I. TOPIC AGENDA FOR WORKING GROUP IIB

Working Group IIB is examining two major topics:

TOPIC ONE: Ways to facilitate formation of unions and worker organizations
(including how workers should choose to be part of worker organizations; whether we should consider making union membership the default workplace status, mandating elections or moving away from elections altogether)\(^1\)

This topic has a rich but discouraging history of labor law developments and efforts at reform. The NLRA was adopted in 1935. While active strikes and vibrant organizing campaigns produced broad unionization in numerous industry-wide sectors like auto, steel and coal mining in the years that followed, the law’s essential framework rests on worker selection of unionization at a workplace by workplace (plant by plant) level; not even on a company/enterprise-wide basis...and certainly not on an industry or sector-wide basis. While the industrial unions were able to organize some of the nation’s major industrial and manufacturing sectors (like coal, auto and steel) on an industry-wide basis in the decades after the NLRA passage that yielded master collective bargaining agreements, the NLRA construct has left workers today with very limited ways, if any, to have an effective voice over the terms and conditions of their work.

Originally workers could select their exclusive representative by one of two ways: a majority vote in an NLRB election or a worker-signed petition process (usually authorization cards) by the majority of the workers in the unit. The original language of the NLRA called for a secret ballot election of employees or “any other suitable method to ascertain” the employees’ representative. That included authorization cards, petitions, employee testimony, affidavits of union membership, participation in a strike, or acceptance of strike benefits. However, this language was removed by the 1947 Taft-Hartley Act.\(^2\) Thereafter employers could reject the easier path to unionization and insist on an NLRB election.

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\(^1\) In this memo, we frequently use the terms “union” and “worker organization” interchangeably. It is worth a deeper discussion on the circumstances when this distinction is truly a meaningful one and not simply the reflection of the current constraints that apply in the U.S. labor law system.

\(^2\) See footnote 45, Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks, Gerald Mayer, Cornell ILR School, digitalcommons.ilr.cornell.edu; 4-2-2007
Over the decades following the NLRA passage, vehement employer opposition and worker coercion for unionizing have grown in intensity and prevalence. There is really no such thing as “laboratory conditions” for elections that once was touted as the way to conduct fair elections. This sad phenomenon has been well documented along the way. Legislative campaigns for labor law reform have been accompanied by a wide variety of studies/reports describing the demise of worker choice to form unions.

During the Bill Clinton administration, for example, the Dunlop Commission on the Future of Worker-Management Relations produced a comprehensive look at the defects in our system for facilitating worker choice of unions, along with other important issues being examined by the Clean Slate Project. The Dunlop Commission issued a set of recommendations. None were enacted. In 2000, Human Rights Watch published a damning report on the state of US labor law along with another set of recommendations. None were enacted. And finally, after the election of President Barack Obama, former U.S. Representative George Miller, as Chair of the U.S. House Committee on Education and Labor, issued a compelling committee report on the Employee Free Choice Act of 2007, H.R. 800. The Committee Report explained the critical need for EFCA to address the multitude of obstacles to worker unionization and effective collective bargaining. While EFCA was adopted by the House, it was never able to garner 60 votes in the Senate to overcome a filibuster.

A host of scholarly articles have bolstered these appraisals. A list of these articles could go on for pages, but for purposes of this literature review, we note the studies of Kate Bronfenbrenner, Cornell’s ILR School, who has spent a lifetime career documenting the strategies and effect of widespread employer coercion on worker choice.

Since many of these studies were issued, matters have only gotten worse. The percentage of private sector unionization has continued to drop dramatically, from nearly a quarter of the workforce being union members in 1973 to just 6.5% of private sector workers today. (http://www.unionstats.com)

Given the growing level of income inequality, it is also critical for our Working Group to respond to the fact that the NLRA left out numerous categories of workers from any protection whatsoever for organizing into unions or worker organization (i.e. agricultural workers, supervisors, domestic workers; and so-called independent contractors who have no real economic independence.) Further, the nature of the

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workplace is changing, with corporations increasingly contracting out work to labor suppliers, temp agencies and so-called independent contractors, as exemplified by the rise of the gig economy.\textsuperscript{7} The nation’s largest private employers like Wal-Mart and McDonalds are generally in the retail/service economy, rather than in the manufacturing sectors. Moreover, 76 percent of America’s working class – defined as non-college workers – worked in the service sector in 2015.\textsuperscript{8}

Unionization was an important pathway to higher wages and benefits for workers of color and a way to counter the effects of rampant discrimination. The decline of unionization has meant this option is now closed to many. (See “The Importance of Unions for Workers of Color,” Folayemi Agbede, Center for American Progress, 4-4-11; “Working Together: How Workplace Bonds Strength a Diverse Democracy,” by Cindy Estlund; “What Unions No Longer Do,” by Jake Rosenfeld, 2014)

With this history as our backdrop, our working group is focused anew on the easiest mechanics for selecting a union or worker organization and what elements are necessary to insure a workplace environment where workers can freely make this choice. We also are looking for a process that results in widespread unionization; i.e. a process that guarantees unions are a workplace norm, not an anomaly.

**Scope:** In taking on this task, it is also very clear to us that the question of what workers achieve once they join a union \textit{in terms of the type/extent of bargaining they actually access}, is a critical component of any analysis. For purposes of our working group assignment, however, we do not delve into how to maximize the size of a bargaining unit or its implications for bargaining effectiveness, as we understand this is the agenda of other working groups.

**TOPIC TWO:** Ways to generate revenue that sustains unions and worker organizations (including what are the implications of different revenue models for solidarity and power).

Our initial review focused on models that are already in use in some form here or abroad. We applied a measurement that looks at whether the model actually produces significant income toward sustaining the organization. We looked at earned income that can be used for any purpose (i.e. a resource for the general treasury) versus income that is restricted to a particular use, e.g. payment of representatives on a retirement board of trustees or delivery of a specific product.

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\textsuperscript{7} See David Weil on “The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve It”

Shayna Strom provides a useful framework for analyzing fee for service and other funding opportunities in “Organizing’s Business Model Problem,” *The Century Foundation*, 26 October 2016. First, groups must keep their broader goals in mind when thinking about revenue generation. “A venture is worthwhile only if it is an efficient way to serve or support the parent organization’s mission performance.” Second, organizations must develop specific criteria to evaluate new opportunities for funding. Her article explores several modes of funding and case studies of how they serve the organizations that employ them. While Strom focuses on worker organizations other than unions, unions already employ many of the methods she discusses and could adapt others as they look for new sources of income.

In their forthcoming California Law Review article, “After Janus,” Catherine Fisk and Martin Malin chart a path forward under our current labor law regime for unions to overcome funding challenges post-*Janus* by enhancing solidarity through a mix of incentives and organizing. They warn against the legislative paths that sacrifice the fundamental nature of unions as membership organizations governed by and for workers, such as members-only representation or contract enforcement, or direct employer/government funding structures.

II. EMERGING BIG PICTURE THEMES

A. Facilitating Formation of Unions and Worker Organizations

One big picture theme that has emerged from our initial review is the urgent need to expand the debate over formation of unions from simply an inquiry into modifying the rules that apply to the current obstacle course for unionization in the United States (although we definitely look at multiple rule changes that might make a difference) into an inquiry over how to require that all workers have unions or worker organizations as an integral part of their workplace; i.e. can we change the “Overton Window” for the national debate over labor law reform?

If vibrant unions and workers organizations are key to addressing income inequality and providing a path to a strong middle class, why shouldn’t our system of labor relations require their involvement at every workplace?

Alongside that big picture theme, we flagged the importance of designing laws that insert unions/worker organizations into the day-to-day life of our civil society as respected and essential actors. More specifically, we looked for examples that mandate unions play an important role in workplace issues and thereby institutionalize their legitimacy and resources. This could involve the administration of national benefit and/or training funds or the designation as the quasi-governmental enforcer of workplace standards.

We came to this vision because inspiring workers to form unions relies, in part, on unions being seen by workers and the public as having a fundamental right to be in
the workplace. Further, workers will overcome fear of employer retaliation and join unions if they perceive them as powerful entities that can deliver on their dreams for a better life. (For these reasons, our working group assignment is closely aligned with the goals of Working Groups IA & B to reimagine a more powerful type of collective bargaining.)

Of course, these questions are also heavily influenced by broader questions of the type of bargaining system that union members can access. If we look to strengthen the enterprise-based bargaining system, then countering a specific employer’s opposition is a top priority in facilitating union formation. However, the problem may be different in a sectoral model – specifically, what are the essential mechanisms to ensure that workers become members of a system in which they will benefit regardless of their membership status or their initial organizing unit?

In sum, our observations led us to the following big picture questions: Even if employer coercion can be severely curtailed, how do we create an environment where workers are attracted to forming unions and worker organizations? And how do we empower unions and worker organizations so they can operate as effective change agents in the workplace and our economy.

Finally, there is an obvious tension in the list of options we explored. The smaller the unit, the easier it should be for workers to organize. (We know too well the difficulties of running an organizing campaign for a national unit covered by the RLA/NMB.) However, the smaller the unit of organization, the less effective its negotiating strength will be.

But what if once organized or while organizing, workers can readily opt for accretion to a broader unit that is covered by sectoral bargaining and a master agreement?

B. Revenue generation for sustaining unions/workers organizations:

A big picture theme we identified is that this topic of research has few examples of real-life success stories.

Aside from expanding access to membership dues, we were challenged in identifying other models that have resulted in significant revenue generation that sustains a union or worker organization. While there are situations where unions are paid fees for various services (e.g. the Ghent system and Australian superannuation industry funds), the actual net income to unions associated with these services appears modest as it relates to income that can be used for unrestricted purposes, including organizing. The most promising ideas came from incomes generated via commissions paid to unions from insurers offering membership products and international laws requiring employer payroll taxes and government subsidies that are paid to unions for carrying out their bargaining and social dialogue roles. It is
clear that unions in some countries rely heavily on corporate and/or governmental support. But we have not explored in depth whether these arrangements carry a serious risk of conflicts of interest or a corrupting influence over the union’s focus.

Another obvious tension is that a number of these revenue models provide important benefits/services to workers and serve to establish the legitimacy of unions in our society at large, but they do not truly function as sources of significant revenue to sustain the union’s broader agenda of organizing, bargaining and political activities.

III. PRELIMINARY APPRAISAL OF DIFFERENT APPROACHES

A. Facilitating Formation of Unions and Worker Organizations

1. Move the U.S. Model toward Mandatory Unionization

a. Mandated Decision Days

Changing the union selection process to occur on a periodic regular basis (by election, card-check, strike or other method) at all workplaces emerged during the IIB Working Group Convening as a possible method of lowering the barrier to entry for workers to join collective organizations.

In 1994, Mark Barenberg suggested a mandatory model where the law would automatically require workers from designated enterprises or networks to convene, deliberate, and cast workplace governance ballots every 5 years to recertify, reject, or alter the initial choice by secret ballot.\(^9\) One of the more recent suggestions to borrow election law concepts in service of enabling access to collective representation was Benjamin Sachs in “Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing (2010).” In particular, Sachs recommended migrating state laws establishing continuous early voting and protections from election interference into the union election processes. In 2014, Estreicher and Oswalt each proposed a version of a regular, mandatory union election scheme.

Sam Estreicher, “‘Easy In, Easy Out’: A Future for U.S. Workplace Representation,” 98 Minn. L. Rev. 1615 (2014), recommends that every two years (maybe the 2nd Monday after Labor Day), employees in a unit, after minimal required showing of interest (5-10%), would have an opportunity to vote in a secret ballot whether they: a) wish to continue being represented by a worker organization, b) select another organization, or c) have no representation at all. The cycle would move to three years if a worker organization reaches a collective bargaining

agreement. Estreicher argues that the “easy in, easy out” system would lower stakes for both sides compared to the current hard in, hard out system.

Under Estreicher’s model, the NLRB and NMB could promulgate rules establishing appropriate bargaining units for election and initial bargaining with a preference for broader units. The electorate would be all full and part time employees on payroll by Labor Day. Where a petition is filed with 30% showing of interest, a rival organization can get on the ballot with a 5% showing of interest. All worker organizations and not just LMRDA-compliant labor groups can represent workers. Notice of the initial organization’s bid would be published on the NLRB/NMB website, and rival organizations have up to 30 days to make required showing. Date of renewal elections would also be published. If a majority vote against unionizing, the agency cannot hold another election for a year. If the majority vote to unionize and the majority votes for one petitioning union, then that union will be automatically certified as bargaining agent for 2 years. A run-off election could resolve a no majority situation, and there would be a statutory duty to bargain with certified union. A showing of majority support in a designated bargaining unit would also be a valid certification method, subject to secret ballot renewal election after 2 years (unless a CBA of 3 years or more is in place).

If a union achieves a contract of 3 or more years, it would defer an automatic renewal vote to 3 or 4 years in the future, but without requiring any showing of interest to trigger a vote. To facilitate informed choices, there would be mandatory disclosure wherein unions would disclose dues structure, right to vote on strikes, contract ratification, union discipline, and terms of CBAs achieved in similar industries and locations. Employers would have to disclose economic performance. There is also an extensive discussion about the transition to this new system, where Option A would be to exempt existing representation relationships from the new regime for 5-10 years. Option B would allow existing bargaining relationships to continue indefinitely subject to existing decertification and employer withdrawal of recognition processes.

“Easy Out” would apply to any bargaining unit with a certified bargaining agent. After two years, workers can vote in automatic secret ballot election if they wish to continue with the current representation, no representative at all, or a new petitioning union. A majority no union vote precludes election for another year. A majority vote to retain will preclude election for two years.

Michael Oswalt’s “Automatic Elections,” 4 UCI L. Rev. 801 (2014) disposes of showing of interest altogether, and begins with the history of the Wagner Act assuming workers’ preference for collective bargaining, and comparing it today to “a cage built for a lion that instead confines a lamb.” He proposes that automatic elections would reorient the law to reflect modern workplace culture and reverse the historically unanticipated costs of a no-election default. Additionally, union “election day” would legitimate unionization, become a common forum for discourse about unionism, and tilt workplaces toward collective action because opportunity generates interest.
Oswalt’s automatic elections would give every nonunion worker the chance to vote for or against representation every year without showing of interest requirements. Union workers would have the chance to affirm, reject, or choose different representation each year. NLRB regional offices could be charged with assigning a staggered election date to every company under its jurisdiction. On the election date, workers would have the option to cast a representation ballot at the agency-monitored neutral voting site. Employees can submit lists of workers willing to serve and be named on the ballot as an exclusive bargaining team if they contact the Regional Office 45 days beforehand. Unions would be included by the same method. If there are no candidates, a generic “Exclusive bargaining representative” would be filled-in, and it could be designated at a later date, possibly through second election limited to in-house employee groups.

Every separate worksite is the default voting unit to clarify the process of creating a list of eligible voters (based on a roll submitted by the employer to the Region 45 days before the election) and facilitate in-person interaction. Once the list is submitted, any candidate on the ballot can challenge the list or request to enlarge the voting unit. Evidence presentations would be limited to one day with decisions from the bench, and all issues must be resolved before the election date. Where a representative is certified, the next election would be forestalled for up to two years. Where a contract is certified within that two year window, the election cycle would retrigger for 1 year after the effective date of the agreement.

Oswalt identified certain cons of this system, including cost concerns. Should the law reserve elections for employers with a minimum level (20 or more) employees instead of a minimum level of revenue to reduce total employers covered to 635,162? Technology could facilitate cheaper, remote elections. Turnout might also be low because elections would not be the result of a campaign, leading to democratic concerns and diminished negotiating strength.

Andy Strom weighed in on both proposals in his blog post, “Why Not Hold Union Representation Elections on a Regular Schedule?” Strom suggested a three-year cycle, and reiterated many of the benefits of regular elections at unionized and non-union facilities, including widespread and consistent discussions about the merits of unionization addressing employer concerns that workers don’t understand what they are doing when they authorize a union, and that the regularity might tone down rhetoric about the stakes. Using the NMB telephone and internet elections as a technological model, employees could vote on a contingent basis for unionization and bargaining unit scope, with any union with 1 or more supporters appearing on the ballot.

In addition to pro-union takes on mandatory decision days, conservative thinkers have also taken interest in the idea. James Sherk of the Heritage Foundation wrote a report about why workers should be allowed to individually choose who represents them in re-election votes every 2-4 years, allowing for multiple certified organizations to negotiate for specific individuals.

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10 OnLabor, 1 November 2017.
or groups of individuals at a company.\textsuperscript{11} The Employee Rights Act, which would amend the NLRA to require decertification elections every 3 years, and similar state level proposals for public sector unions have also circulated.\textsuperscript{12} A 2011 Wisconsin law has succeeded in enacting a recertification requirement for public employee representatives.

**Behavioral economists’** work on “fresh start” effects and facilitating retirement savings could be a useful evaluation tool for the decision day concept, and serve as an argument for recalibrating labor law to provide for opt-out, rather than opt-in structures for collective representation. In “The Fresh Start Effect: Temporal Landmarks Motivate Aspirational Behavior.” Dai, Milkman & Riis found that Google searches of “diet,” gym visits, and commitments to pursue fitness goals all increase following temporal landmarks.\textsuperscript{13} Using statistical modeling, they confirmed hypothesis that temporal landmarks: a) create many new mental accounting periods each year, which relegate past imperfections to a previous period, and b) induce people to take a big-picture view of their lives, and thus motivate aspirational behaviors. Hypothesis A derived from the theory of temporal self-appraisal (Wilson and Ross 2001), which contends that people evaluate their past self in a manner that flatters their current self because faults of a remote, past self are less apt to tarnish their present self-image, and criticizing a distant, inferior self implies self-improvement over time, which is viewed as desirable.\textsuperscript{14} Temporal landmarks can alter people’s decisions because people are motivated to maintain a coherent self-image (Epstein 1973, Markus 1997, Kivetz and Tyler 2007).\textsuperscript{15}

Hypothesis B derives from behavioral economics findings about big-picture thinking being prompted by milestones and switches in focus. Liu (2008) found that interruptions to decision making, like switching to a new background task while pondering a focal decision, move people from a bottom-up, contextually rich mode of thinking focused concrete data to a higher level, top-down mode guided by preexisting goal and knowledge structures.\textsuperscript{16} Bhargave and Miron-Shatz (2012) show that people at milestone ages are more likely than those at other ages to judge their life satisfaction based on their overall achievements rather than daily emotions.\textsuperscript{17}

\textsuperscript{12} Oswalt, \textit{supra}, 834.
\textsuperscript{13} Articles in Advance, Management Science (2013).
\textsuperscript{17} Bhargave R, Miron-Shatz T (2012) Forty and fabulous? Milestone agers assess life satisfaction more on income than positive emotions. Working paper, University of Texas at San Antonio, San Antonio.
Specifically useful to the mandatory decision day framework is research finding that the beginning of a generic calendar cycle (e.g., the beginning of a week, month, or year); the beginning of a new period on an academic or work calendar (e.g., the first month of a semester, the first workday after a meaningful holiday); and the beginning of a new period in one’s personal history (e.g., immediately following a birthday) serve as salient temporal landmarks for fresh start effects (Robinson 1986, Soster et al. 2010). The “Fresh Start” statistical models suggest that the elevated motivation documented in the paper spikes on the first workday after a federal holiday and declines rapidly thereafter, whereas motivation wears off much more gradually over the course of each week, month, year, and semester.

Even so, fleeting fresh start feelings following temporal landmarks can potentially be valuable for at least two reasons. First, the abundance of fresh start opportunities throughout the year offers repeated chances for people to attempt positive self-change, so even if they initially fail, they may subsequently succeed (Polivy and Herman 2002). Second, transient increases in motivation may be sufficient to help people fulfill important one-shot goals such as receiving a medical test or signing up for a 401(k) account with monthly payroll deductions.

Cass Sunstein’s research on default rules supports the idea that regular union decision days might provide a useful retooling of labor law to conform to human behavior and tendencies. In “Deciding By Default,” Sunstein discusses the role of “choice architects,” who design the social background and default rules against which choices are made. He gives three reasons default rules have such a large effect on outcomes:

1. Inertia: To change the default rule, people must make an active choice to reject that rule. This is particularly powerful where a decision is harder or more complex.
2. Endorsement: “Implicit endorsement” of the default rule. This is particularly true if the choice architect is trusted.
3. Reference point and loss aversion: Default rule helps to establish a reference point for people’s decisions.

Sunstein discusses several illustrative scenarios, including an experiment he ran on law students’ bargaining over vacation time, where he found that if the legal default rule includes more vacation time, people will demand a great deal to give it up; if the legal default rule does not include more vacation time, people will not pay a great deal to “buy” it. Sunstein cites Freeman & Rogers (1999), who found in a survey of individuals in the workforce, that they frequently overstated the protections available in the workplace. Consequently, a default rule that gives certain rights to employees might increase the flow of information between the

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21 Freeman & Joel Rogers, What Workers Want 118-22 (1999).
parties and to the legal system because, if the default rule confers certain rights on employees—say, to unionization—employers will want to support those rights. See also Samuel Issacharoff, Contracting for Employment: The Limited Return of the Common Law, 74 TEX L. REV. 1783, 1789-90 (1996) (arguing for penalty default rules that would force parties with superior access to information and bargaining position to reveal critical information at the initial moment of contract). To conclude, Sunstein also delves into the moral implications of choice architecture to promote particular outcomes.

In an earlier article on the law of work, Sunstein (2001), mentions the idea of switching the current default of no union with opt-in by election to beginning with a presumption in favor of collective organization where a vote would determine the particular form of the organization or rejecting collective organization if the group selects to.22 This would help overcome management tactics and serve as an information-forcing default rule. Sunstein also recommended allowing employees to collectively waive the prohibition on “company” unions because current anti-union tactics have shifted away from that particular tactic and to facilitate real freedom of choice in employee participation where the present choice is between a full union and zero collective bargaining agent at all.

Schlomo Benartzi and Richard Thaler’s work on facilitating retirement savings with behavioral economics also provides useful data for facilitating access to collective representation. They have taken the Save More Tomorrow program commercial, and their automatic enrollment and escalation ideas have been codified as part of the Pension Protection Act of 2006. In 2011, 56% of employers offering 401k’s automatically enrolled employees, and 51% offered automatic escalation.23 Their framework features four essential ingredients to facilitate adequate savings for retirement: availability, automatic enrollment, automatic investment, and automatic escalation.24 First, every US worker should have easy access to a payroll deduction-based defined contribution plan. Second, employees should be automatically signed up unless they opt out (~10% do), which will overcome enrollment procrastination. Third, this requires an automatic initial investment default setting, which could include a variety of investment vehicles that provide employees with diversification and an asset allocation mix that is automatically rebalanced when stock prices change, as well as adjusting the portfolio as the employee ages. Fourth, under the Save More Tomorrow (SMT) plan, employees should be invited to commit now to increase their savings rate later (next January or in a few months). Planned increases should be linked to pay raises to diminish loss aversion, and once signed up employees remain in the program until they reach a preset limit or choose to opt out.

Analogs of mandatory decision day structures exist in Belgium and Germany on four year cycles for works council elections. In Belgium, “social elections,” are mandatory, and held every 4

24 Id.
years on dates set by the federal government.\textsuperscript{25} Figures from the ICTWSS database of union membership put union density in Belgium at 50.4% (in 2011). In 2016, social elections had to occur between May 9 and 22. Procedure takes 150 days to complete. The three major unions have the right to propose candidates. Companies are required to hold elections for the Works Council if they have 100 or more employees and/or the Committee for Prevention and Protection at Work if they have 50 or more employees. Reference period for eligibility is the year 2015. Companies with branches/affiliates must check the level at which they must organize social elections: legal entity or the technical operating unit.

Works Councils have extensive rights to be informed by the employer on the economic and financial info of the company. The Health and Safety Committee advises an employer on safety and health at work, including compliance with complicated regulations. There are strong protections for WC candidates from dismissal during this process, involving a procedure before the labour court or Labour Management Commissions. A dismissal must be for serious cause or economical/technical reasons. Fines up to several years of wages could result from failure to comply. Kratos Law has a very useful Manual to the 2016 Social Elections in Belgium, which lays out the preparatory, posting, and election phase calendar. Workplace representation runs through 1) the works council; 2) trade union delegation, which represents the trade unionists; and 3) Health and Safety Body.\textsuperscript{26} In workplaces with fewer than 50 employees, the function of the WC and health and safety committee is taken on by trade union. The follow chart lays out the number of employee representatives called for in these situations:

<table>
<thead>
<tr>
<th>Number employed</th>
<th>Number of employee representatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>101-500</td>
<td>6</td>
</tr>
<tr>
<td>501-1,000</td>
<td>8</td>
</tr>
<tr>
<td>1,001-2,000</td>
<td>10</td>
</tr>
</tbody>
</table>

\textsuperscript{25} http://www.worker-participation.eu/National-Industrial-Relations/Countries/Belgium/Workplace-Representation
\textsuperscript{26} https://www.lexgo.be/fr/articles/droit-du-travail-et-de-la-securite-sociale/droit-du-travail/what-are-social-elections-an-overview-for-the-unitiated,102668.html
Thereafter, there are two extra seats for each additional 1000 employees until 6000, when it becomes one extra for each additional 1000. The maximum number is 25. Manual and non-manual employees should be represented in proportion to their number in the workforce. Separate representation within the WC is guaranteed for young workers (<25 yrs) and for management once their number reaches 25 for young workers and 15 for senior managers.

In Germany, works council elections are held every four years. One such election period started on March 1, 2018. An election committee, consisting of three employees eligible to vote, must be set up to organize the election of the works council. If a works council already exists, the works council currently in office appoints the election committee at least ten weeks prior to the end of its term. If no works council exists, the election committee will be elected in a works meeting. This works meeting may be initiated by 3 employees or a trade union. The election committee has to create a list of employees eligible to vote. In this process, it has to be determined whether individual employees are to be qualified as executive employees — and therefore unable to vote. Six weeks prior to the election date, the election committee has to publish an official announcement of the upcoming elections. Within two weeks of this announcement, employees can be nominated as candidates. Each possible candidate needs a certain number of so-called “supportive signatures” of employees eligible to vote, between 2 and 50, depending on the size of the operation. Employees then vote on the list of candidates in secret. The election committee counts the votes and publishes the result of the election.

**Reflection:** In the United States context, mandatory elections days raise a number of concerns over how being in constant union election mode could deplete union focus and resources (akin to what conservatives forced on public sector unions in Iowa), and how it would affect or encourage infighting among unions over potential turn-overs of jurisdiction.

### b. Works Councils at Every Workplace

Mandate that works councils or worker committees must be convened at every workplace (and require election of workers who will sit on those council/committees)

Tom Kochan (MIT) and Wilma Liebman have written extensively on the subject of works councils in Europe. This model is being more closely examined by another Working Group.27

See also: “A New Voice for the Workplace: A Proposal for an American Works Council Act,” By Stephen F. Befort, Missouri L. Rev. , Volume 69 (2004);

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27 See another type of approach proposed by Professor Cynthia Estlund in her book: “Regoverning the Workplace: From Self-Regulation to Co-Regulation (Yale Univ. Press 2010). The book discusses co-regulation of workplace labor standards through the requirement of inside employee representation and independent outside monitors.
c. Graduated Union Rights based on Membership Density

Design a system that affords graduated rights to unions and worker organizations vis a vis employer relations, depending on membership density and scope of unit. Worker’s vote (by election or by signing of union authorization card) could include an additional vote on whether to be folded into broader employer/industry unit and/or covered by applicable contract. (e.g. right to automatic accretion; elimination of Majestic Weaving prohibition on pre-negotiated contracts; adopt a form of legislated “Kroger clause” in designated industry sectors)

Professor David Doorey has proposed a model of graduated representation rights depending on the density of membership at a workplace. (See Doorey’s article: “Graduated Freedom of Association: Worker Voice Beyond the Wagner Model,” 38 Queens Law Journal 511 (2013).

This design would allow workers’ access to different levels of bargaining and rights, depending on the density of union membership at a particular workplace/bargaining unit, for example, providing rights to:

- represent members in grievance process
- meet and consult with employer re members
- bargain over limited subjects
- bargain over all mandatory subjects
- dues deduction for members

Professor Doorey’s model depends on several key elements, including: (1) no reprisal protection; (2) right to engage in concerted activity (including the right to strike); and (3) the right to engage in good faith, meaningful dialogue and consultation (or bargaining) at varying thresholds of membership below majority support.

d. Open up unionization and union membership to broader categories of workers

Expand the categories of workers entitled to have a voice at their work and representation – independent contractors; supervisors; agricultural workers; managers of certain levels; domestic workers. (e.g. Seattle Uber law)
It is critical to look at the various ways that legislative designs in the past (like the “small business exemption”) have adversely affected workers of color and women workers (See, for example, “Under the Bus: How Working Woman are Being Run Over,” by Caroline Fredrickson, The New Press, August 2016.)

e. **Portability of union membership**

Require employer to recognize right of workers to carry their union membership from one workplace to another (including associated union benefits); including requiring employer payroll deduction of dues

2. **Make it easier for Workers to Join & Select Unions as Their Bargaining Agent**

a. **Require Employer Recognition of Card Check & Other Petition Methods**

EFCA would have required an employer to recognize and bargain with a union where authorization cards established that more than 50% of the proposed bargaining unit wished to be represented by the union. Card check recognition effectively mitigates the consequences of protracted NLRB elections. Unions fare correspondingly worse as time increases between an election petition and the actual election. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 833 n. 61 (2005) (noting that “[union] win rate declines from 50% if election is held within sixty days of petition to 31% if election is held 61-180 days after petition”). With card check, unions earn recognition the moment they demonstrate majority support. *Id* at 833.


Even in the wake of EFCA’s defeat, card check recognition remains a popular policy strategy within the labor movement (though virulently opposed by employers). Union organizers agree that card check will effectively counter election delay and anti-union bias in the workplace. In addition, the AFL-CIO has consistently advocated reviving card check “because people can do it off premises, can do it in their homes, can do it without...

However, numerous voices oppose the revival of card check on one of three grounds: (1) card check limits employee free choice by exposing individual voting decisions to union pressure (the argument typically adopted by employers); (2) the validity of authorization cards signed informally and without third-party supervision will be questioned; and (3) card check does too little to change the traditional NLRA approach and the existing election paradigm.

First, opponents argue that card check puts the decision process in the hands of union recruiters, and unfairly assumes that union representatives and fellow employees will not pressure voters. Undecided voters may sign cards due to coercion or misunderstanding, and voters that do not favor unionization may sign to avoid retaliation should the union eventually be certified. See Amy Livingston, supra, at 237. Advocating alternatives to card check, Benjamin Sachs notes that even card check’s supporters agree that secret elections are a preferable decisionmaking mechanism (when management intervention is not a factor). See Benjamin Sachs, Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing, 123 Harvard Law Review 655, 670 (2010).

Second, some point to the difficulty in verifying authorization cards, with little oversight of the card solicitation process and union control of cards before they are submitted to NLRB. There is minor evidence that cards can be unreliable (whether because of confusion in the signing process or because voters change their minds soon after). See William B. Gould IV, Agenda for Reform: The Future of Employment Relationships and the Law, 162–63 (1993). However, even if allegations of unreliability are unfounded, claims of coercion and misinformation in the card check process can still give rise to litigation that will impede unionization. Raja Raghunath, Stacking the Deck: Privileging “Employer Free Choice” Over Industrial Democracy in the Card-Check Debate, 87 Neb. L. Rev. 329, 360 (2008). Important to note, legislative tweaks could assuage some of these concerns. For example, the Canadian card check system requires that employees signing authorization cards simultaneously apply for union membership and pay a nominal fee, emphasizing the gravity of the decision for employees and evidencing the veracity of their signatures. See David J. Doorey, The Medium and the “Anti-Union” Message: "Forced Listening" and Captive Audience Meetings in Canadian Labor Law, 29 Comp. Lab. L. & Pol’y J. 79, 82 (2008). Alternatively, card check legislation could enhance NLRB’s existing standards for assessing fraud and coercion in the collection of cards. See Raja Raghunath, supra, at 371.

Further, Professor David Doorey alerted Clean Slate participants that union density in Canada is still on the decline despite the availability of mandatory card check recognition.

Finally, experts like Matthew Dimick and Cynthia Estlund argue that card-check recognition and other EFCA reforms hue too closely to the existing regulatory framework. Dimick and Estlund claim that “new governance” approaches (de-regulating the labor framework, and empowering unions and employers to negotiate more flexible

Seymour Martin Lipset et al. (2005) explores the paradox of American and Canadian Unionism, where Americans like unions more than Canadians do, but join much less. Americans want to join unions, but the U.S. emphasis on individual freedom and difficulty of changing labor law have maintained institutional barriers to unions. Furthermore, Lipset ties the weakness of labor unions in the U.S. to the same factors as those related to absence of a visible socialist/labor party. As a result, underlying government institutions have not been as supportive as unionization as they generally have been in Canada, which has an easy in (card check), and hard out unionization system. Lipset delves into the labor and political history of each country to illustrate the divergence of unionization patterns between the U.S. and Canada between 1948 and 1981, where the Carter administration (1976-80) attempted to change labor law, but failed in the Senate, and right to work laws spread rapidly during the 1970s. In contrast, changes initiated by the quiet revolution of Quebec in the early 1960s came with greater militancy by trade unions and expansion of public sector labor legislation in 1964. Overall, Lipset argues that the syndicalist tradition in Quebec particularly and Canada made unions more culturally acceptable as a concept, and that the parliamentary system in Canada permitted growth of parties supported by unions. There was also greater social activism by Canadian unions, a larger public sector, and social democratic values of statism and income egalitarianism in Canada as opposed to the individualist, achievement-oriented, competitive, and meritocratic values of Americans. There is weaker public support for unions in Canada because of their perceived power, but Canadian values support the types of institutions that facilitate union strength.

Using data from Troy and Sheflin (1985) and Bureau of National Affairs for selected years from 1939, Lipset also analyzed state and province level dynamics of union density. He found that there is considerable stability in the ranking of states by union density, and to a lesser extent provinces. Consistent low union densities in certain states preceded the introduction of right to work laws in the states at the bottom of the density rates. Provincial rankings are relatively more volatile, though Ontario has been low for most of the period and British Columbia high. Shift-share analyses show that declines and increases in national union density rates in the U.S. have not been due to a movement of employment to anti-union states. Workers in high density states have lower job satisfaction, higher rates of believing they are treated and compensated...
less fairly, and higher support of a union’s side in a labor dispute than workers in low-density states. Interestingly, states with high church attendance have low union density and vice versa.

Berul (2000) explores the potential of Canadian-style card check reform in the United States as a method of revitalizing American labor. 29 The following table outlines the union certification systems in each Canadian province:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Certify Based on Cards?</th>
<th>Requisite Support for Card Cert. (%)</th>
<th>Requisite Support to Obtain Election (%)</th>
<th>Max. Time from Applying to Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Idaho</td>
<td>Yes</td>
<td>Majority</td>
<td>35</td>
<td>No statutory requirement</td>
</tr>
<tr>
<td>Alberta</td>
<td>No</td>
<td>—</td>
<td>40</td>
<td>a.s.a.p. 3</td>
</tr>
<tr>
<td>B.C.</td>
<td>Yes</td>
<td>55</td>
<td>45</td>
<td>10 days</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>No</td>
<td>—</td>
<td>40</td>
<td>7 days</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Yes</td>
<td>Majority</td>
<td>40</td>
<td>No statutory requirement</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Yes</td>
<td>Majority</td>
<td>5 days</td>
<td>5 days</td>
</tr>
<tr>
<td>Ontario</td>
<td>No</td>
<td>—</td>
<td>5 days</td>
<td>No statutory requirement</td>
</tr>
<tr>
<td>Prince Edward Is.</td>
<td>Yes</td>
<td>Majority</td>
<td>40</td>
<td>5 days</td>
</tr>
<tr>
<td>Quebec</td>
<td>Yes</td>
<td>Majority</td>
<td>35</td>
<td>No statutory requirement</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>Yes</td>
<td>Majority</td>
<td>25</td>
<td>No statutory requirement</td>
</tr>
</tbody>
</table>

![Table 31-1: Requirements for Union Certification in Canadian Jurisdictions](image)

Through a petition of opposition, an employee can express their opposition to the union or change their mind concerning union representation, even if they have already signed an authorization card. A vote will be ordered and carried out within 10 days. If the union can show support over the threshold for card certification after the petitions have been examined, the vote is disregarded and the union is certified.

Before a union application for certification is received by a labor board, an employee can rescind their support without limitation. Once applicable made, petition of opposition must be submitted to the board or union before the terminal date (the date by which all materials that a labor board will consider in reviewing the application must be received). Berul recommends that a card check system should allow 1-10 days between application and terminal dates. Canada has zero to week+ intervals.

Decertification petitions can only be submitted during certain window periods termed the “open season,” similar to the New Jersey WDEA. The Canadian system is easy in, hard out. There is a one-year ban on decertification from union’s certification date. During an existing contract with a less than three-year term, decertification applications can only be made after the last three months of the contract begin. For contracts more than 3 years, decertification applications can be made only after the 37th month of operation and thereafter only during the

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3 months immediately preceding the end of each year; and after the last 3 months of the contract’s operation. The seeming imbalance is not actually unequal because it maximizes employee free choice assuming the employer’s power in a workplace.

Berul recommends against allowing an “easy in” system to be conditioned on “easy out” in the U.S. because it could be worse than the status quo with constant employer pressure to decertify. However, the contract bar should be limited to one year for a first contract because of the valid concern that all employees may not hear the full argument against unionizing before card check. The Canadian NLRA reflects viewpoint that unionization is an employee’s choice and that the employer has no legitimate role to play in the process. The U.S. NLRA does provide for the employer playing a role in employees’ choice to obtain union representation, for the worse. Berul’s ultimate recommendation for the U.S. is to require automatic certification of a union where a majority of employees in the proposed units support the union with signed authorization cards. Through regulation or amendment to NLRA, common sense card requirements like those in B.C. Regulation 3 should be adopted with an added requirement that employees are informed that an election will not be held if the requisite card showing is made for automatic certification. Cards should be signed and dated at the time of signature and contain the following statement: “In applying for membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining, and I also understand that no representation election will be held.” Alternatively, active membership must have been maintained by dues payments within 90 days of the union’s application for certification.

b. Provide Off-Site Voting Options

Design a voting system for workers by which they decide whether to unionize in a process that is conducted off-site of the workplace and is internet-based (other examples from voting improvement in state or local public elections)

a. Mail ballot, phone-based, and internet-based voting – as well as offsite in-person polling – are alternatives to the workplace-based voting system that is the default norm under the NLRA. Some experience exists with each of these systems in the U.S. labor law context, as well as in Canada. See generally Sara Slinn and William A. Herbert, “Some Think of the Future: Internet, Electronic, and Telephonic Labor Representation Elections,” Saint Louis University Law Journal 56.1 (2011): 171-208 (describing experience in the United States and Canada). See also id. at 172 n.1 (cataloging scholarly work on the topic).

Needless to say, there are pros and cons to each system with regard to worker organizing in the face of employer resistance. For example, while voting in the workplace means that employees are subject to employer control at the time of decision-making, off-site voting may benefit the employer if the employer is better
able to transport employees who oppose the union to the polls than the union is able to transport its supporters.

Importantly, the utility of each system for successful organizing in a particular workplace is likely to vary for reasons independent of the degree of employer resistance to unionization, e.g., whether the workforce is widely dispersed, whether most employees have access to and familiarity with the internet, etc.

b. Internet-based voting systems seem potentially promising, but they are not a silver bullet in terms of eliminating employer interference in the organizing process.

Elections conducted by the National Mediation Board under the Railway Labor Act have taken place by internet- and phone-based voting (individual employees can choose to use one method or the other) since the early 2000s, when these systems replaced the NMB’s longstanding practice of conducting elections – which generally take place among geographically-dispersed employees in nationwide units – by mail ballots. In two large elections at Delta Airlines conducted by internet and phone voting, unions complained that Delta interfered with the election process by, among other things, setting up on-site “polling places” where employees were encouraged to vote on company computers in view of managers, other employees, and security cameras and creating “pop-up” messages on company computers so that every time an employee signed in for work purposes they received an election-related message. The NMB ultimately concluded that these actions did not taint the laboratory conditions for the elections. *Delta Air Lines, Inc. (Association of Flight Attendants),* 39 NMB No. 8 (Nov. 18, 2011); *Delta Air Lines, Inc. (International Association of Machinists),* 39 NMB No. 15 (Dec. 9, 2011).

The Office of Labor-Management Standards at the U.S. Department of Labor, in its role in enforcing the LMRDA, has expressed concern over the use of internet voting for union officer elections on the basis that “the challenges presented in assuring the secrecy and security of remote electronic voting systems have been well-documented in the context of public elections, which Congress used as the model for union elections under the LMRDA.” OLMS Compliance Tip, “ELECTING UNION OFFICERS USING REMOTE ELECTRONIC VOTING SYSTEMS,” available at https://www.dol.gov/olms/regs/compliance/catips/2016/CompTip_RemoteElecVote.htm. Use of mail ballots in such elections, on the other hand, is well-established.

As noted by OLMS, similar concerns have slowed any significant move towards conducting public elections over the internet. There are some experiments ongoing, such as West Virginia permitting overseas military members to vote via smartphone on an election application using blockchain technology. See Terry Nguyen, “West Virginia to offer mobile blockchain voting app for overseas voters in November election,” *Washington Post* (Aug. 10, 2018). But that effort has plenty of critics, who question the confidentiality and security of internet voting given existing technology.

c. Given the variety of approaches used in different settings in U.S. labor law, it seems likely that permitting flexibility in voting methods – taking account of what method is likely to allow for the greatest employee participation in decision-making with the least degree of employer interference in a particular workplace setting – will constitute a better approach than mandating a particular approach to voting in all workplaces.

c. **Extend meaningful union access to the workplace**

Expand union access to employees – online, access to the employer’s communications platform(s) and organizer access to the worksite.

See Professor Cynthia Estlund’s article on “Labor, Property and Sovereignty after Lechmere,” 46 Stanford L. Rev. 305 (1994).

3. **Eliminate Employer Coercion**

   a. **Impose strong restrictions on employer conduct regarding unionization**

   Implement a set of rules governing employer conduct and speech to eliminate coercion of workers (or the appearance of coercion) in their decision on whether or not to unionize.

   We looked at rules that were negotiated in privately negotiated recognition agreements between unions and employers, often in settlement of contentious organizing campaigns. The specific rules set out very concrete and practical constraints on employer conduct. The key ingredients are directed at attaining a fast and fair selection process.

   Among the concrete rules negotiated upon the advice of organizers are: no one-on-one supervisor meetings about unionization; no group meetings on the topic of unionization; restriction of employer’s opposition message in its manner and content. If not requiring strict employer neutrality, the manner and content of the employer’s anti-union message must be very constrained. These private agreements also included access to the worksite for organizers and quick resolution of problems during organizing campaign through fast binding arbitration. Workers can see that that union had power at the workplace to enforce the rules and engage in dialogue around unionization.
These agreements have generally resulted in workers’ selection of a union (by expedited election or card-check) and the execution of a first contract. But an essential element of their success was access to a quick and effective enforcement mechanism; usually through an arbitrator who rendered decisions quickly and who was not reluctant to order strong effective remedies.

There may be serious legal impediments to designing a law that places certain of these constraints on employer communications without employer consent.

A challenge ahead is how to address possible constitutional impediments to limiting employer speech and mandating organizer access to private property. (A task for Working Group V?) It would also be helpful to continue to build a case for why supervisory/manager speech on unionization should be considered inherently coercive – can we find relevant research in the world of industrial psychology or the research around non-discrimination/diversity training?

Active monitoring by neutral agent of workplace during organizing and election period with mediation authority and role as official witness for fact-finding purposes

b. Enact effective remedies that truly deter employer violations

Remedies: Expanded remedies for violating workers’ rights of freedom of association and campaign misconduct by employer – quick reinstatement, imposition of neutrality, mandatory card-check; and/or certification of the union with a bargaining order.
Shift the burden of proof regarding misconduct from employee to employer (to show selection process was free of coercion). Fast and effective resolution of alleged violations, including option for private right of action in court and double damages.

Make sure all employees, including immigrant workers, are protected.

Remedies: Expanded remedies for violating workers’ rights of freedom of association and campaign misconduct by employer – quick reinstatement, imposition of neutrality, mandatory card-check; and/or certification of the union with a bargaining order.
Shift the burden of proof regarding misconduct from employee to employer (to show selection process was free of coercion). Fast and effective resolution of alleged violations, including option for private right of action in court and double damages.
1. We reviewed the proposals for changing the existing system of organizing workers into Unions and they point out that these proposals are significant to avoid the problems that often remain unresolved and interfere with unionization.

2. The proposed remedies provide for quicker and more efficient resolutions of Employer misconduct and at the same time, bolsters the role of the Union in the workplace and protects the workers.

3. The private election agreements and the expanded remedies can be successful if unions are in the position to negotiate such agreements. The question is how can these agreements be widely achieved or how can we insert elements of a speedy effective remedies into the law itself.

4. While mandatory card checks can be a good option or remedy, they can be invite outside influence, they can be perceived to limit employee choice, with renewed attention of the validity of the cards. These are challenges to overcome. Imposing a bargaining order on the employer as the default remedy may appear extreme, but it is the most effective approach.

5. Shifting the burden of proof to the employer for its own misconduct and permitting private right of action raises legal impediments that require further exploration.

See also, “Ossification of American Labor Law,” by Professor Cindy Estlund, 102 Columbia L. Rev. 1527 (2002) for a brief discussion of the idea of a private right of action for anti-union discrimination and imagining the development of a doctrine of “hostile environment” discrimination with a damages remedy along the lines of Title VII.

**Differing Views over the Reasons for Loss of Union Density**

Weiler, “Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA” proposed the idea that the primary reason for US union density decline has been the astronomical rise in unfair labor practices by employers during NLRB elections over the last forty years. Alternate U.S. union density decline explanations include structural economic change from traditionally union-friendly blue-collar jobs to union-unfriendly service-sector employment.30 Leo Troy argues the Canada difference can be explained by the fact that it is several steps behind the U.S. in structural economic shifts away from manufacturing towards service-sector economy. Increase in international product market competition. Estreicher proposed that union density decline due to decreasing ability of unions to take wages out of

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30 Berul (2000), supra.
competition in a work of competitive product markets, which has reduced wage premiums and job control policies.

4. Expand/Institutionalize Union’s Role as a Legitimate Workplace Participant

Provide the Union a role at all workplaces outside traditional bargaining role; such as the administration of state-wide or national pension or employee benefits plans.

Our Working Group looked into the operation of the Australian Superannuation Fund Structure as one example of this model.

Tim Lyons, Director/trustee for United Voice on HostPlus, an industry superannuation fund in Australia, provided helpful insights into this model. Lyons described the basic framework of the superannuation funds, that provides retirement income for workers Australia-wide, over and above the very meager old age pension system funded by the federal government, and provide the primary source of retirement benefit for most Australians. There is no equivalent of the U.S. social security system with a mandatory social security tax.. It is a type of national compulsory portable pension plan. (FYI: The term “superannuation fund” is only used in Australia and Singapore.) (BTW, Australia is 100% open shop by law.)

By operation of a law that originated in 1992, all employers must currently pay a sum based on 9.5% of an employee’s wages into a superannuation fund, at least quarterly. (It is hoped that this rate will be increased to 12% by a Labor-backed government next year.) A higher rate can be negotiated via a CBA.

Most workers are covered by the employer contribution requirement, even though 40% of Australia’s workforce is employed in “non-standard work,” that is, jobs that are not permanent full-time jobs. 7% of Australia’s workforce falls into the category of “independent contractors,” and do not qualify for the employer contribution. However, Australian federal law makes it difficult to classify a worker as an “independent contractor.”

Every employee has the right to designate which superannuation fund receives the employer’s contribution on his/her behalf (unless the applicable CBA identifies the specific superannuation fund.) If the employee fails to designate the fund, the employer must choose between 1-3 default funds identified by wage awards.
Workers can usually stay in the same industry fund even if they change jobs. A worker can withdraw from a fund at any time and/or transfer his/her money to another fund. The worker may also belong to more than one fund, especially if he/she changes jobs.

Over time, two major types of superannuation funds have developed (other types exist but are not as significant):

- Industry Funds (non-profit funds, jointly managed by employer and union trustees); and
- Funds run by Bank subsidiaries and other financial institutions for profit.

40% of the superannuation funds are industry funds. Lyons currently sits as a trustee on one such industry fund, known as HostPlus. He is an appointee of United Voice, a union of 120,000 members that includes cleaners, childhood workers, hospitality workers etc. The bank-run funds have been the subject of scandal and scrutiny which have driven increasing numbers of workers to the industry funds that are viewed as well-run with lower fees.

A worker does not have to be employed at a unionized firm in order to designate an industry fund like HostPlus. In fact, there are 3 times as many workers in this industry fund (600,000) than union members in the Fund. A worker does not have to be a union member to join an industry fund.

The industry funds have grown more popular over the years as workers appreciate their reputation as non-profit funds, where the fund assets are maximized for the benefit of the participants, not for a set of shareholders.

The industry funds have accumulated significant investment funds. Trustees are governed by fiduciary standards that require their investments are driven by the sole purpose of increasing the benefits payable on retirement. However, within those constraints, industry funds have invested in infrastructure projects that create jobs.

The industry funds have jointly formed an investment management company known as IFM, Investors Funds Management, that manages investment funds throughout the world. As an asset owner, IFM has more ability to step outside the formal fiduciary legal constraints. Lyons also referenced ISPT (Industry Super Property Trust) that invests and develops commercial and residential property in Australia for the large superannuation industry funds. In both cases, the firms have had some limited success in leveraging their assets to assist organizing campaigns. ME is a licensed bank, owned by some of the large industry funds, which was created to give members in the Funds lower cost banking services. The industry funds also offer group life insurance benefits and disability insurance benefits.

While an incredibly important way to address income inequality through establishing a national system of worker retirement income, the Australian Superannuation Fund has not played a direct role in advancing union organizing. Lyons attributes this limitation to the fact that the
industry funds must be jointly administered, and the employer representatives are opposed to using the funds for such a purpose.

Lyons pointed out that this situation could be improved by a proposal to amend the law governing a trustee’s obligation regarding the fund’s investments. The proposal would incorporate an aspect of the U.K. Companies Act 2006 (Section 172), requiring that the trustee take into account the impact of an investment on the community, including social, environmental and governance objectives. Lyons stressed that this change could help create space to support organizing, but should not be over-rated as an organizing tool.

Lyons also described an innovative program for migrant workers in Vanuatu that has combined resources available through the Industry Fund, including an associated bank. The package involves a union induction program in the workers’ home country. Before migrants arrive in Australia to work in the vegetable growing industry, they meet with a union organizer who can sign them up as a union member, help them become a member of the industry superannuation fund, and open a bank account for them to use in Australia.

One of the benefits of having guest workers signed up to the union and with a bank account is that it makes it easier to ensure that they receive their pay once they’ve returned to their home country. Lyons mentioned this is a problem for guest workers in Australia as it is for H2A and H2B workers in the U.S.

5. Incentivize Employers to Support Unionization

Provide significant incentives for employers with unionized enterprises

Incorporate unionization into federal contracting policy

Tie unionization as requirement to federal contracts or receipt of government benefits and/or public subsidies (ban on the use of public monies to oppose unionization)

The federal government spends more than $1 trillion every year though contracts, grants, and other funding vehicles to deliver essential goods and services. American policymakers have long harnessed the power of this spending by requiring recipients to create decent jobs. Yet today, these protections cover less than half of all spending, and too often, even the jobs covered by existing protections pay poverty wages.

During the former administration, President Obama signed several executive orders to ensure that companies receiving federal contracts respect their employees’ right to organize into unions. These policies require that contractors post notices informing employees of their right to bargain collectively; require successor service contractors to provide a right of first refusal to workers employed on the previous contract; encourage
federal agencies to enter into project labor agreements on large construction projects; and prevent companies from using federal funds to fight the efforts of workers to form a union.

Yet it is still far too easy for anti-union companies to fight workers’ efforts to join together in unions and negotiate for better pay and benefits. While existing government policies prohibit companies from using federal funds to fight workers’ efforts to form unions, they are free to use their own funds to do so.

Last year, the Center for American Progress published a report recommending that existing contracting policies—that require contract recipients post notices informing employees of their right to bargain collectively; require successor service contractors to provide a right of first refusal for workers employed on the previous contract; encourage government agencies to use project labor agreements on large construction projects; and prevent companies from using federal funds to fight the efforts of workers to form a union—to apply broadly to all federal contracts, grants, and other funding vehicles.

The report goes even further to recommend that companies receiving federal funds should also be prohibited from attempting to persuade workers employed on taxpayer-supported work to exercise or not to exercise the right to organize and bargain collectively—a recommendation akin to policies in place under the Roosevelt administration’s War Labor Board and War Production Board.

It’s important to note that employer-neutrality would certainly go a long way in reducing the rampant corporate-coercion in our current system, but it may be less helpful in a sectoral bargaining system where employer opposition is less of a problem.

B. Revenue Generation for Sustaining Unions and Worker Organizations

Fisk and Malin, supra, analyze a range of solutions to post-Janus union funding, and settle upon the following three prong approach:

1. **Employer and employees share grievance arbitration costs**, with employees assessed for their pro rata share through payroll deduction, as with other types of benefits. Unions then reimburse members’ payments as a benefit.

2. **Unions provide and employers facilitate members-only benefits to incentivize** workers to join/continue membership. E.g. legal services, insurance, sick leave banks.

3. **Emulate smaller organizations** where member understanding of impact of dues, mutual support, and solidarity guard against collective action problems. States should mandate that employers provide exclusive reps contact info for new members of bargaining units.
and opportunity to meet during work time shortly after hire or transfer. Legally sanctioned models exist in CA, MD, NJ, NY and WA.

The broader range of options from which these were selected are laid out below:

<table>
<thead>
<tr>
<th>Proposed Solution</th>
<th>Pros/Cons</th>
<th>Examples/Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bargain Only for Dues-Paying Members</td>
<td>-Require overhaul of public employee collective bargaining laws</td>
<td>-Tried in CA until 1976 and replaced by majority exclusive representation</td>
</tr>
<tr>
<td></td>
<td>-Permit discrimination based on union membership</td>
<td>-TN unions w/ &gt;15% get proportional representation on committee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-WI exclusive representation with strict topic limits for negotiation so that richer districts offered external perks</td>
</tr>
<tr>
<td>Charge Nonmembers for Contract Administration</td>
<td>-Fix free-rider but not collective action problem – NE and FL show this</td>
<td>-Local determination; state legislatures should allow non-members to process their own grievances but not mandate it. E.g. NE, FL, NV, NY</td>
</tr>
<tr>
<td></td>
<td>-Would impede worker solidarity</td>
<td></td>
</tr>
<tr>
<td></td>
<td>-Limit union ability to protect collective interests in shaping refinement of general K language -&gt; specific K rights</td>
<td></td>
</tr>
<tr>
<td>Traditional Cost-Shifting to the Employer</td>
<td>-Arrangement could erode solidarity and democracy</td>
<td>-Federal Service Labor Management Relations Statute (FSLMRS)</td>
</tr>
<tr>
<td></td>
<td>-Reduce accountability to rank and file</td>
<td>-Federal Service Impasses Panel (FSIP) partisan, sometimes worse than nothing</td>
</tr>
<tr>
<td></td>
<td>-Union dependence on political bodies</td>
<td>-Trump Executive Order – 25% union activity during work ceiling</td>
</tr>
<tr>
<td></td>
<td>-Vulnerability to cost-cutting</td>
<td>-Postal Service uses this strategy a lot</td>
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<tr>
<td></td>
<td></td>
<td>-Back Pay Act – grievance attys fees</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-office space, equipment, utilities</td>
</tr>
<tr>
<td>Collective Bargaining Fund</td>
<td>-Financial dependence on state but govt employers already provide significant benefits so this would only marginally increase financial cooperation</td>
<td>-Aaron Tang proposes Employers pay union directly for costs incurred in administering a CBA. E.g. HI bill</td>
</tr>
<tr>
<td></td>
<td>-union members still direct union activity</td>
<td>-independent board to review and decide which union expenses qualify for reimbursement</td>
</tr>
<tr>
<td></td>
<td>-Dependent on political bodies still</td>
<td>-unions basically govt contractors, with best case scenario being like public defenders being funded to fight the govt they are funded by</td>
</tr>
<tr>
<td></td>
<td>-Taft-Hartley issues</td>
<td>-state level Labor Management Reporting and Disclosure Acts could prevent corruption (10 exist right now)</td>
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<td>-Corruption and legitimacy perceptions (could be managed by conduct standards)</td>
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<tr>
<td>Proposed Solution</td>
<td>Description/Examples</td>
<td>Pros/Cons</td>
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| Foundations       | -61-63% of most budgets  
|                   | -modest organizing funds for progressive movement groups  
|                   | -insufficient to allow organizing to scale  
|                   | -strings attached and less accessible during economic downturns  
|                   | -limited network of foundations don’t intersect with working class | -Mission creep  
|                   | -Often has strings  
|                   | -Can be unpredictable/limited depending on economic climate |

Strom, *supra*, analyzes and provides examples of revenue generating strategies employed by worker organizations outside of the union context, which expand the range of creative solutions available.
| Reducing costs                                                                 | -IAF bulk purchasing cooperative; -UFW in kind donations and volunteer staff; OUR Walmart digital platform of peer to peer support could negotiate discounted services like banking/childcare -Community Purchasing Alliance: bulk purchase of energy, maintenance, waste hauling, solar installation, supplies | -not sustainable/systematic |
| Voluntary membership dues + incentives                                       | -only 10% of average organizing group’s budget; 2% of worker center budgets -NDWA (insurance, NYR trainings, pharmacy discounts, Care.com) -Kentuckians for the Commonwealth (mailings and 1-1 contact), -ROC (front of housing serving and bartending trainings) -IAF has a strong membership culture but members are institutions, which makes collection easier | -Relationship becomes more transactional than power-building -Increases accountability to membership -hard if members are low-income and/or unbanked |
| Expanding the pool of dues                                                   | -Diners’ United (ROC consumer dues, and possible wine-pairing classes as incentive) -Restaurants Advancing Industry Standards in Employment (RAISE) employer assoc. -Center for Popular Democracy and Working Families Party canvasses -PCUN (retiree membership) -associate membership programs | |
| Investments                                                                  | -Primarily done by larger non-profits, including those with an endowment | |
| Income from (external) businesses                                            | CREDO Mobile, Amalgamated Bank generate small amounts of $ for 501c3’s | |
| Innovation labs                                                              | Fair Care Labs – NDWA, Accelerate Change, Membership Drive, Workers Lab | |
| Using legal wins to help fund organizing                                     | -Members can donate personal winnings -referral fees from attorneys -ROC-United; Workers Defense Project | -Only when corporations compelled by courts |
| Operating businesses that broadly serve the mission                          | -IAF affordable housing developments -ROC United COLORS restaurants -worker owned coop incubation and ownership stake | -hard to run successful businesses; reputational costs if ventures fail -could take up too much time |
1. Importance of Changing the Union’s Brand

Increase the effectiveness and power of unions to affect positive change, so workers will want to join unions and pay membership dues

2. Expand Membership Dues Base and Collection Methods

Allow for unions to expand its membership base and associated dues without the constraints of 302, LMRDA, that broadly restricts dues from so-called “employers;” Provide easy way for voluntary dues collections from other individuals (e.g. independent contractors, supervisors; consumers; public; associate members; community members)

Require employers to provide check-off of employee membership dues to unions, even if the workplace is not unionized or covered by a contract (revise section 302); union security and check-off should be a matter of right for workers and their unions and not necessary to negotiate; allow for workers to carry their membership to new workplaces with check-off rights; require employer to honor check-off requests for membership dues from its payments to independent contractors and supervisors

Encouragement for voluntary dues payment (mandatory access of unions to employee orientations periods; access to new hires; easier sign-up and deduction process at union’s election, including extending bank draft selection options to employees) Make reference to NYC legislation for fast food model for 501c3

Facilitate unions in their operation of voluntary political action funds by requiring employer to check-off voluntary PAC contributions by workers (insert reference to Missouri law)

In New Jersey, the Workplace Democracy Enhancement Act, signed May 18, 2018, strives to limit the effect of Janus, and provides that “employees who have authorized the payroll deduction of fees to employee organizations may revoke such authorization by providing written notice to their public employer during the 10 days following each anniversary date of their employment.” Within five days of receipt of notice from an employee of revocation of authorization for the payroll deduction of fees, the public employer must provide notice to the
employee organization of an employee’s revocation of such authorization. There is already a lawsuit challenging the law under Janus, which was filed on October 3, 2018.

3. Introduce the Ghent system of union administration of public benefits

The Ghent system is a voluntary system of unemployment insurance in which labor unions administer publicly subsidized insurance funds and—along with employers and the state—participate in unemployment insurance policymaking. Named for the Belgian town where the model originated, the Ghent system has been a crucial driver of high union density and favorable labor relations in Nordic nations: Denmark, Finland, Sweden, and Belgium.

Key Points:
1. In Denmark, Finland, and Sweden, unemployment insurance is a voluntary program that conditions benefits upon prior membership to the insurance fund. The minimum period of contribution to these funds is one year in Sweden and Denmark, and typically 43 weeks in a 28-month period in Finland (subject to work requirements).
2. In Belgium, unemployment insurance is a compulsory program, meaning that eligible workers may receive benefits without opting in to an insurance fund. And unlike the prior examples, collection of compulsory social contributions from employers and employees is entrusted to a public institution co-governed by social partners. Though Belgium abandoned a voluntary Ghent system in 1944, it maintains a “hybrid” Ghent system in which Belgian trade unions continue to administer insurance expenditures for most employees.
3. Membership fees represent a minor source of funding for unemployment benefits in Ghent-system nations. Insurance fees are partly tax deductible and the bulk of unemployment insurance costs are borne by tax subsidies and/or compulsory contributions by employers and employees. Thus, for a relatively small extra cost, workers can become fully eligible to benefits, which are primarily financed through other channels.
4. Compensation rates of unemployment insurance in voluntary Ghent-system countries are relatively high, particularly in the initial period for low and average wage earners. Depending on the wage level and family composition, benefits average 70 percent and may approach 90 percent of their previous earnings.
5. Ghent-system countries have union densities approximately 17 percentage points higher than non-Ghent countries. Voluntary Ghent systems correlate with particularly high union density: Sweden, Denmark, and Finland ranked first to third in average net union density over the years 1960 to 2008 amongst the member nations of the Organization for Economic Cooperation and Development. Tellingly, Belgium—a compulsory system—ranked three places below Finland with a net density 15 percentage points lower.

In “Labor Law, New Governance, and the Ghent System,” Matthew Dimick argues that the Ghent system’s alternative form of labor governance is a more effective means of strengthening unions than the regulatory solutions considered in the Employee Free Choice Act.
Ghent-system countries offer surprising few regulatory protections for employee choice, providing little oversight to bargaining or the contents of eventual contracts. And yet, union density is dramatically higher in Ghent countries than in the United States. Dimick finds that this is because the Ghent system’s direct connection between employees and unions assuages the three fundamental dilemmas that face collective representation: the recognition problem, the free-rider problem, and the adversarial problem. While EFCA might have effectively removed barriers to recognition, Ghent resolves all three dilemmas without a substantial, state-based regulatory system of labor law.

First, the Ghent system encourages employers to recognize and bargain with unions by providing workers with incentives to join labor unions prior to and independent of the employers' recognition of the union. Union-administered plans induce an obligation—as a social norm, if not a legal duty—that workers become union members. Membership offers an opportunity to educate workers about the union and its benefits, building social networks and ties of solidarity among members, and the accretion of financial resources that come from member contributions. Additional financial and organizational benefits derive from union contact and membership preceding the bargaining process.

Second, voluntary, union-administered unemployment insurance provides an alternative "selective incentive" that reduces free riding on collective union goods. Their involvement in benefit disbursement legitimizes unions and creates a congenial bond between unions and employees. And because they administer unemployment benefits, unions actually grow rather than falter during low employment periods.

Third, union and employer collaboration in unemployment insurance policy generates efficiency gains that underwrite cooperative labor relations and reduce employer resistance and workplace adversarialism. In exchange for generous unemployment benefits, unions yield on employment- protection rules, giving employers more flexibility in the workplace—a bargain referred to as "flexicurity." Dimick argues that both employers and employees benefit when workers enjoy general "employment security" and not job security in any one position.

Response from Matthew Dimick concerning Ghent as a possible revenue generator for American unions:

The Ghent system is not a revenue generator for unions in the countries where it is employed. Since the Ghent system is so heavily subsidized by the government, any sort of "union appropriation" would be seen as corrupt, as it likely would in the US as well. Union finances and insurance funds are kept strictly separate and the funds are closely regulated. Unions also prize their independence and autonomy from the state, an independence that would be undermined if a Ghent structure was used to economically sustain unions.

Response from Tim Lyons concerning the Australian superannuation fund model as a possible revenue generator for American unions:

The Australian superannuation industry fund does not appear to be a way to generate revenue for union programs and activities.
It is a source of modest revenue stemming from the fact that the Fund pays a fee for the trustee’s (director’s) service to the union and also sponsors some union activity around fund enrollment etc., including pension fund organizing. The performance rate of the Fund is good for retaining union members in the Fund, but the fact that workers can join the Fund regardless of union membership means it does not necessarily produce more dues-paying members.

Lyons mentioned a few situations where smaller industry funds were able to get employer consent to union-supported projects. One example was where the fund invested in a subsidiary to promote construction in shopping centers to create union jobs.

When asked about revenue generation models apart from the superannuation fund model, Lyons mentioned the salary continuation insurance benefit negotiated by the electrical trades union in its CBA, that pays 70% of one’s salary for one-two years of disability. While the insurance premium is paid by the employer, the insurer pays a substantial commission to the union that is disclosed to the workers. The construction union earns a revenue stream from a portability leave program for workers that is held in centralized fund.

In describing these cases, Lyons shared his view that worker support for the union is essential to the success of any revenue generation strategy. Unions need a compelling story why workers should join a union. People won’t join if they don’t believe unions have enough power to accomplish anything worthwhile. He noted that firm level bargaining can rarely produce meaningful results for workers. He underscored the need to move to sectoral bargaining.

If one way of creating an environment where workers are free to form a union, is to re-establish the legitimacy of unions as important players in our civil society, then giving unions a key role in administering a national pension plan (such as the Industry Funds in Australia) should be added to the menu of options to consider.

However, the revenue generation model that was identified in this discussion came via the payment of substantial commissions to unions from insurers who provide a salary continuation insurance benefit for disability that is negotiated with employers in the collective bargaining agreement.

4. **Expand opportunities for fees for services**

*Strom, supra,* explores several modes of funding, evaluated based on their contribution to the organization’s mission, are summarized here:

<table>
<thead>
<tr>
<th>Types of Membership Incentives</th>
<th>Description/Examples</th>
<th>Pros/Cons</th>
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| Services for members, paid for by members | -benefits, training  
-Freelancers Union (insurance) | -Relationship may become more transactional than solidarity based |
| Services for members, paid for by external parties, usually government/companies | -ROC-United: education/training, legal services funded through Legal Services Corporation funds  
-Workers Defense Project Better Builder Program real estate developer standards program funded by companies and governments |
| Services for members negotiated with external companies | -MoveOn.org discounts with clean energy companies and marketing to members  
-AFL-CIO credit card  
-OUR Walmart; job benefits (when companies contribute as well as workers)  
-discounts |
| Services paid for by corporations (serving an organizing mission) | -product certifications, seals of approval, ratings  
-Coalition of Immokalee Workers Fair Food trademark & annual support payments from corporations for the human rights standard monitoring program  
-Top Server fine dining and wine paring training app  
-Diners Guide helps consumers identify high-road restaurants (ROC-United)  
-direct tip pay app in development | -Covers compliance enforcement but not organizing, overhead, or expanding to other markets or regions |
| Services for allied organizations | -Advocacy-for-hire  
-package workplace issue Insights for Environmental, Social and Governance investors  
-Coworker.org |
| Services for non-members that also benefit members; non-members pay | NDWA contract tool where employers/employees can find each other and draft an employment contract |

- For members provided by worker organization paid by members (benefits, training)  
- For members provided by worker organization paid by eternal parties (education training)  
- For members provided by companies paid by members with share going to worker organizations (credit cards, discounts, insurance)  
- For companies provided by worker organization paid by companies (product certification, seals of approval, rating)  
- For nonmembers provided by worker organizations paid by nonmembers (benefits, training, hiring halls)
• For workers at large provided by worker organizations paid by government agencies for enforcement of workplace standards
• For workers at large provided by worker organizations paid by defendants as part of recovery fees (litigation to enforce workplace standards, civil rights)
• Employer payment to union for contract administration services or payment of union expenses, such as salaries, office space, experts; Modify 302 of LMRDA

NOTE: Section 302, 29 U.S.C. § 186, makes it a criminal offense for an employer “to pay, lend, or deliver . . . any money of other thing of value” to a union or union officer, with certain specified limits and exceptions. Because of the breadth of the statutory prohibition, the lawfulness of various run-of-the-mill cooperative activities between employers and unions related to collective bargaining may turn on fine-tooth factual distinctions. See, e.g., Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper, & Forestry, Rubber, Mfg., Energy, Allied Indus., & Serv. Workers Int’l Union, 734 F.3d 708, 711-12 (7th Cir. 2013) (describing various circuit cases regarding when an employer may lawfully pay the salary of a steward, grievance rep, or other union representative under Section 302). The result at times may be to give employers a convenient excuse not to enter into such arrangements, despite their efficacy in achieving a productive collective bargaining relationship.

5. Mandate Employer and/or Governmental Financial Support for Union’s Role

Direct transfers from government and/or employers: Adopt legislation mandating an employer payroll tax and/or government subsidy/citizen tax to support a social dialogue fund that grants unions finances to engage in public policy debates.

• Review of French law creating “fonds pour le financement du dialogue social”

This fund is managed by a bipartite body and is financed both by employers’ contributions on payroll and by state subsidies. Three objectives for this money are: to finance joint labor-management activities; help design and implement state policies, and train employees’ representatives.

The system was reformed in 2015.31 The principle of financing the social partners activities already existed: the FONGEFOR, association for financial management of the national joint Fund of vocational training, was responsible for allocating resources among representative employers’ and employees’ organizations « à parité entre les OS de salariés et les organisations interprofessionnelles d’employeurs représentatives au niveau national » (Code du travail art. R. 6332-99). A percentage (the « préciput », 0,75 %) of the payroll tax paid by the employers was removed to them.

31 The information on this French law came from Nicole Maggi-Germain at the University of Paris, via the Clean Slate’s International Advisory Committee (c/o Gali Racabi)
The creation, by the Act of 5 March 2014 of the joint fund (http://www.agfpn.fr) contributes to increase the public control of the resources and its use. Its tasks (identified through 3 “missions” are wider as well as its functions are more directed, guided: it has become less a matter of financing the functioning (in itself) of representative employers’ and employees’ organizations than financing (also) the “paritarism”, i.e. a specific approach of labor relationships. The reference made, in the law of the 5 March 2014 (Code travail, art. L2135-9), to the “public service mission” ensured by the fund is quite emblematic of a shift that occurs (transfer/delegation/association of social partners – funding of the vocational training of unemployed people, for instance -, involved in the setting up, the implementation and the monitoring of employment policies – art. L2135-11, 1°). The social partners may represent a collective interest, not the general/public interest.

The French financial system (more or less informal before / institutionalized today) is based on external supports to the Unions and employers’ organizations (it is widely known that members contributions are not sufficient). The recent reform hasn’t fundamentally changed the revenue generation, even for those which are not representative: the legal principle adopted is based on an equality concerning the principle of financing (unlike to the amount). All the organizations have to justify, in an annual report to the association which manage the fund (AGFPN - managed by the social partners), the use of the resources. (Check out the annual report of the fund regarding the distribution of the resources according to the 3 missions defined by the law, and the way it is used.)

• **Interview with Stan Gacek: Changes in Brazil’s Trade Union Tax**

Brazilian President Getulio Vargas’s vision and genius of eighty years ago was to: (1) officially recognize and legitimize the worker trade unions, provide them an income stream, restrict that income stream to the provision of welfare services to the members (strike financing, political action, and inter-sector solidarity prohibited) and, thereby, to Brazilian workers in general, keep those organizations and their use of state-financed budgets under tight control, and create the same system for the employers; (2) ultimately control the collective dispute system with a highly interventionist system of labor courts and labor justice, also preempting the use of collective economic force (i.e., the strike) – and legally restricting and repressing the strike instrument – onerous preconditions, effective prohibitions in essential sectors, etc. This was the system of 80 years ago, hardened during the period of military dictatorship from 1964 to the 1980’s, and liberalized to a substantial extent, although greatly intact, from the period of the new Federal Constitution of 1988 to the present.

Upon effective legal registration, the sindicatos (unions) had access to the proceeds of the obligatory contribuição sindical system, which was financed by one day’s salary per year for each and every worker covered by the official trade union structure (CLT, Article 579). The sindicatos received 60% of the contributions rendered by the workers they represented. (“Contribution” also referred to as the imposto
The application of the revenues of the trade union tax were limited by law to essentially social welfare functions to members: i.e., legal, medical, dental and pharmaceutical services. (CLT, Article 592). The federacoes, or federations—the second rung in the official trade union ladder—received 15 percent of the proceeds of the contribuicao sindical. (CLT, Article 589). Additionally, the confederacoes, or confederations—the top level of the official union hierarchy—received 5 percent of the proceeds of the contribuicao.

Brazilian trade unions also enjoyed other revenue streams: (1) contribuicao assistencial (collectively bargained and approved by an assembly of workers—not unlike the concept of union security or agency shop); (2) contribuicao confederativa (members only contribute and the amount is determined by an assembly of members); (3) contribuicao associativa — (voluntary dues contributions by members).

New-unionism and anti-unionism movements in Brazil ferociously fought the trade union tax in Brazil over the past half-century, culminating in the labor reforms passed by the Brazilian Congress in July of this year and the recent election of President Bolsonaro. The reform invalidated the obligatory contribuicao sindical system, with 80% of the financing for unions placed in abeyance in one fell swoop. Under the new scheme, unions will only be able collect dues sourced with individual, voluntary authorization by members. The election of Bolsonaro further signals the end of labor unions as we know them in Brazil. Bolsonaro has said that he wants individual accords to take precedence over any collective agreements. While individual contracts for workers making over $20,000, under the reform, will already supersede any collective agreements, Bolsonaro has also signalled he would like to extend that to any individual accord, effectively ending the collective bargaining scheme. He has even considered doing away with the Labor Ministry entirely, or at least folding it in to another ministry.

Gacek always believed the basic corporatist consensus in Brazil (the parastatal role of unions as administrators of social welfare benefits) would be hard to shake. The government depends on unions to administer these benefits. In fact, that was meant to be the core of Vargas’ labor system: social welfare benefits would provide unions a long-term sustainable role but also, by limiting the use of those funds to social welfare only, the government could keep a tight rein on unions and, in effect, control them. And yet, new-unionism voices have successfully dismantled the core of the corporatist structure—the obligatory trade union tax.

While we might once have seen Brazil as a labor paradise, providing workers with a trade union monopoly and a guaranteed stream of income for those sindicatos, recent shifts demonstrate that Brazil’s labor history should serve more as a cautionary tale, an example of how a legal structure that funds unions and embraces unions as the labor default can still falter if it fails to build a political labor engine or incentivize an active worker-member base. We should look to the weaknesses of the Vargas labor scheme as we consider reforms under our own regime. For example, in Brazil, a guaranteed stream of income has actually provided an incentive to keep voluntary membership low. The incumbent labor leaders wanted to stay in power and more members meant more voters to win over. There was a real disincentive to organize for union administrations that did not want to be voted out of office.
With the trade union tax's repeal, Brazil's labor movement is grappling with the same questions as its American counterpart: how to build and sustain worker power. As in the United States, Brazilian labor unions will now have a categorical imperative to organize. While they could once rely on the union tax, an expanding base of voluntary members will be crucial to union survival.

During the IIB working group convening, general consensus of the room was that direct transfers from government or employers to unions was disfavored because of its potential to diminish union democratic involvement and accountability. More popular were creative methods of charging governments and employers for services like training, grievance arbitration, etc. that unions already provide or could in the future, while preserving the focus on internal organizing and member recruitment.

6. Commission Payments to Unions

Repurpose union activities (benefits, training, HR, apprenticeship) for profit/employer payment for non-representation activities; Enable unions to benefit financially from the business of benefits that are negotiated in collective bargaining agreements (Australian example of unions collecting a commission from insurer who provide disability benefits; e.g. salary continuation insurance)

7. Philanthropy/Foundation Grants

Philanthropy grants and income off investments (e.g. strike funds)

Allow Philanthropic Non-Profit Foundations to make tax deductible contributions directly to unions; that is, to 501(c)(5) organizations

The U.S. Chamber of Commerce actually attempted to document the importance of foundation grants to the financing of worker centers. See “The Emerging Role of Worker Centers in Union Organizing,” by Jarol B. Manheim (2017).

Strom, supra, cautions against foundation funding, however, finding that grants comprise 61-63% of most budgets, which often come with strings attached, cause mission creep, and can be unpredictable and limited where external to movements.

IV. NEXT STEPS

A. Facilitating the Formations of Unions and Worker Organizations

a. Continue to look into insights from behavioral science/nudge theories on union enrollment
b. Look into industrial psychology findings about the inherent coercive nature of supervisory authority and power over an employee
c. Examine RLA/NMB experience on company-wide unionization requirement
d. Inquire into lessons from construction law provisos
e. Explore advancements in public election methods and new recommendations
f. Our Australian contact, Tim Lyons, suggests our working group look into the Quebec pension fund system, where the firm level funds are pooled and centrally managed, and abide by ESG investing standards. (ESG investing is the consideration of environmental, social and governance standards alongside financial factors in the investment decision-making process.) Lyons also recommended a look at the Netherlands pension fund system.

B. Revenue Generation for Sustaining Unions and Worker Organizations

a. Look into AARP model of financing its advocacy (estimated that AARP annual dues are 1.5 billion; while the royalties from its benefits sales amount to 9.4 billion.)
b. Look into the practical impact of international laws that call for subsidizing unions via payroll tax (e.g. the French law)
c. Further explore union commissions from benefits sales and conflict of interest concerns

V. SELECTED BIBLIOGRAPHY

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David Weil on “The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It”

Weiler, “Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA”


Any good articles on post EFCA analysis

b. Case Law, Statutes, and Legislative Reports

1. Delta Air Lines, Inc. (Association of Flight Attendants), 39 NMB No. 8 (Nov. 18, 2011)
2. Delta Air Lines, Inc. (International Association of Machinists), 39 NMB No. 15 (Dec. 9, 2011)
3. New Jersey Workplace Democracy Enhancement Act
4. Thulen v. AFSCME Complaint
5. Report 110-23, 110th Congress, 1st Session
7. Section 302, 29 U.S.C. § 186
8. Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper, & Forestry, Rubber, Mfg., Energy, Allied Indus., & Serv. Workers Int’l Union, 734 F.3d 708, 711-12 (7th Cir. 2013)
10. France: Act of 5 March 2014 of the joint fund: [Link]

c. Other Resources

1. Exchange with Matt Dimick re Ghent system
2. Interview with Stan Gacek re Brazilian labor law
3. Interview with Tim Lyons re Australian’s Superannuation Funds
4. List of revenue generation models from Abroad (c/o Kathleen Thelan, MIT)
5. Chart of Canadian Methods for Proving Majority Support for Collective Bargaining ((c/o David Doorey)
6. Chart on Effective Elements of Privately Negotiated Recognition Agreements (c/o Judy Scott)
7. Information French law from Nicole Maggi-Germain at the University of Paris, via the Clean Slate’s International Advisory Committee (c/o Gali Racabi)
8. Save More Tomorrow program website
9. ICTWSS database of union membership
10. Unionstats.com