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ARTICLES

CHOOSING COMPETITION: A PROPOSAL TO MODIFY ARTICLE XX OF THE AFL-CIO CONSTITUTION

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“Above everything, the people are powerless if the political enterprise is not competitive.”¹

I. INTRODUCTION

Since the passage of the Landrum-Griffin Act,² scholars have struggled with the question of how unions should be managed. Largely, the debate has centered on the question of how much democracy is the right amount; i.e., how to strike the proper balance between freewheeling debate, dissent, and electioneering and the union’s need for efficient and stable operations. In a recent article, law professor Samuel Estreicher introduced a new dimension to the debate.³ To the question of how

1. E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 140 (1960).

2. Labor-Management Reporting and Disclosure Act, (“LMRDA”) 29 U.S.C. §§ 401–531 (2000).

3. Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501.

much is enough democracy, he answered “Let the market decide.”⁴ If democracy proves a big seller, all good and well. If market forces usher democracy out of the market, Estreicher poses the question, “Where’s the harm in that?”⁵

Although the details of Estreicher’s plan to commodify union management involve numerous complicated adjustments to our nation’s labor and anti-trust laws, his argument for deregulation boils down to three simple points. First, the key to good management of virtually any enterprise is competitive pressure to succeed.⁶ Second, union democracy is not, and never has been, competitive.⁷ Third, a program of deregulation, including the introduction of for-profit collective bargaining representatives and a series of new rules designed to facilitate meaningful consumer choice, will finally bring to union management the salubrious effects of competitiveness.⁸

This article reviews and responds to Estreicher’s article. Like Estreicher, I adopt as a basic premise that competition is highly desirable as a feature of union management. It is from this common starting point that I assess Estreicher’s other two points. First, I evaluate the accuracy of Estreicher’s summary assertion that union democracy is generally uncompetitive. Second, I evaluate Estreicher’s contention that deregulation would be an efficacious means for attaining competition in union management. Third, I present the conclusions I have drawn from my reviews of union democracy and Estreicher’s alternative. I summarize these conclusions now.

While Estreicher is certainly correct that union democracy would greatly benefit from increased competition, his solution is drastic, risky, and potentially quite harmful. Instead, I offer a straightforward proposal for increasing competitiveness within the current regime. Article XX of the Constitution of the American Federation of Labor-Congress of Industrial Organization (“AFL-CIO”) prohibits union raiding among federation members.⁹ As Estreicher points out, this provision poses a significant obstacle to competition in union management by all but eliminating the possibility that unions will ever compete with each other to earn their members’ endorsement.¹⁰ Under Article XX, one AFL-CIO

4. *Id.* at 502.

5. *Id.* at 503.

6. *See id.* at 513.

7. *See id.*

8. *See id.* at 503.

9. AFL-CIO CONST. art. XX, §§ 2–5.

10. Estreicher, *supra* note 3, at 514.

union is not permitted to contest another in an election, no matter how poorly the incumbent is being managed.¹¹ The only question in these disputes is which union represented those workers first. Here, I propose that the AFL-CIO should amend Article XX to allow competitive elections in situations where the challenger can show that the incumbent is corrupt, ineffectual, or neglectful. This change will be good not just for union members, but also for the AFL. But more importantly, the amendment is required due to the failings of union democracy. Because union democracy has failed to provide adequate competitive pressure within unions, the proposed amendment is required to provide those pressures from without. I argue that this modification is more sensible than Estreicher's proposal because it seeks the same end of increasing competition between bargaining representatives, but does so through less radical, less complicated, and less harmful means.

In Section I, I conduct an expansive evaluation of how union democracy has performed in attaining the recognized objectives of union management. At the end of my review, I argue that Estreicher's second point is mostly correct, that union democracy has heretofore not performed as well as it was intended. In Section II, I make predictions on how Estreicher's scheme might function in reality, and I present my reasons for believing that the proposal will work great harm on the enterprise of collective bargaining and consequently should not be pursued. In Section III, I make my proposal for amending Article XX and present my arguments for why my proposal should be adopted by the AFL-CIO.

II. EVALUATING UNION DEMOCRACY

In *Deregulating Union Democracy*,¹² Estreicher claims that union democracy fails as a competitive enterprise.¹³ Estreicher's analysis of the litany of failings of union democracy is powerful: historically union democracy tends sharply towards oligarchy; the union members are apathetic and see little value in democracy; and union democracy has proven helpless against, and even complicit with, corruption.¹⁴ Based on these facts, Estreicher urges that society's misguided commitment to the fairy tale of union democracy should be abandoned.¹⁵

Although union democracy's failings are widely acknowledged,

11. AFL-CIO CONST. art. XX, § 4.

12. Estreicher, *supra* note 3.

13. *Id.* at 502.

14. *See id.* at 502, 512–13.

15. *Id.* at 502.

even notorious, Estreicher's claim is nonetheless controversial. *Deregulating Union Democracy* has already drawn scholarly criticism for misrepresenting the record on union democracy by focusing only on its egregious failures while ignoring the points in its favor.¹⁶

Before alternatives can be considered, it seems sensible to come to some resolution on the question of how union democracy has actually performed. As Michael Goldberg's dissent from Estreicher's article shows, there is no consensus on the matter.¹⁷ For that reason, I begin with an evaluation of union democracy.

I evaluate union democracy according to three criteria. First, under union democracy, how responsive are the agents, the officers of the union, to the principals, the members? This inquiry essentially asks how closely aligned the priorities and preferences of the officers are to the priorities and preferences of the membership. Thus, under this criterion, one would measure not only whether the officers are indifferent or "in touch" with the membership, but also whether the officers are bought off, bribed, or otherwise suffer from a serious conflict of interest.

Second, does the union democracy effectively resist or diminish the mismanagement of resources, especially through theft, fraud, embezzlement, or other corrupt practices? Since very often members will oppose resource mismanagement, there is a clear overlap between this criterion and the first. The issues are nevertheless distinct. As the cases of Jimmy Hoffa, Sr. and Gus Bevona show, embezzlement does not necessarily entail that leaders are not serving the member's interest or that the members are particularly dissatisfied with management. Embezzlement also imposes different costs on members than bribery does. For instance, embezzlement may entail that dues are higher than they otherwise would be, but usually it will not erode the value of union contracts. It is also distinct from bribery because it is controlled differently. Embezzlement can be controlled through strict regulation of institutional bookkeeping and disclosure requirements. Bribery, on the other hand, can be detected only by rifling through an officer's personal finances.

Third, how effectively does union democracy facilitate the objectives of the union? This criterion is different than responsiveness because, instead of examining the congruence between official and membership goals, it asks whether the union is capable of identifying and

16. Michael J. Goldberg, *Derailing Union Democracy: Why Deregulation Would Be a Mistake*, 23 BERKELEY J. EMP. & LAB. L. 137, 138 (2002) [hereinafter Goldberg, *Derailing*].

17. See generally *id.* (demonstrating the opposite view of Estreicher, i.e., that union democracy should be regulated).

then achieving objectives. This criterion inquires into a model's cost of decision-making, its ability to minimize conflict, and, most importantly, its chances of producing successful unions.

A. Responsiveness

I first explore union democracy's success in producing responsive management. Generally, it is theorized that democracy ensures that union leaders will be responsive by subjecting union leaders to the persistent threat of electoral defeat.¹⁸ However, this theory relies largely on the underlying assumption that elections will be competitive. If the process is not competitive, unresponsive leaders will never be ousted. Consequently, the leaders do not actually fear ouster, and they therefore will have no incentive to be responsive. This produces two subsidiary questions: (1) Are union democratic processes competitive?; and (2) How much competition is needed to produce responsiveness?

1. Obstacles to Competition

Scholars have identified within unions several obstacles to democracy. One obstacle, first identified by Robert Michels, is the so-called 'Iron Law of Oligarchy.'¹⁹ The 'Iron Law' holds that oligarchy is the unavoidable product of organization itself.²⁰

18. Archibald Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 610 (1958–1959); Morris M. Kleiner & Adam M. Pilarski, *Does Internal Union Political Competition Enhance Its Effectiveness?*, in INTERNAL GOVERNANCE AND ORGANIZATIONAL EFFECTIVENESS OF LABOR UNIONS 103, 107 (Estreicher et al. eds., 2001); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 698 [hereinafter Summers, *Privatization*].

19. ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 401–02 (Eden & Cedar Paul trans., Free Press 1915) (1978). Michels explained the 'Iron Law' as follows:

The notion of the representation of popular interests, a notion to which the great majority of democrats . . . cleave with so much tenacity and confidence, is an illusion engendered by a false illumination, is an effect of mirage The formation of oligarchies within the various forms of democracy is the outcome of organic necessity, and consequently affects every organization, be it socialist or even anarchist . . . “[O]rganization . . . gives birth to the dominion of the elected over the electors, the mandataries over the mandators, of the delegates over the delegators. Who says organization, says oligarchy.”

Id.

20. *Id.* at 401. Michels identified four attributes of organization responsible for producing oligarchy. First, the leaders of any organization will come to view opposition to their policies as disloyalty. Second, through patronage and the power of appointment, the leadership and bureaucracy each has an incentive to keep the other in power; united behind their mutual interests, they combine into a political cartel. Third, because they control the channels of communication, includ-

A second obstacle is the reality that power in unions is closely concentrated in the hands of a few officials who exercise near absolute control over most of the union's resources.²¹ Although officials are prevented by Landrum-Griffin from using union resources for their individual campaigns,²² they nevertheless can manipulate their positions to maximize their chances of success.²³ Judicial decisions have exacerbated this situation by validating certain key advantages of incumbency. Under current law, incumbents are free to award political allies with union positions.²⁴ As noted by numerous critics, this ruling effectively endorses unrestrained patronage and cronyism.²⁵ Courts also have upheld union rules which deprive insurgents of the ability to raise campaign funds from sources outside the union.²⁶ In unions which have such a rule, all funds must be contributed by union members, effectively leaving reform-minded insurgents with meager funding and dim prospects.²⁷

At times, the obstacles to democratic competition have been less subtle and considerably more brutal.²⁸ Even after the trusteeship was imposed on Local 560, and mob boss Tony Provenzano jailed, most observations concluded that members continued to be intimidated from more

ing the organization's publications and training procedures, the perspective of most incumbent administrations is disseminated to union members virtually unopposed or controverted. Fourth, the natural desire to increase individual control couples with a desire to operate more efficiently resulting in highly centralized power structures. See Clyde W. Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93, 96-98 (1984) [hereinafter Summers, *Democracy*].

21. SEYMOUR M. LIPSET ET AL., UNION DEMOCRACY 9 (1956); Summers, *Democracy*, *supra* note 20, at 97-98.

22. 29 U.S.C. § 481(g) (2000).

23. Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903, 920 [hereinafter Goldberg, *Cleaning*]; LIPSET ET AL., *supra* note 21, at 11; Summers, *Democracy*, *supra* note 20, at 98-99.

24. *Finnegan v. Leu*, 456 U.S. 431, 442 (1982).

25. Michael J. Goldberg, *An Overview and Assessment of the Law Regulating Internal Union Affairs*, 21 J. LAB. RES. 15, 23 [hereinafter Goldberg, *Overview*]; Summers, *Privatization*, *supra* note 18, at 715.

26. *United Steelworkers v. Sadlowski*, 457 U.S. 102, 112 (1982).

27. Goldberg, *Overview*, *supra* note 25, at 23. This gives an unseemly advantage to corrupt regimes. Those union leaders who allow their cronies to skim from the union coffers, pensions or to draw multiple salaries have a natural constituency of campaign donors. See Jim Larkin, *Which Way for the Teamsters?*, THE NATION, Oct. 8, 2001, at 20.

28. See Goldberg, *Cleaning*, *supra* note 23, at 909 n.27 (describing the environment of intimidation that permeated Teamsters Local 560, including the murder of two members who were political rivals of the incumbent administration) (citing *Teamsters Local 560 Paid \$28,143 to Jailed Ex-Chief*, WALL ST. J., July 28, 1982, at 2, col. 3); see also *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 273 (3d Cir. 1985); *United States v. Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. 279, 308 (D.N.J. 1984).

active participation in the union.²⁹ Similarly, the murder of Jock Yablonski and his family in 1969 demonstrated that some incumbents were willing to resort to extreme violence and crime to terrorize away competition.³⁰ Granted, these extremes are evidence of another serious problem—namely corruption³¹—but the violence shows that if union democracy cannot prevent corruption, the corruptive elements may mutilate union responsiveness in addition to siphoning away resources.³²

However, even without campaigns of terror, observers studying the matter have determined that union members are largely disaffected with and disengaged from the operation of the union.³³ In 1959, after extensive research, William Leiserson estimated that on average no more than ten percent of union members could be expected to attend a union meeting.³⁴ In a 1977 case involving six United Steelworkers locals, the United States Supreme Court noted that most meetings were attended by no more than three and one half percent of members.³⁵ In most unions, meetings are sparsely attended, typically by ten percent or less of members.³⁶ Additionally, union meetings tend to be monopolized by leaders or small groups of insiders which only exacerbates the natural reluctance of members to speak in public.³⁷

Low participation is especially problematic because union democracy involves significant monitoring and collective action costs.³⁸ Under the current system, each voter is given the responsibility to monitor her elected officials,³⁹ but each individual's monitoring effort will be fruitless unless a majority of other voters is equally vigilant in rooting out infelicitous official behavior. While Landrum-Griffin somewhat reduces

29. Clyde W. Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J.L. REFORM 689, 692 (1990) [hereinafter Summers, *Trusteeships*]; Andrew B. Dean, Note, *An Offer the Teamsters Couldn't Refuse: The 1989 Consent Decree Establishing Federal Oversight and Ending Mechanisms*, 2000 COLUM. L. REV. 2157, 2169.

30. Goldberg, *Cleaning*, *supra* note 23, at 920; George Feldman, *The New Teamsters and the Labor Movement*, 38 WAYNE L. REV. 527, 545 (1991–1992).

31. See Goldberg, *Cleaning*, *supra* note 23, at 912–13.

32. Summers, *Trusteeships*, *supra* note 29, at 694–95.

33. George Strauss, *What's Happening Inside U.S. Unions: Democracy and Union Politics*, 21 J. LAB. RES. 211, 214 (2000).

34. Eric Ames Tilles, Note, *Union Receiverships Under RICO: A Union Democracy Perspective*, 137 U. PA. L. REV. 929, 936–37 (1988–1989) (citing WILLIAM M. LEISERSON, *AMERICAN TRADE UNION DEMOCRACY* 283 (1959)).

35. *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305, 307 (1977).

36. Estreicher, *supra* note 3, at 508.

37. Tilles, *supra* note 34, at 938 n.65 (citing LEISERSON, *supra* note 34, at 284–85).

38. See Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 393.

39. See *id.*

the costs of monitoring by requiring unions to comply with certain membership disclosure requests,⁴⁰ the burden of discovering, interpreting, and publicizing this information falls entirely on each individual union member.⁴¹ On the other hand, this may not be so in society-at-large. Arguably, the free press helps defray these otherwise overwhelming monitoring costs by observing, investigating, and reporting the activities of government officials. For the average citizen, the press seemingly reduces the costs of monitoring to whatever expenditure is involved in reading a newspaper or viewing a television news program. In a union, the union newsletter is unlikely to fill this role since it is controlled by the incumbent officials.⁴² Political democracy also relies on opposing political parties to monitor each other. In most unions, these parties simply do not exist, and the union structure seems to preclude their creation.⁴³

Unions generally lack structural schemes for achieving an internal balance of power.⁴⁴ Government theorists have long understood the importance of avoiding the consolidation of all power in the hands of a single individual or institution in order to prevent tyrannical authority.⁴⁵ Some unions have adopted this insight into their own structures. The United Auto Workers (“UAW”), for instance, have a Public Review Board which acts as a quasi-supreme court for intra-union disputes.⁴⁶ As part of the reforms mandated by the consent decree with the Department of Justice, the Teamsters have established a permanent Independent Review Board modeled on the UAW’s.⁴⁷ These boards play an important role, not only in the prevention of corruption, but they also serve as impartial arbiters for disputes between union members and the union lead-

40. *E.g.*, 29 U.S.C. § 431(c) (2000).

41. *See id.*

42. Summers, *Democracy*, *supra* note 20, at 97–98.

43. *Id.* at 95; *see also* Feldman, *supra* note 30, at 563 n.96 (noting that the UAW views the days of hot elective contests as a period of weakness and internal turmoil).

44. *See* Summers, *Democracy*, *supra* note 20, at 102–03 (providing examples of the abuse that results where union officials are permitted to adjudicate the complaints and grievances of members).

45. *See* MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1751) (“All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.”).

46. *See* Goldberg, *Cleaning*, *supra* note 23, at 924. The UAW’s Public Review Board is composed of upstanding members of the outside community who are not members of the UAW staff or leadership. *See id.* at 924 n.99.

47. *Id.* at 996, 999.

ership.⁴⁸ Unfortunately, public review boards are absent in all but a handful of unions even though they have had much success in ending corruption.⁴⁹

2. Does Competition Exist?

Given these obstacles, the first issue in measuring union democracy's responsiveness is whether democratic competition exists. Surveying the elections of thirty-four unions from 1900-1948, Taft found that the vast majority of candidates ran unopposed.⁵⁰ In the 1950s, after surveying unions across the nation and finding only a single exception, Seymour Martin Lipset, Martin Trow, and James Coleman largely endorsed Michel's bleak prediction that unions would be oligarchies.⁵¹ The exception they found was the International Typographical Union ("ITU"), whose membership for years had been comprised of two vying, roughly equal political factions.⁵² While commending this fact, the authors pessimistically concluded that this state of affairs was attributable to idiosyncratic circumstances unlikely to be duplicated by any other union.⁵³ For all others, there was only the iron law.⁵⁴

Assessments like Lipset's helped spur Congress to pass the Landrum-Griffin Act.⁵⁵ Yet even after the passage of this law, which was designed to rejuvenate union democracy, most commentators conceded that union democracy, if understood to denote the open and meaningful competition between plausibly viable candidates, remained elusive and that the specter of labor leaders with virtual life-long tenure remained.⁵⁶ Many studies and commentators have confirmed that union

48. See generally *id.* at 923-25 (explaining how public review boards conduct "trials" with officers and members of the Board as well as void corrupt elections where fraud is involved and demand reconsideration of laws they found adopted in bad faith).

49. *Id.* at 925.

50. Pamela J. Fitton, Note, *Clarification of Title IV of the Labor-Management Reporting and Disclosure Act: Toward More Democratic Elections*, 2 HOFSTRA LAB. L.J. 157, 163 (1984-1985).

51. Summers, *Democracy*, *supra* note 20, at 93-94.

52. LIPSET ET AL., *supra* note 21, at 59-60.

53. Summers, *Democracy*, *supra* note 20, at 94.

54. See generally *id.* at 94-95. Lipset, Trow and Coleman found that the "functional requirements for democracy cannot be met most of the time in most labor unions Oligarchy is inevitable." *Id.*

55. See *id.* at 94 (stating that three years after the study of Lipset, Trow and Coleman, Congress passed the Act); Fitton, *supra* note 50, at 165 (explaining how pressure from civil liberties groups, experts, congressional committees and the public helped spur Congress into passing the Act).

56. See Leon Applebaum & Harry R. Blaine, *The "Iron-Law" Revisited: Oligarchy in Trade Union Locals*, 26 LAB. L.J. 597, 598 (1975) (citing Marvin Snowbarger & Sam Pints, *A Quantita-*

leaders face little threat that they will be democratically ousted from office.⁵⁷ Most labor leaders can maintain their elected positions through decades of elections.⁵⁸ Moreover, the departure from office of these long-tenured magnates usually has failed to augur a renewal of democratic competition. Most departing presidents have hand-selected their successors.⁵⁹ Even when opponents arose, they almost never prevailed over the standing administration.⁶⁰

Nevertheless, defenders point out that the foregoing presents only a partial picture. George Strauss has shown that the absence of competitiveness in union elections usually is exaggerated.⁶¹ Furthermore, he notes that from 1949-1966, more than half of the unions with more than 50,000 members, had at least one contested election.⁶² Ten percent of those unions saw at least one incumbent defeated during that seventeen-year period.⁶³ Moreover, Strauss notes that competitiveness in union elections is on the rise. From 1981-1998, the percentage of unions with over 50,000 members who experienced contested elections had increased to sixty-five percent.⁶⁴ Twenty-two percent of unions saw leaders go down to electoral defeat.⁶⁵

In addition to these figures, Strauss points to other factors which demonstrate that union democracy is enjoying a resurgence. First, railway unions, where presidents have traditionally enjoyed life tenure, saw the presidents of three major unions ousted in 1991.⁶⁶ Then, in 1995, two of those insurgent presidents were themselves victims of electoral defeat.⁶⁷ The AFL-CIO witnessed a dogged fight for the presidency when John Sweeney defeated Tom Donahue, after former president Lane Kirk-

tive Appraisal of Presidential Rates Before and After the Landrum-Griffin Act, 1970 INST. FOR BUS. & ECON. RES., SAN JOSE STATE COLLEGE (reporting that the 'no turnover rate' for national union presidents actually increased in the first six years following Landrum-Griffin's implementation).

57. See Summers, *Democracy*, *supra* note 20, at 105-06.

58. Applebaum & Blaine, *supra* note 56, at 598 ("Death and retirement, rather than incumbent opposition, resulted in the great majority of the turnover of presidents in the largest unions.") (quoting *Tenure of Union Officers*, 94 MONTHLY LAB. REV., Feb. 1971, at 62).

59. See Michael J. Goldberg, *Evaluating Unions: Labor Economics and the Law*, 84 MICH. L. REV. 1063, 1072 (1985-1986) (book review) [hereinafter Goldberg, *Evaluating*]; Strauss, *supra* note 33, at 213.

60. Goldberg, *Cleaning*, *supra* note 23, at 919-20; Summers, *Democracy*, *supra* note 20, at 97-99.

61. Strauss, *supra* note 33, at 214.

62. *Id.* at 216.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

land opted not to seek reelection.⁶⁸ Lastly, the Teamsters, Hotel and Restaurant Employees, Sheet Metal Laborers, and Painters unions all experienced an upsurge in democracy after their leaders were removed from office under accusations of corruption.⁶⁹

The current state of the Teamsters is also commonly cited as a sign of hope for union democracy.⁷⁰ Although historically considered the most corrupt and undemocratic union, the Teamsters have undergone a significant transformation in the past decade.⁷¹ In 1989, the Teamsters accepted a consent decree imposing federal oversight over the international union.⁷² Along with the oversight, the Teamsters' international constitution was amended to provide for direct confidential votes for the national offices.⁷³ In 1991, this led to the election of Ron Carey, who had long been associated with the reform/opposition group, Teamsters for a Democratic Union ("TDU").⁷⁴ Carey was later removed from office for violating campaign finance regulations, which led to the election of James P. Hoffa, Jr., a candidate sometimes suggested to represent the "Old Guard" from the heyday of Teamster corruption.⁷⁵ Even so, observers point to the fact that the TDU, though currently out of power, is now seen as a legitimate institutional opposition.⁷⁶

Nevertheless, the triumph of union democracy in the Teamsters is not entirely free from skepticism. In the 2001 election, incumbent president Hoffa faced many hurdles to reelection. The Hoffa administration came under considerable fire for its handling of the failed national strike against Overnight Transport Co.⁷⁷ Further, the Teamster convention occurred under a cloud of corruption as leaders of a Chicago local and close allies of Hoffa were charged with scheming to hire a family mem-

68. *Id.* at 217.

69. *Id.*

70. Feldman, *supra* note 30, at 582.

71. *Id.* at 529.

72. Dean, *supra* note 29, at 2157.

73. *Id.* at 2166.

74. Steven Greenhouse, *Challenger Hopes to Upset Teamsters President in Vote*, N.Y. TIMES, Oct. 15, 2001, at A14. *See also* Feldman, *supra* note 30, at 553 (arguing that without government intervention, entrenched leadership would easily have been able to "steal" the election).

75. Larkin, *supra* note 27, at 20.

76. *See* Goldberg, *Overview*, *supra* note 25, at 27–28; *see also* Larkin, *supra* note 28, at 20 (explaining how despite the removal of Carey from office, the TDU and its candidate, Tom Leedham, factored into the Teamsters elections in a legitimate way).

77. Larkin, *supra* note 27. In addition to blaming Hoffa for the failure of the strike against Overnite Transport Company, Larkin also criticizes Hoffa's administration for reducing the Teamsters' organizing budget by two-thirds, for authorizing lavish spending for Teamsters officials- including 141 officials currently drawing more than one full-time salary- and for apparent ties to convention "sweetheart" contract scandals. *Id.*

ber's non-union company to construct the convention stage.⁷⁸ In addition, Hoffa's opponent, Jim Leedham was a prominent and well-known candidate since he had previously received nearly forty percent of the vote after a vigorous campaign against Hoffa in 1998.⁷⁹ Despite all of this, in December 2001, James P. Hoffa, Jr. won his second reelection by a two-thirds margin.⁸⁰ Moreover, even in light of the facts I have listed above, Hoffa's lopsided victory was hardly a surprise because Hoffa enjoyed a ten to one spending advantage over Leedham.⁸¹ The trend, if it continues, certainly suggests that advocates of union democracy may have been premature in celebrating the reformation of the Teamsters.⁸² Rather than the onset of a new trend, the 1990s' surge in union democracy may prove a momentary discursion.⁸³

3. How Much Competition Is Needed?

The second question for evaluating responsiveness is whether high turnover in union offices is necessary to obtain the desired levels of responsiveness. Clyde Summers, the principal author of the original labor Bill of Rights that became section 401 of Landrum-Griffin and long-standing advocate of industrial democracy,⁸⁴ has argued that responsiveness is not precisely correlated with the level of turnover among union leaders.⁸⁵ Instead, he posits that responsiveness correlates with the size of the minority opposition.⁸⁶ By Summers' estimate, the rarity with

78. Stephen Franklin, *Report Ties 2 Teamsters to Non-Union Scheme*, CHI. TRIB., May 25, 2001, at N1.

79. Greenhouse, *supra* note 74, at A14.

80. Stephen Franklin, *Hoffa Holds on to Teamsters Reins*, CHI. TRIB., Nov. 17, 2001, at N1. Hoffa won by a vote of 65 percent with the rest voting for Leedham. *Id.*

81. Greenhouse, *supra* note 74 at A14 (reporting that Hoffa's campaign chest dwarfed Leedham's by a factor of ten: \$2 million for Hoffa, as compared to \$200,000 for Leedham).

82. Compare Feldman, *supra* note 30, at 527–28, 529 (hailing Ron Carey's election as Teamster President as possibly "the major defining event for American workers in the nineties"), with Bob Fitch, *Flubber: How Ron Carey Ruined the Teamsters' Reform Movement*, VILLAGE VOICE, Dec. 2, 1997, at 43 (arguing that the "greatest gift Carey could make to the cause of union reform would be to . . . resign the presidency immediately").

83. I do not take a position on whether the accusations against the Hoffa regime are true, but I do note that political interests exist on all sides. Also, I address the accusations only to make the point that the rosy predictions maintained by authors like Michael Goldberg, who claim that the Teamsters have been transformed into a model of union democracy, may be inaccurate.

84. See, e.g., Clyde W. Summers, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273, 276–77 (1962) [hereinafter Summers, *American*]; Summers, *Trusteeships*, *supra* note 29, at 689.

85. See Summers, *Democracy*, *supra* note 20, at 106.

86. See *id.*

which officials of national unions are unseated does not necessarily mean that democracy has failed to produce responsive union leadership.⁸⁷ Instead, what matters is whether electoral competition can send effective messages to union officials that the membership is dissatisfied and that changes are needed.⁸⁸ Under this reasoning, an election where the opposition candidate receives any significant portion of the vote is an effective exercise of democracy. “[T]he tabulation,” Summers explains, “measures the level of discontent among the members.”⁸⁹ Summers argues that this may be enough to deem union democracy a successful mechanism for attaining responsive leadership.⁹⁰ “Although the incumbent oligarchy stays in power, it becomes responsive to the election returns. The greater the opposition vote, the greater the responsiveness.”⁹¹

The first thing to note about Summers’ modified theory of union democracy is that it concedes that union democracy serves as a flawed and inaccurate measure of membership support of the leadership.⁹² He agrees that “[t]he enormous advantages of the incumbents obviously discourage challengers” and that “the challengers seldom have a realistic chance of winning.”⁹³ For this reason, there are times when the leadership will be returned to office even though a majority of the union membership is dissatisfied with their leadership.

What is clever about Summers’ theory is that despite this admission, he preserves the claim that union democracy is responsive.⁹⁴ The problem, however, is that given the infrequency with which incumbents are unseated, it is not clear why even an impressive showing by an opponent would impel greater responsiveness. If the rascals are rarely ever voted out, then why should we assume that the rascals will reform their ways? In part, Summers explains this by arguing that most union leaders are not rascals at all, but, in reality, “most union leaders are motivated to be responsive to the members less out of fear that they will be unseated than by an inner desire to serve their members.”⁹⁵ Second, Summers’ thesis relies on union leaders being risk averse so that even a remote threat of electoral defeat will induce union officials to react respon-

87. *See id.* at 107.

88. *See id.* at 106, 107.

89. *Id.* at 106.

90. *See id.*

91. *Id.*

92. *See id.* at 105–06.

93. *Id.* at 105.

94. *See id.* at 106.

95. *Id.*

sively.⁹⁶ Accepting both of these claims, Summers' argument depends more on the personal characteristics of individual leaders and less on the attributes of the democratic system; if union leaders are not risk averse, for instance, then they may be willing to persist in their decadent leadership even if it means closer calls at the polls. At bottom, therefore, Summers does not offer a defense of the current system. He is explaining how the system might succeed in spite of itself.

Moreover, accepting Summers' thesis that contested elections are a more important measure of responsiveness than the turn-over of union officials, Stauss' data indicates that from 1981-1998, thirty-five percent of unions with over 50,000 members did not experience a single contested election.⁹⁷ At best, his data indicates that only sixty-five percent of unions with over 50,000 members experienced at least one contested election during the entire seventeen-year period.⁹⁸ Thus, even under Summers' modified view, the mechanisms of union democracy are not encouraging responsive leaders in all unions. And in most, the infrequency of contests generally seems to reduce even the modified theory to little more than wishful thinking, for unless the incumbents are angels or exceedingly risk averse, then the system is generating little—one election every eighteen years in most unions⁹⁹—to compel responsive behavior.

4. Conclusions

By all standard criteria, the current regime of union democracy can be said to guarantee only very weak levels of responsiveness. Certainly it is wrong to claim that union democracy is wholly unresponsive, even on the international level; a union leader does not in fact enjoy a divine right to his position. Even so, by all accounts the level of turnover in union presidencies remains low, and transition at the highest offices continues to be exceptional. Given these realities, it is difficult to deny that union democracy provides leaders with few incentives to be particularly responsive. Although it is impossible to say with any certainty what level responsiveness is desirable or necessary, one can fairly conclude that the current system consistently performs below expectations and often egregiously below them.

96. *Id.*

97. Strauss, *supra* note 33, at 215.

98. *Id.*

99. *Id.*

B. Integrity

A second type of agency cost involves corruption—whether democracy effectively serves to deter or prevent union leaders from stealing from union assets or from using union resources wastefully or inefficiently. Essentially, it is a question of whether democracy forestalls financial conflicts of interest between union agents and their principals. Embezzlement, while not the only concern, is the central and paradigmatic worry.¹⁰⁰

Union democracy has long been invoked as a solution to the problem of union corruption.¹⁰¹ After all, vanquishing union corruption was an impetus for the Landrum-Griffin Act's passage.¹⁰² The disclosure requirements¹⁰³ were designed so that union members might effectively monitor the activities of union officers.¹⁰⁴ The democratic protections were to enable union members to hold officers accountable by "voting the rascals out."¹⁰⁵ Through these devices, Congress hoped that it would empower members to keep their own house and thereby obviate politically controversial government intrusions into internal union affairs.¹⁰⁶ The question here is whether it was sound to presume that union democracy can remedy corruption.

Reality, it seems, has largely betrayed Congress' hopes.¹⁰⁷ While most commentators agree that today's labor movement is cleaner than at anytime previous, Landrum-Griffin seems not to have played a decisive role in arriving at this laudable moment.¹⁰⁸ Landrum-Griffin was passed

100. Leslie Marshall, Note, *The Right to Democratic Participation in Labor Unions and the Use of the Hobbs Act to Combat Organized Crime*, 17 FORDHAM URB. L.J. 189, 202 (1988–1989).

101. Summers, *Trusteeships*, *supra* note 29, at 690, 694.

102. *Id.* at 690; Tilles, *supra* note 34, at 933.

103. 29 U.S.C. §§ 435–441 (2000).

104. See Goldberg, *Cleaning*, *supra* note 23, at 920 (explaining that one of the principal purposes of the Landrum-Griffin Act is to empower union members to ferret out corruption among the higher-ups); Marshall, *supra* note 100, at 196–200 (explicating the provisions of the Labor-Management Reporting and Disclosure Act of 1959).

105. See Goldberg, *Cleaning*, *supra* note 23, at 919–20.

106. See George Kannar, *Making the Teamsters Safe for Democracy*, 102 YALE L.J. 1645, 1672 (1992–1993); Eric J. Pritchard, Comment, *RICO and Labor Corruption: The Propriety of Court-Imposed Trusteeships*, 62 TEMP. L. REV. 977, 1010 (1989).

107. See Kannar, *supra* note 106, at 1661 ("For a variety of reasons—legal, cultural, historical, institutional, and personal—the higher reaches of organized labor in America have felt no need, nor have they shown much inclination, to address the issue of internal union corruption for a good long time.").

108. Dean, *supra* note 29, at 2158 (noting that government attacks on local unions, criminal prosecutions within the union and government supervision could not eradicate the corruption with the Teamsters).

in 1959 in large part to abate the notorious corruption in unions like the Teamsters.¹⁰⁹ Yet, in the decades that followed, corruption in these unions remained.¹¹⁰ It was only through an aggressive campaign by the United States Attorney's office, in which the considerable powers of the Racketeer Influenced and Corrupt Organizations Act ("RICO") were wielded that union corruption was at long last uprooted from these unions.¹¹¹

Conversely, the level of democracy in a union does not necessarily correlate with corruption. The UAW, for instance, has long been hailed for the unimpeachable character of its operations.¹¹² Nevertheless, most agree that the UAW is autocratically run and tightly controlled.¹¹³

In theoretic terms, an objection can be raised that the labor movement's reliance on democratic processes, instead of combating corruption, actually facilitates the occurrence of corruption and obstructs its eradication. One explanation for this phenomenon is that democracy has maintained, and possibly intensified, society's and the courts' traditional reluctance to intervene into union affairs.¹¹⁴ This reluctance to interfere is manifested in numerous policies. First, it centrally motivated the courts' policy of deferring to the union official's interpretation of the union constitution.¹¹⁵ Second, the reluctance to interfere operated to per-

109. *Id.* at 2158 n.6.

110. See Marshall, *supra* note 100, at 190–91. In 1986, the Federal Government found that 400 of 70,000 labor organizations were associated with, influenced by or controlled by organized crime. *Id.*

111. Randy M. Mastro et al., *Private Plaintiffs' Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions*, 24 U. MICH. J.L. REFORM 571, 572–73 (1990) ("RICO has given federal courts the freedom to fashion creative equitable remedies to redress racketeering activity."); Dean, *supra* note 29, at 2164–65 (pointing out that RICO gave the government broad discretion to reorganize corrupt unions, including the ability to discharge officials, to run elections and to oversee all aspects of union governance).

112. See Steve Fraser, *Is Democracy Good for Unions?*, DISSENT, Summer 1998, at 33, 36 (noting that the UAW is famous for its tolerance in internal debates).

113. Estreicher, *supra* note 3, at 510 (noting that the UAW was run as "a one-party state whose challengers, when they dared to raise their heads, might just as readily find themselves in trusteeship as campaigning for election.") (quoting Fraser *supra* note 112, at 36).

114. See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1515 (1981) ("The workplace, portrayed as a self-contained mini-democracy, becomes in the industrial pluralist theory an island of self-rule whose self-regulating mechanisms must not be disrupted by judicial intervention or other scrutiny by outsiders."); Dean, *supra* note 29, at 2186 (stating that the "link between democracy and corruption is problematic" and that "perhaps to a fault, the Landrum-Griffin Act attempted to maintain 'minimum interference by Government into the internal affairs of any private organization.'") (quoting S. REP. NO. 86-187, at 7 (1959)). Society's policy of minimizing interference into internal union affairs long predates the passage of the Landrum-Griffin Act. See Pritchard, *supra* note 106, at 996; Clyde W. Summers, *Legal Limitations of Union Discipline*, 64 HARV. L. REV. 1049, 1050–51 (1951)[hereinafter Summers, *Legal*].

115. See 29 C.F.R. § 452.3 (2002); Kannar *supra* note 106, at 1675; see also Local No. 82,

suade courts to authorize union rules against allowing outside financing of union campaigns.¹¹⁶ Third, it was crucial to the requirement that union members exhaust internal union remedies before they can bring a court action against their union for violating their due process rights.¹¹⁷ Fourth, it also played a role in forming Landrum-Griffin's rule that election results will not be disturbed absent a clear showing that the election law violation altered the election's outcome.¹¹⁸ Finally, the reluctance to intervene is arguably also revealed in Landrum-Griffin's policy of providing relief to election law violations only *after*, and not *before*, the elections occur.¹¹⁹ These policies, largely motivated by a solicitousness to union democracy, have augmented and helped to ossify the power of union officials.¹²⁰

This same concern has also created tensions with the RICO trusteeships that have played such an important role in actually eradicating the most intransigent union corruption.¹²¹ Many have criticized the trusteeships on the grounds that they are undemocratic usurpations of the right of members to choose their leadership.¹²² Defenders of the trusteeships reject the notion that the trusteeships displaced democracy.¹²³ In unions placed into federal trusteeship, the defenders argue, corruption had already killed every last vestige of democracy.¹²⁴ This argument entirely misses the more fundamental point. Irrespective of whether there was any democracy for the trusteeships to displace, the trusteeships have proven to be the only method to meet with appreciable success for ban-

Furniture & Piano Moving v. Crowley, 467 U.S. 526, 545–46 (1984).

116. See *United Steelworkers v. Sadlowski*, 457 U.S. 102, 111, 112 (1982) (reviewing union rule barring 'outsider' funding of union election campaigns under rational basis scrutiny, the most permissive level of scrutiny, even though § 101(a)(2) of Landrum-Griffin "restate[d] a principle of First Amendment value" and burdens on First Amendment rights are usually reviewed under strict scrutiny).

117. See 29 U.S.C. §§ 411(a)(4), 482(a) (2000).

118. See 29 U.S.C. § 482(a); Cox, *supra* note 18, at 633.

119. See 29 U.S.C. §§ 482(a), 483; *Crowley*, 467 U.S. at 545–47 (holding that Title I rights can be remedied by a private action in federal courts only if the action does not seek to invalidate the election); Peter J. Loughran, *Contesting Misuse of Union Funds in Union Election Challenges: Expanded Remedies Under Title V of the Labor-Management Reporting and Disclosure Act*, 22 COLUM. J.L. & SOC. PROBS. 181, 190–91 n.61 (1988).

120. Loughran, *supra* note 119, at 196–98 (urging that union members' rights to private remedies be expanded).

121. Pritchard, *supra* note 106, at 1009.

122. *Id.* ("[A] court must realize the inherently dictatorial nature of a court-imposed decree can be antithetical to the needs of labor democracy.").

123. See Summers, *Trusteeships*, *supra* note 29, at 694.

124. See *id.*

ishing corruption from unions.¹²⁵ It should be disturbing, therefore, that the trusteeships stand in tension with democracy,¹²⁶ since ideally society desires both. That tension exists is indicative of democracy's historic powerlessness against corruption, but also that society's desire for unfettered union democracy has often been an accomplice rather than an enemy of corruption.

Many examples illustrate this point. In the late 1950s, monitors were imposed on the Teamsters.¹²⁷ The monitors ultimately proved a wasted effort.¹²⁸ While the reasons behind the failure of the monitors are varied,¹²⁹ the government's allergy to undue intrusion played a role.¹³⁰ Jimmy Hoffa, Sr. was able to successfully finesse these qualms into a political consensus to terminate the monitorship.¹³¹ While other factors, doubtless, made important contributions to the defeat of the monitorship, governmental compunctions about interference served only to undercut its effectiveness.

This is not to say that the answer lies in increasing interference with union processes. Few would dispute that ideally unions could operate mostly free of government intrusion. The paradox, however, is that through its failure to arrest the problems of union corruption and oligarchical command, union democracy arguably has invited mass intrusion. Because union democracy offers inadequate protection on its own, intervention is often compelled by the perceived need to supplement the regulatory framework. Presumably, if unions could operate with greater fortitude against corruption, the motivation to intervene would disappear.

Another problematic aspect of democracy is that it involves costly collective action.¹³² An official can be installed by appointment quickly and with little fanfare, whereas democratic elections are cumbersome

125. See Mastro et al., *supra* note 111, at 572 (asserting that labor regulations prior to the RICO statute failed to remedy entrenched union corruption); *id.* at 645–46 (urging that RICO must be used to reform unions because these suits have succeeded with great success in recent cases); Tilles, *supra* note 34, at 934 (“Merely providing the tools of democracy, however, has not proved sufficient.”); *id.* at 933 (“[T]he democratic processes incorporated in the Landrum-Griffin Act are not equal to the task of cleaning up a corrupt union.”).

126. Summers, *Trusteeships*, *supra* note 29, at 691 (noting the tension between eliminating corruption and union democracy).

127. Dean, *supra* note 29, at 2168.

128. *Id.*

129. See Tilles, *supra* note 34, at 952–53.

130. *Id.* at 953–54 (“[T]he voluntary approach of the decree limited its effectiveness and made the decree insufficient to overcome the defendant’s resistance to change.”).

131. Comment, *Monitors: A New Equitable Remedy?*, 70 YALE L.J. 103, 120–21 (1960–1961).

132. Kleiner & Pilarski, *supra* note 18, at 107.

and costly endeavors.¹³³ They usually require the production, mailing, and re-mailing of ballots, a mass convergence of the members on a polling place, and the rather elaborate process of ballot counting.¹³⁴ Furthermore, voting is essentially an exercise in coordinating mass groups of people, where each side attempts to coordinate a majority of members to make a particular vote during the election period. While persuasion can operate as an effective means of coordinating a large number of people, it is far more costly than intimidation.¹³⁵ This large cost differential between elicited and illicit democratic tactics may in part explain why unions have been so prone to corruptive influences.¹³⁶

A third problem is that, under the democratic framework, the issue of official corruption will always be counterbalanced by other qualities of the administration.¹³⁷ Members will be forced to choose which they care about more: the leader's corruption or the leader's successes in collective bargaining.¹³⁸ This was seen with leaders like Jimmy Hoffa, Sr. and Gus Bevena who were known both for their corruption and for securing good contractual terms for their members.¹³⁹ When forced to decide which of the qualities mattered more, the membership has consistently preferred to look the other way.¹⁴⁰ The fact that leaders who obtain good contracts for their members are easily forgiven for even gross excesses and indulgent behavior fundamentally challenges the notion that democracy is capable of stemming corruption. At the very least, it can be concluded that democracy is capable of rooting out corruption only in the presence of unsatisfactory collective bargaining results.

133. *See id.*

134. *See id.* at 109 (stating that when all the employees are under "one roof," it is easier and cheaper to campaign).

135. *See Cox, supra* note 18, at 629 (noting the problem of "packing the hall," intimidation, and reprisal in union elections); Mastro et al., *supra* note 111, at 602.

136. Mastro et al., *supra* note 111, at 595-96 (explaining that democratic processes are susceptible to control through the use of violence and intimidation); Summers, *Trusteeships, supra* note 29, at 694 (noting that violence and intimidation can defeat democracy's ability to curb corruption); Marshall, *supra* note 100, at 216 ("Democratic participation in a union means nothing if union officials can intimidate members into relinquishing their rights.").

137. *See Summers, Trusteeships, supra* note 29, at 706 (describing the problem of disbelief of corruption in the face of increased wages and benefits).

138. Strauss, *supra* note 33, at 221 ("[M]embers don't seem particularly upset by corruption as long as their leaders are successful in collective bargaining.").

139. Steven Greenhouse, *Tentative Settlement Is Reached in Maintenance Workers' Strike*, N.Y. TIMES, Feb. 5, 1996, at A1 (noting Bevena's reputation for "deliver[ing] good contracts to his workers").

140. *See Strauss, supra* note 33, at 221 ("With significant exceptions the union movement has shown a high tolerance for corruption.").

The apparent limitations of democracy to arrest union corruption has led some to advocate for viewing RICO civil suits as a supplement to the current regulatory regime.¹⁴¹ Those who embrace this view can credibly claim that the current legal framework, as supplemented, has a proven track record for eradicating corruption.¹⁴² However, note that this scheme, if we are to take it seriously, seems drastically inefficient. Costs include those of the RICO litigation, which often has included broad campaigns by the United States Attorney's office, followed by the cost of the government taking control of the union as it enters receivership.¹⁴³ These costs run not only against the public fisc, but also against the union, which take their toll financially, politically, and psychologically, and often quite expensively.¹⁴⁴ The receivership of the Teamsters, for instance, is already approaching its eighteenth year.¹⁴⁵ In the case of Teamster Local 560, it took years before any real progress in the elimination of corruption was achieved.¹⁴⁶ Thus, even if the supplemented system is ultimately efficacious, its success may come at too high a price.

In over forty years, union democracy has failed to provide a satisfactory answer to corruption. To the contrary, the history following the Landrum-Griffin Act teaches that, under union democracy, solutions to union corruption must come from outside the union, and usually through aggressive government intervention. Accepting that Landrum-Griffin's avowed purpose was to provide unions with the tools to clean their own house,¹⁴⁷ we can conclude that Landrum-Griffin has failed.

141. See Goldberg, *Cleaning*, *supra* note 23, at 1003–06 (discussing the necessary balance between using the least intrusive means to yield the most effective result in ending the corruption of a particular union and providing remedies to transform such a union into a democratic regime); Mastro et al., *supra* note 111, at 572–73 (“Prior to the enactment of the RICO statute, the federal government’s supervision of labor unions principally entailed enforcement of the labor law . . . [T]he RICO statute has given the government a means to change the way corrupt unions elect their officers, discipline their officers and members, and otherwise conduct their operations.”).

142. Mastro et al., *supra* note 111, at 645; Dean, *supra* note 29, at 2194.

143. See Goldberg, *Overview*, *supra* note 25, at 21, 28.

144. See Goldberg, *Cleaning*, *supra* note 23, at 1009 (“Implementation of RICO remedies in union reform litigation can be expensive.”); Goldberg, *Overview*, *supra* note 25, at 28 (discussing the high costs of the RICO remedies on the public and on unions and warning that RICO civil remedies are “powerful and intrusive tools that can easily be misused for the illegitimate purpose of weakening unions”); Dean, *supra* note 29, at 2171–75 (listing several non-pecuniary costs of the RICO trusteeships and arguing for the establishment of a framework for concluding the intervention).

145. Summers, *Trusteeships*, *supra* note 29, at 691.

146. *Id.* at 696–99.

147. See Tilles, *supra* note 34, at 963 (summarizing Senator McClellan’s position on what the Act was intended to accomplish).

In fact, not only has union democracy not served to prevent and eliminate corruption, it has provided reasons for believing that union democracy has been part of the problem.¹⁴⁸ Unions are not separate sovereigns immune from judicial intrusion, yet they have often been treated this way in the name of non-interference and respect for democratic processes. To the extent that union democracy leads courts and government officials to adopt a hands-off view, union democracy has had the effect of fortifying the dominion of union oligarchies, thereby insulating corruption from exposure and eradication. This tendency reveals a central tension within union democracy: As in the real-world, union democracy requires a system of courts willing to intervene aggressively on democracy's behalf. At the same time, however, union democracy requires space for the free play of political forces to produce its own conclusions. To date, a satisfactory balance between these competing demands has not been struck. Until this balance is attained, it will not be clear whether the democracy serves to insulate corruption rather than eliminate it.¹⁴⁹

C. Effectiveness

Does democracy make unions function better? Traditionally, there are two answers. One answer responds that democracy supplies better collective bargaining results by increasing the leader's responsiveness as well as the membership's levels of militancy, solidarity, and resolve.¹⁵⁰ However, the opposite view notes that democracy is inherently fractious, dividing unions according to the membership's allegiance to particular leaders or parties.¹⁵¹ This divisiveness, in turn, exacerbates costs of decision-making by undermining the leadership's confidence in quick and

148. Certainly, I do not mean to argue that Landrum-Griffin has *caused* corruption. Indeed, corruption has been pervasive in some sectors of labor since before 1900. See Goldberg, *Cleaning*, *supra* note 23, at 913 (citing JOHN HUTCHINSON, *THE IMPERFECT UNION: A HISTORY OF CORRUPTION IN AMERICAN TRADE UNIONS* 383-84 (1970)). I contend only that democracy hindered its elimination.

149. It should be noted how this conclusion differs from that reached on the question of responsiveness. The conclusion that union democracy has and will likely continue to perform as a poor guardian against corruption applies to both local and international unions. Entrenched corruption has pervaded both. On both levels, democracy contends with substantial collective action costs while courts and government officials have been reluctant to intervene into internal union affairs. Consequently, the failure of union democracy in respect to corruption exists across the board.

150. See Feldman, *supra* note 30, at 578-79; Kleiner & Pilarski, *supra* note 18, at 107-08.

151. See Robert Bruno, *Democratic Goods: Teamster Reform and Collective Bargaining Outcomes*, 21 J. LAB. RES. 83, 90 (2000); Fraser, *supra* note 112, at 35; Goldberg, *Overview*, *supra* note 25, at 19; Richard W. Hurd, *Professional Employees and Union Democracy: From Control to Chaos*, 21 J. LAB. RES. 103, 105; Schwab, *supra* note 38, at 406-07; Strauss, *supra* note 33, at 212.

decisive action.¹⁵² Instead, the leadership may be dissuaded from making unpopular decisions or may be hesitant about making decisions for fear of fueling opposition. So which of these views is right?

The first claim is that democracy makes unions better by making them more responsive.¹⁵³ Without question, responsiveness is a necessary ingredient of union success. This is especially so when it comes to strikes. For example, before going on strike against UPS, the International Brotherhood of the Teamsters conducted extensive polling to determine its members' priorities.¹⁵⁴ The union was well aware that it might be forced to strike in order to obtain the best possible contract.¹⁵⁵ Realizing that if it did adopt demands which resounded with its members, the members would hardly be willing to shoulder all the burdens, anxieties, and public opprobrium that striking provokes.¹⁵⁶ In this case, UPS's failure to appreciate the responsiveness of the Teamsters proved a fatal miscalculation. The strike was authorized by ninety-five percent of the Teamster membership, and during the fifteen-day strike, only a small percentage of the membership crossed the picket line.¹⁵⁷ If the strike was fought over matters less cherished, it probably would not have succeeded.¹⁵⁸

However, the basic point that responsiveness plays a crucial role in successfully running a union still leaves open the question of whether democracy significantly contributes to responsive leadership. This question was addressed above in Part II.A with the conclusion that union democracy generally under performs as a supplier of responsive leadership. The example of the Teamsters-UPS strike makes a second point about democracy and responsiveness. The strike demonstrates that union leaders can gauge member preferences through methods other than democratic elections. The vigorous solicitation of member preferences by the Carey administration offers at least one alternative. Moreover, it illustrates that an administration intent on successful operation of the union will heed natural incentives to act responsively. The lesson, quite simply, is that democracy is not the only path to the responsive leadership.

152. See Fraser, *supra* note 112, at 38; Schwab, *supra* note 38, at 406; Strauss, *supra* note 33, at 212.

153. Kleiner & Pilarski, *supra* note 18, at 107-08.

154. Steven Greenhouse, *Yearlong Effort Key to Success for Teamsters*, N.Y. TIMES, Aug. 25, 1997, at A1.

155. *Id.*

156. *See id.*

157. *Id.*

158. *See id.*

The second claim is that union democracy makes for more effective unions by instilling in the membership a spirit of militancy, commitment, and resolve.¹⁵⁹ Advocates allege that democracy gives union members an important identity interest in the union and a sense of collective solidarity.¹⁶⁰ The resulting cohesion and unity give the union formidable leverage against the employer.¹⁶¹ When the union threatens to strike or to otherwise disrupt the employer's business, the employer believes the threat will be carried out.¹⁶² Accordingly, democratic unions should be more effective in obtaining economic gains for its members. Anecdotally, at least, these predictions have been confirmed.¹⁶³

A comparison of two UAW locals conducted by Morris Kleiner and Adam Pilarski found that a number of bargaining results were specifically attributable to the union's style of management.¹⁶⁴ Kleiner and Pilarski compared UAW Local 148 to Local 887.¹⁶⁵ Local 887 was autocratically run,¹⁶⁶ while Local 148 was rollickingly democratic.¹⁶⁷ By most other factors, Locals 148 and 887 were substantially similar.¹⁶⁸ Because of their similarity, the differences in each local's bargaining tactics and bargaining results are quite striking.

Local 148 engaged in three strikes and one long work-to-rule¹⁶⁹ action during the period, compared to Local 887, which conducted none.¹⁷⁰ As to bargaining results, Kleiner and Pilarski concluded as follows: "Based on the collective bargaining agreements for both unions and vir-

159. See Feldman, *supra* note 30, at 578.

160. See *id.* at 568, 570.

161. See *id.* at 578–79.

162. *Id.* at 518.

163. See *id.* at 579.

164. Kleiner & Pilarski, *supra* note 18, 115.

165. *Id.* at 115.

166. See *id.* at 109–10. From the 1970s to the 1990s, the presidency changed only three times; each time, the president left the office voluntarily rather than through electoral defeat. *Id.*

167. *Id.* at 108, 110–15. In Local 148, no president served for more than two terms, and only one president managed to serve two terms consecutively. The elections for all major offices were close, tightly contested and the membership exhibited high rates of activism and militancy. *Id.*

168. See *id.* at 108–09. For instance, both unions served in airplane manufacturing facilities in southern California. A factor which may have significantly contributed to higher levels of democracy in Local 148 is that the union served a single location shop. Local 887 was an amalgamated union, meaning that it served many different locations so that the members were spread throughout a larger geographical area. *Id.*

169. *Id.* at 111. A work-to-rule campaign is a form of work slowdown; the slowdown occurs because workers insist on strict and precise adherence to all work rules and regulations. See generally James P. Miller, *Work Week: A Special News Report About Life on the Job*, WALL ST. J., Nov. 9, 1999, at A1 (explaining a work-to-rule campaign by employees of Cipsco, Inc.).

170. Kleiner & Pilarski, *supra* note 18, at 116.

tually all other measures of union success . . . our results show that unionists at Local 148 did better than those at 887.”¹⁷¹

Robert Bruno also found a correlation between union democracy and union success.¹⁷² Bruno examined the changes which took place in Teamsters Local 705 as it made the transition from “undemocratic, corrupt, elite-rule to rank-and-file responsiveness.”¹⁷³ Bruno found that the union became more aggressive in prosecuting grievances and arbitration.¹⁷⁴ The number of grievances quadrupled, with the union securing a positive outcome forty-two percent of the time.¹⁷⁵ Since 1995, the union collected approximately \$2 million in arbitration and labor board awards.¹⁷⁶ The quality of the contracts negotiated by the union, “by every imaginable standard . . . were significantly superior to the ones they succeeded,” including the first wage improvements in over half a decade.¹⁷⁷ Lastly, union organizing increased. By 1997, the union had 2,500 new members. In early 1998, the union won thirteen elections, losing only four.¹⁷⁸

However, Kleiner and Pilarski also identified a down-side of union democracy. Local 148, the more militant and democratic union, engaged in tactics that facilitated a reduction of jobs at the jobsite.¹⁷⁹ Fed up with the combative labor relations, the employer, Douglas Aircraft, eliminated jobs by increasing its reliance on outside contracting, establishing new production facilities in neighboring states and offshore, and ultimately, selling the company to its competitor, Boeing.¹⁸⁰ Another frequently alleged cost of union democracy is the cost of decision-making.¹⁸¹ Evocative of the early Twentieth Century debate between enlightened government and strong men who could “make the train run on time,” Steve Fraser, for instance, argues that real democracy would leave unions hobbled and unable to compete with their disciplined, fast moving, efficiently run corporate opponents.¹⁸² If unions were actually democratic, their leadership would be volatile, they would be unable to

171. *Id.*

172. Bruno, *supra* note 151, at 84, 99.

173. *Id.* at 84.

174. *Id.* at 92.

175. *Id.* at 98.

176. *Id.*

177. *Id.* at 95.

178. *Id.* at 96.

179. Kleiner & Pilarski, *supra* note 18, at 117.

180. *Id.*

181. *See, e.g.*, Fraser, *supra* note 112; Kleiner & Pilarski, *supra* note 18.

182. Fraser, *supra* note 112, at 34.

engage in long-term strategy, and leaders would be hampered in acting decisively in the face of rapidly changing situations.¹⁸³ By contrast, oligarchies are stable, well-operating regimes. Because leaders feel secure in power, they are not paralyzed by concerns over potentially unpopular decisions and are not mired in the political intrigues of democratic competition.¹⁸⁴ Democracy makes nice rhetoric, Fraser notes, but will not produce well-functioning unions.¹⁸⁵

Fraser's argument that autocracy makes for effective unions enjoys some historic support. Jimmy Hoffa, Sr., it is important to remember, continues to be revered not because he was corrupt and ruled with an iron-fist, but because in 1964 he negotiated the first nationwide trucking contract in the nation's history, an accomplishment that revolutionized what it meant to be a trucker in this country.¹⁸⁶ Similarly, Gus Bevena was popular because he negotiated good contracts.¹⁸⁷ The downside of autocracy, however, which Fraser does not directly address, is how to protect against the corruption which frequently accompanies it.

Fraser's other argument, that union democracy can undermine a union's effectiveness,¹⁸⁸ is also anecdotally supportable. Richard Hurd used the Professional Air Traffic Controllers Organization ("PATCO") and League of Creative Artists ("LCA")¹⁸⁹ to point out the difficulties that arise when the union is controlled by rank-and-file insurgents.¹⁹⁰ Although these insurgent power-grabs began with the purpose of restoring democracy, they had the effect of severely crippling the unions when democratic participation interfered with the leadership's ability to set the direction of the union.¹⁹¹ In the case of PATCO, the result was a disastrous strike failure.¹⁹² With the LCA, the insurgent rank-and-file leadership marginalized the role of the union staff to such an extent that daily operations became sclerotic, paralyzed by constant interference by the elected assembly.¹⁹³ As a result, contract negotiation suffered, the mem-

183. *See id.* at 35.

184. *See id.* at 38.

185. *Id.* at 35, 39.

186. Philip Dine, *Turmoil Engulfs Teamsters Election*, ST. LOUIS POST-DISPATCH, Aug. 2, 1998, at E1.

187. Estreicher, *supra* note 3, at 510.

188. *See* Fraser, *supra* note 112, at 34.

189. The LCA is a fictitious name which Hurd used to protect the anonymity and confidences of the real union examined in the article. Hurd, *supra* note 151, at 109.

190. *Id.* at 111.

191. *Id.*

192. *Id.* at 109.

193. *Id.* at 112-13.

bership became increasingly dissatisfied and even hostile, and the union's staff was demoralized and subject to high rates of turnover.¹⁹⁴

Hurd compares the bleak results of the PATCO and LCA cases with the situation of the American Federation of Teachers ("AFT"),¹⁹⁵ a useful point of contrast because the AFT is also a professional union. Though admittedly oligarchical and tightly controlled from the top down, the AFT enjoys the benefits of efficient operation and smooth succession.¹⁹⁶ The comparison warns against emphasizing democratic control at the expense of effective management by union staffs, and implies that increased staff control may offer the benefit of efficient operation.

From the current scholarship, one can conclude that unions who enjoy functioning democratic processes achieve marked success, especially in the short term. However, democratic unions appear particularly susceptible to volatility. In the case of UAW Local 148, the more militant presidents arguably engaged in tactics that ultimately proved unwise by permanently alienating management. In the case of the LCA, democracy led to chaotic disorders from which the union proved unable to recover. The reality of union democracy seems to possess both the capacity for militant activism and aggressive bargaining, but also for imprudent and somewhat uncontrolled behavior.

D. Value-Based Arguments—Industrial Pluralism

The ideal of the democratic union arose from a school of thought called industrial pluralism.¹⁹⁷ More than a theory of union management, industrial pluralism espouses a comprehensive vision for integrating democratic values into the modern industrial world. The thrust of industrial pluralism is that democracy's ideals of self-rule and equality are equally applicable to the workplace as they are to the government.¹⁹⁸ Just as a

194. *Id.* at 112.

195. *Id.* at 108.

196. *Id.*

197. See generally LEISERSON, *supra* note 34, at 283 (explaining how industrial democracy works); Clyde W. Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29 (1979) [hereinafter Summers, *Industrial*] (arguing that possibilities other than collective bargaining should be explored in order to achieve industrial democracy); Van Wezel Stone, *supra* note 114, at 1514–16 (discussing the theory of industrial pluralism).

198. See Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947* (pt. 1), 61 HARV. L. REV. 1, 1 (1947–1948) (noting that collective bargaining finds its "roots in the ideals of self-rule and government according to law" and stating that "[b]y this collective bargaining the employee shares through his chosen representatives in fixing the conditions under which he works, and a rule of the law is substituted for absolute authority").

government run according to unaccountable, dictatorial control is incompatible with fundamental human rights, so too is unaccountable, dictatorial operation of the workplace. Thus, when labor scholars write of bringing the rule of law to the workplace¹⁹⁹ or supplanting the employer's arbitrary will with the collective bargaining agreement's governing body of law,²⁰⁰ they are not just drawing illustrative comparisons. Rather, they are relying on commonly accepted political values to argue in favor of collective bargaining. Union democracy is not to be understood as analogous to political democracy; it is part and parcel of political democracy as understood in a robust form.²⁰¹

Although he does not explicitly refer to the theory of industrial pluralism, Estreicher implicitly discounts any claim that union democracy is morally compelled.²⁰² He argues that any benefit union democracy may provide is largely insubstantial and unwanted. He also contends that most employees join unions to obtain largely pecuniary advantages such as higher wages, greater benefits, and more job security.²⁰³ Workers also

199. Cox, *supra* note 18, at 609.

200. Summers, *Privatization*, *supra* note 18, at 698.

201. Summers explained:

Through collective bargaining employees would have an effective voice, would be able to protect their own interests, and would achieve human dignity. They would find freedom from the autocratic control of employers, and unilateral dictation would be replaced by mutually accepted rules. The divine right of employers would give way to democratic industrial government.

Summers, *Industrial*, *supra* note 197, at 34. Note how in this elocution, Summers seamlessly derives the right to collectively bargain from the foundational values that support our political democracy. Summers is not comparing the right to collectively bargain to a human right, he is presenting it as one. Other normative arguments are worth noting. Some advocates argue that union democracy is needed to fulfill the union's unique role as the primary political organ for working-class citizens. Goldberg, *Overview*, *supra* note 25, at 29. Some say that unions must be democratic in order to provide members with proper political representation and to offer members political training. Cox, *supra* note 18, at 610; Goldberg, *Overview*, *supra* note 25, at 29; Strauss, *supra* note 33, at 211–12. It has also been claimed that unions are obligated to follow democratic processes because they derive their power from the authority of a democratic state. Goldberg, *Overview*, *supra* note 25, at 18.

202. Estreicher, *supra* note 3, at 510–11. Fraser, albeit more subtly, makes a similar point. Suggesting that advocates of union democracy actually lament “the vanished and much mythologized world of guild democracy,” Fraser strongly insinuates that support for union democracy is either anachronistic or fanciful sentimentalization. Fraser, *supra* note 112, at 34–35. Fraser also makes other notable arguments against union democracy. First, he charges that democracy has been used by the labor movement's enemies to justify debilitating governmental intrusions into union operations. *Id.* at 33. Second, he points out the role union democracy has played in labor's shameful affliction with racial and gender prejudice. *Id.* at 35. Further, he turns on its head the argument that union democracy is an essential ingredient of political democracy. To the contrary, he argues, what is important to democracy are unions themselves. To the extent that union democracy disadvantages and weakens unions, political democracy is made poorer: “If there is no democracy within unions, there is no democracy without them.” *Id.* at 34.

203. Estreicher, *supra* note 3, at 510.

want a greater say in determining their work conditions, but union democracy, as long as it does not guarantee the right of employees to ratify collective bargaining agreements, does not necessarily deliver it.²⁰⁴ Democracy, he argues, is an empty value in itself.²⁰⁵ The real value of democracy is responsiveness; so as long as collective bargaining representatives are responsive to membership concerns, the representative satisfies employee desires.²⁰⁶ But the democratic processes of a union, without more, provide nothing intrinsically important to members.²⁰⁷

Like Estreicher, I accept the fundamental importance of responsive union management.²⁰⁸ Therefore, the question is, whether democracy is merely a means to the end of responsive union management, or whether democratic processes are the ends in themselves. If democracy is just a means to responsive management, any mechanism that obtains responsiveness would be just as suitable.²⁰⁹

204. See Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 797–98 (1983–1984).

205. Estreicher, *supra* note 3, at 501, 502.

206. An important difference between Estreicher's and Fraser's arguments should be noted. Although Estreicher rejects the idea that collective bargaining agents must be democratic, he does not disturb the expectation that bargaining agents be responsive. *Id.* at 504. One of Estreicher's central aims is to present an alternative to democratic unionism that preserves responsiveness. *Id.* Fraser, on the other hand, expresses no compunctions about exchanging responsive unions for unions better prepared to do combat with employers. See Fraser, *supra* note 112, at 38. In Fraser's somewhat *real politick* view, union responsiveness is worth subordinating to the end of "serious democratic advance." *Id.* at 39. Fraser's position is quite controversial. See Stanley Aronowitz, et al., *Unions and Democracy: Replies to Steve Fraser*, DISSENT, Winter 1999, at 81. Aronowitz, Benson and Haskell's argument can be restated that the only input into the terms of the collective bargaining agreement, much less the goals and strategies of the union to which the employees are entitled, is the option of decertifying their union. This view is a significant departure from the dominant view of the relationship between unions and members. Aronowitz describes Fraser's view as one where "officials . . . operate as enlightened despots and view union members as mere clients." *Id.* Fraser's view might possibly be described a third way, as perhaps a field commander model of unionism.

207. Estreicher, *supra* note 3, at 504.

208. In contrast, the normative arguments pose significant moral challenges to Fraser's argument that responsiveness should be an ancillary goal of unionism. What is more, these moral snags translate quickly into substantial political hurdles. It is not only some of the labor movement's supporters who would object to the contention that any union, democratic or otherwise, is better than no union at all. The fact remains that a particular segment of the national polity remains stubbornly unreconciled with unionism's legitimacy after nearly two centuries of trade-unionism. See Danny Hakim, *Big Loss at Nissan Seems to Undercut U.A.W. Objectives*, N.Y. TIMES, Oct. 5, 2001, at B3 (For example, Smyrna, a town in Tennessee is "a Southern environment with less of a union culture.") (quoting Steve Babson, a labor program specialist at Wayne State University). For this segment of the country, the idea of union leaders with the kind of barely restrained domination depicted by Fraser is all but unthinkable.

209. See Hyde, *supra* note 204, at 795. Hyde describes the "elitist model" as a model in which "democracy is never favored for its own sake. It is rather a means to some other end, justified by policy, not principle." *Id.* However, Hyde also notes that "[p]olls of the membership may assist the

A sufficient answer to the question begins by specifying exactly what purposes voting serves. Voting serves at least three purposes. First, it acts as a monitoring device.²¹⁰ Second, it aggregates the preferences of those voting.²¹¹ Third, it allows everyone in the population an opportunity to provide input into the decision.²¹² The effectiveness of voting as a monitoring device is contingent on, and is often significantly hampered by, the voters' capacity to be informed about the conduct of officials.²¹³ If the voters are uninformed, the monitoring function is altogether emasculated. As a method for aggregating preferences, the election of an official is less than perfect and somewhat clumsy. Rather than permitting voters the unfettered opportunity to express their predilections, it forces voters to discriminate in favor of those preferences that a particular candidate satisfies at the expense of those preferences the candidate does not.²¹⁴ In this regard, polling does a superior job as compared to the election of officials. Also noteworthy, polling accords everyone an equal opportunity to contribute.²¹⁵ The greatest limitation on polling is that it is effective only in the presence of a mechanism for enforcing the poll's outcomes. Regardless of such a limitation, polling has demonstrated that adequate substitutes to election balloting are at least possible.

It is difficult to fault industrial pluralists for presuming that voting is the best method for arriving at responsive leadership, since we make the same presumption when we select political leadership. Notwithstanding this presumption, one does not have to concede that voting is the *sine qua non* of responsive management, for certainly, in various settings, society employs other devices.²¹⁶ For instance, Estreicher quite correctly points out that we generally trust market competition to facilitate responsive behavior by commodity producers and service providers.²¹⁷ Operating a company as a not-for-profit entity is another method, appropriate to those setting where asymmetries of information and conflicts of interest lead to the perception that the profit-motive is corrosive to responsiveness, rather than instrumental to it. Many of these non-profit models rely largely on disinterestedness, i.e., minimizing conflicts, in order to induce

leaders' formation of demands; expressions of public support from the membership may strengthen the leaders' negotiating position." *Id.*

210. *See id.* at 843.

211. *See id.* at 846.

212. *See id.* at 845.

213. *See id.* at 843.

214. *See id.*

215. *See, e.g., id.* at 795.

216. *See Estreicher, supra* note 3, at 505, 507.

217. *See id.* at 511.

responsive conduct.²¹⁸ These examples show that, at a minimum, we can conclude that society does not require voting in every situation where it desires a responsive outcome.

The question then must be whether voting, if not strictly necessary, is the appropriate strategy for obtaining responsive management in unions. Thus, the value-based arguments for union democracy end up posing the same question that was asked in Part II.A, i.e., does the citizen model produce responsive management? As argued in that section, the evidence from over forty years of Landrum-Griffin indicates that union democracy under-performs, largely due to a lack of competitiveness in the election processes. The answer, therefore, must come down to the question of better alternatives.

E. Conclusions on Union Democracy

As critics have shown, there are many reasons to be skeptical of union democracy. Most commentators agree that union democracy has failed to operate as it was originally envisioned. It seems rarely practiced. Yet, when it is practiced, it is usually more anemic and less responsive than any of the advocates of union democracy intended. Union democracy has played little to no role in eliminating union corruption, and more often has stood as an obstacle to uprooting corrupt elements. It is also unclear that union democracy, when actually practiced, produces desirable results for unions or their members. Examples like those of the Writers' Union and the Machinists strongly suggest that union democracy produces undesirable results. These facts feed into deep suspicions that unions may not be especially suited for union democracy.

This theory can lead to at least three reactions. First, one can ask how union democracy may be improved.²¹⁹ This, however, is unsatisfactory. As argued above, the obstacles preventing success are fundamental and are not readily susceptible to reform. Moreover, the evidence presented in Part II.C, suggests that increased union democracy may produce an entirely new set of problems.

A second reaction, therefore, is to look for alternatives to union democracy. This is the path Estreicher has taken by proposing a system of free market competition between collective bargaining representatives.²²⁰ His alternative is discussed in the next section.

218. *See id.* at 515.

219. *Id.* at 501–02.

220. *See id.* at 516.

A third reaction acknowledges union democracy's shortcomings as insuperable, but then asks, "What implications do union democracy's failings have for other aspects of collective bargaining and union management?" This is the reaction I have had, and it points the way to the path I pursue in Section IV.

III. EVALUATING THE DEREGULATION OF UNION DEMOCRACY

A. The Proposal

In *Deregulating Union Democracy*, Samuel Estreicher proposes a number of modifications to the existing federal labor law.²²¹ First, provisions in the law requiring that unions incorporate a particular structural form should be repealed.²²² Landrum-Griffin would not necessarily be abrogated; instead its obligations would become voluntary.²²³ With the law coolly impassive about the structure of bargaining representatives, representatives would enjoy greater freedom in selecting their organizational structure and operating procedures.

Second, anti-trust obstacles that prevent for-profit enterprises from operating as collective bargaining representatives must be removed.²²⁴ These changes, it is hoped, will result in the introduction of new forms of bargaining representation, especially for-profit versions.²²⁵ The new entrants will be free to compete with traditional unions and each other, which leads to the second major change to the current system.

Estreicher recommends that bargaining unit employees be granted statutory entitlements to vote on major decisions affecting the bargaining unit, like certifying a representative, setting dues levels, reauthorization votes, declaring an impasse in contract negotiations, contract ratification, and striking.²²⁶ Currently, voting on these issues is a privilege of union membership.²²⁷

Estreicher recommends that the rules governing the certification of bargaining agents should also be relaxed in order to facilitate the easy

221. *Id.* at 503, 516.

222. *See id.* at 516.

223. *Id.*

224. *Id.*

225. *Id.* at 516.

226. *Id.* at 518.

227. *Id.* at 503.

interchange of representatives.²²⁸ He recommends that the NLRB change its definition of a substantial showing of employee support from thirty to ten percent.²²⁹ He also suggests the establishment of a ‘reauthorization vote’ whereby every several years employees would cast votes on whether to retain their representative.²³⁰ As an ‘optional’ feature, Estreicher offers card check certification or an expedited, as opposed to the current protracted, NLRB election.²³¹

The impact of Estreicher’s proposal on the jurisprudence governing the rights of represented employees is not entirely clear. Landrum-Griffin would continue as a source of rights for organized employees, but only for those represented by democratic unions.²³² The duty of fair representation, derived from Congress’ grant to the union of exclusive representation over a bargaining unit,²³³ would remain a source of judicially enforceable rights, as would state law remedies based on the contractual relationships formed between an employee and her representative. In general, however, Estreicher’s proposal would displace most of organized employees’ court-enforceable remedies. In their place, employees would have recourse to a more accessible exit strategy in the form of regular reauthorization votes.

Estreicher’s proposal has dramatic implications for the structure of bargaining representatives. Specifically, he would remove all legal strictures requiring that bargaining representatives comply with any particular structural scheme.²³⁴ Instead, the open competition between bargaining agents would act as the final arbiter over which type of organization best suits the employees’ needs.²³⁵ Democratic unions would not be abolished, but neither would they be required.²³⁶ Oligarchical unions

228. *Id.* at 520.

229. *Id.*

230. *Id.* at 523.

231. *Id.* at 522–23.

232. *Id.* at 519.

233. See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 198 (1944). Without deciding the issue, the *Steele* Court intimated that the duty may be constitutionally compelled. See *id.* at 198 (“[W]ithout any commensurate statutory duty toward its members, constitutional questions arise.”); *id.* at 208–09 (Murphy, J., concurring) (agreeing to interpret the Railway Labor Act as not authorizing the union’s conduct, “[o]therwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect.”); see also *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (applying the duty of fair representation to unions under the NLRA).

234. Estreicher, *supra* note 3, at 502.

235. *Id.* at 526.

236. *Id.* at 502.

could freely exist alongside democracies, individual entrepreneurs, and for-profit investor-financed corporate representatives.²³⁷

Estreicher's proposal of creating a market for union management really constitutes a paradigm shift in how unions are conceived. More than emasculating Landrum-Griffin's democratic requirements, or broadening the Clayton Act's²³⁸ exemption to the Sherman Anti-Trust Act²³⁹ to include for-profit enterprises, the proposal radically transforms the entire enterprise of collective bargaining.

The current regime can be described most aptly as a "Citizen Model" of union management.²⁴⁰ By proposing that society has no interest in the specific organizational framework adopted by collective bargaining agents,²⁴¹ Estreicher would accomplish a theoretical shift. Union members would cease to be citizens of a representational system, and

237. *Id.* at 503.

238. Clayton Act, 15 U.S.C. §§ 12–27 (2000).

239. Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7 (2000).

240. There are several reasons for this description. For instance, the legislative and judicial elements of the legal regime were created with reference to the civil and political rights citizens hold vis-à-vis the federal government. See Goldberg, *Overview*, *supra* note 25, at 22 (explaining that Title I of the Labor-Management Reporting and Disclosure Act guarantees to union members basic rights that are essential to a democratic form of government: freedom of speech, equal treatment and due process similar to the Bill of Rights). In fact, the entire project rests on an ongoing analogy in which employees are viewed as citizens, employers are compared to despotic governments and the union becomes the employees' representative for determining how the work place is governed. See Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 809–10 (1992); see also Van Wezel Stone, *supra* note 114, at 1516 ("[T]he workplace under collective bargaining can be analogized to a political democracy. . ."). Academic commentators have often invoked the power of this analogy to argue for enhancing democracy within unions. For instance, union democracy can be seen as "bring[ing] the 'rule of law' to the workplace. . .," or ending the autocratic rule of the employer. See Carlson, *supra*, at 809–10; Cox, *supra* note 18, at 610; Summers, *American*, *supra* note 84, at 277 ("[T]he purpose of intervention was to make unions responsive to their members, just as democratic government is responsive to its citizens."). In addition, the values which sustain the model are those of democratic government: voice, legitimacy and due process. See Goldberg, *Overview*, *supra* note 25, at 22; Summers, *Trusteeships*, *supra* note 29, at 689–90. See generally Strauss, *supra* note 33, at 211–12 (explaining reasons why democratic values affect unions and why these democratic values are important for unions). Title IV of the Landrum-Griffin Act was based on the Bill of Rights of the United States Constitution and was intended to mirror the "basic human rights on which our very freedom was founded." 105 CONG. REC. S5811 (statement of Sen. McClennan). These rights were intended to carve out space within unions where dialogue about union policy would be free-flowing and vibrant, and where dissent and opposition could become established and institutionalized. See Summers, *Democracy*, *supra* note 20, at 107, 117–18. The Landrum-Griffin Act supports the view that all unions should run democratically and it aims for the "full and active participation by the rank and file in the affairs of the union." See *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 182–83 (1964). As Clyde Summers has written, the Landrum-Griffin Act "seeks to keep ever-present the rudimentary instruments of self-government and to protect those who would assert their rights of citizenship within the union." Summers, *American*, *supra* note 84, at 300.

241. Estreicher, *supra* note 3, at 516.

collective bargaining would no longer implement the rule of law in the workplace. Under Estreicher's program, bargaining representatives are transmuted into fungible service providers, and union members into consumers whose preferences are expressed by the dollars they pay to their chosen collective bargaining agent. Collective bargaining is subsumed into the commodity form—a good peddled by representatives competing to provide preferred services for the lowest price.²⁴² In short, Estreicher proposes to place the collective bargaining representative into a Consumer Model.

Estreicher's deregulation proposal, therefore, differs significantly from conventional deregulation proposals. By more than stripping away substantial government regulation or transferring a public service to the private sector, Estreicher's deregulation will create a commodity and a class of consumers where none existed previously. Additionally, by changing the model itself, Estreicher's proposal would alter the questions we ask about union management. The bargaining representation's legitimacy will no longer be a meaningful concern; we might just as soon discuss the legitimacy of the business strategy pursued by a phone company selling long distance service. Quality of the product and price are the only issues which retain any significance, and consumer satisfaction is the only measure which counts.

B. Assessing the Proposal

1. Responsiveness

As noted above, critics frequently allege that union democracy is unlikely to internally generate the incentives to be efficient, corruption-free, and responsive.²⁴³ Since enhancing employee voice has proven un-

242. *Id.* at 516–17. It should be noted that the differing concepts of union ownership affect how a union's finances are described. For instance, according to Donald Martin's scheme, the rents extracted by unions through collective bargaining are described as the union's revenue stream to which the "owner," namely the member, is entitled. See DONALD L. MARTIN, AN OWNERSHIP THEORY OF THE TRADE UNION 72–73, 74 (1980). However, under Estreicher's scheme, a collective bargaining agent's revenue is the money collected in dues. Estreicher, *supra* note 3, at 517–18. The rents derived through collective bargaining are part of the product the union sells. *Id.* Under the current system, a union is most similar in structure to a credit union because its customers, meaning those who benefit from its services, are also its only true owners. Dues, in the current regime, are analogous to taxes or the funds collected by a non-profit. When there is a surplus, the money is simply reinvested in the operation for the owners benefit. See *Id.* at 512–13.

243. Estreicher, *supra* note 3, at 512.

successful, Estreicher argues that the exit option must be pursued.²⁴⁴ Estreicher cites at least two benefits that increasing the opportunity for exit would produce. First, the creation of an outside market for bargaining representation management will reduce agency costs.²⁴⁵ Second, fewer agency costs will improve dwindling employee attitudes towards unions.²⁴⁶

The argument proceeds as follows. Competition is generally recognized as an effective mechanism for assuring efficiency in many business environments.²⁴⁷ In the operation of businesses, the creation of a market for management has helped to minimize agency costs endemic to the corporate structure.²⁴⁸ Union members, it is said, have a natural desire to obtain effective representation at the lowest possible cost.²⁴⁹ Union corruption and other agency costs detract from the value of services provided by unions.²⁵⁰ Thus, if members are accorded greater freedom to select bargaining agents and offered more options from which to choose, the overall quality of union services will increase and agency costs, such as corruption and apathetic union officials, will be eradicated by competition.²⁵¹ Furthermore, in a market, workers will be free to use their dollars to express their preferences and will not be dependent on the responsiveness of any given union.²⁵² Thus, market competition between unions will stem corruption and also improve the quality of the services unions provide.²⁵³

These benefits are accompanied by a conception of collective bargaining purified of any fixation on union democracy's illusory values.²⁵⁴ This will leave bargaining representatives free to concentrate, it is argued, on what employees really want—economic benefits.²⁵⁵

These are significant claims, but do they hold up? There is good reason for skepticism that Estreicher's proposal delivers the economic goods it promises. There are at least three reasons that the proposal, if tried, would fail. First, Estreicher's model is perilously susceptible to

244. *See id.* at 523.

245. *See id.* at 513.

246. *See id.* at 512.

247. *See id.* at 504–05.

248. *See id.* at 513.

249. *Id.* at 508.

250. *See id.* at 513.

251. *See id.* at 503–04.

252. *See id.* at 505.

253. *See id.* at 504.

254. *Id.* at 510.

255. *Id.* at 510–11.

“sweetheart” unions and collective bargaining agreements. Second, a union’s ability to deliver economic goods to its employees depends on the union’s ability to reduce labor market competition. The competition envisioned in Estreicher’s proposal will hamper the bargaining representative’s pursuit of this goal. Lastly, it is likely that a for-profit bargaining representative is precluded due to the oppressive credibility costs involved in introducing a profit-seeking actor in a field where the consumer is essentially incapable of measuring the value of the services she is purchasing.

2. Consumer Model Will Produce “Sweetheart” Contracts

The consumer model would create substantial problems with “sweetheart” unions because it gives the employer too much influence over the selection of a bargaining representative. As Estreicher acknowledges, one potential deficiency with his proposal is the danger that employers will be encouraged to thwart a certified bargaining representative through strategic recalcitrance to negotiating a contract.²⁵⁶ Estreicher rebuts this point by questioning whether this problem is not equally present in the current system.²⁵⁷

However, there are a number of important differences between the consumer model and current law. Under the current system, if a contract has not been reached within a year of certification, an employer can force a new election only by demonstrating a reasonable uncertainty as to whether the union continues to hold majority support.²⁵⁸ Under Estreicher’s proposal, this uncertainty standard could conceivably be watered down because a rival union could force an election upon a showing that a mere ten percent of the unit employees do not support the certified union.²⁵⁹ Granted, having a rival union on the scene distinguishes the situation from one where the employer is simply forcing the union, in the words of the Board in *Levitz*, to “prove its majority repeatedly.”²⁶⁰ Nevertheless, it still implicates the *Levitz* Board’s well-founded concerns with encouraging “disruption of collective bargaining relationships such

256. *Id.* at 526.

257. *Id.*

258. See *Levitz Furniture Co. v. United Food and Commercial Workers Union, Local 101*, 333 N.L.R.B. 717 (2001). However, the employer cannot withdraw recognition unless it can demonstrate that a majority of employees no longer supports the union. See *id.* at 723.

259. Estreicher, *supra* note 3, at 520.

260. *Levitz Furniture Co.*, 333 N.L.R.B. at 728.

elections would entail.”²⁶¹ Thus, this situation poses serious problems even if we do not postulate, as I do *infra*, that the rival is interested in making “sweetheart” deals. Moreover, if Estreicher also intends to lower the threshold for forcing a decertification vote from thirty to ten percent,²⁶² then clearly his system would give the employer more tools with which to frustrate collective-bargaining.

That said, the greater concern is not that employers will try to remove a bargaining representative, but that the employer will attempt to subvert it.²⁶³ A profit-motivated bargaining representative would be offered a clear entrepreneurial opportunity if only they are willing to negotiate contracts that are attractive to employers.²⁶⁴ Employers will obviously prefer these placating representatives over more militant, obstreperous ones, and they will be enthusiastic about replacing more difficult representatives with these “sweetheart” varieties.²⁶⁵ Employers will soon realize that they can accomplish this by stalling first contract situations until the end of the certification year. When the year expires, under Estreicher’s proposal, the “sweetheart” can obtain an election with only ten percent support.²⁶⁶ Together, the “sweetheart” and the employer can campaign against the incumbent with guarantees that the rival will find greater success negotiating a contract than its predecessor. It would take a committed bargaining unit to persevere with the incumbent through such a tactic.

So why is this tactic more likely to occur under the consumer model than under the present one? In part, because of the AFL-CIO “no raid” policy,²⁶⁷ and because profit-seeking unions are the exception and not the norm since under the current regime unions are prevented from formally reaping profits.²⁶⁸ Lowering the ‘substantial showing’ standard from thirty to ten percent contributes to this outcome as well. The most

261. *Id.*

262. Presumably, lowering the threshold to force decertification must be part of Estreicher’s program. Otherwise, it would be easier for a rival union to obtain an election than for the employees, which arguably would be anomalous given that the employees’ right to decertify a union extends from a direct grant of authority, whereas the union’s right is derivative from that of employees. *See* 29 U.S.C. § 157 (2000).

263. Fraser, *supra* note 112, at 35 (“[C]ompetition invites corrupt dealing with businesses always looking for an edge.”).

264. *See* Schwab, *supra* note 38, at 413.

265. *Id.* at 413–14. Schwab compared this strategy to the “white knight” defense against corporate takeovers. *See id.*

266. Estreicher, *supra* note 3, at 520.

267. *Id.* at 514.

268. *See id.* at 515. Although profit-motivated unions are not permitted by law, they do exist in the form of union officials who take bribes or embezzle from union coffers.

significant factor, however, is the employer's knowledge that a whole industry of "sweetheart" bargaining representatives is hovering in the wings, a phone call away, ready to swoop in and relieve the employer from the danger of having to make any serious concession to its employees. The primary danger with the consumer model is that competition among unions is more likely to bring economic benefits to the employer than the employees because it is less costly for a profit-seeking enterprise to cater to the employer's interests. Because the for-profit representative is exclusively interested in increasing its net revenues, there is no countervailing concern motivating the representative to take the represented employees into account.

Describing the phenomenon in general theoretical language, the problem is that collective bargaining representation does not neatly fit the role as commodity. Unlike most other commodities, the choice to purchase it is not a simple decision by a single consumer, nor a simple matter for the majority of the bargaining unit to determine. Instead, the identity of a collective bargaining representative is a compromise drawn between a majority of unit employees and their employer. The current system is frequently criticized for giving the employer too much leverage in a decision where many commentators feel the employer has no legitimate role.²⁶⁹ The consumer model, by treating collective bargaining as if it were a commodity like any other, alters the current system's precarious balance by increasing the number of options available, not only to the employees, but to the employer. This modification is important because it prolongs the process of establishing a representative who is agreeable to both employer and employee; delay—the failure to arrive at a decision—is itself an outcome that serves the employers and frustrates the employees.²⁷⁰ The consumer model creates incentives for the employer to delay by offering the employer an outcome worth struggling for—namely, a "sweetheart" representative.²⁷¹ Additionally, the consumer model gives the employer more tools to frustrate collective bargaining.²⁷² By introducing this incentive, the consumer model strikes a new balance in the process of establishing a bargaining representative, which significantly favors the employer.

269. See Paul Weiler, *Promises to Keep*, 96 HARV. L. REV. 1769, 1813, 1814 (1983) (comparing the employer's role in a union election to Canada's role in a United States election and concluding that "it is hard to see why the employer should be given a role to play in the process by which employees decide in the first place whether they will deal collectively with the employer").

270. See *id.* at 1795.

271. See Schwab, *supra* note 38, at 413.

272. See *id.* at 412–15.

More importantly, the consumer model's susceptibility to "sweetheart" representatives undermines the model's ability to produce its central purported benefit. Estreicher sells the model on the argument that it will deliver the economic goods employees truly want.²⁷³ But 'sweetheart' contracts are favored by employers precisely because they redistribute so minimally.²⁷⁴ If "sweetheart" deals are what the consumer model offers employees, they are better off, economically and otherwise, with a system that offers real contracts along with the "spiritual" goods of union democracy.

3. Integrity

Estreicher's model seems reasonably adapted to reduce the occurrence of unlawful embezzlement. In theory, the competition between unions, to offer the lowest dues, should deny bargaining representatives the opportunity to siphon dues for their own personal gain without exposing themselves to competitive disadvantage. Furthermore, because Estreicher proposes the introduction of for-profit bargaining representatives, the distinction between embezzlement and profit-taking is obscured. Behavior that would be illegal under a non-profit model may be legal in a for-profit setting. However, this does not mean that the model is completely resistant to corruption. At the outset of this article, corruption was differentiated from responsiveness partially to distinguish embezzlement from bribery, even though both are forms of corruption. As explained above, the consumer model offers ample ground for worrying that it will give rise to employers exercising inappropriate influence over unions on a fairly widespread scale.

4. Effectiveness

a. For-Profit Bargaining Representatives are Inherently Inefficient

When Stewart Schwab analyzed the notion of for-profit unions, he concluded that they would be inherently inefficient.²⁷⁵ The first evidence of this was the fact that for-profit unions had generally never arisen at

273. See Estreicher, *supra* note 3.

274. Schwab, *supra* note 38, at 413–14.

275. Schwab, *supra* note 38, at 397–99.

any time in history,²⁷⁶ even before the barriers identified by Estreicher, i.e., the Sherman Anti-Trust Act.²⁷⁷ Second, Schwab concluded that the gains of collective bargaining, because they are public as well as individual goods, are too diffuse to be meaningfully evaluated on an individual basis.²⁷⁸ Thus, it is impossible to tell whether dues fairly reflect the costs of representation or whether employees are being overcharged and union leaders are lining their own pockets. Although product market competition is supposed to address this concern, Schwab thinks it would be inadequate in this case.²⁷⁹ In the sense that each experiment would take at least three years—the length of the NLRB’s contract bar rule²⁸⁰—Schwab is certainly correct that typical product market forces, i.e., the ability of the consumer to compare differing services, is radically impaired in this setting.²⁸¹ It was to overcome this problem, Schwab concludes, that unions have always taken the non-profit form.²⁸²

b. The Consumer Model Will Impede Labor’s Objective of Eliminating Labor Market Competition

Another problem is that the intense competition inherent in the consumer model probably is incompatible with the collective bargaining representative’s need to eliminate labor market competition in order to safeguard the union scale. Unions have traditionally employed two strategies to eliminate wage competition—either the union organizes the entire labor market or it induces non-union employers to agree to honor the union scale.²⁸³ The success of both strategies relies on the union’s ability to maximize the breadth of its influence. While it hardly can be maintained that inter-union competition is necessarily incompatible with mass expansion, there is good reason to think that competition may have the deleterious consequence of discouraging organizing by denying unions the opportunity to recoup the cost of organizing. In his evaluation of

276. *See id.* at 397.

277. Estreicher, *supra* note 3, at 512.

278. Schwab, *supra* note 38, at 398–99. Schwab quite instructively compares the roles of the for-profit sports or entertainment agent to the non-profit collective bargaining representative in those same fields. Whereas the individual has no problem evaluating the services of the entertainment agent, this does not seem to be the case with the collective bargaining agent.

279. *See id.* at 397.

280. *See* General Cable Corp. v. United Elec., Radio & Machine Workers, 139 N.L.R.B. 1123, 1125, 1128 (1962).

281. Schwab, *supra* note 38, at 397.

282. *Id.* (“By eliminating the incentive to divert dues toward greater profits, nonprofit status can give the worker greater confidence that his dues actually go to quality union services.”).

283. *See* Goldberg, *Evaluating*, *supra* note 59, at 1065–66.

the impact of increased competition between collective bargaining representatives, Schwab similarly concluded that some impediments to competition ultimately might be efficient if they had the effect of encouraging organizing.²⁸⁴ The elimination of such protections, in his words, would be a “cure for an anemic market for raids [that] may be worse than the disease itself.”²⁸⁵

This becomes particularly problematic because all units are not created equally. As Estreicher notes, many employees have widely divergent feelings towards unions.²⁸⁶ This differential translates directly into organizing costs. Units with a high percentage of employees who are adverse to unionization will require a greater input of valuable resources to successfully organize, e.g., more organizers to engage in one-on-one appeals, more effort to create tight networks among employees to coordinate the organizing drive, better research determining which issues take the greatest priority with employees, and more money to be spent on publicity counteracting the employer’s campaign. On the other hand, some units are so amply staffed with union veterans, fed-up employees, or solidarity-minded workers that the unit will literally organize itself. In the common union today, the core of a union is composed of these steadfast bargaining units, and from this foundation, unions are able to devote resources expanding their representation to units less hospitable and more costly to organize.

Under Estreicher’s scheme, the best strategy for a profit-maximizing bargaining unit is to parasitically feed off the previously established units. A collective bargaining agent working under this strategy has the clear cost advantage of not devoting resources to the difficult work of organizing new units where workers are more likely to be initially apprehensive or hostile. The agent therefore can attract these units with promises of lower dues while obtaining essentially the same contract as its predecessor. With their core membership base under threat from competition, bargaining representatives intent on broadening their organization will feel compelled to abandon its organizing efforts and dedicate resources to defensively preserving its domain. The result of these competitive pressures is obvious: less organizing.

284. Schwab, *supra* note 38, at 414. Schwab analyzed the effect of reversion clauses that provided for the local’s assets to revert to the international if the local disaffiliated from the international. Schwab concluded that these provisions had the overall effect of “encouraging internationals to invest in organizing new locals.” *Id.*

285. *Id.*

286. Estreicher, *supra* note 3, at 512.

Restriction of the labor market competition by expanding the portion of the private sector governed by collective bargaining agreements is an essential component of collective bargaining. The benefits are plain, but they are also prospective and indirect. They conceivably consist of better wages, benefits, and working conditions, but better conditions in the future. The mere fact the benefits are prospective, without more, should not necessarily mean that employees will be indifferent to them. Theoretically, employees could perform the calculus determining whether the higher dues attached to greater organizing efforts are worth the speculative future benefits derived from reduced labor market competition. In reality, however, there is reason to doubt this will occur or will even be possible.

Under the consumer model, organizing new units comes to look like an act of charity. Collective bargaining agents who organize will put themselves at a competitive disadvantage in terms of the dues they can charge. Although the agent should receive new revenues in the form of dues from the new unit, the benefit is short-lived. When the reauthorization vote comes, the collective bargaining agent will face competition from some parasitic competitor offering lower dues. If we assume the scheme includes card-check certification, then the reauthorization vote will present the employer with its first opportunity to commence the counter-campaign. If we do not assume the card-check certification, then at reauthorization the employer could well launch its second offensive against the collective bargaining agent. Therefore, it seems unlikely that organizing will be a net-revenue producing venture in the consumer model.

c. Credibility Costs Will Prevent a For-Profit Representative from Organizing

Since new organizing will not pay for itself, it will have to be financed by units secure from the external threat of the employer or other unions. The collective bargaining agent will then have to persuade these secure units that the dues attributable to organizing expenses yields benefits justifying the costs. If the agent is a for-profit entity, it will be incapable of convincingly making this case. The unit members will have ample reason to suspect that the for-profit bargaining agent is simply seeking higher dues to increase its net revenues. It may be prohibitively expensive for the for-profit agent to dispel these suspicions.²⁸⁷ Short of

287. See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 228 (1996); Schwab, *supra*

permitting the members to review the agent's financial records or visit the other workplaces being organized, the member may never be convinced that their money is being put to uses beneficial to them. Thus, relying on Henry Hansmann's framework, the costs of contracting are too high for ownership to be efficiently given to investors.²⁸⁸ This credibility gap likely will ensure that only bargaining agents with a non-profit structure protecting against gross opportunism will be able to engage in organizing. But even for non-profit agents, it will be difficult to compete with non-organizing agents by persuading existing members that they will benefit from organizing.

Lastly, it must be mentioned that something less quantifiable would be lost in Estreicher's scheme. The competitive mentality of the consumer model, where employees and bargaining agents each strive to maximize their advantage over the other, would corrode the trust inherent to the proposition that the individual benefits through the collective good. However, this proposition is essentially what is required for a union member to agree that organizing another group of workers will eventually produce dividends for them. This necessary trust is completely dissolved in the case of a for-profit bargaining representative and, even outside of the for-profit context, it is significantly undermined by a model that encourages employees to play one representative off the other to maximize their individual position.

C. Conclusion on the Consumer Model

Most of my attacks concentrated on the introduction of for-profit bargaining representatives. If my arguments are correct that the for-profit structure is inherently inefficient for collective bargaining, enterprises of this type would not be successful and would not proliferate. Accordingly, it might seem that Estreicher's amendments to the law would merely fail, but not, as I have suggested, do substantial harm to collective bargaining as an institution. But as I have shown, harm to collective bargaining itself is the central worry due to the likely prospect that for-profit bargaining representatives will prosper not by servicing employee demands, but by meeting the improper objectives of employers. On those grounds, for-profit collective bargaining representatives should be rejected.

note 38, at 397.

288. HANSMANN, *supra* note 287, at 228.

The next question, then, is whether Estreicher's approach can stand if we eliminate the proposal to introduce for-profit bargaining representatives? Stripped of that element, Estreicher's plan consists of abrogating the legal force of Landrum-Griffin, lowering the threshold needed for a rival union to challenge an incumbent, and federally protecting the right of all represented employees to vote on the adoption of collective bargaining contracts and strikes. So amended, it is unclear what the virtues of these changes would be.

Certainly, it makes less sense to repeal the legal force of Landrum-Griffin if we are no longer introducing new forms of bargaining representatives. After all, the rationale behind the repeal was to remove the primary obstacle to introducing new forms of representatives. As to lowering the minimum showing needed by a rival union to trigger an election, without the introduction of new for-profit competitors, this proposal would have little impact given that the AFL-CIO's no-raid policy will continue to restrict almost all inter-union raiding. Regardless of whether it expands employees' exit options, federally protecting the right of employees to vote on collective bargaining decisions may be a sensible proposal in its own right. That said, however, it would not constitute a fundamental shift in how unions are managed. Thus, as a plan to transform union management, the rejection of for-profit unions is decisive.

IV. CHOOSING COMPETITION: FORCING MISMANAGED UNIONS TO COMPETE

A. The Current System Under Article XX

Article XX, section 2 of the AFL-CIO Constitution provides that "[e]ach affiliate shall respect the established collective bargaining relationship of every other affiliate. No affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate."²⁸⁹ Article XX further states that "[n]o affiliate shall by agreement or collusion with any employer or by the exercise of economic pressure seek to obtain work for its members as to which an established work relationship exists with any other affiliate, except with the consent of such affiliate."²⁹⁰ Sections 9 through

289. AFL-CIO CONST. art. XX, § 2.

290. *Id.* § 3.

15 set out the procedures for enforcing violations of the Article, which consist of a hearing before an impartial umpire.²⁹¹ The party losing before the umpire can appeal to the AFL-CIO President on the grounds that the umpire's decision was "not compatible with this constitution, or [was] not supported by facts, or is otherwise arbitrary or capricious."²⁹² Section 15 of the Article lists the sanctions the Federation can impose on the offending union.²⁹³

A union can violate section 2 of Article XX in two ways; either it can steal another union's members or it can steal another union's work.²⁹⁴ However, if a union is accused of stealing another union's work, it can defend itself by proving that its members have traditionally performed work of that kind for the employer and obtained the consent of the present union.²⁹⁵ A union can also defend itself with a claim of justification. Additionally, a union can avoid sanctions if it establishes "special and unusual circumstances" that would make it "contrary to basic concepts of trade union morality or to the constitutional objectives of the AFL-CIO or injurious to accepted trade union work standards to enforce the principles [of Article XX]."²⁹⁶ However, the claim of justification must overcome a number of procedural obstacles. First, the raiding union's claim of justification must be made *prior* to conducting the raid.²⁹⁷ Second, the finding of justification can only be made before the AFL-CIO's Executive Council, not the impartial arbitrator.²⁹⁸ Last, and most significantly, a claim of justification will be sustained only if two-thirds of the AFL-CIO's Executive Council vote in favor of the proposed raid; a simple majority will not suffice.²⁹⁹

Section 5 of Article XX provides that "[n]o affiliate shall, in connection with any organizational campaign, circulate or cause to be circulated any charge or report which is designed to bring or has the effect of bringing another affiliate into public disrepute or of otherwise adversely affecting the reputation of such affiliate or the Federation."³⁰⁰ In the decisions enforcing Article XX, this provision has been interpreted to prohibit an affiliate from making defamatory statements about another af-

291. *Id.* §§ 9–15.

292. *Id.* § 12.

293. *Id.* § 15.

294. *Id.* § 2.

295. *Id.* § 3.

296. *Id.* § 4.

297. *Id.* § 17.

298. *Id.*

299. *Id.*

300. *Id.* at 5.

affiliate in the course of any organizing campaign.³⁰¹ In 1986, the AFL-CIO implemented Article XXI, which creates a dispute resolution procedure when two affiliates are attempting to organize the same group of unrepresented employees.³⁰² Though this is not a “raid” situation, Article XX, section 5 applies nonetheless.³⁰³ Thus, a union violates Article XX by publicly disparaging its rival affiliated union in the course of an otherwise permissible organizing contest. By the standards developed under this section, it is generally a violation to accuse another union of corruption or any other form of dishonesty.³⁰⁴ It is permissible, however, to accuse the other union of poor management.³⁰⁵

B. The Proposal to Amend Article XX

Article XX should be amended to allow contests between affiliates whenever the challenger can establish that the incumbent is corrupt, guilty of gross mismanagement, or neglectful. These standards, though broad, are certainly capable of explication, especially by adjudicators genuinely interested in realizing the objectives that undergird these standards.

The ground of “corruption” is straightforward. The law of embezzlement, as well as numerous federal statutes prescribe the fiscal responsibilities of union officials.³⁰⁶ If a union can prove that an incumbent’s officials have violated any of the regulations against corruption, that union should be entitled to challenge the incumbent in an election for recognition or certification over that union’s members. Similarly, associating with individuals known to have ties with organized crime also should be considered proof of corruption.

301. Decisions under Articles XX and XXI of the AFL-CIO Constitution are housed at the organization’s headquarters and are not generally available to the public. The following citations allude to cases in that collection. *See, e.g.*, *American Federation of Government Employees v. International Association of Machinists*, AFL-CIO Case No. 01-1 (Feb.2, 2001) (Lesnick, Umpire); *Office & Professional Employees International Union v. International Union of Electrical Workers*, AFL-CIO Case Nos. 99-71, 99-72 (Nov. 30, 1999) (Weiler, Umpire); *Laborers’ International Union of North America v. American Federation of Teachers*, AFL-CIO Case No. 78-9C (June 5, 1978) (Kleeb, Umpire).

302. AFL-CIO CONST. art. XXI.

303. *Id.* art. XX, § 5.

304. *Id.*

305. *See American Federation of Government Employees*, AFL-CIO Case No. 01-1; *American Federation of State Employees v. International Brotherhood of Teamsters*, AFL-CIO Case No. 91-52 (May 22, 1992) (Weiler, Umpire).

306. *See, e.g.*, 29 U.S.C. §§ 501–502 (2000).

“Guilty of gross mismanagement” is intentionally broad so as to embrace a wide variety of malfeasance.³⁰⁷ Examples might include repeated violations of the duty of fair representation, persistent failures to hold union meetings, repeated violations of the union’s bylaws, repeated commission of unfair labor practices, inept handling of a strike, or wasting of union assets.

“Neglect” indicates that a union is derelict in its responsibilities to aggressively advance its member’s interests.³⁰⁸ Evidence of neglect could include a pattern of failing to bring grievances, or to carry those grievances to arbitration, failing to meaningfully negotiate for improved contract terms during each renewal period, failing to enforce the contract terms against the employer, or failure by the shop steward or business agent to maintain contact with the unit employees for long stretches of time.

Procedures for establishing whether an incumbent is corrupt, mismanaged, or neglectful should be designed to uphold meritorious claims. The impartial umpire should have the authority to find whether the incumbent is guilty of corruption, mismanagement, or neglect. Article XX currently denies the umpire this authority; instead, the umpire’s role is limited to making the factual findings related to the violation of Article XX.³⁰⁹ Authority to rule that a contest is justified is reserved to the Executive Council.³¹⁰ There are two reasons that the umpire is better suited than the Executive Council to make this determination. First, the umpire is, by definition, impartial and therefore well-suited to apply the standards to the facts of the case in good faith.³¹¹ The same cannot be said of the Executive Council. They may have prior or current affiliations with the incumbent or challenger. Moreover, the Executive Council members may tend to have long-term relationships with the AFL-CIO’s affiliates. The desire not to make enemies may improperly influence them not to approve the contest.

The challenger union should bear the burden of proving the incumbent’s corruption, mismanagement, or neglect. However, because only the opportunity to compete with the incumbent hangs in the balance, the

307. *See id.* § 501(b).

308. *See id.*

309. *See* AFL-CIO CONST. art XX, §§ 7, 10.

310. *Id.* § 17.

311. In fact, the AFL’s practice has been to appoint highly respected academics and other reknown labor law experts to serve as umpires in these disputes. These umpires are not only extremely accomplished, but they accumulate specific expertise in these matters through regular retention. *Id.* § 9.

required proof should be no more than a preponderance of the evidence. After all, if the incumbent cannot rebut, at a hearing before an impartial umpire, evidence that it is guilty of corruption, gross mismanagement or neglect, it deservedly should be put to rigors of proving to its members its fitness to continue representing them. Because the umpire's finding would not be a final determination of the union's fitness, and because the rival seeks only the right to get its foot in the door, the quantum of proof should reflect that fact and not be unnecessarily exacting.

Discovery should be extremely limited. If liberal discovery were allowed, rival unions may be tempted to bring groundless claims in order to obtain access to the other union's documents. To prevent this type of opportunistic behavior, discovery should be permitted only upon a showing of good cause. Furthermore, discovery should be limited to document requests, with interrogatories and depositions prohibited. Ideally, the process should be as streamlined and as inexpensive as possible, while still providing a meaningful forum to adjudicate whether a contested election should be allowed. Moreover, the rigorous discovery methods, such as depositions and interrogatories, would not be appropriate here, where, ultimately, all that is at stake is whether a contest between two unions will be allowed.

The Executive Council should retain some jurisdiction over the approval of a contested election between two affiliates. However, this authority should be severely limited. Currently, the Executive Council has the sole authority to determine whether a union is justified in seeking a contested election against another union.³¹² Justification can only be found upon a two-thirds vote by the Executive Council.³¹³ The current procedure is precisely the opposite of what it should be. Instead of a two-thirds majority being necessary to permit a contested election, a two-thirds majority should be required to preclude a contest after an impartial arbiter has found the incumbent guilty of corruption, gross mismanagement, or neglect. This way, the Executive Council can act as a safeguard against misconduct or a miscarriage of justice that might somehow occur before the impartial arbiter, but, its participation should be restricted to just that. By removing the Executive Council from most of the determination of whether a contested election is justified, the proposal also provides the Executive Council with political distance from the decision. Since members of the Executive Council will bear little responsibility for the decision, incumbents who are subjected to an elec-

312. *Id.* § 17.

313. *Id.*

tion contest will have little grounds to blame Executive Council members. These decisions will therefore be less likely to spoil relations between the Council and affiliate members.

Other aspects of Article XX, section 5 also would need to be amended. If an umpire makes an affirmative finding of corruption, mismanagement, or incompetence, the challenging union should be permitted to use this finding in its campaign against the challenger. Currently, a union violates Article XX whenever it makes a statement bringing disrepute on an affiliate union.³¹⁴ Unless these statements refer to specific facts and circumstances, their truthfulness is irrelevant.³¹⁵ Section 5 would need to be amended to provide that a union successfully establishing another union is corrupt, guilty of mismanagement, or neglectful, will not violate section 5 by publicizing the umpire's finding.

A union unsuccessful in establishing that an incumbent is corrupt, guilty of gross mismanagement, or neglectful should be required to recant its accusations in a public fashion designed to repair the reputation of the incumbent. Furthermore, the unsuccessful potential challenger should also bear the incumbent's costs of fending off the rival's challenge. Obviously, these measures are designed to deter frivolous or malicious claims and to protect an innocent union's reputation from being tarnished without just cause.

C. *The Argument for the Amendment*

Unless it were to occur by federal legislation, the only entity with the power to implement this proposal is the AFL-CIO.³¹⁶ Thus, adoption of this proposal clearly requires that the AFL-CIO change its perspective on election challenges between affiliates. It is not difficult to apprehend the rationale behind the AFL-CIO's traditional opposition to competition among allied unions. The notion of unions fighting among themselves for members intuitively seems in tension with labor's ideology of solidarity. The policy was even more sensible in 1953 when the no-raiding compact first was entered between the American Federation of Labor and the Congress of Industrial Unions.³¹⁷ After the two international un-

314. *Id.* § 5.

315. *See* American Federation of Government Employees v. International Association of Machinists, AFL-CIO Case No. 01-1 (Feb. 2, 2001) (Lesnick, Umpire); American Federation of State Employees v. International Brotherhood of Teamsters, AFL-CIO Case No. 91-52 (May 22, 1992) (Weiler, Umpire).

316. *See* AFL-CIO CONST. art. IV, §§ 10, 11.

317. *See* Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L.

ions merged in 1955, Article XX codified the compact into the new organization's constitution.³¹⁸ Prior to the compact, jurisdictional disputes and other raiding was common between the two.³¹⁹ Ending the struggle between the two labor organizations was one of the major benefits of the merger.

However, this proposal does not seek to disturb the idea that, in general, federation members should not waste their resources competing amongst themselves. It is not an argument in favor of unfettered competition between unions. Instead, the idea is that infighting should be permitted when the competition advances the AFL-CIO's other substantive goals. This is why I propose to add exceptions to Article XX instead of advocating its abrogation.

The other substantive goals of the AFL-CIO advanced by this proposal is that of giving the labor movement the capacity to police its own members—borrowing the language of the Landrum-Griffin's sponsors—to clean its own house.³²⁰ The argument can be phrased this simply: Because of the inadequacies of union democracy, the labor movement cannot afford a blanket policy against election contests between federation members. Election challenges must be permitted to supply another avenue for competition because union democracy does not. Phrasing the ar-

REV. 779, 795 n.86 (1992).

318. AFL-CIO CONST. art XX, § 2.

319. See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 645 (1950). The authors note that after Taft-Hartley "divisions within the labor movement and the resulting organizational rivalry were accentuated. Raiding was widespread between right- and left-wing unions even within the CIO, between complying and noncomplying unions, between craft and industrial unions, and between the AFL, the CIO, and the large unaffiliated unions such as District 50 and the Machinists." *Id.* While noting that competition "exert[s] considerable influence for democratic, honest, and effective unionism," the authors cite several detractions as well. *Id.* at 276. Particularly, they point out that American unionism was "more a collection of separate unions than a labor movement." *Id.* at 554. Further, the authors note that "Taft-Hartley encouraged rival union competition and instability in collective bargaining," *id.* at 644, and "became a management 'headache' . . . lev[ying] a heavy tax on management and on public understanding." *Id.* at 277.

320. When it comes to Article XXI, which governs inter-union competition in organizing campaigns, the AFL-CIO has already modified its policies to prioritize larger substantive goals of the labor movement. Specifically, the AFL-CIO now requires that, in resolving a dispute between two affiliates vying to organize a group of workers, the umpire must consider which of the two unions is more likely to be successful. See AFL-CIO EXECUTIVE COUNCIL POLICY STATEMENT, IMPLEMENTING ARTICLE XXI OF THE AFL-CIO CONSTITUTION 4 (Oct. 8, 1999). In making this determination, the umpire must consider which of the two unions is more willing to invest resources, has the more developed organizing strategy and is more likely to obtain a first contract. In the realm of Article XXI disputes, therefore, the AFL-CIO has already recognized that the policy of limiting intra-federation rivalry must be fashioned to simultaneously advance other goals in the process of adjusting jurisdictional disputes. *Id.* at 5–6.

gument in reverse, the AFL-CIO's no-raid policy is too costly to maintain in light of union democracy's shortcomings.

Amending Article XX to allow election challenges against unions guilty of corruption, gross mismanagement, or neglect will benefit the AFL-CIO by providing more incentives for union leaders to be responsive, law-abiding, and diligent representatives of their employees. Conceivably, the incentives created by the amendment could be quite significant. The reason for this is that an affirmative finding under Article XX—a finding that the incumbent union is corrupt, incompetent, or absent—would be devastating to the union. Such a finding would instantly serve as the central theme of the rival union's election campaign. Additionally, the incumbent union could certainly expect to have its jurisdiction challenged in other shops as soon as the shield of the contract bar is lifted. Because an adverse finding under Article XX would have such serious consequences, union officials could be expected to take the threat seriously.

The proposal also offers benefits to the AFL-CIO as an organization. First, the proposal would give the AFL-CIO an additional option when dealing with corrupt affiliates. Currently, the AFL-CIO's only resort is to expel a corrupt union from the Federation.³²¹ For example, the Teamsters were expelled from the AFL-CIO in the late 1950's due to corruption.³²² The result was that the Teamsters, no longer constrained by the "no-raid" policy, commenced a campaign of "raiding" AFL-CIO shops.³²³ If the proposal were enacted, the AFL-CIO could address a corrupt union by encouraging "clean" unions to contest the corrupt union for its bargaining units. If successful, the AFL-CIO would have a method of policing against corrupt unions without expelling that union's members from the Federation.

Second, the AFL-CIO would offer union members assurances against corruption that independent unions could not provide. Under the proposal, union members in the AFL-CIO could turn to the Federation or another affiliated union to address corruption within their union, and the AFL-CIO could respond by challenging the allegedly corrupt union and holding a hearing on the union's management. On the other hand, members of independent unions lack the ability to bring their union leaders to a hearing to defend their management.³²⁴

321. AFL-CIO CONST. art XX, § 15.

322. See HUTCHINSON, *supra* note 148, at 337.

323. See *id.* at 339.

324. See George P. Santos, *Title I and Union Democracy*, 12 N.Y.U. REV. L. & SOC. CHANGE 449, 452 (1983-1984) ("Although Title I protects union members from some forms of abuse, it does

Third, the amendment affords the AFL-CIO substantial public relations benefits. It is difficult to quantify the public relations costs that unions have suffered from notoriety of their corruption scandals and connections to organized crime. What we do know, however, is that sometimes a bad union is much worse than no union at all. There is no reason that the options should ever be so spare. Under the proposal, the AFL-CIO could legitimately represent that it takes seriously the historic problems between labor and union management, and that it has measures in place to address those problems meaningfully.

Fourth, if the amendment helps AFL-CIO unions to clean their own house, the unions avoid having the government do it for them. The costs of government clean-ups of union corruption are ponderous. Government prosecutions impose costs on individual unions that must fund the oversight and force them to surrender their independence from the government. It also costs the entire labor movement in the form of opprobrious publicity.

If the amendment accomplishes these goals, then the AFL-CIO has obvious motivation to implement the amendment. The question of whether the amendment is likely to be efficacious, therefore, is taken up next.

D. Why the Proposed Amendment Would Succeed

This system would work for two reasons: (1) because unions would have an incentive to challenge corrupt or mismanaged unions; and (2) because the danger of rival unions bringing election contests would act as a deterrent against union corruption and mismanagement.

1. Incentives for Unions to Police Each Other

The amendment would create incentives for unions to challenge corrupt or mismanaged unions. Primarily, the incentive consists of the possibility that the union would increase its memberships rolls. Although challenging another union by establishing its corruption or mismanagement may seem too troublesome, it could actually be a less burdensome method for increasing a union's membership. Workers who are already organized are significantly more pro-union than all other work-

not place a positive duty upon union leaders to respond to the dictates of their membership nor does it give union members tools which are powerful enough to ensure that leaders will respond.”).

ers.³²⁵ This means that organized shops will be significantly more receptive to union organizing than a previously unorganized shop. Furthermore, a union is less likely to find the same kind of determined opposition from the employer of an organized shop than one facing unionization for the first time.³²⁶ Thus, for an enterprising union interested in increasing its membership, challenging a corrupt or mismanaged union may present a better expansion opportunity than organizing a group of workers from scratch.

Moreover, this incentive can be increased by granting an exclusive right to the union who prevails in establishing that the incumbent is likely to be guilty of corruption or mismanagement. After establishing that an incumbent union is corrupt, mismanaged, or neglectful, the challenger should be granted an exclusive right to challenge the incumbent in order to prevent other unions who may smell blood in the water from attempting to steal the fruits of the challenger's labors. By preserving an exclusive right for the initial challenger, a union who made the investment to expose another union's mismanagement will be guaranteed an opportunity to secure its reward, and it will be assured that its efforts will not be frustrated by an opportunistic latecomer.

Additionally, the challenger's exclusive right to contest the incumbent's elections should apply to all of the incumbent's bargaining units for two reasons. First, if the preponderance of the evidence shows that an incumbent is guilty of corruption or mismanagement, the AFL-CIO should not allow Article XX to shield that union from challenge and thereby consign the members to poor representation. Second, the challenger's right to a contested election should be exclusive to ensure that the proposed amendment creates a maximal incentive for unions to police each other for compliance with scrupulous management standards.

The incentive is important because the union must be motivated to actually find the evidence of the target union's mismanagement or corruption. While Landrum-Griffin imposes mandatory reporting requirements on unions, the effectiveness of the requirements is undermined by the fact that most union members are not aware of the availability of the information and do not know the process for obtaining the information.³²⁷ Even when a member succeeds in obtaining the union's reports, the member may not know how to meaningfully interpret it.

325. See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 70 (1999) (reporting that ninety percent of current organized employees would vote for their union if an election was held the next day, whereas only thirty-two of unorganized workers would vote for a union).

326. See *id.* at 66.

327. See Marshall, *supra* note 100, at 199.

Unions face none of these obstacles. As organizations subject to the reporting requirements, unions know both how the reports are obtained and what the reports actually disclose.³²⁸ Furthermore, as opposed to members, union staff members are experienced observers of the labor movement. Not only do they possess detailed information on how to manage a union successfully, but they are also knowledgeable in how others have mismanaged or stolen from unions in the past. In short, unions probably are the parties best suited for the task of policing other unions for corrupt practices. Presuming that unions respond to this incentive, there is good reason to believe that the amendment will create an effective mechanism for checking union mismanagement.

2. The Amendment's Value as a Deterrent Against Corruption

The amendment would create a meaningful deterrent against corruption because an adverse ruling from an Article XX umpire would seriously jeopardize the union's well-being. First, an adverse ruling would significantly undermine the union's prospects for prevailing in the contested election against the challenging union. Second, the union would be vulnerable to challenge in all its bargaining units. If the evidence of corruption or mismanagement is strong, the incumbent would be in serious danger of losing those elections as well. Thus, under the proposal, corrupt or poorly managed unions would face a substantially amplified threat of having their wrongdoing exposed and used against them. If my analysis above is correct, the threat of exposure would be credible and deterrence should reasonably follow.

Moreover, as a matter of union culture, scrupulous management standards would become even more central to successful management strategies. Unions living up to high ethical standards would be rewarded in the form of protection from challenge by rival unions. Thus, high standards of management would bestow a comparative advantage. In theory, at least, this should tend to allow ethical unions to prosper while unethical or mismanaged unions should dwindle. Even if the reality falls somewhat short of the theoretical prognostication, any movement in this direction would be worthwhile.

By increasing incentives to uncover corruption in unions, the proposed amendment could improve the enforcement of the Landrum-Griffin Act. Evidence uncovered and used to demonstrate the corruption of a union official could also form the basis of a federal action to recover

328. *See id.* at 198–99.

under the Labor-Management Reporting and Disclosure Act (“LMRDA”) for breach of fiduciary duty. Thus, under the amendment, corrupt unions or mismanaging leaders would face not only the threat of competition, but also a greater prospect that the law will be enforced against them.

3. The Effect of the Amendment on International Unions and Trusteeships

An admitted shortcoming of the proposed amendment to Article XX is that it would do very little to reform union corruption at the international level. Because the amendment functions by exposing a certified collective bargaining representative to a contested election for certification, the amendment only impacts unions who are certified as collective bargaining representatives. In the rare situations where international unions hold the collective bargaining authority for certain bargaining units, the amendment would directly apply. Ordinarily, however, the amendment would exert no direct effect to reform a corrupt international union. Where the international union is corrupt but the local union is clean, the only resort of the members, other than trying to oust the international incumbents democratically,³²⁹ would be to disaffiliate. This shortcoming, therefore, underscores the reality that the proposed amendment is in no way a complete solution to the problem of union corruption. But even so, as argued above, the amendment should achieve significant progress in combating union corruption and mismanagement, and make it worthwhile to pursue.

A related difficulty is posed by union trusteeships. The primary reason that an international union has the power to impose a trusteeship on a subsidiary is to redress union corruption and any mismanagement occurring within that union.³³⁰ Thus, the objective of the trusteeship power and of my proposed amendment is substantially the same—to reform corrupt or mismanaged unions in situations where union democracy has failed to do so. However, there are several important differences between trusteeship and my proposal for resorting to an election

329. The members’ chances of succeeding in challenging the incumbent officials are extremely low. *See supra* Part II.A.2.

330. As discussed earlier, union trusteeships have been used in the past as a tool to defeat union corruption. *See supra* Part II. Corrupt international leaders can use the international’s power to place a local in trusteeship either to expand the breadth of their corrupt enterprise or to suppress dissidents and insurgents. The proposed amendment’s usefulness for combating corruption within trusteeship situations is discussed, *infra*, note 337

contest. First, an election contest and a union trusteeship are initiated by different entities. Whereas the trusteeship only can be imposed at the international's initiative, an election contest must be triggered by a rival AFL-CIO affiliate.³³¹ This difference is especially important because the rival AFL-CIO affiliate arguably has greater incentive to seek an election contest than does an international union to place a subsidiary into trusteeship. While the international union has greater access to information than a rival affiliate, there is little in the way of self-interested incentive for the international union to impose a trusteeship.³³² Additionally, the international union is constrained from imposing a trusteeship by several factors. These include the possibility that the corrupt local union may be an important political ally to the international leadership, that trusteeships oust democratically elected officials, and that the use of trusteeships may make the international officials unpopular and subject to electoral challenge because they are seen as heavy-handed and extreme.³³³

A second difference between trusteeships and election contests is that trusteeships suspend union democracy for the duration of their existence. Whereas, election contests invigorate union democracy by expanding the role of employee choice and according to the membership an additional avenue to express its will.³³⁴

The third and most obvious difference between an election contest and a trusteeship is that each will place a different party in the role of collective bargaining representative over the relevant bargaining units. With a trusteeship, the international union takes control of the union through the appointment of a trustee who assumes the management of the union.³³⁵ In an election contest, a rival AFL-CIO union may be chosen as the certified collective bargaining representative. This difference is elementary, but bears note because it reveals that a trusteeship and an election contest, as remedies to union corruption or mismanagement, cannot be used simultaneously.

331. Goldberg, *Cleaning*, *supra* note 23, at 920–21.

332. *See id.* at 921.

333. I acknowledge that the AFL-CIO affiliate is not without constraints in pursuing election challenges. Obviously, challenging another union's jurisdiction will foster hostility from the target union and all of the attendant dangers that rivalry brings. However, history strongly suggests that the incentives to increase membership through a "raid" usually prevail over a union's fear of acrimonious relations with sister unions. *See* MILLIS & BROWN, *supra* note 319, at 276 ("[T]he temptation to expand by annexing the other fellow's members was substantial, and considerable energy was expended in such efforts.")

334. *See* Goldberg, *Cleaning*, *supra* note 23, at 921.

335. *Id.*

If the international union places a corrupt or mismanaged union into trusteeship in order to reform the union, it is nonsensical to subject the trusteeship to a contested election on the grounds that the previous leadership was guilty of mismanagement. On the other hand, it could potentially undermine the incentive of rival unions to petition for a contested election if, after it has brought the target union's mismanagement to light, the rival union's efforts are thwarted by the unseasonable imposition of an international trusteeship. Thus, a rule must be established determining which method of reform is entitled to priority.

The rule to be adopted should be based on the principle of "first in time." Whichever event comes first—the takeover of the union by trusteeship or the petition to the AFL-CIO for the right to challenge the corrupt, mismanaging, or neglectful union in a certification election—should be given priority. If the challenger petitions the AFL-CIO for an election contest against the target union before the international imposes the trusteeship, then the petition should be heard and, if granted, the election contest should be permitted to proceed, even if the international subsequently imposes a trusteeship.³³⁶ Conversely, if the trusteeship is imposed before the rival petitions the AFL-CIO, then the petition for an election contest should be denied.³³⁷ By privileging whichever reform method is invoked "first in time," the incentives for all parties to utilize both are maximized. A union intent on challenging a mismanaged union is assured that its efforts will not be frustrated by an untimely trusteeship. Likewise, an international union aware of corruption or gross mismanagement in a subsidiary stalls intervention at the peril of a rival union filching the subsidiary's bargaining units. A "first in time" rule, therefore, best coordinates the proposed amendment with the existing mechanisms of internal union reform.

V. CONCLUSION

In Part I of this article, I argued that union democracy underproduces competition, and that history shows that there are no realistic

336. In the resulting certification election, the international will have the onus of convincing members to vote for the incumbent and not the rival, notwithstanding the fact that the union is in trusteeship.

337. However, a different result should occur if the rival has evidence that the management of the union under the trusteeship is corrupt, guilty of mismanagement or neglectful. That is, if a rival seeks to challenge the trusteeship as a corrupt, mismanaged, or neglectful union, a hearing on the petition to bring an election challenge should not be barred merely because the union is in trusteeship.

prospects to improve this situation. I further argued that because meaningful competition in union democracy is lacking, union democracy fails as a guarantor of responsive, effective, and ethical management of unions. The result is that even though problems of union mismanagement are among the most serious faced by the labor movement, the movement is still no closer to a solution to these problems than it was when Landrum-Griffin was passed.³³⁸

Building on the strengths of Estreicher's recent work on the issue, I propose to introduce new avenues of competition for union management. By amending Article XX of the AFL-CIO Constitution to permit challenges by rival unions upon proof that the incumbent is guilty of corruption or mismanagement, the proposal increases competition for union management. At the same time, it does not detract from or in any way weaken union democracy, and it also does nothing to disturb the delicate balance of power between employers and unions. I have argued that the proposal is realistically efficacious and has a high likelihood of improving union management across the country. The proposal involves minimal costs because it relies on the established system of adjudication under Article XX. In any event, if the proposal actually succeeds in reducing the mismanagement of unions, the costs saved by those successes will more than compensate for any additional administrative costs that may arise.

That said, legitimate concerns can be raised. By definition, allowing greater competition within the AFL-CIO will produce both winners and losers. The unions, who historically have struggled the most with corruption, certainly have more to fear from this proposal than unions with less notorious pasts. Furthermore, competition is strong medicine—a corrupt union will not simply be “cleaned up”; most likely it will be severely diminished or possibly destroyed. Additionally, the proposal could weaken unions by creating new vulnerabilities for unions enjoying strong bargaining positions with an employer, but who nevertheless may have problems with corruption. In sum, this proposal envisions benefits for the labor movement as a whole at the necessary expense of particular unions deemed to be bad actors. Thus, opposition is inevitable.

Even in the face of this opposition, the labor movement cannot afford to be complacent. I fear that if the movement fails to take serious measures to eradicate corruption, it will continue to face serious public

338. News stories of corrupt practices within unions continue to materialize even after the unprecedented wave of government clean-up efforts in the late 1980s and early 1990s. *See, e.g.*, Justin Blum & Valerie Strauss, *Charges Filed in Union Scandal*, WASH. POST, Jan. 28, 2003, at A1.

relations consequences. At the very least, labor faces the prospect of greater government regulation and likely will find that most unorganized workers regard labor suspiciously.³³⁹ At worst, labor may lose credibility as a movement dedicated to the enrichment of the country's working people, and instead be dismissed as a movement dedicated to the enrichment of its own leaders. Neither outcome is acceptable. The improvement of the labor movement's reputation is indispensable to its overall resurgence. If the movement is not willing to subject its worst actors to the rigors of competition, the remainder will suffer. In my judgment, therefore, the benefits of the proposal outweigh the perils.

Fortunately, this is not my determination to make. The AFL-CIO and the labor movement are democratic organizations, open to deliberation and free dialogue. This article reflects my opinion of how the labor movement productively can address one of its most debilitating problems. Having considered the matter thoroughly, I now offer it respectfully for the consideration of others, who are equally concerned with guiding the labor movement back to a position of strength and prosperity.

339. For instance, the Bush Administration's Department of Labor has recently proposed significant new reporting requirements on unions. See Steven Greenhouse, *Labor Dept. Seeking to Expand Disclosure Rules for Unions' Finances*, N.Y. TIMES, Dec. 21, 2002, at A16. Labor leaders have denounced the new requirements as onerous and implemented in bad faith.