Toward a “Tender Offer” Market for Labor Representation

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TOWARD A “TENDER OFFER” MARKET FOR LABOR REPRESENTATION

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Abstract: 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 this strategy does not seem to be working for enough workers. Despite some recent renewed activity, private-sector unionization rates remain below ten percent 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. This new methodological approach also provides a lens for a constructive reevaluation of the objectives and tactics of American labor law.

INTRODUCTION

For decades, corporate America has succeeded in delivering ever-higher profits for shareholders by squeezing workers.¹ Whether the basic driver is

¹ See, 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, Spring 2020, at 1, 1, 10 (“Since the early 1980s in the United States, the share of income going to labor has fallen, measures of corporate valuations like Tobin’s q have risen, average profitability has risen even as interest rates have declined, and measured markups have risen.”).
labor monopsony,\(^2\) a lack of worker power to capture economic profits at corporations,\(^3\) or increasingly ruthless business and legal practices,\(^4\) there is 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 their own, workers 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 to form a union.\(^8\) Workers can then cast votes that determine whether a union will be certified as their representative.\(^9\) If certified, the

com/sol3/papers.cfm?abstract_id=3832069 [https://perma.cc/NQ9E-3E2X] (suggesting that common ownership by large institutional investors may suppress investments that would boost employment, having effects comparable to labor monopsony).

\(^3\) See Stansbury & Summers, *supra* note 1, at 2–3 (suggesting that declining worker power, more than globalization or technological changes, is responsible for the major structural trends in the economy).

\(^4\) See generally DAVID WEIL, *THE FISSURED WORKPLACE* (2014) (examining the use of business and legal tactics, including outsourcing, that have diminished the employer-worker relationship).

\(^5\) See Steven Greenhouse, *New Poll: Americans See Big Power Imbalance in the Workplace*, ON LAB.: WORKERS, UNIONS, POL. (May 14, 2020), https://onlabor.org/new-poll-americans-see-big-power-imbalance-in-the-workplace/ [https://perma.cc/VDV3-DNZD] (“The new survey . . . found that 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.”).


\(^8\) See NLRB v. Gissel Packing Co., 395 U.S. 575, 607 (1969) (stating that if an employer does not voluntarily recognize a union, the union must have support of thirty percent of workers to trigger election); 29 U.S.C. § 159(c)(1)(A) (granting unions the ability to trigger an election upon a showing that a “substantial number of employees . . . wish to be represented.”).

\(^9\) *Your Right to Form a Union*, NAT’L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/your-right-to-form-a-union [https://perma.cc/Q3RN-7NLZ]; see also *Union Certification Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/u/union-certification/ [https://perma.cc/2SV5-XF9Q] (“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
union can advocate for worker interests, and the employer must bargain with it in good faith.\textsuperscript{10} By acting collectively through unions, workers \textit{are supposed to} be able to demand higher wages and better working conditions.\textsuperscript{11}

But the once-mighty American labor movement is in disarray. Only about six percent of private-sector workers in the United States belong to a union.\textsuperscript{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.\textsuperscript{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.\textsuperscript{14} And scale is necessary for effective advocacy in the political arena. As a result, the
diminished size and influence of 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.\(^\text{15}\) Although there have been some important victories during the recent tight labor market,\(^\text{16}\) it remains to be seen whether the small number of workers affected so far will continue to support their union in the face of likely setbacks and disappointments.\(^\text{17}\) Moreover, it is uncertain whether the labor movement can build on those victories to


\(^{17}\) This is not to slight the unionization efforts, 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. See, 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 a New Balance: Freedom of Contract and the Prospects for Union Representation, 98 HARV. L. REV. 351, 352 (1984) [hereinafter Weiler, Striking a New Balance] (observing that an employer can prevent a new union from fully establishing itself by preventing the union from successfully negotiating a first contract).
achieve victories in different kinds of workplaces, and whether any momentum will survive changes in the business cycle.\footnote{See Noam Scheiber, *A Union Blitzed Starbucks. At Amazon, It’s a Slog.*, N.Y. TIMES (May 12, 2022), https://www.nytimes.com/2022/05/12/business/economy/amazon-starbucks-union.html [https://perma.cc/3SX2-QYHY] (noting that certain kinds of workplaces, like Starbucks locations where baristas work together regularly in close proximity, may be more amenable to organizing than other workplaces, like large Amazon warehouses where workers often do not come into close contact).}

contract on a repeat vote. The issues are not limited to the UAW—striking workers at four Kellogg plants overwhelmingly rejected a contract negotiated by their union before finally accepting a deal that ended the strike. Although Americans seem to approve of unions in the abstract, they appear deeply skeptical about trusting unions to make decisions about their own livelihoods, and with some justification.

Resources are also a meaningful constraint. As matters stand, unions must make difficult and contentious decisions about how to best allocate scarce financial capital. The funds available for organizing are limited, and place unions at a disadvantage vis-à-vis employers. The largest labor federation, the

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25 See Jonathan R. Macey, Agency Costs, Corporate Governance, and the American Labor Union, 38 YALE J. ON REGUL. 311, 318–19 (2021) (discussing the prevalence of agency problems in unions and arguing that such corruption erodes trust in unions); cf. Matthew T. Bodie, Information and the Market for Union Representation, 94 VA. L. REV. 1, 23–25 (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 skepticism is not unfounded. 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 21 (discussing the 2021 UAW scandal in which two vice presidents and seven UAW officials pleaded guilty to ten years of embezzlement, bribery, and other related crimes); Consent Decree at 1, United States v. Int’l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., No. 20-cv-13293 (E.D. Mich. Jan. 29, 2021) (“The defendant union acknowledges that there have been criminal convictions, allegations, sworn testimony, and judicial findings of past problems with fraud, corruption, and criminal conduct by certain officials within the UAW and certain of its related entities.”).

26 For example, conflicts over spending priorities were a major cause of disputes between the American Federation of Labor and Congress of Industrial Organizations (“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) (detailing the progression of conflict between the AFL-CIO and the Change to Win Coalition); 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 [https://perma.cc/AYN5-T9YY] (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).

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), had total spending of $123 million in the fiscal year ending in 2019; of this, less than ten percent was dedicated to organizing. By contrast, employers spend $340 million per year on union avoidance consultants. 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 with anti-union messages, the disparity in financial resources is an important constraint.

A broad range of solutions has been proposed, but these solutions often address only part of the problem. For example, policymakers have suggested reforms that would make it easier for unions to win certification elections, 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 or new models for competition between unions. Although 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-mandated terms for employment and increasing government benefits. Although this approach has promise, it would only have a limited impact on workers’ ability to bargain collectively—mandatory universal terms cannot provide the full set of benefits potentially available from agreements customized to different industries, firms, and worker needs. The existing proposals thus do not solve the problem of ensuring vigorous, effective, and well-resourced collective action on behalf of workers by well-motivated representatives.

29 LAFER & LOUSTAUNAU, supra note 27, at 5–6.
30 See infra notes 58–62 and accompanying text (discussing reforms such as eliminating various advantages enjoyed by hostile employers).
31 See infra notes 58–75 and accompanying text.
32 See infra notes 63–75 and accompanying text.
33 See infra notes 76–86 and accompanying text.
But the basic problem has already been solved, at least for shareholders and corporations. Like workers, shareholders have much to gain from successfully overcoming the collective action problems that they face and 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.

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

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35 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 Law & Contemp. Probs. 65, 65–67 (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).

36 See Dorothy S. Lund & Elizabeth Pollman, The Corporate Governance Machine, 121 Colum. L. Rev. 2563, 2578–618 (2021) (describing interlocking mechanisms that keep corporate directors and officers focused on advancing shareholder interests); Lucian A. Bebchuk & Roberto Tallarita, The Illusory Promise of Stakeholder Governance, 106 Cornell L. Rev. 91, 139–54 (2020) (describing system of incentives that align interests of directors and officers with stockholders).

37 See Macey, supra note 25, at 315 (defining “policy arbitrage” as “observing promising mechanisms for controlling agency costs in the corporate context and recommending their adoption in the union context”); cf. Hiba Hafiz, Labor Antitrust’s Paradox, 86 U. Chi. L. Rev. 381, 383 (2020) (proposing “regulatory sharing” between labor law and antitrust).

38 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 246–247 and accompanying text.
cause without such a premium, shareholders would have no reason to tender. 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. Although managers now have powerful tools to flummox a hostile tender offer, it remains an important disciplining force. 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 is under constant threat of replacement.

A similar market mechanism could revitalize labor organizing. 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 change 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 through certification 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 because to profit, the investor would have to proceed to negotiate a meaningful wage increase for workers.

This new market would bring significant new resources and scale to the task of organizing workplaces. Traditional labor unions would be armed with new tools to organize workplaces and attract investment. 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, each with a financial incentive to identify workplaces

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40 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, 57–58 (Del. Ch. 2011) (approving the board’s use of takeover defenses in light of the “threat” that shareholders would accept a tender offer at an inadequate price).

41 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.

42 See Coffee, supra note 39, at 1192–95.

43 See infra notes 87–179 and accompanying text.

44 See infra notes 187–218 and accompanying text.
where workers are underpaid and intervene to drive wages up. This mechanism would also create new competition and accountability for traditional unions by giving all workers a sense of how much traditional collective bargaining should be able to deliver.

Exploring this mechanism may also shed light on broader issues. Corporate experience could be a rich source of ideas for labor law reforms. Indeed, 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. 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 them. More fundamentally, such concerns are best addressed through vigorous regulation and enforcement under statutes like the Occupational Safety and Health Act. 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 reframing of the issues. But the current state of wages, income disparities, and American labor unions demand a reconsideration of traditional approaches to improving the lot of the American worker.

This 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

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45 See infra notes 223–250 and accompanying text.
47 See infra notes 132–161 and accompanying text.
49 For a broader discussion of this set of concerns, see infra notes 223–228 and accompanying text.
50 See infra notes 54–86 and accompanying text.
51 See infra notes 87–179 and accompanying text.
the plausibility of the proposal, addressing the structure’s potential scope and feasibility.52 Part IV considers broader implications, leading to our conclusion that insights from the market for corporate control can be useful in analyzing and improving labor markets.53

I. PRIOR PROPOSALS

The struggles of workers and labor unions have prompted various reform proposals. This Part details the prior proposals and their shortcomings.54 Section A discusses proposals to improve union-related processes, with the goal of making it easier for unions to win certification elections and represent workplaces.55 Next, Section B reviews proposals to encourage competition between different unions and between different models of organizing, with the goal of prompting innovation and improvements.56 Last, Section C discusses proposals to empower workers directly, with the goal of improving their lot and reducing the demands placed on collective bargaining.57

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, 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.58 There

52 See infra notes 180–218 and accompanying text.
53 See infra notes 219–250 and accompanying text.
54 See infra notes 54–86 and accompanying text.
55 See infra notes 58–62 and accompanying text.
56 See infra notes 63–75 and accompanying text.
57 See infra notes 76–86 and accompanying text.
58 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 17, 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, Professor Samuel Estreicher has proposed transitioning from the current “hard in, hard out” system in which it is difficult for un-
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.\textsuperscript{59} The Protecting the Right to Organize Act (\textquotedblleft PRO Act\textquotedblright) includes provisions that would bar employers from requiring workers to 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.\textsuperscript{60} In an early memorandum setting out her priorities, Biden Administration NLRB General Counsel Jennifer Abruzzo suggested an array of potential administrative changes, such as 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.\textsuperscript{61} Although these measures may provide real benefits, they would do little to address key problems driving the decline in unionization. Specifically, they would neither directly increase union credibility nor 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: electing union leaders directly, 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.\textsuperscript{62} Although 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.

B. Encouraging Competition

A different class of proposals, which directly inspire our new proposal, has sought to tap the potential benefits of competition, both between individual unions and between different models of organizing. Several commentators have proposed removing barriers to competition between unions, with the goal of boosting overall competence and credibility. Importantly, 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. 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. These legal barriers are exacerbated by union pacts and policies that prevent unions from raiding each other for members.

Competition spurs innovation and responsiveness, and the unions that survive the process would likely be effective in satisfying worker demands. At the same time, labor law’s traditional skepticism of competition has some powerful justifications. It would be difficult for a union to make headway in the wake of major scandals, the UAW voted to adopt a system of direct elections. See 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 25, at 337–38 (describing the value of direct elections).

63 See Kye D. Pawlenko, Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism, 8 U. PA. J. LAB. & EMP. L. 651, 687–91 (2006) (suggesting an 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. & EMP. L.J. 1, 51–53 (2005) (suggesting an amendment to the no-raid provision in the AFL-CIO constitution to allow challenges against unions “guilty of corruption, gross mismanagement, or neglect”); Estreicher, supra note 62, at 520 (suggesting a loosening of rules on rival bids to permit a more competitive market to emerge).

64 See 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.").

65 "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 thirty-day period prior to the expiration date of the existing agreement. Mountaire Farms, Inc., 370 N.L.R.B. No. 110 (Apr. 21, 2021) (citation omitted) (announcing the NLRB’s decision to retain the “contract-bar” doctrine after inviting briefing on whether the doctrine should be overturned).

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. Given that less than ten percent 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 labor representation. One key element of this liberalization would be to permit for-profit organizations to represent workers. At present, antitrust laws exempt only labor organizations created to achieve “mutual help” without capital stock and without operating for profit. 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. Such a reform would be necessary in order to implement our proposed 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

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67 Cf. Petruska, supra note 63, at 25–27, 38–39 (describing the difficulties for a union that had to compete with other unions instead of focusing its resources on the employer).


69 See Estreicher, supra note 58, at 1635–36 (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 demonstrate 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, 840 (1996) [hereinafter Estreicher, Value-Added Unionism] (proposing “relaxing, ex ante, prophylactic safeguards that inhibit the possible emergence of alternative approaches to worker representation”); Estreicher, supra note 62, at 516 (suggesting that unions be deregulated to allow for-profit unions and unions in which participation rights and membership are separated).

70 Estreicher, supra note 62, at 516; see also Schwab, supra note 66, at 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). See generally Donald L. Martin, An Ownership Theory of the Trade Union (1980) (developing the concept of a “proprietary union”).


72 Estreicher, supra note 62, at 513.
justify high dues with promises of high-quality union services and then deliver something less.73

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.74 As a result, potential insurgents cannot simply purchase a controlling interest; they must persuade existing members of the union of their superior efficiency.75

C. Empowering Workers

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

First, policymakers should seek to limit the range of non-wage issues that are subject to negotiation between workers and employers.76 For example, if the government provided health insurance uniformly 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.77 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

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73 Schwab, supra note 66, at 397; see also Petruska, supra note 63, at 40–41.
74 Schwab, supra note 66, at 400–04.
75 Id. at 404.
76 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. 1325, 1360–62 (2022) (describing how German firms operate in a market where government involvement “limits opportunities to compete by squeezing worker benefits”).
77 Id. But see Estreicher, Value-Added Unionism, supra note 69, 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). See generally Stewart J. Schwab, The Union as Broker of Employment Rights, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 248, 254 (Cynthia L. Estlund & Michael L. Wachter eds., 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).
problematic. Of course, this approach entails 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.

Second, 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 allow workers to tap into the value of their next paycheck by borrowing against it. This 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. 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. As a result, payday loans provide a cautionary tale of the limited potential for financial schemes to improve worker wellbeing.

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 in 1945, and have since become a prominent part of policy conversations on funding higher education. Extensions to other areas—such as an exchange enabling athletes to sell interests in their future

78 See infra notes 132–161 and accompanying text (suggesting that the tender offer system should focus exclusively on improving total pay to workers).

79 See 29 U.S.C. § 158(d) (mandating that an employer and union “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 increasing pressure over time. See generally Samuel Estreicher, Trade Unionism Under Globalization: The Demise of Voluntarism?, 54 ST. LOUIS U. L.J. 415, 417 (2010).


81 See, e.g., Abbye Atkinson, Rethinking Credit as Social Provision, 71 STAN. L. REV. 1093, 1107–08 (2019) (urging that access to credit is not a solution to entrenched poverty or financial instability); MEHRS BARADARAN, HOW THE OTHER HALF BANKS 8–9 (2015) (showing that public policies including support for minority-owned financial institutions have not and likely cannot address financial inequity).


83 For another, more exotic proposal in which workers could protect against the risk of adverse changes in employment prospects through a private insurance system, see Michael Abramowicz, Toward Livelihood Insurance, 2021 U. CHI. LEGAL F. 17, 21–23.

84 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) (discussing the mid-twentieth century proposals by Milton Friedman and Simon Kuznets, as well as applications in the higher education context).
income to fans—have also been attempted, with a certain limited success.\(^85\) Although the concept informs our proposal, a market for equity-like interests in worker income would not improve worker incomes on its own.\(^86\)

**II. THE PROPOSAL**

This Part lays out a market-based solution to the problems of low union uptake and low union credibility.\(^87\) 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 motives, expand the number of potential union organizers. The upfront payments would encourage workers to agree to collective bargaining by allowing them to tap some of its future value immediately, 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.

Moreover, our 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

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\(^86\) 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* notes 248–250 and accompanying text.

\(^87\) *See infra* notes 87–179 and accompanying text.
features of the system. In this Part, we identify the key issues while surfacing relevant insights from corporate experience. Section A discusses the mechanics of upfront offers, including the potential for competing bids and the possibility of mandated disclosure. Section B discusses the mechanics of representation by an investor, including the tools available to investors and the need to control conflicts of interest. Section 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 system would need to generate a robust flow of offers while maintaining an orderly process that allows workers to evaluate bids and maximize the value they receive from the investors.

In the modern corporate context, the board of directors addresses analogous problems. 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. The board can also structure a rational process to test market values, such as 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.

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88 See infra notes 91–118 and accompanying text.
89 See infra notes 119–174 and accompanying text.
90 See infra notes 175–179 and accompanying text.
91 See, e.g., Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 57 (Del. Ch. 2011) (noting that corporate boards are empowered to resist the “threat” of “substantive coercion” from an inadequate bid by using a poison pill, even in combination with other defenses like classified board structure); Paul Kim, The Poison Pill Defense: A Tactic Employed by Companies to Defend Against a Hostile Takeover, BUS. INSIDER (May 3, 2022), https://www.businessinsider.com/personal-finance/poison-pill[https://perma.cc/2VVR-B99R] (defining “poison pill” as a contingency built into a company’s by-laws that empowers its board of directors “to dilute a shareholder’s stake in the company” in case of a hostile takeover).
92 See, e.g., Guhan Subramanian & Annie Zhao, Go-Shops Revisited, 133 HARV. L. REV. 1215, 1222–23, 1226–32 (2020) (discussing judicial acceptance of “go-shop” terms 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).
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. 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.

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 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, unions 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.

As a result, there is justification for a larger and more direct role for government regulation in the proposed market for labor union control 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 and 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

\[93\text{ See Lund & Pollman, supra note 36, at 2578–609 (describing the system of institutional players that orient corporate governance toward shareholder value maximization); Bebchuk & Tallarita, supra note 36, at 139–55 (describing several powerful incentives that corporate directors and officers have to maximize shareholder value, even when they have been granted express legal authority to pursue other goals).}\]

\[94\text{ The market for corporate control is shaped by some rules, several of which inform our proposals here. See infra note 104 and accompanying text (discussing the requirement that tender offers remain open for twenty days); infra note 114 (discussing the requirement that shareholders make disclosures upon reaching certain ownership thresholds); infra note 115 (discussing the requirement that the terms of tender offers be disclosed).}\]

\[95\text{ See News Release, Bureau of Lab. Stat., supra note 12 (reporting that union membership among private-sector workers sits at 6.1%).}\]

\[96\text{ See infra notes 132–161 (describing legal and other barriers to competition).}\]

\[97\text{ See infra notes 100–108 and accompanying text.}\]
workers to weigh the competing bids.\textsuperscript{98} Finally, it may be necessary to provide for disclosure of worker contact information and of investor bids to facilitate the market for union representation.\textsuperscript{99}

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,”\textsuperscript{100} and current law prohibits a union from offering financial incentives for workers to give their support.\textsuperscript{101}

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 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.\textsuperscript{102}

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 ob-

\textsuperscript{98} See infra notes 109–110 and accompanying text.

\textsuperscript{99} See infra notes 111–118 and accompanying text.

\textsuperscript{100} See 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, Member, dissenting) (observing that “the Board, in General Shoe Corporation, adopted its ‘laboratory conditions’ rationale” (quoting Gen. Shoe Corp., 77 N.L.R.B. at 126–27)); 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) (first citing Gen. Shoe Corp., 77 N.L.R.B. at 127; and then citing Med. Ancillary Servs., 212 N.L.R.B. at 584) (“[T]he National Labor Relations Board . . . requires that these elections be held under ‘laboratory conditions.’”).

\textsuperscript{101} See NLRB v. Savair Mfg. Co., 414 U.S. 270, 277 (1973) (finding a violation where a union offered to waive initiation fees in exchange for worker’s public support, because the practice would allow “the union to buy endorsements”); Nestle Ice Cream Co. v. NLRB, 46 F.3d 578, 584–85 (6th Cir. 1995) (concluding that a union “thwart[s] . . . 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 the merits of the election”); Owens-Illinois, Inc., 271 N.L.R.B. 1235, 1235 (1984) (providing jackets with union insignia to employees who had voiced support for union was “objectionable conduct”).

\textsuperscript{102} 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 wants to signal that confidence, might offer cash to every worker that signs up. An investor that is less certain might offer to pay cash if and only if it prevails in the election.
tain 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 twenty business days. 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 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 and labor law have analogous principles, and it would be sensible 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, such as years of experience, would not be objectionable because the value of union representation might vary from worker to worker depending on seniority.

An investor that prevails in a certification election should be required to take additional steps to demonstrate compliance with the prohibition on structural coercion or discrimination. For example, the successful bidder should also have to treat all workers equally in wage negotiations, regardless of whether

103 17 C.F.R. § 240.14e-1(a) (2021); Equity Tender Offer FAQs, SEC. & EXCH. COMM’N, https://www.sec.gov/Archives/edgar/data/802481/000119312506199094/dex996.htm#:~:text=A tender offer must remain open for twenty business days after material changes [https://perma.cc/2KVC-RP27] (“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.”).

104 See 17 C.F.R. § 240.14e-1(a); Equity Tender Offer FAQs, supra note 103. For a description of the “Saturday Night Special” and regulatory efforts to eliminate it, see Andrew G.T. Moore II, The Birth of Unocal—A Brief History, 31 DEL. J. CORP. L. 865, 866–67 (2006).

105 See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985) (noting that a two-tier offer in which shareholders who tender early get one form of consideration while squeezed-out shareholders get a different form of consideration is “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).

106 See Savair Mfg. Co., 414 U.S. at 277 (forbidding waiver of 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”).
some workers declined to sell their votes. Specific details of the regulatory infrastructure necessary to implement our proposal are discussed below. At a high level, though, 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. In other words, an investor that prevailed in an election by buying fifty-one percent 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.

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. Although competition would help to ensure that workers received full value for the benefits of collective bargaining, it would be necessary to ensure that the competition proceeds in a fair and orderly way. A comprehensive 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.

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107 See infra notes 124–131 and 161–163 and accompanying text.
108 In France, for example, “[i]ndividuals 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 securities regulator, the Autorité des Marché Financiers,] and must file a tender offer for all outstanding equity securities.” ARMAND W. GRUMBERG, ARASH ATTAR-REZVANI & JULIEN ZIKA, PUBLIC MERGERS AND ACQUISITIONS IN FRANCE: OVERVIEW (maintained), West Practical Law, Country Q&A No. 4-502-1646, https://uk.practicallaw.thomsonreuters.com/4-502-1646?transitionType=Default&contextData=(sc.Default)#co_anchor_a323509 [https://perma.cc/VR37-MBCG]. An entity forced to make a tender offer under this requirement must offer “at least the highest price paid by the bidder for securities of the target during the twelve-month period” before it crossed the thirty percent threshold. Id.
ardized disclosures would also be helpful to investors, regulators, and researchers seeking to aggregate data for purposes of analysis.

This proposed system should also make allowances for deals between competing investors. If one investor attracts twenty-five percent support and another attracts thirty-five percent 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.110

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.

Investors would need the ability 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,111 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.112

OMRI BEN-SHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 7–8 (2014) (“[M]any people cannot read most disclosures.”). 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, for example, the clean design of mandatory fuel economy stickers for cars, which indicate miles per gallon and estimated fuel costs along with benchmarks for comparison).


111 See Bodie, Mandatory Disclosure in the Market for Union Representation, supra note 62, at 638 (suggesting a mandatory disclosure regime with short forms provided directly to all employees and further disclosures on a website).

112 At present, if a union attracts enough support to trigger a certification election, the employer must provide the NLRB’s regional director with a list of eligible voters and their contact information. The NLRB regional director then provides the list to the union. See NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969) (discussing and upholding this disclosure process); Excelsior Underwear,
On balance, the best policy would be for regulations to actively facilitate communication between investors and employees. For example, in the corporate context, activists mounting a proxy fight are generally able to access the information required to contact other stockholders.113 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 NLRB.

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 ten days of acquiring five percent or more of the stock of a public company.114 Acquirers making a tender offer must immediately disclose information about their offers.115

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 for their shares. Disclosures also allow for a

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114 See 17 C.F.R. § 240.13d-1(a) (2021) (“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 (§ 240.13d-101).”).

rational weighing of offers, instead of a frantic rush to tender. At the same
time, there are significant potential costs to this type of disclosure. Indeed, it
reduces the profitability of acquisitions due to others’ ability to see the oppor-
tunity and free ride on the initial acquirer’s efforts. In turn, disclosure will re-
duce the amount of activity in the space by reducing bidders’ incentives to bid
in the first place. Disclosure also allows management to take defensive steps
to frustrate acquirers, which commentators believe disserves the shareholders’
interests.

These benefits and costs would have analogues in the labor tender offer
space. Secret campaigns by competing investors would likely confuse employ-
ees, particularly if the competing bids are not presented to workers in an organ-
ized 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 inform-
ation, but disclosures could also make the process less profitable and thus
reduce the incentives of potential investors to make an offer to workers to pay
for their votes in union elections. Further, a secret process could facilitate in-
terference by employers eager to frustrate collective bargaining. Given the
strenuous efforts of many employers to avoid unionization today, there is good
reason for concern about employer interference with investor efforts.

B. Representation During the Initial Term

In order for the proposed system to succeed, investors need to have clear
incentives to advance worker interests and meaningful tools to facilitate collec-
tive bargaining. This Section discusses the mechanics of representation. First,

116 See Frank H. Easterbrook & Daniel R. Fischel, The Proper Role of a Target’s Management in
Responding to a Tender Offer, 94 HARV. L. REV. 1161, 1198 (1981) (arguing that resistance by a
corporation’s managers to premium tender offers should be proscribed because it decreases sharehold-
er welfare); cf. Lucian A. Bebchuk & Robert J. Jackson, Jr., The Law and Economics of Blockholder
Disclosure, 2 HARV. BUS. L. REV. 39, 41 (2012) (“[T]ightening disclosure requirements can be ex-
pected 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.”).

117 See Macey & Netter, supra note 115, at 133 (criticizing the mandatory disclosure require-
ments of takeover regulations).

118 See, e.g., Lafer & Loustaunau, supra note 27, at 1 (“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 bargain-
ing.”); WEILER, GOVERNING THE WORKPLACE, supra note 17, at 111 (stating that an employer eager
to avoid unionization can mount “a vigorous campaign against the union in which management regu-
larly raises the spectre of strikes and job losses, and adds credibility to the threats through selective
discriminatory action against key union supporters”).
it discusses accountability through elections and terms of representation. It discusses accountability through elections and terms of representation. Second, it considers compensation for investors aligned with a metric that reflects worker interests. Third, it details potential limits on total compensation to investors. Fourth, it develops rules for addressing potential conflicts of interest between investors and workers. Finally, it concludes by discussing the powers available to an investor that is certified as the exclusive bargaining representative for a group of workers.

1. Term of Representation

After winning a certification election, the investor would be recognized as the exclusive bargaining representative for the workers for a defined term. Currently, unions are largely shielded from efforts to call elections that might dislodge them. 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. Again, corporate analogies are instructive. Corporate 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. Using the mechanism of voting, shareholders have had recent, remarkable success in registering their disapp...
pointment with the management and boards of directors of major companies.\textsuperscript{127} 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, a defined 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.\textsuperscript{128}

We believe that a five-year renewable term would balance the need for stability with democratic values. It can take more than 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.\textsuperscript{129} A five-year term also should not seem too short to potential investors—private equity firms typically seek exits after 5.4 years on average, and investors in the market for union control should be comfortable with the need to generate returns within that timeframe.\textsuperscript{130} 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.\textsuperscript{131} In setting the timeframe, policymakers might also consider the typical

\textsuperscript{127} 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. E.g., Madeline Rae, Impact Investment in Action: Climate Activists Shake Up Exxon’s Board, SAGE BUS. CASES, July 6, 2021, https://sk.sagepub.com/cases/impact-investment-in-action-climate-activists-shake-up-exxon-board [https://perma.cc/5VJA-GYAA].

\textsuperscript{128} Cf. Estreicher, supra note 62, at 526; see Weiler, Striking a New Balance, supra note 17, at 352 (noting that an employer can prevent a new union from fully establishing itself by preventing the union from successfully negotiating a first contract).

\textsuperscript{129} See Robert Combs, How Long Does It Take Unions to Reach First Contracts?, BLOOMBERG L. (June 1, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-long-does-it-take-unions-to-reach-first-contracts [https://perma.cc/NVS9-PM6F] (finding that new unions take an average of 409 days to negotiate a first contract, with the time period varying by industry).


\textsuperscript{131} See supra notes 64–65 and accompanying text (describing the one-year certification bar and the three-year contract bar).
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 wide 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. 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. Aside from helping workers to police misconduct, a simple metric would help workers evaluate the usefulness of collective bargaining and would establish investor performance as a benchmark for union performance.

Perhaps the simplest incentive would be for the investor to take a percentage of the gain in cash wages that the bargaining unit actually achieved within the term. This structure would ensure that the investor would only profit if the 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. It is difficult to place a monetary value

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132 See, e.g., Schwab, supra note 66, at 381–82 (describing an 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 29 U.S.C. § 158(d) (requiring an employer and the representative of employees to bargain “with respect to wages, hours, and other terms and conditions of employment”); Allied Chem. & Alkali Workers of Am., Loc. Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971) (stating that the employer must bargain over any “mandatory subject of bargaining,” that is, 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) (holding that employers and labor may insist upon negotiation of matters subject to mandatory bargaining—that is, matters that settle a “term or condition of employment”). See generally Michael Evan Gold, AN INTRODUCTION TO LABOR LAW 74–75 (3d ed. 2014).

133 There are some antecedents in labor union practices. See Schwab, supra note 66, at 382 (describing schemes granting higher pay to union officials when members enjoyed higher pay). This would require changing antitrust laws to permit a for-profit organization to organize workers without fear of liability. Estreicher, supra note 62, at 515.

134 Cf. Martin, supra note 70, at 2 (listing a range of maximands for unions that appear in the literature); Estreicher, supra note 62, at 519 (suggesting that a representative might seek authority only on limited issues like wages or pensions, thus reducing concern about tradeoffs).
on job security, working conditions, or training, especially given different
tastes of workers and changing labor market conditions.135

This fundamental 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 pro-
spective collective bargainers. Ultimately, the benefits of our proposal out-
weigh the costs, particularly in light of the defects with current collective bar-
gaining schemes and the ability of workers to reject any proposal from an in-
vestor that they deem insufficient. It is not clear what objectives unions pursue
in collective bargaining, 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.136

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. This control comes at a signif-
icant cost, however, as it limits the potential power of collective bargaining
and undermines its capacity to benefit workers.137

Ultimately, our proposal reduces agency costs and reduces complexity by
simply paying workers cash up front in exchange for representation by an in-
vestor 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. However, this solution does not eliminate the potential for serious
conflicts. Even within a small workplace, workers may 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 paid family leave. Reconciling such con-
flicts is necessarily costly, and it is not clear whether even the existing systems

135 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 em-
ployer should be free to strike separate deals, whether on an individual or collective basis.
136 See MARTIN, supra note 70, at 1–2 (noting the “embarrassing number” of proposed answers to
the “deceptively simple question . . . ‘What do unions maximize?’”); Macey, supra note 25, at 336–44
(noting hurdles to controlling agency costs in the union context).
137 For some of the potential benefits of a broader approach, see infra notes 201–214 and accom-
panying text (describing potential benefits from sectoral bargaining). The narrow approach may also
make it difficult for unions to pursue certain value-creating strategies. See Estreicher, Value-Added
Unionism, supra note 69, at 839 (stating that because “unions represent only a fraction of an employ-
er’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”).
of union democracy are effective in finding reasonable or efficient answers.\textsuperscript{138} Flattening preferences into a narrow mandate to maximize wages is an efficient approach that would improve outcomes for workers, much as corporate managers’ narrow mandate to maximize stock returns has driven major gains for shareholders.\textsuperscript{139}

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.\textsuperscript{140} 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.\textsuperscript{141} The regulatory scheme might adjust investor compensation to provide similar encouragement.\textsuperscript{142}

Other adjustments would help to curb destructive gamesmanship. Investors must not be incentivized to bargain away two dollars of health insurance benefits for one dollar of wages. Adjustments to address these problems are

\begin{enumerate}
\item \textsuperscript{138} See generally Henry Hansmann, The Ownership of Enterprise 91–92 (1996) (suggesting that employee-owned firms are essentially absent from some industries due to the difficulty of managing competing interests).
\item \textsuperscript{139} A single-minded focus on wages could also enhance worker power in other ways. For example, employers may be able to reduce the elasticity of labor—the rate at which reductions in wages will reduce the supply of labor—by making non-wage improvements that are difficult for workers to compare. Workers may be reluctant to switch jobs for more pay out of concern that there are non-wage terms that would be worse. The result is increased employer power, and a greater capacity to extract economic profits. Cf. Jonathan Masur & Eric A. Posner, Horizontal Collusion and Parallel Wage-Setting in Labor Markets 5 (Univ. of Chi. L. Sch., Pub. L. and Legal Theory Working Papers, Paper No. 781, 2022), https://ssrn.com/abstract=4008687 [https://perma.cc/W5ST-XGFX] (discussing how labor market frictions increase employer power). Flattening the competition to focus on a single variable could help change this dynamic.
\item \textsuperscript{140} See Anna Stansbury, Do US Firms Have an Incentive to Comply with the FLSA and the NLRA? 21 (Peterson Inst. for Int’l Econ., Working Paper, Paper No. 21-9, 2021).
\item \textsuperscript{141} See 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,” establishing that workers “are entitled to expect that the union will bargain effectively on their behalf . . . ”).
\item \textsuperscript{142} 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.
\end{enumerate}
easily implemented. 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—that is, purchasing two votes at the cost of one vote—for a traditional union seeking to remain in place.\footnote{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 \textit{infra} notes 15–25 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.} In contrast, 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 ensure 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 weigh wage reductions more heavily than wage increases.\footnote{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).}

Depending on the actual operation of the system, policymakers should consider additional adjustments as well. For example, policymakers might encourage investors to prioritize wage increases for the lowest-paid employees. A justification for this approach is the Rawls “difference principle,” which suggests that inequality is only tolerable if it improves outcomes for the worst-off members of society.\footnote{See \textsc{John Rawls}, \textit{A Theory of Justice} 75–80 (1971).} At the same time, this approach may have limited benefits\footnote{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.} and serious costs,\footnote{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.} and may be difficult or impossible to implement.\footnote{148}
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 could give employers opportunities for mischief if they respond to a newly launched tender offer by preemptively raising wages.\textsuperscript{149} It might be advisable to give the investor credit for gains that occur after a campaign is announced but in advance of the vote.\textsuperscript{150} Measuring the baseline as of the date the offer was disclosed would create a clear, bright-line rule.\textsuperscript{151}

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 per week and hires a new worker making $500 per week, should the investor be credited with a $100 wage increase? If the employer fires two workers each making $400 per week and hires one new worker making $800 per 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 and indeed might vary their answers over time depending on changing macroeconomic conditions.\textsuperscript{152}

\textsuperscript{148} 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 fairly be paid less than a longstanding employee nearing retirement, and an employee with flexible work arrangements may appropriately be paid less than an employee with a strict schedule.

\textsuperscript{149} 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. \textit{E.g.}, NLRB v. Exch. Parts Co., 375 U.S. 405, 409 (1964) (holding that § 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”).

\textsuperscript{150} 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.

\textsuperscript{151} See infra notes 111–118 and accompanying text.

\textsuperscript{152} See generally MARTIN L. WEITZMAN, THE SHARE ECONOMY 3–6 (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
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 per week with a new worker making $500 per week would raise total payroll, and the investor could claim a percentage. Replacing two workers each making $400 per week with one new worker making $800 per week would have no impact on payroll, and the investor’s compensation would not be directly affected.153

Although changes in the workforce that do not result in wage increases for the workforce as a whole would not directly impact the investor’s compensation, 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.154 Workers with some degree of job security would be more likely to make firm-specific investments in human capital.155 If the investor hopes to remain in place for a second term,156 needs worker support for industrial actions like strikes,157 or 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:

153 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.

154 Cf. Estreicher, Value-Added Unionism, supra note 69, at 830–31 (describing the “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).

155 Cf. Blair & Stout, supra note 34, at 249–50 (suggesting that corporate law empowers boards to protect employee interests as part of a strategy to encourage employees to make firm-specific investments).

156 See supra notes 124–131 and accompanying text.

157 See infra notes 164–171 and accompanying text.
twenty-seven states have right-to-work laws that ensure that workers who refuse to join a union do not have to pay union dues.\footnote{158 See Scott Neuman, Missouri Blocks Right-to-Work Law, NPR, https://www.npr.org/2018/08/08/636568530/missouri-blocks-right-to-work-law [https://perma.cc/8ZXE-ASDL] (Aug. 8, 2018) ("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. \textit{See} 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. 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. (2019).} In the public sector, the concept has been elevated to the stature of a constitutional principle.\footnote{159 See Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2459–60 (2018).} 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.\footnote{160 E.g., \textit{Del. Code Ann.} tit. 8, § 253 (2022) (permitting a holder of 90% of a company’s stock to squeeze out the remaining 10%).} 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.\footnote{161 For example, squeezed-out shareholders may be able to obtain a judicial valuation of their shares through an appraisal. \textit{E.g.}, \textit{id.} § 262.}

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. \textit{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. Independent 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.

In addition, a laissez-faire approach may not lead to investors trying to claim one hundred percent 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 com-
pensates 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.

On the other hand, 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.¹⁶² 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 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

¹⁶² Such loans are often highly detrimental to workers because of their high interest rates. See Paige Marta Skiba & Jeremy Tobacman, Do Payday Loans Cause Bankruptcy?, 62 J.L. & ECON. 485, 516 (2019) ("[P]ayday loan applicants barely approved for their first loans file for bankruptcy protection significantly more often than barely rejected first-time applicants.").
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 incentivize investors to seek the best possible deal, though at the cost of allowing a theoretically unlimited transfer of value to investors.163

4. Conflicts of Interest

The structure of backend compensation would help align the investor’s interests with workers’ interests. Nevertheless, 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 Corporation (ABC) 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’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 pressuring ABC to enact that agenda, as opposed to profiting from its interest in improving worker outcomes.164

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163 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.

164 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 (2021) (stating that a 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”); DEL. CODE ANN. tit. 8, § 141(a) (2022) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board
c. An investor that represents important workers at ABC might take a short position in ABC or a long position in its competitor, DEF Corporation (DEF), before pursuing an industrial action that has the potential to damage ABC’s value. Although 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, 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 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.\footnote{29 U.S.C. § 158(b)(4). The PRO Act would permit secondary strikes. 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. (2019).} 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 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 evolves. 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.\footnote{See 29 U.S.C. § 501(a) (“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.”).} 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.\footnote{Cf. Brophy v. Cities Serv. Co., 70 A.2d 5, 8 (Del. Ch. 1949) (conceptualizing insider trading as a breach of corporate fiduciary duty).} On the other hand, investors should have broad discretion to pursue actions that are reasonably calculated to improve conditions for workers, such as driving up wages at other employers.\footnote{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, Int’l 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.” (first citing Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); and then citing United States v. Carolene Prods., 304 U.S. 144, 154 (1938))).}

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 force corporate boards of directors to adopt worker-friendly positions.
for their companies.\textsuperscript{170} The strategy could map over easily to players in the labor tender offer market. Investors could attempt even bolder strategies, such as buying up the debt of a bankrupt company to protect worker interests.\textsuperscript{171} 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. Even still, 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 it. For example, an investor able to call a strike to pressure management would be more effective in bargaining than one that lacked such power.\textsuperscript{172} Of course, having an investor call a strike is extremely problematic because it gets 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.

\textit{First}, an investor that prevails in a certification election might be empowered to require workers to participate in a strike. Courts would then hold any workers who refused liable for damages or enjoin them from working.\textsuperscript{173} This

\textsuperscript{170} \textit{See generally} SANFORD M. JACOBY, LABOR IN THE AGE OF FINANCE 1 (2021) (describing labor leaders’ “use of union pension assets as leverage” in achieving labor’s goals); DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER, at xii (2018) (describing use of “labor’s capital” as a “source of power for labor”).

\textsuperscript{171} \textit{Cf.} Douglas G. Baird, Anthony J. Casey & Randal C. Picker, \textit{The Bankruptcy Partition}, 166 U. PA. L. REV. 1675, 1694 & n.46 (2018) (noting that a bankruptcy judge has the power to “designate” or disqualify the votes of creditors that are cast in “bad faith,” that is, to advance an interest outside of their interest as creditors (citing 11 U.S.C. § 1126(e)).

\textsuperscript{172} The investor would not be completely powerless without this ability, as it would remain the exclusive bargaining representative of the workers and the employers would have a duty to bargain in good faith. \textit{See} 29 U.S.C. § 158(d) (“To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith . . . .”). 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. \textit{Id.}

\textsuperscript{173} 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. \textit{See} NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938) (“Nor was it an unfair labor practice to replace the striking employ[e]es with others in an effort to carry on the business.”). 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.
is a harsh approach, and 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 prevails 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. Although 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; thus, if the investor presents 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 seeks 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 upon 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. However, after the first term by a for-profit investor, it may be difficult for the system to operate without

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174 Although 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 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.

175 See supra notes 124–131 and accompanying text.
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 had, the initial investor presumably realized the majority of them during the initial period. 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 three-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 still 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 the 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 176 Cf. Schwab, supra note 66, 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).
assets—is 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 third 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. 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 those susceptible to improvement, taking a stake in those firms, encouraging shareholders like index funds to vote for improvements, profiting from those improvements, and then departing. 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.

III. DEMAND AND SCALE

This Part evaluates the plausibility of our proposal, elaborating upon the structure’s potential scope and feasibility. Section A explores the ways in which a labor tender offer market would attract various investor groups, such

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180 See infra notes 180–218 and accompanying text.
as activist funds and litigation funders, while Section B discusses the potential targets of our proposed market structure. Finally, Section C lays out the infrastructure necessary for a fair and robust labor tender offer market.

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 with the goal of showing that there is likely to be significant interest in the space. First, it details the operating models of activist funds and litigation funders. Second, it details traditional unions.

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. As explained below, 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. The ap-

181 See infra notes 184–197 and accompanying text.
182 See infra notes 198–214 and accompanying text.
183 See infra notes 215–218 and accompanying text.
184 See infra notes 186–193 and accompanying text.
185 See infra notes 194–197 and accompanying text.
187 See Edward B. Rock, Majority of the Minority Approval in a World of Active Shareholders, in THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 105, 115–27 (Luca Enriques & Tobias
L. Troger eds., 2019) (collecting and analyzing examples of the “majority of the minority” approval approach to blocking a transaction).


189 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.”).


191 See supra notes 132–161 and accompanying text.

192 See ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 34–41 (2021) (discussing a “litigation gap” in which cases challenging monopsony in labor markets are not brought as frequently as cases challenging antitrust violations in product markets).
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. But labor representation rights would represent a markedly different type of claim against the cash flows of a company.

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. 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. While a union’s outside interests might pose other problems, those interests 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 prove to be a source of financial backing, as there is growing interest in using work-

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193 Of course, successfully asserting labor representation rights would decrease the value of a company’s shares. See supra notes 164–171 and accompanying text.

194 See Samuel Estreicher, Labor Law Reform in a World of Competitive Product Markets, 69 CHI.-KENT L. REV. 3, 12 (1993) (“[U]nions 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 63, at 41–42 (explaining that collective bargaining representatives must “eliminate labor market competition in order to safeguard the union scale,” either by unionizing entire industry or by 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, supra, at 13.

195 For example, the Teamsters have sought to unionize Amazon and to challenge its expansion plans. See Julia Love, Amazon’s New Union Battle: Teamsters Go Local to Snarl Expansion, REUTERS (Sept. 1, 2021), https://www.reuters.com/world/us/amazons-new-union-battle-teamsters-go-local-snarl-expansion-2021-09-01/ [https://perma.cc/9YZR-NQZT] (describing Teamster efforts to encourage state and local governments to constrain Amazon’s expansion and adopt antitrust regulations); Teamsters Pass Amazon Resolution, INT’L BHD. OF TEAMSTERS (June 24, 2021), https://teamster.org/2021/06/teamsters-pass-amazon-resolution/ [https://perma.cc/P7R4-NMLG] (describing the Teamsters’ decision to pursue a comprehensive strategy to challenge Amazon).

196 Cf. supra notes 164–171 and accompanying text (describing potential conflicts of interest for financial market participants).
ers’ saved capital to advance workers’ interests. 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.

**B. Potential Targets**

A labor tender offer market would also require targets. This Section explains that the targets for intervention are likely to evolve over time, as market participants gain experience, demonstrate capacity, and attract resources. First, it explains why a natural starting point would be individual, non-unionized workplaces. Then, as the market matured, investors would be more likely to take on established unions or attempt to obtain control over labor across sectors or geographies. Second, it explores the application to unionized workplaces. Finally, it details the benefits an investor may obtain through organizing workers in a particular sector.

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. Still, 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. 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.

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197 See generally, e.g., JACOBY, supra note 170 (discussing the history of attempts by unions advance workers’ interests by leveraging their relationships with pension plans in their role as corporate shareholders); WEBBER, supra note 170 (describing several examples of “pension fund power” being used to advance workers’ interests in both the long- and short-term).

198 See infra note 201 and accompanying text.

199 See infra notes 202–205 and accompanying text.

200 See infra notes 206–214 and accompanying text.

201 Cf. POSNER, supra note 192, at 133 (explaining that 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.
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. For example, 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.\(^{202}\) At the same time, 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. 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\(^{203}\) or have the resources to pursue strategies that would be out of reach for a traditional union.\(^{204}\) 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 on which they could be compared to unions.\(^{205}\)

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.\(^{206}\) 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.\(^{207}\) From the perspective

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\(^{202}\) See Schwab, supra note 66, at 386 (suggesting that unionized workplaces may be particularly ripe targets because workers and employers are familiar with collective bargaining).

\(^{203}\) See supra notes 187–193 and accompanying text (describing various Wall Street business models that reward relevant competencies and that are transferable to this context).

\(^{204}\) See infra notes 206–214 and accompanying text (suggesting that well-resourced investors could organize entire sectors or geographies more easily than traditional unions relying on persuasion).

\(^{205}\) Cf. infra notes 215–218 and accompanying text (describing the informational infrastructure required for a well-functioning labor tender offer market).

\(^{206}\) See, e.g., Estreicher, supra note 194, at 12 (noting that unions could historically make this promise). The rules on conflicts of interest would have to permit this type of offer. See supra Subsection II.B.4.

\(^{207}\) See Schwab, supra note 66, at 385.
of an investor, these effects suggest potential returns to scale. 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 seek to broaden their influence to attain them as well. But traditional unions have struggled to organize individual workplaces on a piecemeal basis, and now largely seek to change the legal landscape. Such strategies may be plausible for countering some forms of “fissuring,” in which companies hive off and outsource various labor-intensive functions to legally distinct entities. However, they do not provide a likely path to collective bargaining across competitors. 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.

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 skill set, while other unions pursued an “industrial” strategy and sought to

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208 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.

209 See, e.g., Kate Andrias, The New Labor Law, 126 YALE L.J. 2, 58 (2016) (“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 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 17, at 188.

210 Weil, supra note 4, at 183–213 (describing potential legislative changes that could help counter fissuring); see Posner, supra note 192, at 133 (“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.”); Andrias, supra note 209, at 6 (“[F]issured corporate structures were adopted by employers in part to reduce labor costs and diminish the potency of the NLRA and employment law.” (first citing Jefferson Cowie, Capital Moves: RCA’s Seventy-Year Quest for Cheap Labor 2 (1999); and then citing Weil, supra note 4, at 10)).

211 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 76, at 1335–37 (discussing German sectoral bargaining rules and their limits).

bargain on behalf of all workers within a given industry. 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. Although 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, but it may be 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 Institutional Shareholder Services (ISS) Inc. Nor are shareholders 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

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213 **WEILER, GOVERNING THE WORKPLACE, supra** note 17, at 194–200 (discussing the “trade” model of the American Federation of Labor and the “industrial” model of the Congress of Industrial Organizations).

214 See **POSNER, supra** note 192, at 133 (“[W]orkers have become increasingly isolated from each other as a result of broad economic trends, and this isolation interferes with organization . . . .”).

215 **Macey, supra** note 25, at 344–50.
corporate prospects. 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 value to this scheme—helping investors to identify targets—such disclosures would have other potential benefits to workers and to society more generally. 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.


217 See, e.g., Cynthia Estlund, Just the Facts: The Case for Workplace Transparency, 63 STAN. L. REV. 351, 401–07 (2011) (describing how disclosures in the small business world would increase worker awareness of their working conditions compared to other similar businesses); Ann M. Lipton, Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure, 37 YALE J. ON REGUL. 499, 511–17 (2020) (listing the wide range of benefits from disclosures, including helping workers, particularly women and people of color, negotiate for better working arrangements).

IV. BROADER QUESTIONS AND IMPLICATIONS

This Part discusses significant policy considerations evoked by our proposal. Section A explores the ways in which corporate law informs a “policy arbitrage” approach to labor law issues. Next, Section B considers alternate goals of labor law, which a market-based approach may undermine in practice. Finally, Section C discusses our proposal’s applications to human capital, advancing workers’ ability to take more calculated financial risks and make meaningful investments in themselves.

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. 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.

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. Other scholars have generated provocative proposals to help the labor movement by tapping corporate law insights about private ordering or securities disclosure. 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 scholars are increasingly focused on worker issues, and advocates for workers are in-

219 See infra notes 219–250 and accompanying text.
220 See infra notes 223–228 and accompanying text.
221 See infra notes 229–247 and accompanying text.
222 See infra notes 248–250 and accompanying text.
223 See Macey, supra note 25, at 315 (explaining policy arbitrage as borrowing mechanisms from the corporate context for the union context). 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 generally ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974).
225 Macey, supra note 25, at 315; see supra notes 58–62 and accompanying text.
227 E.g., George S. Georgiev, The Human Capital Management Movement in U.S. Corporate Law, 95 TUL. L. REV. 639, 652–56 (2021). Many suggestions made by corporate law scholars also raise real questions under labor law: structures intended to give workers a voice within a company
creasingly focused on corporate law tools. At a minimum, there is clear value in a greater scholarly dialogue between the two fields.

B. Solidarity and Voting Versus Market

Although 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. 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. It could also be understood as an effort to support political movements based on worker solidarity. Market-based approaches drawn from corporate practice are unlikely to be helpful on these fronts, and could easily prove destructive. Although a labor tender offer market would recruit big-pocketed allies, it would not necessarily promote worker solidarity or mobilize workers may violate Section 8(a)(2) of the National Labor Relations Act, which is intended to prevent companies from co-opting labor representatives by forming company unions. See 29 U.S.C. § 158(a)(2); Strine, Kovvali & Williams, supra note 76, at 1340–41 (noting that American labor law adopts an adversarial approach that may preclude works councils and other structures that are common abroad).

See generally, e.g., WEBBER, supra note 170 (describing how unions have used their power as shareholders to advance the interests of workers).

See Estreicher, supra note 62, 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.”).

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. BODE, RECONSTRUCTING THE CORPORATION 177–78 (2020) (explaining that 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 quite successful”); Brett H. McDonnell, Employee Primacy, or Economics Meets Civic Republicanism at Work, 13 STAN. J.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.”).

See, e.g., Michael M. Oswalt, Alt-Bargaining, 82 LAW & CONTEMP. PROBS. 89, 101 (2019) (suggesting that union campaigns can serve as a locus for community organizing); Andrias, supra note 209, at 84–88 (describing the 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, 182–97 (2013); Michael J. Goldberg, Deregulating Union Democracy: Why Deregulation Would Be a Mistake, 23 BERKELEY 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.”).

Cf. Schwab, supra note 66, at 403 (positing that the right to sell union membership would undermine solidarity values).
in an ideological sense or promote democratic values. The labor tender offer proposal thus forces a confrontation between these two models of labor law.233

Ideally, workers would decide for themselves which approach works best for them. 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.234 Workers today, however, are increasingly eager to have their work reflect their moral values.235 Allowing the market to value moral benefits offers one potential resolution to the impasse, and would avoid a one-size-fits-all prescription.

Moreover, 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.236 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.237


234 See Estreicher, supra note 62, at 510 (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 63, at 26 (same).


236 See McDonnell, supra note 230, at 374–79 (identifying externalities that affect value and the adoption of employee-empowering governance models).

237 Cf. Oliver Hart & Luigi Zingales, Companies Should Maximize Shareholder Welfare Not Market Value, 2 J.L. FIN. & ACCT. 247, 252–54 (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 incentive to resist an economically favorable tender offer on moral grounds (their tender won’t affect
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, there would be troubling issues to resolve about the choice between democracy and market transactions. But with private-sector unionization rates currently at about six percent, 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. These views enjoyed an uneasy coexistence until the rise of tender offers forced a confrontation and a relentless focus on shareholder returns. 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 and do not limit the rights of workers who disagree.

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238 See supra notes 202–205 and accompanying text.

239 News Release, Bureau of Lab. Stat., supra note 12 (reporting that the “union membership rate of public-sector workers (33.9 percent) continued to be more than five times higher than the rate of private-sector workers (6.1 percent)”)


241 E.g., Allen, supra note 233, at 264.

242 Cf. Weiler, Governing the Workplace, supra note 17, at 257 (calling out the 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, 523–24 (1993) (suggesting that a flawed analogy to political democracy has led to procedures that incorporate employers in the certification process).

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.”244 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.245

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.246 This logic, and eventually the rule, collapsed as financial markets developed.247 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 workers can reasonably rely on each other to make mutually beneficial decisions. A tender offer

244 See supra note 100 (collecting sources).
246 See Schreiber v. Carney, 447 A.2d 17, 24 (Del. Ch. 1982) (collecting and discussing cases in which a court considered vote-buying to be deceitful).
247 Id. at 25; DEL. CODE ANN. tit. 8, § 218 (2022).
market for labor representation would also operate transparently, without the falsity that has driven objections to vote-buying or other inducements.

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.248 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 ensuring this asset or immediately tapping its value, workers are inevitably risk-averse.249 This risk-aversion has direct consequences for labor organizing, as workers are rationally reluctant to entrust their careers to unions that have not yet demonstrated capacity and credibility. It also 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.250

The labor tender offer market that we propose in this Article would change the calculus. By accepting a tender offer, workers would have a way to capture, quickly and immediately, a meaningful portion of the value of any firm-specific investments they have made. By investing that money in schemes

248 See supra notes 187–193 and accompanying text.
250 Cf. Blair & Stout, supra note 34, at 249–50 (considering “team production” problems in which “a productive activity requires the combined investment and coordinated effort of two or more individuals or groups” (first citing Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 AM. ECON. REV. 777 (1972), and then citing Bengt Holmstrom, Moral Hazard in Teams, 13 BELL J. ECON. 324 (1982))).
at other companies, or in education for themselves or their families, workers would be able to diversify their 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 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.251 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.

251 See Macey, supra note 25, at 315, 336–61; Estreicher, supra note 58, at 1626–36; Estreicher, supra note 62, at 523; Bodie, Mandatory Disclosure in the Market for Union Representation, supra note 62, at 69–77 (advocating for additional disclosures in union certification elections).