

SEVEN STRATEGIES TO REBUILD WORKER POWER FOR THE 21ST CENTURY GLOBAL ECONOMY:

A Comparative and Historical
Framework for Policy Action



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Executive Summary

Is globalization good or bad for workers? One view sees globalization as an inevitable and desirable process of making economies more efficient: It may displace workers in the short run, but it has the potential to make them richer in the long run. Another view sees globalization as a net negative, leading to a loss of local and national control as workers are divided against each other in a race-to-the-bottom where business wins and labor loses.

This paper takes a different view. First, it asserts that there is no immutable phenomenon called globalization. Rather, nations have tasked certain actors to make a particular set of rules with a certain set of priorities in mind, ultimately driving a global economy that serves the few over the many. All of this—the rule-writers, the rules, and the priorities—can be changed. Global governance could help rebuild labor, reduce inequality, and achieve other social and environmental goals. As such, it makes little sense to be for or against global integration; it all depends on the terms that are set. Second, it documents how the experience of labor has varied widely, even during the period of greater global integration. While the U.S. labor movement fights for its life, its counterparts in many of America’s trading partners have fared substantially better. This leads to the third point: Labor abroad has fared better due, at least in part, to different domestic policy choices by their governments. Government needs not be—and historically hasn’t been—a passive observer of business-labor relations. Recent Supreme Court decisions like *Janus v. AFSCME* reveal that the state (of which courts are a part) can and does put its thumb on the scale against labor. Thus, policy could instead actively tilt the other way.

This paper proposes a fundamental re-visioning of the role of government in rebuilding worker power. Instead of resignation, despair, modest legal changes, or waiting for unions to save themselves, we recommend ambitious and linked strategies at the international and domestic level to strengthen labor institutions. Part I defines what we mean by worker power, while Part II outlines seven strategies for rebuilding it. In particular, this section proposes a new international labor rights framework modeled on the Paris climate deal. Unlike the Paris deal, where countries set targets for reducing carbon, countries in a new Worker Power Agreement would adopt targets for increasing union density. Like the Paris deal, countries would retain sovereignty over how they achieved these targets. Indeed, most of Part II is a menu of options of how countries might consider meeting these obligations—all based on best practices or learned lessons from U.S. history or the nation’s trading partners. In short, far from having “no alternative” to the type of labor markets the U.S. has now, there’s an excess of rich alternatives.



SECTION ONE

Worker Power: What It Is and Why It Matters

DEFINING WORKER POWER

We can define worker power in a number of ways, but the U.S. ranks near the bottom amongst developed Western economies in one of the most common measures: higher **union density**. In 2017, private-sector union density was a mere 6.5 percent. To put this into perspective, this would be as if everyone in Florida belonged to a union, but no one in the rest of the country did. (Florida has just over 6.5 percent of the total U.S. population.) If we include the considerably more unionized public sector in the calculation, 10.7 percent of U.S. workers belong to unions. In contrast, for the latest years for which numbers are available, the average union density of the U.S.' peers is over three times that, at 35 percent. America is outpaced at the top end by Iceland (90.4 percent) and at the low end by Spain (13.5 percent). Only France does worse than the U.S., with a union density of 7.9 percent. These figures are shown in Figure 1.

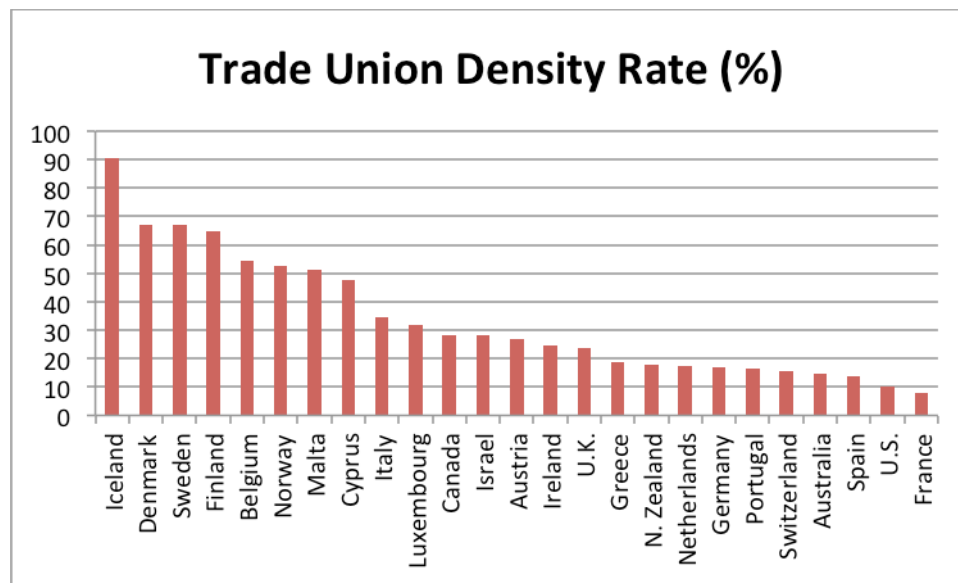


FIGURE 1 U.S. Near Bottom of Union Density. Source: International Labor Organization (ILO).

When one turns to another indicator of union power—**collective bargaining coverage**—the U.S. compares even less favorably to its peers. Only 11.5 percent of American workers are covered by a collective contract, which are typically negotiated by a union or similar

workplace organization (regardless of whether the individuals are officially members of the union). In contrast, the average for the U.S.' peers is nearly six times that at 62 percent—or nearly twice the average rate of workers who belong to a union in those countries. What explains this discrepancy? In labor policy discussions in the United States, collective bargaining coverage and union density are sometimes used interchangeably. This is because the gap between the two numbers is only 1.3 percentage points in the U.S. This gap is similar to that of other countries with an Anglo-Saxon legal heritage (3 points). In these countries, including the UK and Ireland, bargains are typically completed at the firm level, and the firm level is also where unions are recognized. Thus, if a firm has a union-negotiated contract, they typically also have a union—and vice versa. Matters are different in non-Anglo-Saxon countries, where the terms of collective bargaining agreements are applied throughout the industrial sector. Indeed, if one looks only at those latter countries, the collective bargaining coverage rate averages nearly 70 percent—almost seven times higher than the U.S. These figures are shown in Figure 2 for countries where data is available.

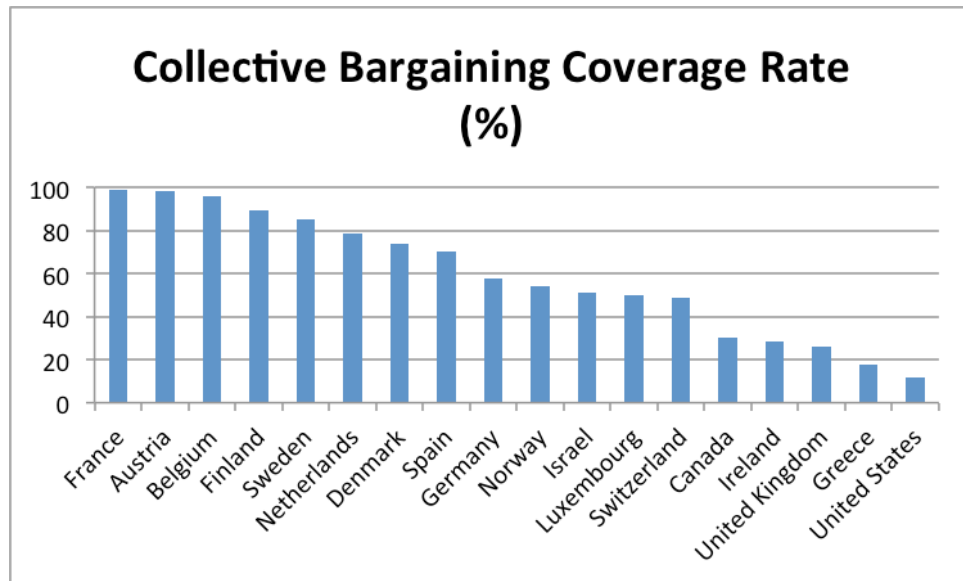


FIGURE 2 U.S. At Bottom of Collective Bargaining Coverage. Source: ILO, Visser.

There is still another indicator of worker power: union incorporation into national economic governance structures. This typically occurs via **tripartite structures** alongside business and government. In a study of EU countries, University of Warwick sociologist Colin Crouch (2017) found that these structures were highly correlated with lower inequality and unemployment. We will discuss these arrangements in more detail below.

At this point, let us defend a few choices we make in this paper. Why focus on government-led initiatives, rather than merely allowing workers themselves to organize? Indeed, it's a far different emphasis than that of scholar-organizers like Jane McAlevey (2016), who



focus on what workers' organizations can be doing better in order to boost unionization, including improved leader recruitment and strike participation. Nonetheless, we view the bottom-up and top-down approaches as complementary rather than competitive. Indeed, smarter organizing can be amplified many times over with a more favorable institutional environment. Because of the substantial collective action problems and risks involved with starting a union drive—as well as the substantial positive externalities to higher worker power noted below—labor weakness can be thought of as a market failure that government can help correct. That said, there is no reason that unions could not themselves initiate the kinds of reorganizations contemplated in this paper, as (for instance) legal scholar Matt Dimick recommends with regard to more centralized bargaining (2014).

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Second, why not focus on the firm-level power of unions? After all, individual workers are not employed in “the economy” but in specific firms that might have unique characteristics. One example of a firm-level labor structure would be the “closed shop,” where management agrees to make union membership a condition of hire or retention. In much of the developed world, closed shops are illegal or sharply restricted. Such strategies have drawbacks. In the U.S., for instance, federal private-sector labor law forbids the closed shop, but permits unions to negotiate “agency shop” clauses under which represented workers must remit “fair share” fees to them; however, that law also allows states to outlaw the agency shop—and today, 28 of 50 states do so. Among the drawbacks to the closed or union shop model is that it requires a considerable effort on the part of specific workers and management to get it into place, and may only affect a small number of workers overall. Government policy should focus on efforts that have the potential to be more broadly shared.

Third, why focus solely on policies that are so closely linked to unions? There are management practices that affect workers directly as individuals, including outsourcing to contractors (Weil 2017), leveraging the linkage of public benefits and health insurance to employment, using contracts with at-will employment, and even coercing workers into political activity that might go against their class interests (Hertel-Fernandez 2018). These practices also make it harder to organize unions by increasing the risks to individual organizers. But removing these risks would not automatically lead to more unionization, even if they would make it more likely. Again, lessening these types of risks are complementary to the strategies offered in this paper, which more directly target the collective outcomes that we believe have significant spillover benefits.



Fourth, might the U.S. Constitution or international treaties get in the way of implementing some of the changes recommended in this paper? It's absolutely possible. The vision we lay out in this paper, however, assumes that these structures are changeable with sufficient political commitment—such as by constitutional convention. Finally, aren't there downsides to unions, like corruption or lack of internal democracy? Absolutely. In this paper, we mostly bracket the downsides of union power for future research.

THE BENEFITS OF WORKER POWER

A growing body of academic research identified numerous public benefits to higher worker power. Economists at the International Monetary Fund (IMF) have concluded that a 10-percent change in union density is associated with a 5-percent increase in the top 10 percent's income shares (Jaumotte and Osorio 2015). The benefits of a union to the workers within it is fairly obvious: In addition to valuable “fringe” benefits, union membership leads to nearly a 20-percent wage premium (Farber et al. 2018). But sociologist Jake Rosenfeld of the University of Washington-St. Louis found more widely shared benefits. After accounting for regional differences, he estimates that the decline in union density accounted for 30 percent of the overall growth in private-sector wage inequality among men and approximately 20 percent of that for women (Rosenfeld 2014). In work with Meredith Kleykamp of the University of Maryland, Rosenfeld found that the racial wealth gap between black women and white women would be 30 percent lower if union density had remained at its levels 40 years ago (Rosenfeld and Kleykamp 2012).

In a recent meta-analysis of nearly 150 social science books and articles for the *Annual Review of Political Science*, John Ahlquist (2017) of the University of California-San Diego identified four ways that stronger unions bolster the power of workers and lessen inequality for the nation or region as a whole. First, a threat effect may encourage employers who do not have unions to increase wages to union levels in order to stave off organizing drives. Second, unions may increase overall wages when their contracts are extended to whole regions or sectors. Third, union norms may lessen the absolute and relative earnings of managers and executives. Finally, unions improve policy outcomes through their lobbying activity. For instance, numerous articles show that union influence with boards, pension funds, and governments helps to increase the top tax brackets and restrain large pay packages for top firm officials—a compression that limits elites' ability to have outsized influence within firms and on national policy. Unions can also improve productivity and macroeconomic outcomes by demanding training and reducing turnover and reliance on (not directly productive) managers (Freeman and Medoff 1984).



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A related body of work focuses on the benefits of unions to democracy and political participation. On a basic level, unions help boost voter turnout of their members and the population as a whole. This is particularly pronounced for unionized, private-sector workers, who are 7 percent more likely to turnout than their non-unionized colleagues—a premium that goes up to 11 percent when comparing workers without a high school degree (Rosenfeld 2014). Turnout drops by up to 3 percent for adjacent counties that have anti-union, right-to-work laws relative to those that do not (Feigenbaum, Hertel-Fernandez, and Williamson 2018). Unionized black workers are as much as 15 percent more likely to turn out to vote, while unions helped reverse low turnout by Asian and Latinx workers, as well (Sousa 1993; D. Kim 2016).

Higher union influence translates to better policy outcomes. Political science research has shown that in settings with high economic inequality, influence over policy is also uneven (Gilens and Page 2014). Unions—as an organized voice representing less wealthy voters—can help counteract that in a number of ways. First, union members tend to be more politically engaged and informed, so they can thereby improve the quality of democratic deliberation (Iversen and Soskice 2015). Second, unions have the capacity to—through strikes—block undemocratic or elite-biased policy. Research shows however that this effect is less pronounced in very low and very high union density countries, where strike threats are either low cost or unnecessary, respectively (Lindvall 2013). Third, unions can serve as a pathway to public service for people with working class backgrounds. The most famous working class politician of recent world history, former president Lula da Silva of Brazil, received his political training as part of a union and union-linked political party. In contrast, millionaires make up a majority of post-war era presidents and current Supreme Court justices, and highly paid professionals make up at least half of Congress; people from working class backgrounds amount to less than 2 percent of federal legislators. Irrespective of party membership or ideological orientation, politicians with working-class roots are more likely than those with blue-blood roots to support policies that reduce inequality (Carnes 2013). Unions also have an unparalleled ability and (still) wider reach than other civic institutions to communicate anti-inequality positions to their members and the public



at large (S. E. Kim and Margalit 2017). One cross-national study finds that stronger unions are associated with more transparency, less corruption, and more effective government, and that they may also help boost membership in other civic organizations (Lee 2007). In short, as unions—and worker power—weaken, the political base of support for more egalitarian tax, health, and trade policies is eroded, ultimately hurting the populace as a whole.

SECTION TWO

Seven Strategies to Rebuild Worker Power

Should public policy favor labor unions? Throughout U.S. history, the answer from lawmakers has been a resounding “no.” Until the endorsement of the Wagner Act by the Supreme Court in 1937, unions lacked significant legal protection. However, it would be a mistake to think that the pre-1937 regime was laissez-faire or that government was out of the way. Rather, the power of the state was used to favor employers by breaking up labor organizing using the military, police, or courts. For the remainder of the New Deal period, a relative détente between business and labor prevailed, during which time union density (the proportion of the labor force belonging to a union) rapidly increased. With the Taft-Hartley Act of 1947, this all changed. The measure, passed by a Republican Congress over Democratic President Harry Truman’s veto, tipped the scales back towards business by making (or allowing individual states to make) unions less viable. Over time, a series of court measures added to this attack on unions, and a growing number of states—now a majority—passed anti-union laws. As a result of these policy decisions, a lower percentage of workers belong to unions than before they were granted substantial legal protections (see Figure 3).



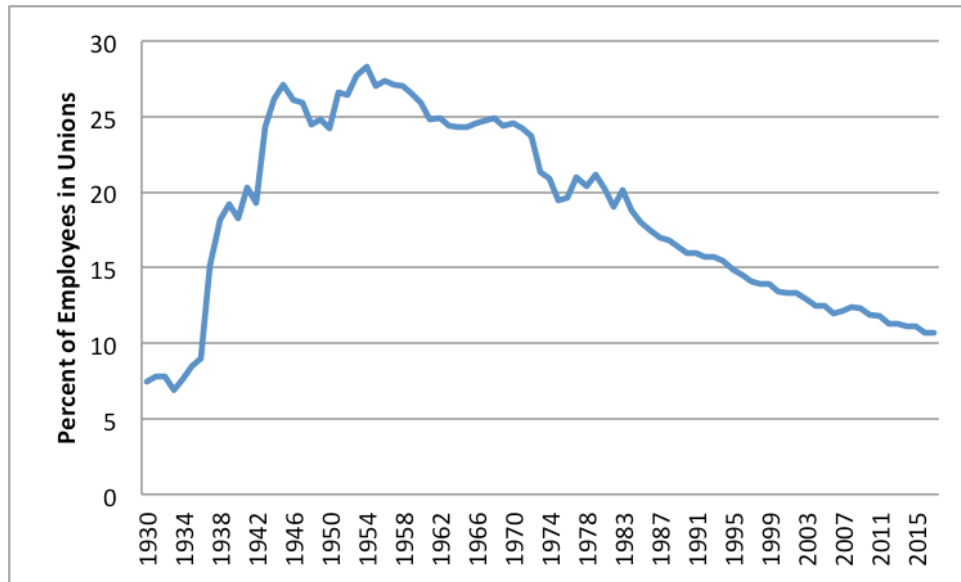


FIGURE 3 Rise and Fall of U.S. Union Density, New Deal to Present. *Source: Congressional Research Service.*

In June of 2018, the Supreme Court took aim at what is left of the U.S. labor movement. Since the 1950s, U.S. policy and law have long allowed individual workers to opt out of unions for religious or any other reasons. But recognizing that this poses a free-rider problem (i.e., opting-out workers would benefit from collective bargaining agreements concluded by a union without contributing to the union’s costs), these non-members are often required to pay agency fees (essentially payments to help cover bargaining costs without having to join the union). In *Janus v. AFSCME, Council 31*, the conservative majority determined that these arrangements are unconstitutional in the public sector—which is more heavily unionized than the private sector (where right-to-work laws have already weakened these arrangements). Unless unions overhaul their business models, they may become financially unviable in the near future.

This moment creates an opportunity for policymakers to fundamentally rethink our public policy framework around unions. A growing body of academic research shows that where union strength is higher, there are more favorable economic and political outcomes—including lower inequality and increased democratic stability. Yet, because these benefits are shared by citizens and workers whether or not they pay union dues (and because organizing unions is hard work), individual workers lack sufficient incentives to form unions. In public policy parlance, unionization has a market failure and collective action problem—the classic reason for governmental intervention. But what policy should be pursued?

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Below, we propose seven strategies that countries have used or could use to boost worker power—from policies that extend practices that the U.S. already does (including labor issues in international treaties and adopting pro-labor procurement policies) to policies that would represent a more substantial shift (like making union membership compulsory). In each strategy area, we provide examples of how these strategies have been deployed and lessons learned for updating them for the 21st century. While the narrative focuses on the U.S., any country could adopt comparable reforms. Indeed, our framework envisions that countries would commit to an international framework (Strategy #1) to then employ a locally appropriate version of Strategies #2-7—providing a mutually reinforcing link between progress at the national and international levels.

STRATEGY #1: MAKE BUILDING WORKER POWER AN INTERNATIONAL OBLIGATION

Lessons Learned

- Existing labor and human rights agreements lack meaningful enforcement or leave interpretation up to non-labor-oriented judges.
- Recent U.S. trade agreements try to link labor rights to more enforceable trade rules, but they have proven inadequate in practice and are not global in coverage.

Recommendation: Launch a global agreement modeled on the Paris Climate Accord that explicitly targets higher unionization rates, but allows countries discretion on which of the above policies or others to utilize to get there. Pair this with arbitration that can be initiated by labor groups.

Domestic inequality is not good for the world. In 2016-2018, we faced the prospect of destabilizing trade and currency tensions, with governments in the United Kingdom, the United States, and Italy capitalizing on populist discontent by raising (or threatening to raise) barriers to trade and immigration. This is not good for countries like Canada or Denmark, which have more successfully adapted their domestic labor markets to



globalization's challenges. It's also not great for the countries taking the measures, as the governments' proposed remedies are unlikely to meaningfully reverse the economic damage suffered by working families in these countries. Indeed, research has shown that tariffs create rents for elites that—without explicit mechanisms for redistribution—remain captured at the top (Dean 2015). Nonetheless, the attempt to mobilize domestic resentment at foreign workers, trade, and supposed incursions on sovereignty can have short-term political advantages for populist governments even if they don't solve the most fundamental problems facing workers.

Despite the obvious benefit to the international order through the economic stability that unions can provide domestically, efforts to construct meaningful international obligations to build labor power within countries has been halting at best. The body most clearly associated with the task, the International Labor Organization (ILO), has an unwieldy tripartite structure that defers strongly to states and has only once, since its creation in 1919, attempted to sanction a rule violator (against Myanmar in 1996) (Hurd 2017). Attempts by the ILO to sanction behavior within the richest countries have been almost non-existent, and the U.S. has refused to ratify many ILO conventions. Indeed, the structure of the commitments (dispersed in nearly 200 conventions, each of which requires affirmative opt-in) introduces the risk that countries might refrain from signing so as to not give a competitive advantage to their trading partners (Baccini and Koenig-Archibugi 2014). Finally, many of the ILO conventions that relate to unions are more “process” (e.g., can unions exercise their rights?) than “outcomes” focused (e.g., is union density high?)

Efforts outside of the ILO were similarly hamstrung. In 1948, Eleanor Roosevelt—then the Truman administration's ambassador to the United Nations—succeeded in getting recognition of union rights into the Universal Declaration of Human Rights. Two years later, the European Convention of Human Rights contained similar language, with Article 11 reading in part “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.” Forty-eight countries (including the U.S.) voted in favor of the Universal Declaration, and 47 for the European Convention (including a number of countries not in the European Union, a separate entity). Yet these advances on paper have been hampered in practice. The Universal Declaration has no enforcement apparatus, and the U.S. Supreme Court has maintained that it does not contain legally binding obligations (Putnam 2016). The convention can only be enforced against governments—not anti-union firms.

The problem isn't only with the initial rules, but how these rules were interpreted and refashioned over time. The European Court of Human Rights (the body tasked with



interpreting the bare-bone rules of the convention) has turned Article 11 on its head. In a series of three legal cases, the court turned the positive freedom of association (a collective right to form unions) into a negative freedom of association (individuals' right to be free of being compelled to join a union). In *Young, James, and Webster v. the United Kingdom* (1981), the court determined that the closed shop arrangements of British Rail (as applied to three workers that had religious or political objections to union membership) violated the individuals' right to earn a living. The court noted many benefits of closed shops, including “the fostering of orderly collective bargaining, leading to greater stability in industrial relations; the avoidance of a proliferation of unions and the resultant trade union anarchy; the counteracting of inequality of bargaining power; meeting the need of some employers to negotiate with a body fully representative of the workforce; satisfying the wish of some trade unionists not to work alongside non-union employees; [and] ensuring that trade union activities do not benefit of those who make no financial contribution thereto” (Wiarda 1981, 20). Nonetheless, the judges imposed requirements on the exercise of these policy goals that were not contained in the convention, including that policy be no more economically restrictive than absolutely necessary.

This redefining of rules continued in later decades. In *Sigurdur Sigurjonsson v. Iceland* (1993), the court examined a statutory closed shop arrangement whereby taxi operators—by law—had to join a taxicab association. In Iceland's defense, the government pointed to the fact that the taxicab driver who brought the case didn't have the same political objections as the plaintiffs in the *Young* case. This did not convince the court, which determined that an objection against governmental regulation generally and limitations on the number of taxicabs specifically must be seen as political speech worthy of being protected. Iceland also pointed out that the convention intentionally excluded the language of Article 20 of the earlier-in-time Universal Declaration, which reads that “(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.” In Iceland's view, this meant that the convention was intended to be more protective of collective rights than the available treaty alternatives. The court again rejected this defense, not tackling it head on but instead arguing that international labor law had moved on since the convention was initially signed (Ryssdal 1993).¹

The court completed its move in redefining the meaning of the convention in *Sorensen and Rasmussen v. Denmark* (2006). In the years since *Young* and *Sigurdur*, Danish authorities

¹ Historical research shows that Iceland could have stated its case even more strongly. In his granular review of the drafting history, Drew University political scientist Johannes Morsink (1999) argued that the Universal Declaration must be interpreted as permitting closed shops. Uruguay had proposed—and the negotiators rejected—specific language that would have made the right to leave a union explicit. The New Zealand and Polish delegates noted that the U.S. had recently slid towards right-to-work laws, something that would be internationalized had the effort been successful. Mr. Altman (Poland): “The Taft-Hartley Act, in force in the United States, but recently condemned by the President of that country, was evidence of what might happen if an amendment such as had originally been proposed by Uruguay were adopted” (Schabas 2013, 2605).



had attempted to bring their domestic legislation in line with the convention’s rulings. In national courts, Danish judges had found that closed shops would be permissible in certain cases, provided that they did not constitute serious barriers to workers’ right to earn a living, or that the requirement was not imposed by statute. Indeed, the Danish government argued before the court that the decline of closed shops meant that workers that wished to avoid union membership could simply work for one of the many shops that were not closed. Danish unions submitted additionally that “Closed-shop agreements were of crucial importance for enforcing collective agreements, securing fair competition and combating undeclared and illegal work. It would be detrimental to the Danish collective-agreement system to prohibit them,” with the unions predicting an eventual incentive for both employers and employees to opt out of the pro-union workplace norms (Wildhaber 2006, 22). Yet the court found that the plaintiffs—both of whom wished to join the so-called “yellow unions” discussed in Strategy #6, and one of whom was only seeking brief holiday employment—enjoyed a total freedom from having to join a union (no matter how minor the economic inconvenience for them).²

In short, the European Court’s jurisprudence is an example of international labor rights done wrong, with original text weaponized against its original social democratic purpose.

These cases have serious consequences both within and beyond Europe. Notably, the European Court of Human Rights is one of the few international legal bodies whose decisions (national courts are increasingly deciding) are directly enforceable in domestic legal systems. In countries where this is true, countries must update national legislation to be consistent with court rulings (Martinico 2012). Beyond the continent, European Court rulings are influential in other bodies, regularly being cited as authoritative in forms with lesser powers like international economic and human rights courts (Voeten 2010). In short, the European Court’s jurisprudence is an example of international labor rights done wrong, with original text weaponized against its original social democratic purpose.

² A dissenting opinion took issue with this argument, noting class bias (as lawyers and doctors may normally only work if belonging to a relevant professional association), and the corrosive effects of individualism: “While an individual(ist) worker may not want to belong, the individual conditions of employment he currently enjoys have been achieved through decades of collective bargaining. Can he reap the economic and other advantages, take the job and then say he does not want to belong to the very trade union whose past efforts have made all of this possible for him?... It may turn out that a substantial collective economic interest of the workers has been sacrificed to an insubstantial, individual preference.”

For their part, international trade agreements have begun to creep towards more labor-friendly global governance. The Clinton administration succeeded in getting a labor-side agreement alongside the 1993 North American Free Trade Agreement (NAFTA) with Mexico and Canada. The 2005 U.S.-Central America Free Trade Agreement (CAFTA) negotiated by George W. Bush took it one step further by including labor obligations in the core text of the treaty. And a wide range of European pacts with developing countries include substantial social clauses (Hafner-Burton 2009).

Nonetheless, their efforts suffer from numerous weaknesses. First off, negotiators have not directly bound countries to the obligations of the International Labor Organization, the global tripartite body with monitoring capacity. Rather they have referenced a declaration that references those fundamental rights—a move that creates wiggle room (Alston and Heenan 2003). Second, these changes are done on a piecemeal basis, expending massive negotiating energy but without any mechanism to ensure they diffuse out to the network of thousands of trade and investment agreements throughout the world (Tucker 2018). Finally, these treaties have high bars for the kind of evidence that must be brought to bear.

This last point was demonstrated in 2011, when the Obama administration launched the first-ever legal test of labor rights under a trade deal, alleging that Guatemala’s failure to ensure reinstatement for union organizers violated CAFTA’s terms. Alas, labor success was not to be. A panel of three ad hoc adjudicators found that the U.S. had not borne its burden of proof. Specifically, while Obama’s trade attorneys convincingly showed that Guatemalan companies routinely abused union organizers without effective government penalty in violation of national and international law, they failed to show a sufficient nexus to trade advantages for the companies’ exporters. The panelists’ decision was met by howls in the House of Labor, but they appeared to faithfully discharge their remit. The relevant obligation in CAFTA’s Article 16.2, after all, is for countries to “not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties” (emphasis added). The negotiators could have just as easily put a requirement that all labor rights be observed (trade-related or not). This could have been a way to use international law to enfranchise all workers—in tradable and service sectors alike. In the realm of international legal interpretation, countries’ sovereign decision to require a tight link to trade in the treaty text had to be given weight. (As it happens, not even the Obama administration’s Trans-Pacific Partnership—vaunted for its supposed improvement to labor rights—removed the hurdles identified by the panel.)



Recommendation

A central challenge in constructing any meaningful international obligation is balancing enforceability against sovereignty. That said, governments have shown bias in the way that they've struck that balance, generally ceding more sovereignty on treaties that relate to protecting multinational investors than on pacts promoting labor. One consequence of this asymmetry is that domestic populations begin to see the very international order as rigged for the powerful (Colgan and Keohane 2017). This is one of the biggest vulnerabilities to the legitimacy of global governance going forward.

To help rehabilitate the image of globalization, a shifting of this class bias is necessary. But to be effective, it must be something that states would agree to while also achieving deeper ambition than what countries would have done without it. This involves hitting the middle ground between total voluntarism (e.g., the ILO now) and overly ambitious targets that states would have an incentive to defect from (e.g., the 1992 Kyoto Protocol on climate that the U.S. never joined).

The Paris Agreement provides a useful template for how nations can preserve their sovereignty over domestic policy while also taking on meaningful commitments. For decades, the U.S. had been unwilling to make meaningful climate concessions. The Paris Agreement unblocked the logjam by setting collective targets to reduce carbon emissions to levels that would head off catastrophic damage (i.e., the means), while allowing each nation to pledge how they would get there using nationally appropriate ends. Thus, nations had to be transparent about they would achieve their targets, but the main enforcement was a review process that would evaluate progress and present opportunities for inter-governmental and public naming and shaming of foot-draggers.

This template has weaknesses, not least that the Trump administration pulled out of the process. As international relations scholars Robert Keohane and David Victor note, the Paris deal would ideally be paired with mechanisms to promote deeper cooperation, including “climate clubs” of groups of countries willing to punish outsider laggards, coordinated research funds, and collective technological experimentation (Keohane and Victor 2016).

Nonetheless, we see substantial conceptual value in the model. We propose a Workers Power Agreement (WPA), modeled on and upgrading the Paris climate deal. Unlike the Paris Agreement, where states committed to the end of *reducing* carbon emissions, the WPA would commit nations to *increasing* union density. Nations already target inflation rates, unemployment rates, and the like, so this builds on existing practice. The targets would not be the same for each country, which vary widely in how unionized they are at



present. In other words, the U.S. need not reach Icelandic levels of unionization overnight, and Iceland (with near total union membership and coverage) is unlikely to be able to make significant further progress. Nonetheless, each country would lay out a national plan with objectively observable commitments, including how they will ensure that these unions remain democratically governed and accountable to their membership. For countries with low union density, the default target would be an increase of 5 percent union density over five years, a target that would be reduced slightly for subsequent years to account for upper limits on the total percent of workers it would be possible to unionize. If the WPA were to go into place in (say) 2020, that would mean that the U.S. would undertake an increase from 10.7 percent union density to 15.7 percent by 2025, around 20.7 percent by 2030, and so on.

***We propose a Workers Power Agreement (WPA),
modeled on and upgrading the Paris climate deal.***

Like the Paris Agreement, the means of how countries would reach these targets would be nationally determined. Thus, the U.S. might frown on making union membership compulsory by statute, but would be more willing to create specialized labor courts to be friendlier to organizing drives. The important thing is that they would commit on paper and in public to how they will get there, to make it easy to test for compliance. At the end of every five-year period, the WPA's member countries would have a Conference of Parties to the Agreement (CPA), where each country would present its progress. Other governments and civil society expert panels would likewise prepare and circulate their commentary on each country's compliance record. The official record would report which countries met their targets and which did not.

The Workers Power Agreement should go beyond the Paris deal in having more incentives and penalties. Countries that want to experiment with, say, importing the Ghent model of unionization (where unemployment benefits are provided by unions) could be given grants to do so and have dedicated review groups to test how well it adapts to new settings. Moreover, as we've proposed elsewhere (Tucker 2018), labor unions should be able to launch arbitration claims against states that fall afoul of their commitments or against major employers that were frustrating the national targets. These panels should be staffed by labor experts with a demonstrated sympathy for the WPA's goals (perhaps as evidenced by pro bono work for unions). Accused states and firms would have the opportunity to defend themselves. Perhaps a country is off track to increasing union density by 5 percentage points, but has undertaken alternative policies (such as more union involvement in policymaking) that it believes should be a mitigating factor. Or perhaps union density is



not going up, but collective bargaining coverage is—along with a clear plan to incentivize eventual union membership. The arbitrators would be tasked with rendering an overall assessment of a state or firm with the letter and spirit of the WPA.

To balance sovereignty concerns, any arbitration award would be advisory and not carry a specific sanction beyond public humiliation and reputational costs. This is not nothing: These compliance assessments would be reported in the CPA official record, and states with a record of adverse judgments would be subject to more scrutiny by the expert panels.

Finally, “labor clubs” of countries that wished to punish agreement violators would be permitted to do so, subject to review as to the proportionality of these measures by joint panels of labor and trade experts.

That’s the overall international framework; now what are the ways that states might achieve these targets domestically? We explore six options in the sections that follow.

STRATEGY #2: PRIVILEGE FIRMS THAT PLAY WELL WITH UNIONS

Lessons Learned

- From 1933 to 1935, the U.S. attempted to incentivize industries and firms to boost worker power. While an important marker, this was badly managed and ultimately struck down by the Supreme Court.
- Various European governments and the Obama administration conditioned various procurement benefits on firms respecting labor rights—but these have also been held back in the courts.

Recommendation: Corporate personhood, government subsidies, and overseas diplomatic assistance could be made contingent on having strong independent unions. Meanwhile, international treaties should be rewritten to make clear that pro-labor rules of these kinds are consistent with countries’ obligations.

The U.S. and other governments have long used the power of the purse to try to entice private firms towards serving broader social goals. In the contemporary context, this is most notable in the environmental sector, where many countries have articulated green public procurement policies as a way to directly expand demand for low-carbon products and indirectly incentivize firms to engage in green technological innovation.



Less common are procurement policies that aim to use government purchasing power to bolster unions. An early experiment was the National Industrial Recovery Act (NIRA). The brainchild of various members of Franklin D. Roosevelt’s so-called “brain trust,” this 1933 legislation had as its mission to “provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision,...to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.”³ The act created the National Recovery Administration (NRA), tasked with promulgating codes for each major industry that would promote economic recovery, uphold the right to collective bargaining, and promote independent unions—among other objectives.

In the conception of this plan, the role of labor and business associations was central. In NRA administrator Hugh Johnson’s words, “if we didn’t have these trade unions and trade organizations, we’d have to form them”—just to have partners in promoting economic recovery (Ohl 1985, 194). But between conception of the idea and execution, several compromises were made. After legislators shelved the idea of penalties on code violators of up to 20 percent of a company’s gross receipts, there was less incentive to participate. Instead, companies would participate and comply in exchange for the right to display a government seal of approval in the form of a Blue Eagle. Then, Johnson traded off labor’s interests in cotton, steel, autos, and other negotiations—using ambiguities in NIRA to strike deals that favored firms over workers. Despite not being terribly effective in the first place, the Supreme Court struck down NIRA in 1935, finding that it unconstitutionally delegated legislative power to the executive branch (Hughes 1935). Parts of the National Labor Relations Act (NLRA) of 1935 (discussed more in Section #3) have extended aspects of the NIRA’s goals, including workers’ right to organize.

And more or less in 1935 we remain. A number of federal policies, such as the Davis-Bacon Act and project labor agreements, attempt to encourage federal contractors to pay adequate or prevailing wages. This may lower the disincentive to using (perhaps more expensive) union labor, but it does not specifically require it. Of more recent vintage, the Clinton administration attempted to use procurement laws to require contractors to not replace lawful strikers with permanent replacement workers. The D.C. Circuit did not smile on this, finding that “No state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be” (Silberman 1996). Similar efforts by state governments—such as Wisconsin’s rule barring procurement from NLRA violators—have been struck down on related grounds.

³ See, the National Industrial Recovery Act: <http://legisworks.org/sal/48/stats/STATUTE-48-Pg195.pdf>.



The Obama administration attempted to steer through the confines created by Congress and the courts with a series of executive orders signed just days after coming into office on January 30, 2009. These included an order prohibiting federal contractors from attempting to seek public reimbursement for activities to discourage unions at their firms, and another requiring federal contractors to visibly post a notice at work sites informing employees of their labor rights under federal law (including seeking union representation).⁴ In announcing these policies, President Obama attempted to respond to likely court objections that unions would increase rather than decrease the costs to the public purse, by arguing: “When the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest.” These orders were followed by a few others throughout his two terms, including one requiring firms to disclose to procurement officers any violations of federal labor law (Davidson 2017).

These moves have hit their own hurdles in the courts, with the D.C. and South Carolina circuits considering the requirement to post labor rights posters constituted either compelled speech on the firms or was not required by the NLRA (B. Williams 2013). As for the broader argument that a more equitable society would save the public money in the long run (and thus be efficient), another federal court wrote that the administration has “not demonstrated that implementation of these requirements will promote economy and efficiency in government contracting [(a requirement under federal procurement laws)]... In fact, the reverse appears to be the case, in view of the complex, cumbersome, and costly requirements of the Executive Order and Rule, which hamper efficiency without quantifiable benefits. These circumstances evince arbitrary and capricious rulemaking” (Crone 2016).

These rulings indicate that courts are not well suited to evaluate the political and economic complexities of labor policy, and Congress should assign this authority to entities that are (see Strategy #3).

The European Union has adopted a different approach than the U.S. In a series of union-wide directives issued in 2004 and updated in 2014, the body encourages a “triple bottom-line approach,” putting social and environmental sustainability on equal footing with economic considerations in the award of public contracts. Contractors that violate minimum labor standards or collective bargaining rights, for instance, can have their contracts revoked and be subject to blacklists in the future (Di Pierro and Piga 2016). Individual European governments have adopted ambitious applications of these principles. The Basque Country government in Spain requires contractors to respect the International

⁴ See, “Using the Procurement Process to Drive Policy: A Review of Labor and Employment Executive Orders in the Obama Administration”: <https://www.laborandemploymentcollege.org/images/pdfs/February2016newsletter/FederalContractorObligations10.28.15Event.pdf>.



Labor Organization’s core labor rights, which include the right to collective bargaining. The Paris city government goes further still, requiring its clothing contractors to ensure that even their subcontractors respect these rights (EU 2011). A comparative study of several European countries found that unions use public-sector procurement and outsourcing rules and monitoring both to compensate for their weaknesses (as in Leeds, England) or to extend their strengths (as in Bremen, Germany, and Copenhagen, Denmark) (Jaehrling et al. 2018).

However, like in the U.S., some procurement efforts have been hamstrung in the courts. In 2008, the European Court of Justice ruled against a pro-labor procurement policy by the German state of Lower Saxony. In that case, a German company had subcontracted with a Polish firm to post Polish workers in the construction of a prison. State rules required that subcontractors pay workers the rates agreed in the collective agreement for the sector. The court was skeptical, noting that this arrangement was simultaneously an overreach (discriminating against workers from countries with lower wages) and an under-reach (applying only to public contracts in Lower Saxony but not private ones). Moreover, the court added that “the restriction also cannot be considered to be justified by the objective of ensuring protection for independence in the organisation of working life by trade unions, as the German government contends” (Makarczyk 2008, para. 41). In the analysis of the University of Duisberg’s Karen Jaehrling, this makes it difficult for the public sector to have higher standards than the private sector, and “thereby prevents procurement legislation from playing an independent role in the protection of workers employed to fulfil public contracts” (Jaehrling 2015, 151).

Recommendation

Clearly there is room to go further within governments to motivate industries and firms to boost worker power. In no case that we could identify did a government procuring entity explicitly privilege the presence of an independent union in a contracting firm. Instead, governments used indirect proxies that looked at the availability of a process where unions could choose to exercise their rights—some stronger (Europe) and some weaker (the U.S.). There are sound regulatory reasons for adopting more direct proxies. For example, governments could merely ask for a union to independently certify that it represents the workers at a contractor in question, and/or that the company’s overall operations contribute to a higher union density in a region. This put the emphasis on desired outcomes (existence of a union) rather than process (workers if they organize can organize a union if they want). This type of certification (together with site visits to ensure its validity) is less resource intensive than waiting for a union to be formed and for union lawyers to identify a rights or process violation that then has to be litigated in courts. A firm or region with higher



union density—all else equal—is likely to have labor influence in shops and in politics. All of this helps the governance of social life, without using scarce government resources towards goals that aren't (or shouldn't be) the actual goal.

We can also remove the hurdles that have hampered progress under the Obama administration. The Federal Property and Administrative Services Act of 1949 and other procurement laws could be amended to make clear that promoting unions is a legitimate means of promoting “economy” and “efficiency” in government purchasing.

Finally, contracting is but the tip of the iceberg when it comes to the benefits firms derive from government. Public subsidies, corporate personhood, and overseas diplomatic assistance: all are freely given to companies at present with little to no evaluation of their net contribution to society. Lenore Palladino and Jennifer Harris of the Roosevelt Institute have argued that this could be reversed. For instance, instead of permitting individual American states to engage in a race-to-the-bottom to offer the lowest requirements for corporate registration, the U.S. could federalize its chartering process and require that companies provide a benefit to the public at large and to its stakeholders (Palladino 2018). Or instead of making State Department and trade negotiator resources available to all U.S. firms, favor instead those that contribute to the fight against inequality (Harris 2018).

All of these initiatives could include labor-specific components. For instance, one of the primary levers that government has over company behavior is at the stage of mergers and acquisitions. Domestically, the Federal Trade Commission (FTC) can block mergers if it is concerned about effects on competition. For foreign potential acquirers of companies, there is an additional layer of review by the Committee on Foreign Investment in the United States (CFIUS). Under the CFIUS implementing legislation and its updates in 2009, the Treasury-headed committee has the discretion to consider a wide-ranging impact of mergers on the economic security of the country. Regulators have determined that economic security would be construed narrowly (Jackson 2011), but there is no reason that that decision could not be revisited. Indeed, as part of the review process, regulators could block a merger that would not preserve and strengthen workers' rights. Firms and business associations that are anti-labor should not benefit from public largesse or favorable regulatory treatment.

All of these initiatives could include labor-specific components. For instance, one of the primary levers that government has over company behavior is at the stage of mergers and acquisitions.



International frameworks should be made consistent with these national policies. A general thrust of the procurement and competition provisions of many trade agreements is to limit the kinds of considerations governments can make in their purchasing and antitrust policies. For instance, NAFTA's procurement chapter includes a provision that makes conditions for supplier participation in tendering procedures "limited to those that are essential to ensure the fulfillment of the contract." Where appropriate, these provisions should be updated to ensure that countries can place labor conditionalities on who can apply for and be awarded public contracts. And to the extent that purchasing officers find it more difficult to ensure that overseas suppliers are favoring unions, certain additional documentation and verification requirements should be allowed to be imposed on foreign tenders without this running afoul of non-discrimination requirements. Indeed, pro-labor measures of these kinds should count towards countries' overall compliance with the Worker Power Agreement.

STRATEGY #3: MAKE LABOR LAW MORE PRO-LABOR

Lessons Learned

- During the New Deal, the Roosevelt administration realized that the Supreme Court's bias against working people's collective action was an obstacle to progressive change. FDR threatened to pack the court and successfully got more direct labor supervision transferred to the less judicialized National Labor Relations Board. Unfortunately, the court later re-asserted judicial review.
- New Zealand achieved very high union density through creating highly binding labor arbitration systems, but this came under attack when the political winds shifted towards more neoliberal government.

Recommendation: Clarify that courts defer to the NLRB when doing so would produce a more pro-labor outcome, and consider creation of a parallel system of labor courts staffed by labor attorneys and modeled on European constitutional and labor courts. Award credit in the Worker Power Agreement for countries that have pro-labor legal institutions, and clarify that outcomes in these courts be given appropriate deference by international investment arbitrators.



As we've noted, a possible objection to using government to aid unions is that the state should just stay out of labor-business relations. But as we've argued, the state is not presently and has not historically been neutral. Perhaps the clearest evidence comes from U.S. courts, which have been more hostile than friendly to workers' organizations.⁵ In the 19th century, businesses were able to get courts to issue injunctions to break up strikes. Such procedures were not based on any statute, but rather common law tradition inherited from England (Naidu and Yuchtman 2016). As detailed below, courts were adept at blocking Congress from curtailing this judicial power over the early part of the 20th century. By then, however, workers' organizations concluded that courts were not merely failing to solve a problem created by industrialists, but were themselves the problem. With partners in Congress, they passed legislation that for a time loosened the judiciary's grip on labor policy, enabling a rapid increase in the unionization rate over 1937-39.⁶

It took a series of reactions and counter-reactions before policymakers achieved the desired outcome of lessened judicialization. Before 1890, courts ruled on labor issues on the basis of common law and customs, but by 1890, they had a statutory basis for anti-labor injunctions: the Sherman Act. Under this act, judges blocked workers from combining together to sell their labor only at certain higher wage rates—just as they did businesses combining together to sell their goods at fixed prices (Cox 1955). Unions responded on multiple fronts. In 1894, they launched a strike on the railroads that paralyzed inter-state commerce. The public sided with the unions and Congress responded in 1898 by passing the Erdman Act, which criminalized the blacklisting of union members on the railroads. Yet the U.S. Supreme Court rolled back the provision in *Adair v. the United States* (1908), arguing that it interfered with liberty of contract.

Before 1890, courts ruled on labor issues on the basis of common law and customs, but by 1890, they had a statutory basis for anti-labor injunctions: the Sherman Act.

⁵ Thus, this regime had much in common with what scholars now call “neoliberalism.” Unlike classical liberalism or libertarianism (with a minimalist state), neoliberalism aggressively uses the power of the state (especially courts) with “the consistent purpose of promoting capitalist imperatives against countervailing democratic ones” (Grewal and Purdy 2015, 6).

⁶ Alternative explanations for the increased focus on a business-union pact are made during the war, but this does not fit the temporal sequence. The percentage of workers belonging to a union went from 7.5 percent in 1930, to 9 percent in 1936, to 15.1 percent in 1937, to 19.2 percent in 1939—the eve of the 1940 Lend-Lease Act, which facilitated foreign arms sales and the 1941 U.S. entry into World War II. Thus, nearly three-quarters of the trough-to-peak percentage gains predated entry into the war. In contrast, by the end of World War II, the unionization rate edged up “only” 40 percentage points (to 27 percent of workers), and would not reach its peak of 28.3 percent until 1954, nearly a decade after the war. Thus, while the war may have increased unionization, the lion's share of the percentage gains pre-dated Pearl Harbor but followed Roosevelt's court-packing threats of February 1937.



The 1914 Clayton Act seemed to make progress for labor. The law specified that “the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of [unions] or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.” But yet again, in 1921, the Supreme Court in *Duplex Printing v. Deering* gutted the law, finding that the Clayton Act exemption applied only to those few workers in disputes with their actual or prospective employer, not to the activities of unions (which typically involve union staff and other sympathetic unions). Moreover, in this decision, the court decided that the employer’s property rights were not only in his factory but also in his business plan, which required “unrestrained access to the channels of interstate commerce”—access made more difficult when unions engage in secondary boycotts (Pitney 1921). Ironically, Congress had considered but ultimately rejected a clearer formulation that antitrust laws shall not “be construed to apply” to labor. Instead, a perfectly legitimate reading of the Clayton Act’s language was that an injunction would do nothing to limit the “existence” of unions, even if it made organizing them through proven tactics more difficult.

In *Duplex*, there was a progressive path not taken—just as there had been in 1914. A dissent by Supreme Court Justice Louis Brandeis argued for judicial sensitivity and modesty when it came to social policy, noting that the Clayton Act “was the fruit of unceasing agitation, which extended over more than 20 years and was designed to equalize before the law the position of workingmen and employer as industrial combatants.” Brandeis added that “the social and economic ideas of judges [...] were prejudicial to a position of equality between workingman and employer [...] and that, in any event, Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands.”

After such limited success in 40 years of campaigning, the labor movement and its allies began proffering still more radical solutions. In 1927, Senator Henrik Shipstead of Minnesota introduced legislation developed with Andrew Furuseth of the Seamen’s Union. The legislation stated that: “courts shall have jurisdiction to protect property when there is no remedy at law; [but] for the purpose of determining such jurisdiction, nothing shall be held to be property unless it is tangible and transferable, and all laws and parts of laws inconsistent herewith are hereby repealed.” The connection to *Duplex* was clear: A business plan was not a tangible thing, thus the state could not protect the ways that labor might have interfered with it.

But the Shipstead Act was not to become law. In lieu, Congress gave U.S. workers a more mixed resolution to judicial interference in their affairs. First, in 1932, a coalition of progressive Republicans and Democrats passed the LaGuardia-Norris Act, which addressed the *Duplex* decision by stating that: “No court of the United States shall have jurisdiction to



issue a temporary or permanent injunction in any case involving or growing out of a labor dispute” unless five specific exceptions are met. This blunt restriction on judicial power was fairly effective. In University of Washington political scientist George Lovell’s telling:

“Even judges who appeared to be quite hostile to organized labor had a difficult time ruling that employers met the entire gauntlet of procedural and jurisdictional limitations specified in the statute [...] Even when confronted with provocative and violent behavior that judges would have routinely enjoined as ‘coercive’ or ‘unlawful’ a decade earlier, judges adhered to the statutory procedures and refused to issue injunctions when they could not make the required findings of fact” (Lovell 2003, 180-182).

Second, in 1935, Congress passed the Wagner Act, which established the National Labor Relations Board (NLRB) and strengthened administrative law courts for labor disputes. This had the potential of aiding unions, by creating a more specialized and flexible group of NLRB adjudicators under the control of the executive branch. Indeed, early decisions by the board were strongly pro-labor and useful for gathering evidence about harmful business practices.

How would the Supreme Court respond? While the conservative majority had ruled against various early New Deal policies, President Franklin D. Roosevelt threatened, in February 1937, to pack the court with more favorable judges. Two months later, the court responded by confirming the constitutionality of the Wagner Act, sparking the coining of the quip “a switch in time that saved nine” and upholding the constitutionality of the labor programs. The decision was close. Four justices still held onto their anti-New Deal views (Hughes 1937). Moreover, the court managed to reassert its role in later cases. The creation of the NLRB’s administrative law courts—like the LaGuardia-Norris Act before it—lessened courts’ role as the frontline of state intervention (intervention that rarely worked in unions’ favor). Yet the courts have repeatedly read the act in ways that undermine workers’ rights. Consider Section 13, which stated: “Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.” Yet, in *NLRB v. Mackay* (1938), the Supreme Court unanimously ruled that business prerogatives could allow employers to permanently replace striking workers. A year later, in *NLRB v. Sands*, the court majority found that such replacing was also permissible if employees were striking during the term of a labor contract—even if the contract lacked a “no strike” clause.

This shift away from workers’ interest set the path of things to come. Even before a Republican Congress passed the Taft-Hartley Act in 1947 over President Truman’s veto, the courts had sharply raised the costs for workers who might try to exercise the supposed “right” to strike. The 1947 act finished much of what was already started, included explicit



bans on solidarity strikes, secondary boycotts, and other tools that help close the labor-business power asymmetry. Moreover, the act permitted states to pass so-called “right-to-work” laws that make unions uneconomical and allowed the executive branch to issue injunctions to stop strikes.⁷

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This isn’t to say that there were not occasional bright spots. According to one recent tally, the Warren Court (1953-69) sided with progressive policies 64 percent of the time. But the court’s two-thirds “allyship” to labor and other progressive priorities mid-century has declined steadily over time, to a low of 34 percent under the Roberts Court (Gidron and Kaplan 2017). U.S. policymakers had the right idea in seeking to limit the reach of the court, but they didn’t go far enough in creating a firewall between conservative judges and issues of worker power.

Policymakers in New Zealand acted even earlier than their American counterparts to segregate labor relations from the judiciary. Inheriting the same anti-union English common law as their American counterparts, the liberal government approved the Industrial Conciliation and Arbitration Act in 1894. Its preamble read: “An Act to encourage the formation of industrial unions and to facilitate the settlement of industrial disputes by conciliation and arbitration”—legislation more progressive than anything else in the world at the time. (This was not the government’s only egalitarian policy, as it was the first country to enact universal female suffrage, in 1893.) Any seven workers could file for government registration, and once they obtained it, they were given a monopoly for their industry or region. This was not simply pro-labor benevolence on the part of the government: The recognition process allowed the state to help ensure that industrial disputes did not spill over and disrupt the country’s primarily export-oriented economy, as unions could be deregistered if they went on strike. Moreover, unions were almost never allowed to encroach on industries beyond their own. In response to the act, employers also organized themselves into associations in order to deal with their labor counterparts.

⁷ It has done so most recently in the 2002 longshoremen’s strike (S. Greenhouse and Sanger 2002).



As the preamble suggests, this act created a publicly financed labor arbitration process that only members of government-registered unions could invoke in the event of, say, a wrongful dismissal. These cases would first go to a conciliation board made up of representatives of workers and employers, and could be appealed up to an arbitration court made up of a Supreme Court judge and representatives from labor and business.⁸ Over time, the scope of these awards expanded to deal with a fuller range of working conditions and minimum wages that in other countries were dealt with by statute or collective bargaining. Awards made by these bodies need not and did not follow legal precedents in the main court system, and were based on equitable considerations. Once issued, they were binding and un-appealable, and the government would enforce and extend the settlement for the whole industry—not just the litigants in the case (A. Williams 1976; Goldfinch and Smith 2006).

Yet New Zealand never wrote these generous provisions into a constitution. Indeed, the country lacks a written one altogether. This lack of solidity opened up the seeds of disintegration of labor’s special legal arrangement. In 1968, the Arbitration Court’s lead judge announced an award where wages would not rise that year. Both employers and employees rejected this settlement, and instructed their two representatives on the court to greenlight a 5-percent wage increase—thus overpowering the nominal chair of the process. After this demonstration of waning confidence in the system, policymakers responded with the Industrial Relations Act of 1973, which allowed collective bargains to be made on top of and in addition to court orders. The system was further weakened with 1984 and 1987 amendments pushed by a Labour Party government that (respectively) made arbitration voluntary and then forced unions to pick between either awards or bargaining. The 1987 changes also shifted enforcement responsibility away from the state and onto unions, which were forced to prove violations before the Labour Court (the renamed and weakened Arbitration Court).

In 1991, the conservative government took matters further. In the Employment Contracts Act, employers were allowed to refuse to negotiate multi-employer contracts and unions were barred from striking to force them to. Extension of agreements beyond the union and firm was prohibited. Government registration of unions was gone. The Labour Court was renamed the Employment Court, which lacks labor and employee representatives and whose decisions can be appealed to the main courts. These combined effects also remove what was essentially a public subsidy to cover the costs of collective bargaining, now forcing unions and employers to shoulder this responsibility on their own.

⁸ Belgium to this day has a labor court where unions are represented on the panel and given legal aid (Van Gyes, De Witte, and van der Hallen 2000).



The effect of these and related changes on union density was profound. By 1987, the share of workers in a union was 10 percentage points lower than its 1970s average. A decade later, the rate had dropped a precipitous 30 points further to 20 percent of the total workforce—a level where it remains today. And in the five years after passage of the 1991 act, multi-employer collective bargaining coverage dropped from nearly all of the private workforce (93 percent) to nearly none of it (13 percent) (Boxall 1990; Kasper 1997; Chelliah and Mukhi 2004; Barry and Walsh 2007).

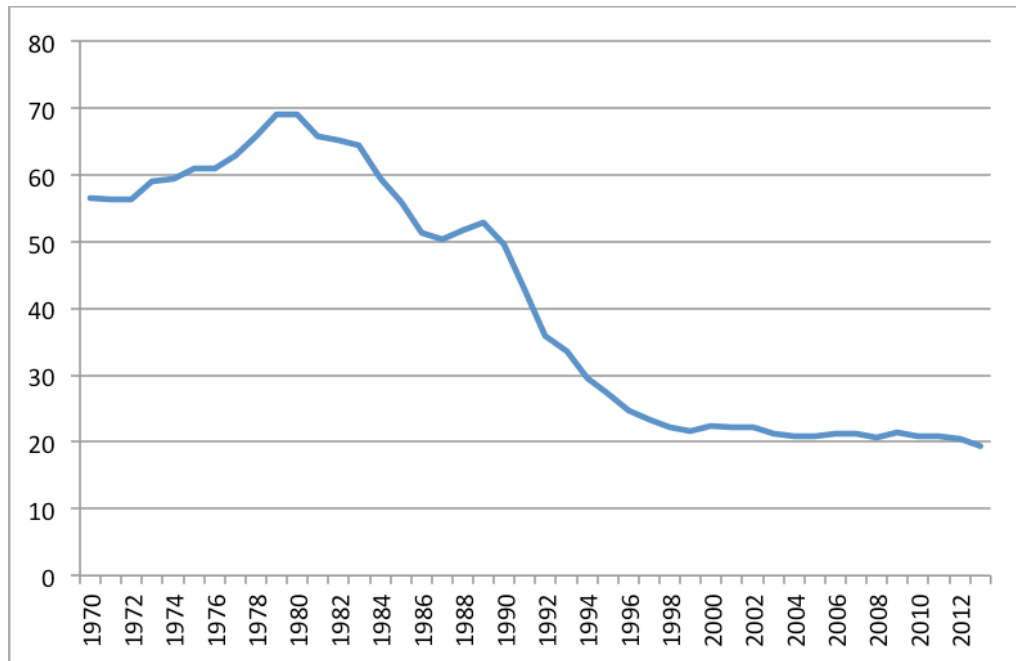


FIGURE 4 Union Density in New Zealand, 1970-present. Source: Visser data.

Recommendation

These examples show that worker power has often chafed under judicial review in the main courts. Yet there are alternatives. Europe’s constitutional courts provide one model of how to permanently segregate out certain legal questions from the normal court hierarchy. Before World War II, many European countries’ courts lacked strong U.S.-style forms of judicial review, so specialized courts were a middle ground, not deciding ordinary litigation and comprised of a mix of officials—sometimes including specialized judges or members of the legislature. In “abstract review,” these courts have the power to offer advice to the parliament on pending legislation, to identify constitutional defects before laws are enacted. This review is triggered on the motion of designated officials like certain parliamentarians, regional governments, or human rights ombudsmen. In “concrete review,” the normal courts refer matters of constitutional importance to the constitutional courts, whose

decision becomes binding on the former. If a law is found unconstitutional or incompatible with treaty obligations, it is automatically invalidated.

Alternatively, the Scandinavian countries all have specialized labor courts where unions and employers take their legal disputes. Cases are decided by panels of three, consisting of a labor representative, an employer representative, and a senior judge (often from the national Supreme Court). Because they are in the minority, the professional judge defers to the collective wishes of the private actors (when these are in agreement)—and most decisions are unanimous. There is no appeal from these special courts' decisions (Fahlbeck 2009).

Similar institutions should be considered for the U.S. and other national contexts. The union could appoint one of the members, or other qualifications could include (in addition to labor law expertise): experience organizing a union or union election, working-class parents, state school (non-Ivy League) education, or past experience with crippling health care costs or indebtedness. While this would be a big reform indeed, intermediate steps could also make progress. One example would be to reboot the Administrative Procedure Act to ensure that courts should defer by default to decisions of the NLRB where doing so would result in a more favorable outcome for unions (where the issue is a conflict between union and employer rights).⁹ This would parallel governmental constraints on firm-level contracts in various countries (including Austria now and France historically), which provided that contracts at the lower level couldn't be less favorable to workers than contracts or law at a higher level.

Countries that align their legal institutions with the best pro-labor practices should get credit in their Worker Power Agreement assessments. Meanwhile, older generation international investment treaties (including in NAFTA and over 3,000 other treaties) may need to be updated to clarify that arbitrators should give appropriate deference to national labor courts when multinational companies claim that legal losses are somehow unfair treatment or a denial of justice.

⁹ For disputes between workers and their unions, normal court review should be available—which can serve as an incentive for unions to stay mindful of individual rights.



STRATEGY #4: EXTEND UNION CONTRACTS TO NON-UNION WORKERS

Lessons Learned

- France has extended the benefits of union-negotiated collective bargains to all workers since the 1960s, but today wants to limit the scope of those bargains and push benefit decisions down to the firm level.
- Austria has maintained strong and comprehensive industry-wide bargains, but suffered from non-members free-riding on the benefits.

Recommendation: Couple extension agreements and wage boards with subsidies to labor unions if members free-ride, and give countries credit for extension in the Worker Power Agreement.

In contrast to their Anglo-American counterparts, other Western economies are less likely to rely on firm-specific organizing drives as an exclusive means of meting out the benefits of unions. Indeed, governments in these countries extend or enlarge collective agreements beyond the immediate signatories to include all employers in a professional association, profession, or geographic area—whether or not the resulting beneficiaries are union members (Robe and LeMasson 2013). For example, careful readers of Figure 2 would note that France—the West’s laggard in union density—is the leader in collective bargaining coverage. Indeed, Figure 5 shows that unions in some countries stand out for having influence far beyond their official membership number, with France chief among them. This is not a recent phenomenon: France has always lagged behind the U.S. in union density, as shown in Figure 6.

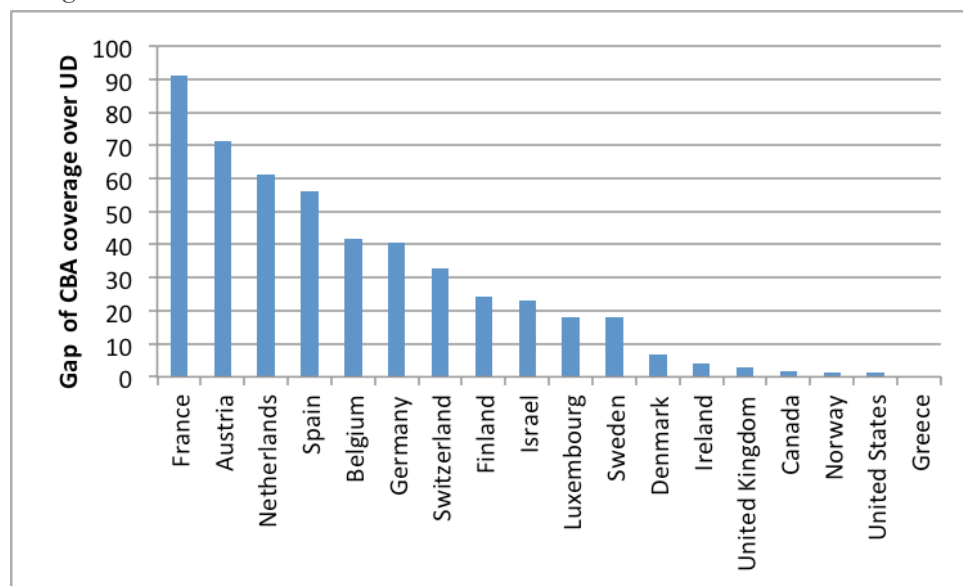


FIGURE 5 Collective Strength Beyond Union Membership Across Countries. Source: ILO.



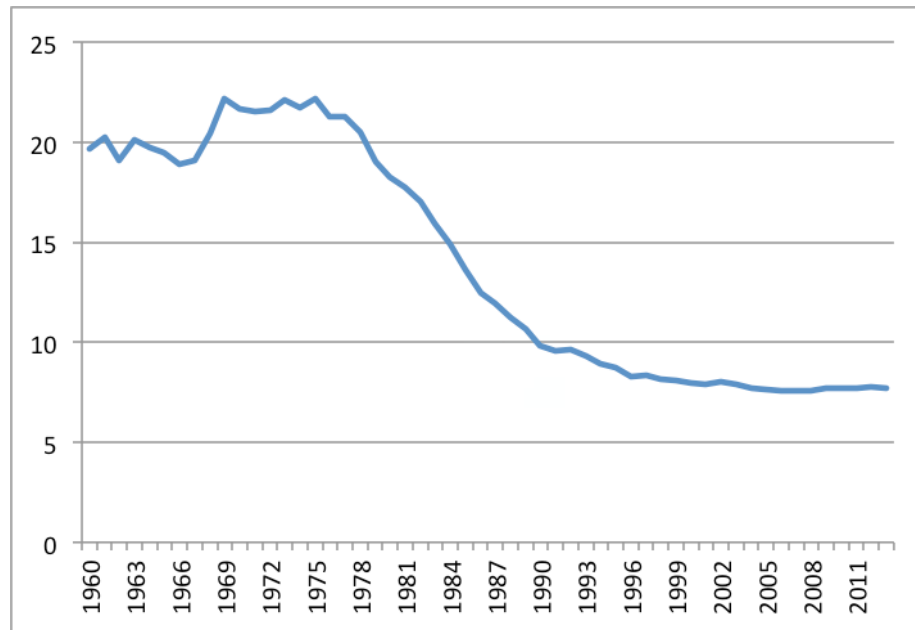


FIGURE 6 Union Density in France, 1960-2013. Source: Visser.

So is worker power weaker or stronger in France? Historically, firms there could make firm-level contracts, but only on the condition that they be no less generous than that provided by statute or national-level industry agreements negotiated by unions—the latter of which continues to cover 98 percent of workers outside of the agricultural sector. Moreover, all industry agreements had to in turn be as good as the strong wage and layoff protections found in statute. This strict hierarchy undermined the goal of any firm-level agreement: to gain a labor cost advantage over their competitors. Thus, in practice, few firms made localized contracts.

But this good deal for workers encourages massive free-riding: Why pay dues if the state and union will fight for your interests on your behalf? The relatively centralized bargaining process started to be watered down in the early 1980s with the introduction of what are called the Auroux laws, which created a stronger role for firm-level works councils or local unions. Employers responded by signing contracts with local labor entities that represented few workers. By the 1990s, firms were proposing collective agreements to employee representatives that were not members of any union. These firm-level agreements no longer need be more favorable than the sector-wide arrangements, which are increasingly diminished in the scope of rights they cover. Most recently, the Emmanuel Macron government campaigned on an agenda of sweeping labor changes. As of 2018, firms can lay off workers without having to show financial difficulty and can easily bypass national-level agreements (Howell 2009; Amossé and Forth 2016; Baccaro and Howell 2017; Beardsley 2018).

Unlike in France, where union power is shared by five state-recognized federations, Austria has a single peak union association: the Austrian Trade Union Confederation (OGB), which has a representational monopoly for collective bargaining purposes. (Although independent unions are in theory allowed, they do not qualify for bargaining status.) The OGB is made up of seven constituent unions servicing different industry groupings, ranging from manufacturing to public services to freelancers. The federation is mirrored by a single business organization: the Austrian Economic Chamber (WKO), a combination of bargaining entity and think tank to which all businesses compulsorily belong and which is also tightly linked to the center-right party. The OGB sets the goals for all negotiations, but its metal and mining division conducts the first round of negotiation. Because this sector has the highest productivity of the six sectors and is also the most highly exposed to trade, union negotiators subordinate their demands to the needs of macroeconomic stability. The pacts that are reached with the corresponding sub-unit of the WKO are then applied across the entire sector. After those negotiations, the other six OGB sub-units negotiate wage agreements for their sectors (called “pattern bargaining”), with the goal of getting as close to what the metalworkers got as their sectors’ lower productivity allows (Johnston 2009; Feichtinger, Peyerl, and Peitsch 2013).

Austrian unions have sidestepped some of the problems that have led to instability in France. First, unlike in Macron’s France (but like France historically), works councils at the shop level are allowed to make shop-specific agreements with their employer, but this cannot derogate from any of the rights of the collective bargaining agreement. Second, the OGB is tightly linked to the social democratic party, works councils at the firm and shop level, and a nationwide Chamber of Labor that looks out for workers interests (see Strategy #5 below). Officials from these bodies sit on each other’s boards, and candidates for public office often get their start in the union movement. Works councils help elect local union leadership. This tight integration mostly avoids the problem whereby the center-left political party, union, and works council interests diverge (Katzenstein 1987).

Nonetheless, the possibility of free-riding on a collective bargain without belonging to a union has led to an ongoing decline in union membership. Austria—now the country with the second highest gap between union density and collective bargaining coverage after France—once had nearly 70 percent density in the 1960s, but has had a linear drop of about 10 percentage points every decade since. These changes are shown in Figure 7.



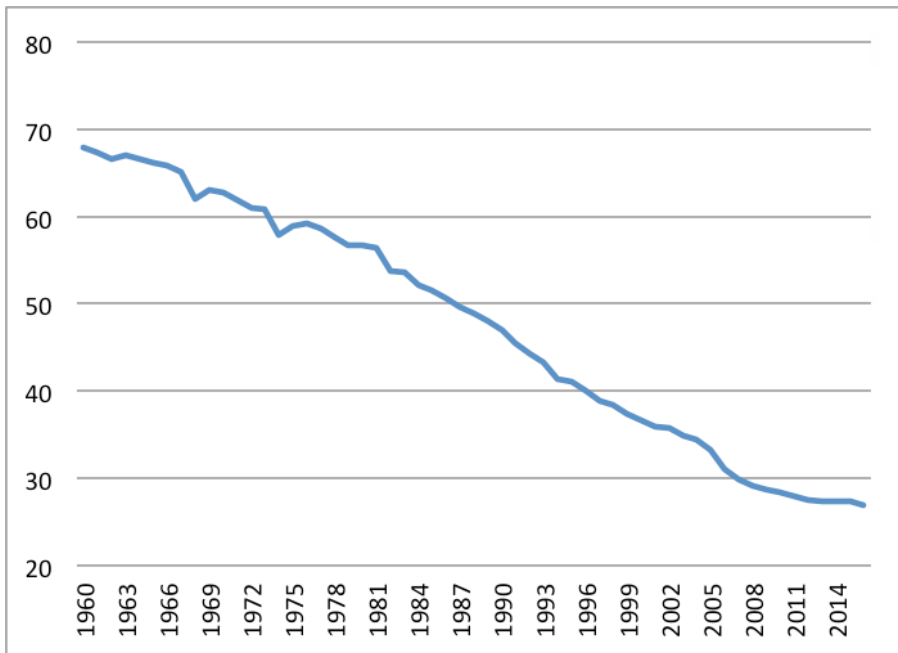


FIGURE 7 Union Density in Austria, 1960-2016. *Source: Visser.*

Recommendation

Here, we can be brief. Extension agreements are an efficient way for the state to help business and labor economize on scarce bargaining resources, and they also help establish industry-wide floors. Higher collective bargaining coverage should also count towards countries’ obligations in the Worker Power Agreement.

Industry-wide bargaining is not a totally untested model in the U.S. context. New York’s fast food industry, the National Football League, and television writers have wage boards that set certain standards for their industries. In his proposed expansion of this model, labor scholar David Madland would have the secretary of labor sit on panels with five employer and five employee representatives. These panels would hold public hearings, meet every two years, and meet more often if economic circumstances necessitated. While wage boards would do much to ensure greater fairness at the industry level, they would work best—as Madland notes—with various firm- and community-level forms of organization (such as works councils). This would help ensure that the national deals were not a one-size-fits-all solution when specific local conditions required a greater level of worker protection (Madland 2018).

Still, in order to ensure not only positive economic outcomes for workers but also more effective political organization, wage boards should be more explicitly linked to union power. Workers who benefit from wage boards should be strongly encouraged to join

unions. If uptake is low and workers free-ride on wage board accomplishments, the Department of Labor should compensate unions. For example, the government could make up a percentage of what unaffiliated workers would have paid in dues. Countries should get credit for any and all of these measures in the Worker Power Agreement.

STRATEGY #5: STRUCTURALLY INCORPORATE UNIONS INTO POLICYMAKING

Lessons Learned

- Ireland has relatively low union density, but brought unions into the policymaking process for several decades—only to abolish this channel afterwards.
- Austria has standing labor chambers that help shape policy and whose membership is compulsory and financed via taxes—yet these institutions are now under attack by right-wing populists.

Recommendation: Institutionalize labor representation in the policymaking process at every stage, and include unions’ assessment of any policy in the text of bills and regulations. Use a net institutional density metric to evaluate the desirability of regulation, alongside cost-benefit and other tools. Ensure that international agreements contain appropriate policy space for these added layers of participation and evaluation.

Let’s turn now to another policy choice: whether to bring unions into the policymaking process. This practice is called **concertation** or **social partnership**, where planning for the economy as a whole is carried out by a tripartite coalition of labor, business, and government. Outside of the U.S., these formal arrangements are commonplace and help ensure responsive governance.

Some practitioners of concertation are surprising. For instance, under Irish law, collective bargaining is completely voluntary for management: Employers are not required to negotiate with or recognize unions. Nonetheless, the government has partly compensated for this lack of power through social partnership practices. Trade explains much of the Irish move towards concertation. For its size, the Ireland of 1970 was a relatively closed economy—having attempted import substitution industrialization and trading primarily with Britain. After Ireland’s accession to the European Economic Commission (precursor of the EU) in 1972, trade expanded rapidly. By 1990, its trade exposure had nearly doubled,



with imports plus exports amounting to nearly all of gross domestic product. In response to the dislocation this caused, Irish policymakers pursued a number of policies to further the goal of structural adjustment. In the 1970s, the government facilitated centralized pay deals that modestly raised wages but did little else (as unions and employers could not come to agreement on the fundamental challenges facing the economy). By the mid-1980s, government, unions, and employers had formed the National Economic and Social Council (NESC), which jointly studied economic conditions and made recommendations on how to reconcile trade competitiveness with improving livelihoods. In 1987, all three bodies agreed to a historic Program for National Recovery—the first of five triennial agreements where employers agreed to modest wage increases, unions agreed to not strike, and government agreed to reduce workers’ taxes so as to boost their take-home pay. Not only was this good for workers (who hadn’t seen real take-home pay go up in the early 1980s), but it was also good for employers (who had difficulty in the disorganized Irish labor market in convincing workers to moderate wage demands in what had transitioned from a high- to a low-inflation economy) and the government (which had an interest in sustaining growth rates and thus tax revenues).

All in all, the NESC’s social partnership was enormously popular, with nearly 80 percent of the Irish agreeing that the practice helped explain the country’s economic success in the 1990s.

It’s worth dwelling on how distinct this arrangement was from what American policymakers are familiar with. Imagine the U.S. executive branch’s National Economic Council, except instead of only having in-house economists like Larry Summers or Larry Kudlow manning the ship, there would be inbuilt representation by class groupings and a prescribed focus on making the national economy work in an era of globalization. Additionally, the process in Ireland led to more inclusive inputs and outputs than we see in the United States. Before each round, the NESC served as a space where all three bodies could collaborate on a common analytical framework—something long missing between labor, government, and capital on the U.S. policy scene. In 1991, this was supplemented with a local and region-specific framework called the Area-Based Response to Long-Term Unemployment, which included the three partners plus organizations of the unemployed. With each new three-year plan, there was an opportunity to expand the content of the social packages, including gender inclusion (1996) and infrastructure (2000). All in all, the NESC’s social partnership was enormously popular, with nearly 80 percent of the Irish agreeing that the practice helped explain the country’s economic success in the 1990s (Hardiman, Murphy, and Burke 2008; Baccaro and Simoni 2004).



These talks also yielded major gains for organized labor more narrowly defined. In 2006, discussions empowered the country’s labor court to issue binding determinations on employers even if they refused to recognize a union. In the words of one legal study, this “arguably gave trade unions an even stronger legal right than obligatory recognition. If compulsory trade union recognition had been introduced, it is likely that the only obligations would have been to consult and negotiate, not to actually reach agreement on anything. In contrast, the mechanisms introduced by [this tripartite deal] allow trade unions to make application for a binding determination in regard to employees’ pay and working conditions, something arguably more significant” (Dunne et al. 2013, 15-62).

Nonetheless, these arrangements were fragile—and government and business can and did occasionally walk away from the negotiating table. Indeed, the collapse of the centralized pay rounds was due to the employers walking away in 1981—leaving a half-decade before the new form of cooperation under the NESC could come into being (Culpepper 2005). More recently, since 2009, for instance, the Irish business association has not participated in tripartite talks. In an environment where unions were dependent on the benevolence of government, their plight rose and fell with the whims of their politically stronger partners.

One way of avoiding loss of political support can be to more firmly institutionalize the consultation process, as several European jurisdictions have done. Since 1918, Austria has had a Chamber of Labor (*Arbeiterkammer*, or AK), a public corporation to which every private-sector worker in the country is a compulsory member. This body is financed by a 0.5 percent tax on gross salaries, collected by the state as part of social security payments and remitted to the AK—currently totaling to a budget of over 40 million euros. Its charter compels it “to represent and promote the social, economic, professional and cultural interests of the workers”—including the unemployed (who are also members). It serves effectively as the think tank and law firm of Austria’s union federation, engaging in labor law litigation for its members and offering free advice on consumer, tax, and work issues to its membership. The chamber is a democratic legislature-like body, geographically organized along Austria’s nine states. All major political parties vie for local and national leadership, although the center-left party has the strongest ties and holds the most seats. It has—along with similarly compulsory aforementioned Chamber of Business (WKO) and a chamber of agriculture—privileged access to legislative documents, which they can shape much as if they were a congressional committee in the U.S. context. Together, these chambers and the OGB are referred to as the “Social Partners” (Talos and Kittel 1996).

This firmer institutionalization has helped the labor chamber weather many political storms. For most of the post-war period, Austria was ruled by a grand coalition of the center-left and center-right parties (SPO and OVP), which respectively had organic links to the peak union and business associations. As a matter of course, every major policy decision was



extensively vetted with, if not crafted by, the social partners. Yet in 1994, the coalition chose to exclude the social partners from a discussion about an austerity package. The two warring political factions were unable to come to agreement, and were forced to call new elections. After their return to power, they delegated the matter to labor and business representatives to reach an agreement. Indeed, even during the unusual 2000-06 period when the center-left was not in government and the OVP with a populist right-wing party, it was the social partners that helped break deadlocks over matters like pension reform (Rathgeb 2018).

Institutional Chambers

Austria is not the only place that has institutionalized chambers. Two German states—Saarland and Bremen—also have their own *arbeiterkammern* with compulsory membership. And the country of Luxembourg has a similar institution, called the *Chambre des salaires*, or Chamber of Employees. The chamber was formed in 2008, following a merger of the Chamber of Private-Sector Employees (*Chambre des employés privés*, or CEPL) and the Chamber of Labour (*Chambre de travail*, or AKL)—which had existed alongside chambers of commerce, agriculture, and craftsmen since 1924 (as well as a chamber of public employees since 1964). Like in Austria, the compulsory Luxembourgian Chamber of Employees exists alongside voluntary labor unions engaged in collective bargaining. The chamber’s role is to represent workers’ interest in the policymaking process, as well as manage retraining programs. Also like in Austria, union density has declined—though from a peak of 50 percent in 1980 to around 30 percent today. (Collective bargaining coverage remains around 50 percent in the private sector.)

Nonetheless, Austria’s labor chamber has come under political attack. From the 1940s through the 1990s, chamber elections had ever-lower turnout, and the percentage of workers polled who favored abolishing compulsory membership was on the rise (Crepaz 1994). The right-wing populist party (FPO) capitalized on this declining popularity and campaigned on ending compulsory membership—entering government for the first time from 2000 to 2006. As of 2017, the center-left is once again excluded from government, and the right-wing coalition government has committed to lowering the amount of the AK’s tax to 0.3 percent—something that will lessen its ability to effectively represent workers’ interests.¹⁰

¹⁰ Thus far, the Labor Chamber has survived legal challenges. Austria’s Constitutional Court has upheld compulsory membership on a number of occasions, calling it “an indispensable structural element of non-territorial self-government” by workers (Verfassungsgerichtshof 2009).



Recommendation

As even long-established social partnership models like Austria’s are coming under attack, stronger solutions that outlive the coalition of the moment start to look more appealing. For instance, to take a model from classic times, the Roman Republic (509 to 27 BCE) instituted a complex system of checks and balances between the wealthy and the workers. A plebeian council could pass laws, try judicial cases, and appoint plebeian tribunes. The latter were effectively designated worker officials within the executive branch that could veto acts of the patrician-dominated Senate or block the actions of other executive branch officials (called magistrates). The plebes committed to kill anyone who harmed a tribune, thus giving them security in their office.

While this may sound like an extreme model to consider, it’s informative: To institutionalize labor representation within the policymaking process in the U.S., structural solutions—updated for modern times—may be necessary over the medium to long term. In his book *The Crisis of the Middle-Class Constitution*, legal scholar Ganesh Sitaraman writes that unlike other great republics in history, the U.S. “Constitution does not have a single provision—not one—that explicitly entrenches economic class into the structure of government. There is no provision excluding poor people from the Senate, and no provision excluding the rich from the House of Representatives” (Sitaraman 2017, 4). In his reading, this means that the founding fathers predicated the structure of the state on the idea that there would be a rough equality in income between the richest and poorest. However—from climate policy to basic budget negotiation—sky-high inequality promoted gridlock, gumming up the sound functioning of a formally class-neutral system (Gilens and Page 2014).

To institutionalize labor representation within the policymaking process in the U.S., structural solutions—updated for modern times—may be necessary over the medium to long term.

There are a number of ways to make U.S. policy more “concertational” and labor-friendly without having to impose a plebeian tribunate. Consider the following: Various agencies have advisory panels. For example, the Office of the Trade Representative has 16 industry trade advisory committees, comprised of over 300 private-sector advisors who get privileged access to negotiating documents. There are an additional seven broader advisory committees. Only one of these is by and for members of unions, significantly skewing representation in favor of business. Other agencies have their own advisory committees,



each of which has to be selected and managed ad hoc. In Congress, staff members have to spend endless amounts of time meeting with industry interest groups who self-initiate contact and may have little to no connection to the legislator's district. All of this can be streamlined by having labor and business institutes that serve as clearing houses for input into the policymaking process and nominate their own representatives (rather than have these picked at the discretion of officials). These bodies would force each group to confront internal, within-group trade-offs of pursuing different policy options. Before Congress votes on new legislation or before an agency approves new regulations, an indicator of the business and labor recommendation would be attached to each measure and made publicly available. For the regulatory process, agencies would have to explain why they are rejecting labor's advice.

Or consider the way that policy proposals are evaluated. Currently, the Congressional Budget Office makes budget projections, the Office of Information and Regulatory Affairs conducts cost-benefit analysis of new regulations, the Environmental Protection Agency conducts environmental assessments, and so on. These bodies—or a new one—should be required to incorporate explicit measurements of how proposed policies will contribute to union density and labor power. For instance, a net union stability ratio would require that all policies at least “do no harm” to the union density ratio. If, for instance, a trade agreement is projected to hinder unionized manufacturing but help non-unionized service sectors, the union density requirement would block it from advancing absent a strategy to boost unionization in fast food, finance, and other tertiary industries.

At the international level, investment treaties should be clarified that these new participation and evaluation tools do not constitute violation of the rights of multinational investors.



STRATEGY #6: LET UNIONS MANAGE PUBLIC BENEFITS

Lessons Learned

- Belgium has maintained strong union-centric compulsory unemployment funds and lets workers choose between ideologically and culturally diverse options.
- Denmark allows unions to distribute unemployment insurance, but coverage is not compulsory. In recent years, “union-lite” entities have entered the business—undermining support for the labor movement.

Recommendation: Allow unions to manage “new generation” welfare policies as pilot programs, with substantial state subsidies. Revise international trade and investment agreements to allow for more experimentation in and out of these pilot programs.

Almost alone among advanced economies, Belgium has substantially increased its union density and has not seen the drop-off in membership seen in other countries. As shown in Figure 8, over half of the workforce belongs to a union. Moreover, collective bargaining coverage has increased—going from 86 percent in 1960 to almost complete coverage (96 percent) today.

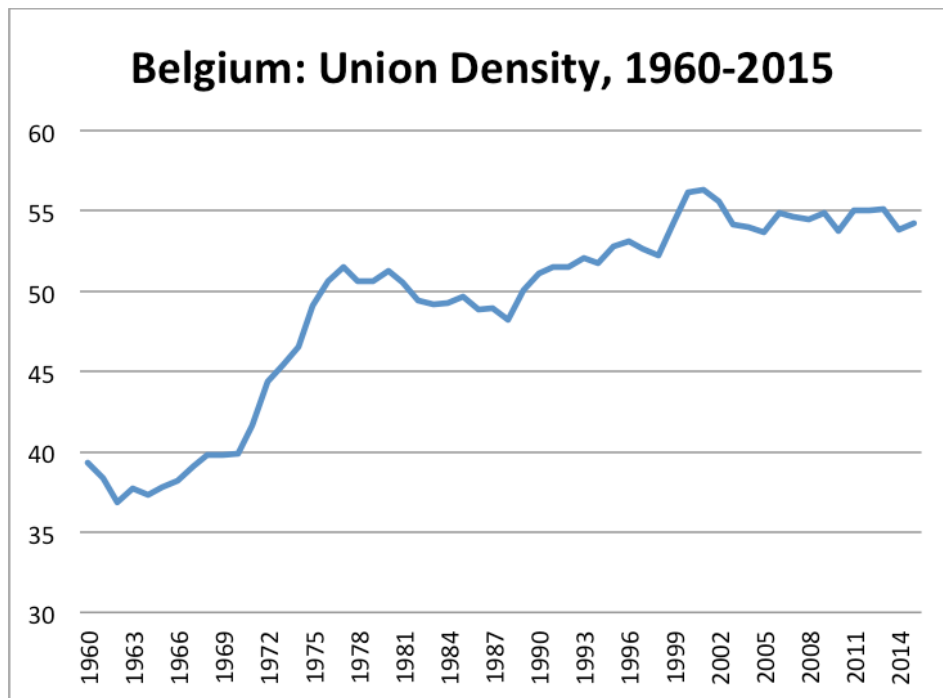


FIGURE 8 Union Density in Belgium, 1960-2015. Source: Visser, ILO stat for 2015.

What explains the Belgian outlier? Unlike in Austria, there is not one union federation, but three, split along party and ideological lines between socialists, Christians, and liberals. While this makes for certain diffusion of resources, it is well suited to a country that is divided in three language groups, three communities, and three regions with significant governing powers. Yet, unlike in France, the federations are capable of working together and (because of their close partisan ties) with the parties in power. They have a strong centralized bargaining system that (through government extension of contracts) sets labor standards for the economy as a whole. This makes it impossible for individual employers to opt out, leaving them with little reason to fight unionization. The unions for their parts benefit from extensive worksite contact, where they collectively have a monopoly (but compete between themselves) for elected slots on the firm-level works councils and health committees. Unions have also convinced employers to pay a yearly “union bonus” to members, which amounts to a reimbursement of up to 75 percent of the union dues (Liagre and Van Gyes 2012; Vandaele 2005; Van Gyes, De Witte, and van der Hallen 2000).

Unique among developed countries is Belgium’s system of managing unemployment insurance. After failed attempts at unions managing their own unemployment funds, in 1895, workers asked the government of the city Ghent for public subsidies. In 1897, the provincial level government unveiled the Liege system, which did exactly that—with the explicit aim of furthering union density. But Catholics and liberals opposed this initial experiment for ideological reasons, and so the system was modified to provide supplementary money to union unemployment funds—while maintaining a government-run unemployment fund, as well. In 1920, this was expanded to the national level, and in 1944, coverage in one or another unemployment funds became compulsory.¹¹ In the new system, financial management is done by a state agency co-run by employers and unions—while the unions maintain separate payment agencies that disburse benefits. There is a firewall between these funds and other union financial resources, so the former can’t be used for political or bargaining purposes. Moreover, the state subsidizes the union payment agencies’ cost of doing business. These union-managed units also provide advice on housing and pensions and help fund early retirement and career interruption benefits. In the event of disputes over the amount of payment due, the unions provide fund beneficiaries with free legal representation; unions also have appointees on the labor court that decides appeals (Vandaele 2006; Van Rie, Marx, and Horemans 2011).

While the state-run payment service continues to be available, an estimated 86 percent of unemployment benefits are paid through unions. One isn’t required to join a union to avail themselves of that union’s unemployment benefits, but many feel a moral obligation

¹¹ This was not a guaranteed outcome; employers had favored employer-run funds.



to do so. The union services are more widely dispersed than the state service, which is seen as less efficient. Because youth are more likely to be unemployed, young people are drawn into close contact with unions through the payment agencies. Nonetheless, Belgian unions regularly have to contend with right-wing politicians who seek to strip them of their role in the payment services or lower administrative reimbursements. And the ongoing push by Flemish politicians to break up the country represents another threat. But for now, the system has survived.

Denmark—along with Finland and Sweden—has a closely related approach to unemployment insurance, with a few differences. In the 19th century, unemployment insurance was virtually non-existent in Denmark, as businesses and policymakers believed that this would be an incentive to work. Beginning in 1907, unions began directly administering unemployment insurance plans. While the funds were required to be open to non-members, the unions, until 1969, were allowed to charge a 40 percent union due to workers who did not join up. That year, the state also ramped up its subsidy to the system, which became more generous (Clasen and Viebrock 2008). After these reforms were introduced, union density jumped 20 percentage points, from an already impressive 60 percent to 80 percent of the working population. These trends are shown in Figure 9.

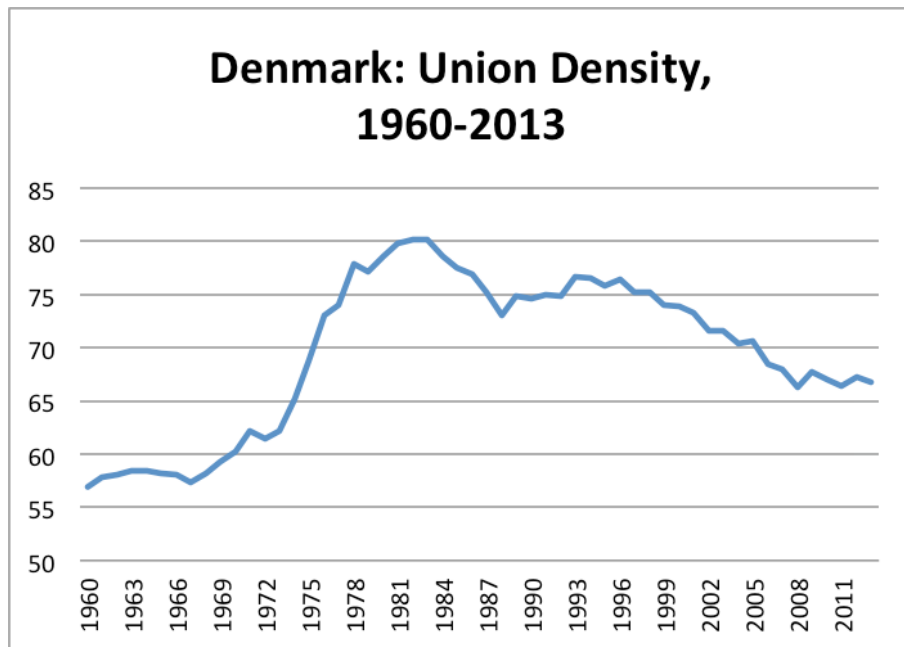


FIGURE 9 Union Density in Denmark, 1960-2013. Source: Visser.

One reason many countries have mandatory unemployment insurance schemes is the problem of adverse selection. Namely, people do not self-insure until it is too late: Healthy people do not wish to pay health insurance costs; employed people do not want to pay into unemployment insurance.



The Danish unemployment insurance system sidesteps this problem by offering incredibly generous benefits of up to 90-percent replacement pay for up to four years (!) of unemployment, with the premium costs subsidized by the government. Thus, there is little downside and substantial upside for the individual worker to join.

As already noted, workers do not have to join the union in order to benefit from the fund. So why do many join anyway? For most of their history, the several dozen unemployment funds corresponded to unions affiliated to one of the major federations. The unions—out of respect for one another (and originally due to legal restrictions)—did not attempt to “poach” workers to join their funds. This created the impression on the part of workers that membership in the fund required membership in the union—even though that had never been the case. Moreover, the funds and the unions are sometimes in the same building and share personnel, cementing the impression of a unified scheme still further. The funds also offer other services, such as job placement, which are widely seen as superiorly run to the state job search agency. There are also other enticements. In 1979, the funds began administering a generous early retirement scheme. However, there was a catch to qualify for it: A worker had to be a part of a fund for at least a quarter century. This nudged workers into joining funds early in their careers.

However, this effect has not held over time. In 2001, a center-right government came to power. Seeking to sever the historic relationship between the center-left party and the blue-collar workers union (which had sat on each other’s boards and helped finance each other’s activities), the government introduced a subtle but consequential change to the unemployment system. In 2002, the regulations were opened up, allowing new funds to recruit across lines of work and skill. Several new so-called “yellow,” or “alternative,” funds popped up overnight. Along with a previously existing but small alternative fund for Christians religiously objecting to union membership, this new generation of funds advertised fees up to four times lower than what the union-linked funds offered. Another round of changes in 2010 cut the unemployment benefit duration from four to two years, doubled the amount of weeks until one was eligible to nearly a year, and lowered the tax deductibility of union dues. After these measures, Denmark’s union density dropped 15 points¹² (F. Ibsen, Høgedahl, and Scheuer 2013; Høgedahl 2014; Toubøl and Jensen 2014).

Recommendation

The most recent comparative research suggests a complicated relationship between these

¹² Moreover, since 1999, policymakers allowed the funds to disentangle the unemployment from the early retirement benefits, which has lessened the uptake by younger workers.



types of union-run or co-run unemployment insurance (collectively called Ghent systems) and worker power. In particular, do strong unions create Ghent systems, do Ghent systems create strong unions, or is this the wrong question? Social scientists Magnus Rasmussen and Jonas Pontusson find that 10 developed countries have had Ghent-like systems at some point in their history, while 16 have utilized compulsory, wholly state-run unemployment insurance. Using data going back to 1870, they find that introducing Ghent systems had no discernable effect on union density. Instead, they argue for a key interaction effect between Ghent systems and state subsidization. In the early part of the 20th century, Ghent funds were a bad deal for workers imposed by centrist governments who did not want to fund generous benefits. In contrast to this early model, New Deal-style state-run unemployment insurance was far preferable. This initial design decision set countries with union-run and state-run funds on different trajectories. In the first group of countries, increases in the generosity of the scheme led more people to join unions. In the second group, more generosity led people to leave unions (because the state-provided safety net made unions seem less necessary) (Rasmussen and Pontusson 2018).

Where it's possible to enact a federalized, public system, government could do so. However, in areas where it is not possible, pilot programs could be run by unions using state subsidy.

So is the answer for the U.S. to privatize its social safety net and then outsource it to unions? This is unlikely to have any identifiable constituency—as business would dislike empowering unions and everyone else would be fearful of any disruption of their benefits. Instead, if this strategy were to be adopted, it would need to be for newer social safety net policies. For instance, federal job guarantees, paid family leave, Medicare for all, and free college tuition are policies that are being increasingly contemplated or even enacted at the local level. Where it's possible to enact a federalized, public system, government could do so. However, in areas where it is not possible, pilot programs could be run by unions using state subsidy. This would allow for a more gradual and evidence-based approach—one that tests whether in fact union density increases in states or localities that adopt Ghent-style systems updated for the 21st century.

Finally, international agreements should be clarified where appropriate to ensure that experimentation in and out of monopoly provision of social services by unions is presumptively consistent with trade and investment rules.



STRATEGY #7: MAKE UNION MEMBERSHIP THE DEFAULT

Lessons Learned

- Australia's New South Wales attempted to compel universal union membership by statute, but failed to build adequate political support and was never implemented.
- New Zealand actually achieved compulsory membership in 1936, but this unraveled along with the arbitration system explored above.

Recommendation: Use nudge-style policy to make union membership the default (including through addendums to W-4 tax filings); force free-riding workers who opt out to shoulder some of unions' costs; and have anti-abuse checks in the Workers Power Agreement, so purely paper unions aren't created to artificially boost compliance numbers.

While it may seem far-fetched to individualist American ears, a number of countries have gone further than subsidizing or allowing unions: They've mandated by law that workers belong to one. The notion of compulsory unionization sounds almost communist. However, in one of the few Western economies where such a mandate was actually put into law, the government's goal was actually to contain communism. In 1953, the Australian state of New South Wales enacted legislation that required employers to give absolute preference to union over non-union workers, made non-union employees liable to dismissal within 28 days of the act's entry into force, and subjected the employer and/or employee to fines and prosecution for failure to comply. While conscientious objectors were allowed to opt out, all workers were forced to pay the equivalent of union dues. Finally, unions could not refuse admission or expel members. But as Macquarie University labor historian Nikola Balnave documents (1997), business groups waged a resistance campaign, suing the government and then using delay tactics to prolong hearings. At the same time, they told employees to not join the union and promised to pay any fines they incurred. Even some unions opposed the measure, since they thought it deprived them of the ability to compete for and win workers' allegiance. Left-wing groups also feared an influx of conservative workers into the union ranks. Until the time the act was repealed in 1959, the Labour Party's majority narrowed, making it wary of actually enforcing the law. The result: Union membership actually fell during the period.



Earlier, New Zealand was able to achieve much of what New South Wales could not. In 1936, after decades of experience with arbitration and recovering from the throes of the Great Depression, the country's first Labour Party government made union membership compulsory by statute for any worker covered by an arbitration award. This freed workers from fear of being sacked by their employer for joining the union, and density tripled. It also cemented the centrality of the unions favorably disposed to operating within the constraints of the arbitration system. And the strictures were strong indeed. Membership fees were set by law, educational and welfare activities were banned until 1964, and unions were permitted to only narrowly address the "industrial concerns" of their workers before the court. Officials were appointed rather than elected, and need not have any workplace presence to enjoy a captive membership. In contrast, unions that stayed out of the arbitration system were able to strike for pay raises higher than those allowed for under the awards, and they developed closer bonds with their membership.

As explored in Strategy #3, New Zealand's labor regime soon came under strain. One reason: Many workers themselves felt no strong loyalty to the system. Part of the reason that the Labour Party pushed for reform in the 1970s and 1980s was because its own constituents were dissatisfied with the sclerotic arbitrationist system. In 1983, the conservative government had abolished compulsory unionism—though a Labour government soon restored it two years later. In 1987, the Labour government loosened the link between workers and their unions by allowing the former to choose the latter. In 1991, the conservative government finished what Labour had started: making compulsory unionism and monopoly representation unlawful. Its language could not be more different from its 1897 predecessor that set the establishment of unions as a national goal, instead indicating that "Employees have the freedom to choose whether or not to associate with other employees for advancing the employees' collective employment interests." As shown in Figure 4, this negative freedom of association dramatically weakened the power of New Zealand's labor movement (Kasper 1997; Chelliah and Mukhi 2004; Barry and Walsh 2007).

Recommendation

Of all the strategies contemplated in this white paper, compulsory unionization is the most alien to U.S. politics. Done in the wrong way, it would create still-borne, "on paper only" organizations. This might help governments realize their numerical targets under our proposed Worker Power Agreement, but this would by itself do little for workers. For this reason, union density numbers under the WPA should be carefully scrutinized for artificial inflation, including the existence of company or purely paper organizations.



Moreover, in the U.S. context, mandatory representation without any possibility of opting out would likely face severe constitutional hurdles. The overall direction of jurisprudence both domestically and internationally is towards the right of the individual to opt out of organizations, not the right of the collective to have individuals join them.

Nonetheless, there are a few reasons to think more deeply about the topic. First, the Austrian Labor Chamber example shows that compulsory membership in an organization is feasible as an administrative issue and can be made democratically responsive (though, notably, the chamber does not engage in collective bargaining). In the U.S. context, the approach for compulsory unionization could be made to mirror what 13 states and the District of Columbia have already done with voter registration. In that context, voters who interact with government agencies are automatically registered to vote unless they affirmatively opt out. Similarly, an addendum to the W-4 (the tax form that new hires have to fill out) could ask workers to check a box that read: “Under federal law, all workers have extensive protections, including the right to a union and voice at work. Please check here if you DO NOT want a union that will represent your interests.”

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To eliminate incentives for unions to overly curry favor with employers, there would need to be one union per industry, overseen by a union federation for workers as a whole. The state would provide the structure, but who provides the leadership would be vigorously contested and decided by the workers themselves. In exchange for the considerable power that would come with this arrangement, unions would have to agree to more legal oversight—perhaps including term limits for leaders and others of what legal scholar Brishen Rogers calls “libertarian corporatist” democratic accountability measures (Rogers 2015). To lessen constitutionality and cultural concerns, conscientious objectors to membership would be given the right to opt out. However, to lessen free-rider concerns, those who opt out would (instead of dues) pay an “inequality fee” to the government. The proceeds of this fee would be put in a fund to help the government respond to the downsides of rising inequality. Workers insisting on their right not to belong to labor organizations may scratch some individualist itch, but it does so at high costs to society. As noted in Part I, unions have many positive externalities, and there may not be obvious ways of substituting for the functions they fill. Workers who opt out of organizations when they are (say) young and healthy do a disservice to their older and more vulnerable selves, as well as to future generations that



will find it harder to arrest inequality at higher levels (Follett 1994). An inequality fee would encourage more internalization of these costs by the citizens positioned in the present to do something about them.

Second, as to the objection that workers might not share their union's ideological or political orientation, there is no reason why there couldn't be a "red state" and a "blue state" leadership slates within the new federation. Indeed, having a formal organized labor correlate for each party might ensure that class issues aren't completely neglected when government control changes party hands. If union leadership elections were synched up to the presidential cycle, this would also allow either party to simultaneously context both federal and union elections. This could help lessen voter abstention by connecting democratic processes more closely to where people spend much of their lives (the workplace). It would also benefit parties: If they made a clean sweep, they'd have "governing partners" in labor. Finally, it would also eliminate the incentives of declining unions to hold onto their membership by pursuing tactics that are bad for workers as a whole but good for their membership in the short term. This happened in the 1930s and 1940s when the American Federation of Labor (AFL) partnered with anti-labor forces like the Liberty League to frustrate Congress of Industrial Organizations (CIO) organizing efforts (Dubofsky 1994).



Conclusion

This white paper has focused on the role of state policy in incentivizing worker power, at both the international and national level—and by creating mutually reinforcing dynamics between them.

There are many alternatives for more just domestic economies, even as countries across the globe experience similar patterns of increased trade and capital flows.

We have shown that—far from a single trajectory where there is no alternative but to let unions die—countries can and do maintain different arrangements that promote greater equality between the classes. Thus, takeaway one: There are many alternatives for more just domestic economies, even as countries across the globe experience similar patterns of increased trade and capital flows. Indeed, global integration in certain countries has prompted more reliance on worker power, not less.

But even in countries that are thought to have high worker power, nothing is set in stone and policy can tilt or balance the scales. Indeed, a common thread between neoliberal and center-right governments (e.g., the U.S. in 1947, New Zealand in 1991, Denmark in 2001, or Austria post-2017) is that they attack labor’s institutional base. What that base is made up of varies by country, whether it is closed shops, arbitration courts, or social benefits provision. But whatever gives labor its staying power will inevitably be targeted. This leads us to takeaway two: Worker power has a stronger foothold when it benefits from more than just one base of support. That’s why the seven strategies explored in this white paper are not mutually exclusive, but complementary.

Worker power has a stronger foothold when it benefits from more than just one base of support.

If embraced, the kind of strategies we outline in this paper would signal a shift in how policymakers do policy, moving beyond standard cost-benefit analysis or distributional questions and towards incorporating an institution- and power-building lens. If the kinds of metrics we propose in Strategy #4 had been in place, for instance, it is very unlikely



that NAFTA would have gone into effect—certainly not without a complementary policy like repeal of so-called “right-to-work” laws. If we think strong civil society and social connections matter (and much research in the “Bowling Alone” tradition suggest they do), it’s time to begin explicitly considering them in our economic strategies. Our democracy—both political and economic—demands it.

This needn’t mean that massive state resources have to be plowed year after year into supporting unions. If the state can help labor get to a certain union density, the effort can take on independent self-reinforcing dynamics. Survey research suggests that this choice largely responds to the institutional context: Workers join unions when other workers join and it’s seen like the right thing to do (C. L. Ibsen, Toubøl, and Jensen 2017). The decline of factory floors and rise of contingent work challenges these workplace norms. The question for us is whether government can tilt against the market and put its finger on the scale of labor, as one countervailing force helping another.



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