenda.

[178] *See* Macey, *supra* note __ at 315. The concept also has some similarities with the concept of a "legal transplant," in which legal rules are moved from one nation's system to another. *See* Alan Watson, Legal Transplants: An Approach to Comparative Law (1974).

[179] *E.g.* Cynthia Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002).

[180] *See* Macey, *supra* note __; *supra* Part I.A.

[181] *See* Estreicher, *supra* note __; Bodie, *supra* note __.

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scholars are increasingly focused on worker issues,[182] and advocates for workers are increasingly focused on corporate law tools.[183] At a minimum, there is clear value in greater scholarly dialogue between the two fields.

### B. Solidarity and Voting Versus Market

While promising, the policy arbitrage approach advanced here does raise a fundamental question about the nature and objectives of labor law. It is plainly consistent with a vision of labor law as a vehicle for improving economic outcomes for workers.[184] But that is not the only potential conception of labor law's purpose. Labor law could be understood as an effort to inject democratic processes and values into everyday working life, in the hope of increasing the dignity and agency of working people and enriching political democracy.[185] It could also be understood as an effort to support political movements based on worker solidarity.[186] Market-based approaches drawn from corporate practice are unlikely to be helpful on these fronts, and could easily prove destructive.[187] While a labor tender offer market would recruit big-pocketed allies, it would necessarily promote worker solidarity or

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[182] *See, e.g.*, George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 Tulane L. Rev. 639 (2021). Many suggestions made by corporate law scholars also raise real questions under labor law: structures intended to give workers voice within a company may violate Section 8(a)(2) of the National Labor Relations Act, which is intended to prevent companies from coopting labor representatives by forming company unions. *See* 29 U.S.C. § 158(a)(2); Strine, Kovvali, Williams, *supra* note __ (noting that American labor law adopts an adversarial approach that may preclude works councils and other structures that are common abroad).

[183] *See, e.g.*, Webber, *supra* note __ (describing how unions have used their power as shareholders to advance the interests of workers).

[184] *See* Estreicher, *supra* note __ at 510 ("A union is a limited-purpose organization that, when it works as it should, advances the membership's economic goals; it is not for most members a vehicle for realizing their noneconomic, spiritual needs.").

[185] This democracy-advancing goal has frequently been cited in support of proposals to give employees greater governance rights at work. *See, e.g.*, Grant M. Hayden & Matthew T. Bodie, Reconstructing the Corporation 177-78 (2020) (The German system of allowing workers to elect representatives to the board of directors "is viewed less in terms of an economic system than as one designed to promote a well-functioning democracy and help prevent social division – in particular, the division between labor and capital. And, on this broad level, it is thought to be broadly successful."); Brett McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 Stanford J. of L., Bus. & Fin. 334, 369 (2008) ("The hope is that employee primacy can create both skills and values that support greater democracy in the political world").

[186] *E.g.*, Michael M. Oswalt, *Alt-Bargaining*, 82 L. & Contem. Problems 89 (2019) (suggesting that union campaigns can serve as a locus for community organizing); Andrias, *supra* note __ at 84-88 (describing role of labor unions in "social bargaining" systems that enlist political support); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 Yale L.J. 148 (2013); Michael J. Goldberg, *Derailing Union Democracy: Why Deregulation Would Be a Mistake*, 23 Berk. J. Emp. & Lab. L. 137, 143 (2002) ("Economists' models may portray unions as purely economic actors and nothing more, but political scientists and sociologists recognize that unions play a much broader role in our society.").

[187] *Cf.* Schwab, *supra* note __ at 403 (right to sell union membership would undermine solidarity values).

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mobilize workers in an ideological sense or promote democratic values. The labor tender offer proposal thus forces a confrontation between these two models of labor law.[188]

Ideally, workers would decide for themselves which approach works best for themselves. If workers themselves (as opposed to their fans in the academy) actually do care about democracy or solidarity, traditional unions that offer those benefits will have a competitive advantage vis-à-vis investors that merely offer money for the right to represent them. Financial investors will prevail if and only if they can offer economic benefits that workers find more valuable than the bundle of economic and moral benefits that some people attribute to traditional unions. Evidence on worker preferences is somewhat mixed. Significantly, workers historically have supported union leaders who were arguably corrupt or authoritarian because those leaders delivered meaningful economic benefits.[189] Workers today, however, are increasingly eager to have their work reflect their moral values.[190] Allowing the market to value moral benefits offers one potential resolution to the impasse, and would avoid a one-size-fits-all prescription.

The market-based answer is not without serious drawbacks. First, there may be externalities to the decision. Helping a worker to become an empowered and engaged citizen helps the entire community, not just the worker.[191] A worker will thus undervalue the moral benefits of a traditional approach to labor law, and may agree to investor offers that are socially destructive. Second, collective action problems tend to put moral benefits at a disadvantage when decisions are based on market transactions instead of traditional voting. Except in a very small workplace, a given worker is unlikely to make the difference between acceptance or rejection of a union or investor. As a result, the worker would have no reason to act on a preference for traditional representation when offered cash by an investor, and no reason not to act on that preference when offered a free choice in a traditional election.[192]

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188 *Cf.* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 Cardozo L. Rev. 261 (1992) (describing similar confrontation in corporate law).

189 *See* Estreicher, *Deregulating*, *supra* note __ at __ (noting that union members consistently backed authoritarian leaders like Hoffa and Bevona because they obtained favorable economic terms in collective bargaining agreements); Petruska, *supra* note __ at 26 (same).

190 *See, e.g.*, M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 Colum. L. Rev. 571, 578 & nn. 28-29 (2009) (firms perceived as being ethical generate goodwill with employees and have a recruiting advantage).

191 McDonnell, *supra* note __ at 374-79 (identifying externalities that affect value and adoption of employee-empowering governance models).

192 *Cf.* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. Fin. & Acct. 247 (2017). The basic intuition is that an individual is not likely to make the difference in either a tender offer or a proxy fight. As a result, the individual has no

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A better answer is that democracy and solidarity are not really options for private sector workers today. Perhaps in the specific situation of an investor challenging a traditional union,[193] there would be troubling issues to resolve about the choice between democracy and market transactions. But with private sector unionization rates currently at about 6%, the concern is not central to the lives of modern workers.

There are also real benefits to focusing exclusively on a narrow set of economic interests. An analogy to corporate law is again instructive. There had been a longstanding debate about whether corporations should focus exclusively on delivering financial returns to shareholders or should balance shareholder returns against a broader set of social concerns.[194] These views enjoyed an uneasy coexistence until the rise of tender offers forced a confrontation and a relentless focus on shareholder returns.[195] Whatever its flaws, the resulting system has clearly delivered substantial financial returns to shareholders. Given the economically enfeebled state of American workers, a similarly monomaniacal focus on their financial wellbeing would be appropriate.

Alternative understandings are also fraught with peril. If unions are understood as political organizations, it becomes reasonable to adopt stringent regulations to ensure that they genuinely command majority support among workers[196] and do not limit the rights of workers who disagree.[197] If they are

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incentive to resist an economically favorable tender offer on moral grounds (their tender won't affect the outcome, so why not make a quick buck), or to compromise their morals by voting for an economically favorable scheme (their vote won't affect the outcome, so why not vote to do the right thing).

[193] *See supra* Part III.B.2.

[194] *See, e.g.*, William D. Savitt & Aneil Kovvali, *On the Promise of Stakeholder Governance: A Response to Bebchuk & Tallarita*, 106 Cornell L. Rev. 1881 (2021) (arguing for consideration of a broader set of concerns); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 Stetson L. Rev. 23 (1991) (arguing for focus on shareholders). The labor tender offer proposal should have a similarly clarifying effect.

[195] *E.g.* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 Cardozo L. Rev. 261 (1992).

[196] *Cf.* Weiler, Governing the Workplace, *supra* note __ at 257 (calling out assumption that "since certification confers on the trade union a quasi-governmental authority over the employees, we must have an election procedure comparable to the one by which our political governors are chosen"). This view shades naturally into support for secret ballots and opposition to card-check procedures urged by unions. The analogy to democracy may have led to other problems within labor law. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495 (1993) (suggesting that a flawed analogy to political democracy has led to procedures that incorporate employers in the certification process).

[197] *See* Janus v. AFSCME, 138 S. Ct. 2448 (2018) (First Amendment bars public sector unions from requiring non-members to pay dues); Tom Campbell, *Exclusive Representation in Public and*

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instead understood as vehicles for achieving a narrow set of economic goals, this type of ideological regulation would be more difficult to justify. The labor movement's choice of a political path may well have left it open to unfavorable government interventions.

Diminishing the role of elections might also raise a separate set of economic concerns. Union elections are supposed to be conducted under "laboratory conditions."[198] Regulators are sensitive when a worker is offered inducements to take a public stance during a certification election, out of a concern that the worker's "outward manifestation of support must often serve as a campaign tool . . . to convince other employees . . . , if only because many employees respect their coworkers' views on the unionization issue. [Permitting inducements would allow the employer or] the union to buy endorsements and paint a false portrait of employee support during its election campaign."[199] In other words, allowing market mechanisms like payments could move outcomes away from the undistorted preferences of workers, because workers count on each other to advance common interests.

In corporate law, very similar concerns once led courts to prohibit vote buying. Each shareholder was believed to be entitled to every other shareholder's independent judgment of how best to advance the common goal of maximizing the value of the firm. A payment buying the vote of an influential shareholder thus operated as a form of deceit on other shareholders.[200] But the logic, and eventually the rule, collapsed as financial markets developed.[201] Shareholders are dispersed and have a broad range of interests. No shareholder can reasonably assume that another's voting decisions are motivated by a common goal. Because there is no falsity, payments cannot move outcomes away from undistorted preferences.

The corporate law trend is worth considering in the labor space. Though labor organizers might prefer otherwise, workers do have their own interests independent of the workplace. Many of the developments in the labor market that have made organizing difficult — including fissuring in the workplace and high turnover in jobs — have reduced the extent to which a worker can reasonably rely on each other to make mutually beneficial decisions. A tender offer market for labor representation would also operate transparently, without the falsity that has driven objections to vote buying or other inducements.

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*Private Labor Law after* Janus*,* 70 Syracuse L. Rev. 731 (2020) (proposing to extend *Janus* to eliminate concept of unions serving as exclusive bargaining representative for workers in a unit).

198 *See supra* note __ (collecting sources).

199 NLRB v. Savair Mfg. Co., 414 U.S. 270, 277 (1973).

200 *See* Schreiber v. Carney, 447 A.2d 17, 24 (Del. Ch. 1982) (collecting and discussing cases).

201 *Id.* at 25; 8 *Del C.* 218(c).

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### C. Completing Markets

A labor tender offer market would offer investors a new form of claim on the cash flows of a firm, and would offer workers new opportunities to tap and diversify the value of their human capital. Investors in capital markets are already eagerly seeking new avenues for investment that can help diversify away risks.[202] A new asset class with different correlations and sensitivities would help in this effort, and could help markets reach more efficient outcomes.

The potential benefits for workers are even more striking. Workers have a large portion of their wealth, and a large measure of their sense of self-worth, tied up in their jobs. Because they are currently unable to diversify away the risks associated with this human capital, and have extremely limited options for insuring this asset or immediately tapping its value, workers are inevitably risk averse.[203] This risk-aversion has direct consequences for labor organizing, as workers are rationally reluctant to trust their careers to unions that have not yet demonstrated capacity and credibility. And it has implications for corporate governance, as workers are rationally reluctant to make firm-specific investments in their human capital without meaningful assurances that those investments will not be lost to opportunistic employers.[204]

The labor tender offer market that we propose in this Article would change the calculus. By accepting a tender offer, a worker would have a way to capture, quickly and immediately, a meaningful portion of the value of any firm-specific investments she has made. By investing that money in schemes at other companies, or in education for herself or her family, the worker would be able to diversify her human capital. In theory, this should make workers more willing to make valuable investments in themselves and more tolerant of risk.

## Conclusion

The approach that we have taken in this Article reflects the potential benefits of "policy arbitrage" between corporate law and labor law. By tapping into the

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[202] *See supra* Part III.A.1.

[203] *Cf.* Jens Damann & Horst Eidenmueller, *Codetermination: A Poor Fit For U.S. Corporations*, 2020 Colum. Bus. L. Rev. 870, 932-34 ("Employees . . . cannot protect themselves against firm-specific risks easily."); Schwab, *supra* note __ at 383 ("Union members . . . depend on one set of leaders to represent them in the workplace. They cannot diversify into several jobs, but are stuck in one."); Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. Chi. L. Rev. 1061, 1067-68 (1984) ("Human capital, unlike capital investments in particular firms, is notoriously difficult to diversify. . . . Relative inability is relevant . . . for risk-averse workers whose firm-specific investments of human capital constitute a large percentage of their wealth.").

[204] *Cf.* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 Va. L. Rev. 247 (1999).

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mechanisms that have made corporations powerful tools for directing wealth toward shareholders, the approach seeks to make labor representation a more powerful tool for directing wealth toward workers. Some scholars already have generated provocative proposals to help the labor movement by tapping insights about corporate governance, private ordering, or securities disclosure.[205] This Article taps insights about the market for corporate control to offer a mechanism that could deliver immediate payments to workers, draw new resources into the work of labor organizing, and improve the quality of labor representation.

205 *See* Macey, *supra*, note __; Estreicher, *supra* note __; Bodie, *supra* note __.

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