Agency Costs, Corporate Governance, and the American Labor Union

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Acute agency costs exist in unions as they do in other complex organizations. Specifically, union officials are imperfect representatives of the rank-and-file workers they ostensibly represent. Yet far less attention has been paid to addressing agency costs in the context of unions than in the context of public corporations, where the separation of share ownership and managerial control long has been the subject of intense scrutiny by academics and policymakers. By contrast, concrete suggestions for confronting agency problems in unions on the ground are few.

This Article posits that unions would be more successful in attracting new members and in securing benefits for existing members if unions could reduce agency costs. Workers who think that unions are corrupt and incapable of faithfully representing their interests in the workplace rationally will eschew union membership. The lack of focus on agency costs in the union context appears to be based on ideological and political considerations that conflate the interests of workers with the interests of union officials. But the interests of workers and union officials diverge in significant ways. Workers are concerned with job security, wages, and working conditions, and union officials are concerned with maximizing the private benefits of their office, often at the expense of workers.

To reduce agency costs, this Article proposes a strategy of policy arbitrage consisting of identifying effective mechanisms for controlling agency costs in the corporate context that can be transferred to the union context, and shows how such arbitrage could be accomplished. I identify four corporate governance mechanisms as particularly promising candidates for import into the union context. First, proxy advisory firms could be employed to provide rank-and-file workers with high-quality advice about how to vote in union elections. Second, existing disclosure obligations under the Landrum-Griffin Act should be both enhanced to include better disclosure of union officials' compensation and "weaponized" by

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providing rank-and-file workers the right to vote up or down on such compensation through the provision of what are known in the corporate context as "say-on-pay" voting rights. Third, following Securities Exchange Act Rule 14a-8, union-voting procedures should be reformed to give workers the right to make proposals that are distributed, along with the union's voting materials, at the union's expense, to workers for their approval. Allowing rank-and-file workers to make direct appeals to other rank-and-file workers would enable workers to recommend internal governance reforms of unions and empower them to nominate rival slates of directors and officers for their unions. Finally, following well-established norms of corporate governance, unions should be required to have independent directors on their governing boards. The responsibility for nominating union directors, determining compensation for top union officials, setting internal governance rules, and selecting the union's independent, outside auditors should be removed from the board as a whole and delegated to committees consisting of these independent board members.

Introduction

> *"The assets of a labor union belong to the members. Union office is a position of trust to be used for the benefit of the members. In collective bargaining, and in conducting other business, union officers must put their fiduciary obligations ahead of their personal interest."*[1]

No known governance mechanism aligns the interests of union officials with the interests of the rank-and-file workers they ostensibly represent. Applying the simple insight from agency theory that controlling agency costs[2] is an important factor in "the survival of organizations,"[3] this Article posits that the failure to control agency costs in unions likely is an important factor in explaining their decline.

The first goal of this Article is to explain why so little is done to manage and control agency costs in the union context while so much is done to manage and control agency costs (albeit with varying degrees of success) in the corporate context. Few, if any, of the well-documented reputational, structural, and market-based solutions that generally are deployed to mitigate agency-cost problems are available in the union context. The generally observed solutions to the agency-cost problem in the corporate context—which include the threat of being displaced by a hostile takeover and incentive-based compensation—are largely unavailable in the union context for a variety of reasons.[4] Similarly, the risk of union management being displaced by rank-and-file workers in an election is very low because of the attenuated, anti-democratic nature of union voting.[5]

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1. 105 CONG. REC. 15,549 (1959) (statement of Rep. Elliott), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, TITLES I-VI, at 1059 (1964).

2. Agency costs are the costs of the divergence between the interests of principals (such as shareholders or workers) and agents (such as corporate directors or union officials) who are supposed to work to further the interests of principals. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) ("We define an agency relationship as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decisionmaking authority to the agent."). The thesis of this Article is that these agency costs help explain why unions are often corrupt and generally do a poor job of representing workers' interests, as opposed to the interests of high-ranking union officials. While agency costs are inevitable and ubiquitous in complex organizations where parties agree to enter into "agency relationships," in which agents are supposed to serve the interests of principals, they can be controlled, at least to some extent. *Id.*

3. Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 301 (1983).

4. *See* Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367 (describing the lack of a market for control of labor unions).

5. *See supra* Section IV.A (discussing the indirect election of union officials).

On the bright side, one factor makes it relatively easy to structure solutions to the agency-cost problems in the union-worker context. Specifically, while it is often extremely complex to articulate with specificity the things that judges, lawyers, or chief executive officers (CEOs) must do to further the interests of their principals, it is somewhat easier to catalogue and describe the things that workers want from their unions: higher wages, greater benefits, better working conditions, and more job security.[6]

Advancing the interests of union workers in improved wages, benefits, working conditions, and job security will improve not only the lives of the specific union workers who are bound by collective bargaining agreements, but inevitably will generate significant positive externalities for the economy generally, particularly by reducing wage inequality.[7] Lowering agency costs also will improve the quality of our democracy by reducing inequality, amplifying the voices of marginalized working people, strengthening the rights of minorities,[8] and offsetting the lobbying efforts of other narrow special interest groups such as business owners and CEOs, who currently are better organized to represent their interests in policy-making circles at the state, local, and national levels.[9]

Unfortunately, many of the devices and tactics that function in the corporate context to align the interests of management with the interests of shareholders are not available in the union context because of the lack of any price-setting mechanism for union memberships and unions' ina-

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6. *See Labor Unions Today*, UNION PLUS, https://www.unionplus.org/page/labor-unions-today [https://perma.cc/3ZGE-9LY6] ("Working people have a lot of concerns in this economy. They want decent pay. They want benefits. And of course they want job security. I tell them all the reasons why they need union representation." (quoting Joseph Crane, Member, Communications Workers of America, Local 7901)). Workers' interests are also highly heterogeneous relative to the interests of public-company shareholders, all of whom have concerns about returns on equity in addition to whatever other issues, such as social justice and environmental responsibility, they might care about.

7. In particular, advancing the interests of unionized workers sets "norms and standards that raise the wages of comparable nonunion workers." Lawrence Mishel, *Unions, Inequality and Faltering Middle-Class Wages*, ECON. POL'Y INST. (Aug. 29, 2012), https://www.epi.org/publication/ib342-unions-inequality-faltering-middle-class [https://perma.cc/WRE3-8G3Q]; *see also* David Card, Thomas Lemieux & W. Craig Riddell, *Unions and Wage Inequality*, 25 J. LABOR RES. 519 (2004) (noting that unions systematically reduce wage inequality); *cf.* Daniel B. Cornfield, *The U.S. Labor Movement: Its Development and Impact on Social Inequality and Politics*, 17 ANN. REV. SOC. 27, 27 (1991) ("Over the last century, the labor movement has continued to be the chief effort made by workers to address problems associated with social inequality.").

8. "Nearly two-thirds of union workers aged 18-64 are women and/or people of color. Almost half of union members are women. More than one-third of union members are people of color. Black workers are more likely to be union members than white or Hispanic workers." Kenneth Quinnell, *Nine Things You Need to Know About the Role of Unions in 2017*, AFL-CIO (Aug. 25, 2017), https://aflcio.org/2017/8/25/9-things-you-need-know-about-role-unions-2017 [https://perma.cc/9G9T-ARB4].

9. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 9-10, 32-36 (2016).

bility to sell or otherwise monetize the membership interests that workers have in their unions. However, several viable corporate governance devices are available for import into the union context.

This Article employs a simple strategy of policy arbitrage in the form of observing promising mechanisms for controlling agency costs in the corporate context and recommending their adoption in the union context. For example, just as shareholders directly elect directors, I recommend that union workers be able to directly elect their representatives, rather than the current, attenuated practice of electing delegates who then select the union leadership at national conventions. In this Article, I identify four mechanisms for controlling agency costs in the corporate context as particularly promising candidates for the union context. First, I recommend the use of proxy advisory firms to provide rank-and-file workers with high-quality advice about how to vote in union elections. Second, I recommend both enhancing unions' existing disclosure obligations under the Labor Management Reporting and Disclosure Act of 1959[10] (Landrum-Griffin Act) and "weaponizing" these enhanced disclosure obligations by giving rank-and-file workers the right to vote up or down on union officials' compensation through what are known in the corporate context as "say-on-pay" voting rights.

Third, following Securities Exchange Act Rule 14a-8,[11] I suggest reforms in union-voting procedures that would give workers the right to make proposals that are distributed, along with the union's voting materials, at union expense, to workers for their consideration. Allowing rank-and-file workers to make direct appeals to other rank-and-file workers would enable workers to recommend internal governance reforms and empower them to nominate rival slates of directors and officers for their unions.

Finally, following well-established norms of corporate governance, independent directors should be introduced to union boards of directors and certain decision-making powers should be removed from the board as a whole and delegated to these independent board members. In particular, responsibilities for nominating union directors, determining compensation for top union officials, setting internal governance rules, and selecting the union's independent, outside auditors should all be allocated to independent, outside directors.

This Article proceeds as follows. After this Introduction comes a discussion in Part I about why agency costs matter. This Part considers the nature of agency costs, how agency costs manifest themselves in the union context, and how agency costs in the union context are distributed

10. 29 U.S.C. §§ 401-531 (2018).
11. 17 C.F.R. § 240.14a-8 (2020).

among workers, unions, and other economic interests in society. Part III argues that there has been insufficient recognition by academics and policymakers of the extent to which agency costs compromise unions' capacity to generate benefits for workers. A particular problem is that even in those rare occasions when the agency problem is discussed and contextualized, such discussions are not accompanied by any constructive suggestions for how to resolve the problem. Part IV addresses the principal methods for controlling agency costs in the corporate context, with particular focus on methods that have been successful there and that may be adapted to address the agency-cost problems in unions. A conclusion follows.

I. The Nature of Agency Costs

Compared with the agency-cost problems in labor unions, the agency-cost problems in the corporate context seem simple, almost to the point of triviality. In the corporate context, the prospective agents are the entrepreneurs seeking to raise capital from outside investors. These outside investors become the principals after they have made their investments. However, to the extent that these potential investors recognize that they are entering into an agency relationship, they will anticipate that agency costs diminishing the potential value of their investments will manifest themselves in the future. Anticipating these future agency costs, investors will either decline to invest entirely, or else they will reduce the amount they are prepared to invest by an amount sufficient to compensate for the entrepreneur's future self-interested behavior. As Michael Jensen and William Meckling famously observed, prospective minority investors "will realize that the owner-manager's interests will diverge somewhat from theirs, hence the price which they will pay for shares will reflect the monitoring costs and the effect of the divergence between the manager's interest and theirs."[12] Based on this realization, it is easy to demonstrate formally that the entrepreneur seeking outside funding "will bear the entire wealth effects of these expected costs so long as the equity market anticipates these effects."[13]

Thus, in the corporate context, agents have strong incentives to devise mechanisms to limit their ability to shirk because the better they can credibly bind themselves as faithful agents of their investors, the more investors will be willing to pay for their shares. Corporate officials, therefore, have strong incentives to accept: legal regimes that impose upon them strict fiduciary duties of care and loyalty that can be enforced in

12. Jensen & Meckling, *supra* note 2, at 313.
13. *Id.*

shareholder litigation; compensation packages that are dominated by incentive compensation tied to company performance; monitoring by independent outside directors, auditors, and other gatekeepers; and the disciplinary regime of the market for corporate control.

It does not appear that certain well-known strategies and mechanisms for credibly committing to reducing agency costs of the kind ubiquitously available in the corporate context ever have been considered for adoption in the union context. The possible strategies that might be used by unions include: invoking a private litigation model to enforce fiduciary duties, using incentive-based compensation packages to link union officials' pay to how they perform for workers, using proxy advisory firms, implementing say-on-pay voting on union officials' salaries, permitting workers to put proposals for reform up for a vote by their fellow workers, and requiring union boards of directors to have a majority of independent directors.

In the union context, the implications of unreduced agency costs seem clear. Rational workers who are considering affiliating with unions will factor anticipated agency costs into their decision-making processes. Corruption, self-dealing, and other manifestations of extreme agency costs are so rampant in unions that it is plausible that rational workers will abjure any affiliation with a union.[14]

The success of public-sector unions raises an important challenge for the agency-cost analysis in this paper. In particular, looking at unions from an agency-cost perspective requires an inquiry into whether the relative success of public-sector unions indicates that the agency-cost problem has been addressed more successfully in the context of public-sector unions than in the context of private-sector unions. I argue that unions have more success in representing public-sector employees than they do private-sector employees because public-sector unions, working with politicians, are able to shift the agency costs of representing workers from the shoulders of the workers themselves onto the shoulders of the taxpayers. Put simply, in private-sector unions, workers reject union representation because of the high agency costs that the workers themselves must internalize if they join a union. In the context of public-sector unions, however, these costs are borne by taxpayers and not by workers, so the agency costs are not problematic for workers. In other words, agency costs are still acute in the context of public-sector unions, but they are not as objectionable to workers because the workers do not bear the costs.

14. Steven Inskeep, *Solidarity for Sale: Corruption in Labor Unions*, NPR (Feb. 6, 2007), https://www.npr.org/templates/story/story.php?storyId=5181842 [https://perma.cc/BZ2S-MKNM] ("Working people are never going to make sacrifices or run risks for institutions they don't trust.").

And public-sector unions have considerable political clout, which they are willing to wield against politicians who do not support them.[15]

A. Why Agency Costs Matter

Agency costs in the union context manifest themselves in the most extreme form imaginable: corruption. Such corruption strongly undermines confidence in union leadership and erodes popular and worker support for unions.

In 2019 alone, a typical headline read "Feds charge 12th person in ongoing corruption probe into United Auto Workers union,"[16] as a panoply of massive, multi-faceted corruption schemes were revealed at the highest levels of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). The corruption in the UAW is not an isolated event. In the Department of Labor (DOL), the Office of Labor-Management Standards has investigated and prosecuted union leaders for embezzling union dues; restitution of more than $100 million was paid or ordered to be paid between 2001 and 2009.[17] Investigations by the DOL's Office of Inspector General targeting labor racketeering and organized crime's influence within the labor movement have resulted in more than $1 billion in fines, restitutions, and forfeitures; fewer than 5% of unions audited by the DOL received unqualified assessments.[18] With that record, it is hardly surprising that union membership has steadily been in decline such that unions now represent only about six percent of the private-sector workforce.[19]

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15. *See* Sarah Anzia & Terry Moe, *Public Sector Unions and the Costs of Government*, 77 J. POL. 114, 125-26 (2015) (observing that "public sector unions have two main routes of influence: collective bargaining and politics," and finding that political activity by unions has "positive, statistically significant effects on per employee salary and health benefits expenditures . . . [and] employment," thereby supporting the argument that public-sector unions have influence both through collective bargaining and politics); *see also* Daniel DiSalvo, *The Trouble with Public Sector Unions*, NAT'L AFF. 3 (2010), https://www.nationalaffairs.com/storage/app/uploads/public/58d/e7c/d03/58de7cd03dd09675038152.pdf [https://perma.cc/D3GU-XBM5] (cataloguing the expenditure of $6 million by the New Jersey Education Association to attack an executive order that would subject unions to the same limitations on political contributions that applied to corporations and oppose the governor's efforts to implement a one-year wage freeze, limit future pension benefits, and require that unionized teachers contribute to the costs of health insurance).

16. Michael Wayland, *Feds Charge 12th Person in Ongoing Corruption Probe into United Auto Workers Union*, CNBC (Oct. 31, 2019, 4:12 PM EDT), https://www.cnbc.com/2019/10/31/prosecutors-say-uaw-leaders-embezzled-more-than-1point5-million-in-union-funds.html [https://perma.cc/L38Y-JV4E].

17. John Lund, *2009 Annual Report*, U.S. DEP'T LAB. 2 (Dec. 2010), https://www.dol.gov/olms/regs/compliance/annualreports/highlights_09.pdf [https://perma.cc/DC3K-ZSC2].

18. *Crime and Corruption*, UNION FACTS, https://www.unionfacts.com/article/crime-and-corruption/ [https://perma.cc/6RPM-4T8V].

19. According to the Bureau of Labor and Statistics:

Corruption in unions is so rampant that "[t]here are enough disparate union-corruption and racketeering studies by social scientists, historians, and journalists to constitute a union-corruption specialty."[20] Modern commentators attribute the atrophy of labor unions to a variety of causes including agency problems, such as corruption. For example, Kate Andrias attributes the decline of unions to "unrelenting employer resistance, globalization, and the fissuring of the employment relationship, along with union complacency and, in some unions, corruption and discrimination."[21]

Agency costs that plague unions have contributed significantly more to the decline of unions than is generally acknowledged. Democracy is certainly not a check on union officials' self-interested behavior. As Samuel Estreicher observes, union members "do not make the investment in information and attendance at meetings necessary to exercise an informed choice or to participate in a way that would ensure an effective influence."[22] This apathy is attributable in part to the fact that "Americans continue to have a fairly low opinion of union leaders," and "nonunion workers form unfavorable attitudes towards unions because of per-

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> In 2019, 7.1 million employees in the public sector belonged to a union, compared with 7.5 million workers in the private sector. The union membership rate declined over the year in the private sector by 0.2 percentage point to 6.2 percent. The unionization rate for public-sector workers was little changed over the year at 33.6 percent, and remained substantially above that of the private sector. Within the public sector, the union membership rate was highest in local government (39.4 percent), which employs many workers in heavily unionized occupations, such as police officers, firefighters, and teachers. Private-sector industries with high unionization rates included utilities (23.4 percent), transportation and warehousing (16.1 percent), and telecommunications (14.1 percent). Low unionization rates occurred in finance (1.1 percent), insurance (1.4 percent), professional and technical services (1.4 percent), and food services and drinking places (1.4 percent).

Bureau of Labor Statistics, *Union Members — 2019*, U.S. DEP'T LAB. 2 (Jan. 22, 2020, 10:00 AM EST), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/3UJJ-NX26]; *see also* Dylan Matthews, *Europe Could Have the Secret to Saving America's Unions*, VOX (Apr. 17, 2017, 9:30 AM EDT), https://www.vox.com/policy-and-politics/2017/4/17/15290674/union-labor-movement-europe-bargaining-fight-15-ghent [https://perma.cc/GFE4-N6CP] (noting the decline in membership in American labor unions).

20. James B. Jacobs, *Is Labor Union Corruption Special?*, 80 SOC. RES. 1057, 1057-58 (2013). *See generally* JOHN HUTCHINSON, THE IMPERFECT UNION: A HISTORY OF CORRUPTION IN AMERICAN TRADE UNIONS (1972) (providing a thorough account of trade union corruption—focusing on several unions, in different cities and industries, and across significant time periods).

21. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 689 (2019) [hereinafter Andrias, *Social Democracy*] (discussing the reasons for the decline of unions); *see* Andrias, *supra* note 9, at 13-32 (same).

22. Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 502.

ceptions of unresponsive leadership, union corruption, or simply Rabela[i]sian excess of the Gus Bevona[23] variety."[24]

B. How Agency Costs Manifest Themselves in the Union Context

In this Article, I use the word "corruption" as an umbrella-term that includes: bribery (which involves an exchange made to pay for an improper benefit, and one form of bribery is unions and employers conspiring to defraud workers), fraud, and extortion (which, unlike bribery, involves payments made to avoid economic or physical injury). Bribery is a paradigmatic manifestation of corruption:

> The most distinctive form of union corruption is bribery. The impetus can come from either party. The corrupted union officer agrees to ignore violations of the collective bargaining agreement—for example, an employer's hiring of nonunion workers, failure to make pension and welfare fund payments, or failure to pay contractually required wages—or agrees to a collective bargaining contract with a lower-wage local. Employers may pay off union officials to obtain sweetheart contracts or 'waivers' of collective bargaining provisions.[25]

Unions and employers conspiring to defraud workers of their hard-won pension and welfare-fund benefits is a time-honored form of corruption. This form of bribery features union officials receiving private benefits for permitting employers to avoid making required contributions to employee benefit funds or allowing pension-fund trustees to use pension and benefit funds to benefit themselves and their cronies.[26]

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23. Gus Bevona was a leader of stewardship of Local 32B-32J of the Service Employees International Union. "Despite a salary in excess of $400,000 a year—the highest in the labor movement—a penthouse apartment and other luxuries funded with union dues, dissidents have not been able to dislodge Bevona in open elections because . . . the janitors and doormen [who constituted the rank-and-file membership in the union] liked the contracts he negotiated." *Id.* at 510.

24. *Id.* at 512.

25. Jacobs, *supra* note 20, at 1064 (internal citations omitted); *see also* RONALD GOLDSTOCK, CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY: THE FINAL REPORT OF THE NEW YORK STATE ORGANIZED CRIME TASK FORCE 22 (1990) ("Bribes have frequently been solicited by . . . union officials who can offer sweetheart contracts (contracts that omit significant and customary benefits and rights for employees in order to reduce the employer's labor costs, arrived at without the approval—or even knowledge—of union members) or nonenforcement of costly collective bargaining provisions."); HUTCHINSON, *supra* note 20, at 289 (discussing a bribery charge against an American Federation of Labor employee); HAROLD SEIDMAN, LABOR CZARS: A HISTORY OF LABOR RACKETEERING 245-46 (1938) (describing racketeering charges against a union official); PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 687 (1964) (distinguishing between situations in which union officers themselves use the union's power for extortion and those in which union officers are part of a larger conspiracy).

26. *See* GOLDSTOCK, *supra* note 25, at 27.

Corruption, in the form of fraud, occurs even in the absence of bribery when, for example, union officials defraud union treasuries by reimbursing themselves for nonunion-related expenses or overbilling.[27] Fraud also occurs when union officials stuff ballot boxes or miscount the ballots that workers cast in union elections.[28]

It is hardly surprising that rational workers lack enthusiasm for supporting unionization where there is genuine concern that union officials and management will conspire together to make crooked deals to benefit themselves at the expense of the workers. And, of course, union corruption manifests itself in myriad ways beyond the bribery and fraud described above.

Extortion, for example, also is common. Whereas bribery involves an exchange made to pay for an improper benefit, extortion involves payments made to avoid economic or physical injury.[29] Union officers engage in a variety of types of extortion, including: (1) assigning employers only unqualified or incompetent workers;[30] (2) destroying or vandalizing materials or structures belonging to the employer;[31] and (3) instructing workers not to perform critical tasks or to delay in performing time-sensitive tasks, such as refusing to remove perishable cargo from ships.[32]

Other familiar types of corruption by union officials include stealing funds; providing "no-show" union jobs to relatives and friends; paying themselves and their designees extravagant "consulting" fees; paying illegal sums to suppliers of goods and services; and investing union funds in projects controlled by friends, business partners, or organized crime figures without any expectation of repayment or a competitive rate of return on capital invested.[33]

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27. *See, e.g.*, Ashleigh Costello, *Former Detroit Teachers Union Official Faces Federal Indictment for Bank Fraud*, EAG NEWS (Aug. 8, 2013), http://eagnews.org/former-detroit-teachers-union-official-faces-federal-indictment-for-bank-fraud [https://perma.cc/H8TE-946H]; Joe Johnson, *Former Athens Postal Union Official Faces Federal Fraud Charges*, ATHENS BANNER HERALD (Dec. 5, 2012, 11:23 AM), http://onlineathens.com/local-news/2012-12-05/former-athens-postal-union-official-faces-federal-fraud-charges [https://perma.cc/SX3G-CW3T].

28. *See, e.g.*, Steven Greenhouse, *Testimony Implicates Union Negotiator in Vote Fraud Case*, N.Y. TIMES (July 12, 2000), http://www.nytimes.com/2000/07/12/nyregion/testimony-implicates-union-negotiator-in-vote-fraud-case.html [https://perma.cc/D2BE-P3HQ].

29. *See* Office of Inspector Gen., *Glossary of Terms*, U.S. DEP'T LAB., http://www.oig.dol.gov/hotlineterms.htm [https://perma.cc/P7VU-F93K].

30. *See* Jacobs, *supra* note 20, at 1064-65.

31. *Id.*

32. *See* JAMES B. JACOBS, COLEEN FRIEL & ROBERT RADICK, GOTHAM UNBOUND: HOW NEW YORK CITY WAS LIBERATED FROM THE GRIP OF ORGANIZED CRIME 154 (1999); Jacobs, *supra* note 20, at 1064-65.

33. *See* Jacobs, *supra* note 20, at 1065.

C. Who Internalizes the Agency Costs of Unions

Agency costs manifest themselves in the form of the costs of structuring, monitoring, and bonding a set of contracts among agents with conflicting interests, plus the residual loss incurred because the cost of full enforcement of contracts exceeds the benefits.[34] In the private sector, as noted above, economic theory posits that entrepreneurs seeking funding from investors will internalize anticipated agency costs.[35] But in the union setting, where there are no entrepreneurs seeking funding by offering arms-length investment contracts, the costs of society's inability to control agency costs appears to manifest itself mainly in the form of residual losses. Put differently, because union leaders and those forming unions do not have ownership interests or any other form of property rights in the unions they lead, they do not internalize either the benefits of reducing agency costs in their organizations or the costs of failing to reduce such costs.

While the relationship between reducing agency costs and the wealth of union managers is highly attenuated, such a relationship nevertheless clearly appears to exist. One can easily imagine, for example, that if membership in a particular union were to increase dramatically, that union's managers would benefit in various ways, including increased salaries and perquisites. Nevertheless, all indications are that the relationship between reducing agency costs and income or wealth gains to union officials appears to be so highly attenuated as to be indiscernible.

Thus, it appears most likely that the significant agency costs in the union context manifest themselves in the form of residual losses. Moreover, unless contractual or regulatory mechanisms can be devised to enable workers or unions to transform these residual losses into income, unions will continue to flounder. Put another way, the analysis here indicates that significant gains could be made by reducing agency costs.

That the potential gains from reducing agency costs likely are significant finds further support in the fact that reducing such costs would have significant external effects on non-contracting third parties, particularly non-unionized workers who would benefit collaterally from a stronger union movement. The positive external effects of a strong union movement are clear, particularly for nonunionized workers, but also for society in general.

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34. *See* Fama & Jensen, *supra* note 3, at 304.
35. *See supra* note 13 and accompanying text.

With regard to nonunionized workers, strong unions establish payment parameters that nonunion employers follow.[36] For example, a high school graduate whose workplace is not unionized but whose industry is 25% unionized is paid 5% more than similar workers in less unionized industries.[37] In fact, it appears that the positive impact of unions on total nonunion wages is almost as large as the impact on total union wages.[38] The effect of unionization on nonunion workers is particularly noticeable in improvements in fringe benefits for nonunionized workers.[39]

With respect to general societal benefits from stronger unions, unions generate positive externalities by lobbying to obtain general workplace protections and rights, particularly in the realm of safety and health, overtime, and family/medical leave.[40] Generally speaking, unions reduce wage inequality because they raise wages more for low- and middle-wage workers than for higher-wage workers, more for blue-collar than for white-collar workers, and more for workers who do not have a college degree than those who do.[41] Because of the benefits provided by unions to workers generally, unions are described as "an intermediary institution that provides a necessary complement to legislated benefits and protections."[42]

II. Agency Costs May Only Be Part of the Explanation for the Decline of Unions: But They Are Definitely Part of the Story.

My point is simple and, I believe, irrefutable: if unions were less corrupt and did a better job of representing workers, then they would attract more members because they would be more successful in union-organizing campaigns. Thus, if the agency costs associated with the union-worker relationship declined, then union membership would increase and unions would play a larger role in the U.S. economy. While agency costs likely do not explain the entire decline of the American labor union, they are very important.

The decline in union membership has been well documented. According to the Bureau of Labor Statistics, in 2019, only 10.3% of workers were union members.[43] This is the lowest rate of union participation since

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36. *See* Lawrence Mishel & Matthew Walters, *How Unions Help All Workers*, ECON. POL'Y INST. 1 (Aug. 26, 2003), https://www.epi.org/files/page/-/old/briefingpapers/143/bp143.pdf [https://perma.cc/7A8J-EGRB].
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 2.
41. *Id.* at 5.
42. *Id.* at 2.
43. *See* Bureau of Labor Statistics, *supra* note 19.

the Bureau began collecting statistics. The decline in union membership has been particularly significant in the private sector, where only 6.2% of workers are unionized,[44] down from 16.8% in 1983 (the first year for which comparable data are available).[45] Public-sector unions, particularly those in protective-service occupations and education, training, and library occupations, have suffered only a small decline from about 37% of the workforce in 1983 to about 34% and 33%, respectively, in 2019.[46]

The decline in American private-sector union membership since the mid-twentieth century often is attributed to macroeconomic and social changes as well as America's legal regime and individualist ethos. In particular, economic globalization increased competitive pressures on American companies, making the costs of unionized labor less affordable.[47] Accordingly, firms moved manufacturing positions from the union-friendly North and Midwest to developing countries and the American Sun Belt, which have greater right-to-work protections.[48] Traditional union strongholds now have more white-collar and service jobs, positions that have historically eschewed labor organizing.[49]

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44. *See id.*

45. Megan Dunn & James Walker, *Union Membership in the United States*, U.S. DEP'T LAB. 4 (Sept. 2016), https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf [https://perma.cc/95VK-6CSX].

46. "1 in 10 American employees are in a labor union, just over half the rate of 1983 . . . ." Bureau of Labor Statistics, USA FACTS, https://usafacts.org/articles/labor-union-membership [https://perma.cc/UH9E-Q65J] (chart showing unionized workers in public and private sectors from 1983 to 2019).

47. *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 363 (2002) ("Given the lower wage structures of most developing nations, American unions now face intense resistance in virtually every sector in which international production is feasible."); Todd E. Vachon & Michael Wallace, *Globalization, Labor Market Transformation, and Union Decline in U.S. Metropolitan Areas*, 38 LAB. STUD. J. 229, 247 (2013).

48. *See* Andrias, *supra* note 9, at 21; Befort, *supra* note 47, at 363 ("[E]mployers, accordingly, have shifted production to the Sunbelt and developing nations as a means of escaping unions and lowering labor costs."); Victor G. Devinatz, *Right-to-Work Laws, the Southernization of U.S. Labor Relationship and the U.S. Trade Union Movement's Decline*, 40 LAB. STUD. J. 297, 300 (2015) (emphasizing the role of right-to-work laws); Daniel J. Galvin, *From Labor Law to Employment Law: The Changing Politics of Workers' Rights*, 33 STUD. AM. POL. DEV. 50, 51 (2019) (citing "capital flight from mostly pro-labor states to mostly anti-union states" as a key cause of unions' decline); Robert J. LaLonde & Bernard D. Meltzer, *Hard Time for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 957 (1991) (same).

49. *See* Befort, *supra* note 47, at 364-65 ("The American economy has changed from a predominately blue-collar workforce in 1950 to a predominately white-collar workforce in 2000. Unions traditionally have enjoyed greater success in organizing blue-collar workers."); Lalonde & Meltzer, *supra* note 48, at 956-57 (citing "a shift of consumer demand from goods to services [and] a relative increase in the number of professional, managerial, and other white collar workers"); Seymour Martin Lipset & Ivan Katchanovski, *The Future of Private Sector Unions in the U.S.*, 22 J. LAB. RES. 229, 233 (2001) ("The proportion of blue-collar workers in the labor force dropped from 41.1 percent in 1950 to 24.8 in 1998. White-collar employment increased from 36.6 in 1950 to 58.9 percent in 1998. Traditionally, blue-collar occupations have been a stronghold of unionism.").

Another likely factor in the decline of unions is said to be employers' increased reliance on a contingent workforce—of part-time and temporary workers, as well as independent contractors—instead of unionized employees.[50] Still another possible factor in union decline is the existence of provisions of American labor law that allow employers to discourage unionization in several ways. Scholars have argued that hostile acts by employers, some permitted under this regime and others prohibited yet insufficiently punished, have been a leading cause of private-sector unions' decline.[51]

Lastly, commentators have asserted that private-sector unions are weak because they do not engage in sector-wide bargaining.[52] Some have contended that this decentralized structure of American labor derives from Americans' faith in individualism and distrust of collectivism.[53]

Thus, the solutions here are not a panacea for workers or a complete solution to the problem of declining unions. But the solutions here will make unions more desirable to workers and offset some of the broad, economic forces that have led to the decline of unions in America.

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50. *See* Andrias, *supra* note 9, at 21-22; Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1535 (1996) (observing that the use of contingent workers allows employers to circumvent labor law protections); Katherine M. Forster, Note, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541, 552 (2001) ("[U]sing contingent workers discourages union activity by permanent workers. Many employers use contingents as strikebreakers. The presence of contingents may also serve to remind nonunionized employees that they are replaceable, implicitly suggesting that employees refrain from organizing if they want to keep their jobs.").

51. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1539 (2002); Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 535 (2001) (arguing that hostile actions by employers "can account for as much as 40 percent of the decline in private sector union membership"); Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 378 (2007); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1777 (1983) ("[D]ecline in union success in representation campaigns is in large part attributable to deficiencies in the law: evidence suggests that the current certification procedure does not effectively insulate employees from the kinds of coercive antiunion employer tactics that the NLRA was supposed to eliminate."); Paul Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 YALE L.J. 1907, 1913 (1993).

52. *See* Andrias, *Social Democracy*, *supra* note 21, at 689 (2019); Reinhold Fahlbeck, *The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307, 318 (1994).

53. *See* Fahlbeck, *supra* note 52, at 318 ("[T]he extremely decentralized bargaining structure reflects concerns in U.S. society for the freedom of markets and fears of restraints on individual competition."); John Godard, *The Exceptional Decline of the American Labor Movement*, 63 INDUS. & LAB. REL. REV. 82, 101 (2009); Lipset & Katchanovski, *supra* note 49, at 238 ("The fact that the American national tradition is Jeffersonian, classically liberal, individualistic, and egalitarian has weakened efforts to mobilize workers and others on behalf of socialist and collectivist objectives, including unions.").

III. Agency Costs and Unions: The Failure to Recognize the Problem in the Union Context (and Recognizing the Problem Is the First Step to a Solution)

Outside of the union-worker context, agency costs are legendary in all sorts of business organizations where investors' interests are supposedly furthered by the work of managers, directors, and other agents.[54] Agency problems between clients and lawyers, particularly in the context of representations in class action lawsuits,[55] are so well known and accepted that scholars have described the problem of self-interest as "canonical"[56] and observed that "[n]o one doubts that class action plaintiffs' attorneys operate, in reality, as independent entrepreneurs guided by self-interest."[57]

In addition, the problems of agency costs are ubiquitous in politics and government, where it long has been known that political actors must be constrained from pursuing their own, private ends:

> It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate inter-

54. As Adam Smith famously observed, "The directors of [joint-stock] companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 311 (London, T. Nelson & Sons 1852); *see also id.* at 310-11, 316-18 (suggesting that joint-stock companies in most business sectors cannot compete successfully against partnerships whose owners are more committed to their firms' success).

55. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7-8 (1991) (observing that "the single most salient characteristic of class and derivative litigation is the existence of 'entrepreneurial' plaintiffs' attorneys [who, because they] are not subject to monitoring by their putative clients . . . operate largely according to their own self-interest"); *see also* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882-83 (1987) ("High agency costs characterize class action litigation and permit opportunistic behavior by attorneys. As a result, it is more accurate to describe the plaintiff's attorney as an independent entrepreneur than as an agent of the client.").

56. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L REV. 103, 104 (2006).

57. *Id.*; *see also* Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2088 (1995) ("Most critiques of class actions assume that substantial agency costs are unavoidable because no class member has a stake in the litigation large enough to justify monitoring the attorneys who represent the class.").

> est which one party may find in disregarding the rights of another or the good of the whole.[58]

A particular focus for scholars studying agency costs in politics has been the myriad agency costs generated by the administrative state.[59] Congress creates administrative agencies and devotes considerable energy and attention to making sure that the policies developed and pursued by the bureaucrats who populate such agencies do not "drift" too far from the policies that the lawmakers (and the interest groups that influence the lawmakers) initially intended the agencies to pursue.[60]

Even judges have not been immune from agency-cost analysis.[61] Commentators have pointed out that we should assume that judges are "rational." On this basis, they have attempted to construct a predictive model of judicial behavior motivated by the assumption that judges will maximize their own utility, where "utility is a function mainly of income, leisure, and judicial voting."[62] This approach is used to explain judicial behaviors including stare decisis and "go-along voting," provide a frame-

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58. THE FEDERALIST NO. 10 (James Madison). Also from an agency cost perspective, Hamilton or Madison pointed out in Federalist 51 that men are not angels, and good institutional design should take full advantage of the self-interest of those in government, rather than relying on their good will or forbearance. THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

59. *See, e.g.*, Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 93 (1993); Kenneth Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111, 116 (1993); Barry R Weingast & William J. Marshall, *The Industrial Organization of Congress; or Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 134 (1988).

60. Leading works on this topic include Matthew McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); and Matthew McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

61. The leading article is Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) [hereinafter Posner, *What Do Judges Maximize*]. *See also* Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 472-78 (1998) (describing the literature treating judges as rational utility maximizers and the key components of the judicial utility function); William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEG. STUD. 271, 279-325 (1998) (identifying factors relevant to explaining differences in the influence of individual judges, including citations); Gilat Levy, *Careerist Judges*, 36 RAND J. ECON. 275, 281-88 (2005) (documenting the effect of reputation-seeking behavior on judicial decisionmaking); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31, 37-42 (1994) (developing a model of judicial decisionmaking based on self-interest); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1259 (2005) ("[J]udicial behavior is best understood as a function of the incentives and constraints that particular legal systems place on their judges.").

62. Posner, *What Do Judges Maximize*, *supra* note 61, at 3.

work for evaluating changes in both judicial compensation and rules of conduct, and compare judicial and legislative behavior.[63]

The first reason agency costs in the union context are largely ignored is that, while policymakers and social planners readily see agency-cost problems in a variety of contexts, such problems tend to be conveniently ignored in the union setting. Specifically, in policy-making circles, academia, and even the popular imagination, union representation typically is conflated with labor representation, notwithstanding the fact that union officials are often spectacularly unfaithful agents of the rank-and-file workers whose interests they ostensibly represent. Thus, even scholars who recognize that labor unions have declined take the view that a problem "more fundamental than the decline in union membership [is that] . . . [t]he existing labor law regime does not grant unions a significant degree of public, political power."[64]

The second explanation for why agency costs within unions are generally unstudied and ignored, despite the intense focus on agency costs within the context of corporate governance, stems from the critical importance of the concept of worker "solidarity." Solidarity is the existence of a strong community of interests, feelings, and actions, which, taken together, create a sense of unity and shared objectives among workers.[65] Solidarity binds workers to one another such that they are willing and able to make sacrifices for the general welfare of the entire group. Union solidarity, which means camaraderie and unity in support of the union, is thought to be necessary to achieve improved wages, working conditions, and job security for workers.

Solidarity facilitates successful group action by reducing the incidence of defection and limiting collective action problems such as free riding that otherwise make it difficult for workers to negotiate effectively with employers. In the union context, solidarity is thought to be tied inextricably to workers' loyalty and allegiance to the union. Loyalty and allegiance to a union are expressions of solidarity, while failure to manifest loyalty and allegiance to a union represents a lack of solidarity. I argue that the benefits of worker solidarity can be achieved without ignoring agency costs. This can be done by focusing not on workers' solidarity with their labor unions or labor-union bosses, but rather on workers' solidarity with their fellow rank-and-file workers.

Third, I argue that the agency problem in unions has not received the attention it so desperately deserves because the union officials who

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63. *See id.*

64. Andrias, *supra* note 9, at 33.

65. Charles Sprang, *Importance of Solidarity*, TRADES & UNION DIGEST, https://www.paunions.com/importance-of-solidarity [https://perma.cc/V98W-WGB4].

occupy significant positions of power within unions are considered workers. Thus, while there is a clear line of demarcation in the corporate context between shareholders and managers, there is no concomitantly clear line of separation in the union context between workers and union officials. Here, analytically, I point out that workers would be better served by recognizing that union officials, particularly those who work full time for the union and cease being rank-and-file workers, have interests and preferences that diverge significantly from those laborers who actually work for a unionized employer. Of course, scholars have recognized the basic fact that any analysis of governance issues related to unions must take an agency perspective in which workers are modeled as "principals" and unions are modeled as "agents."[66] Scholars also have observed that analogizing between union members and leaders and stockholders and managers would be fruitful.[67] But these commentators simply introduce the problem without attempting to analyze it or to distinguish the agency-cost problems that plague unions from the agency-cost problems that present challenges in other contexts.[68]

Worse, there is a systematic effort to ignore and deny the problem of agency costs in the union context. This effort manifests itself in two ways. The first problem is that agency costs simply are ignored in the union context, as unions and workers are treated as being the same from both an analytical perspective and a practical perspective. This is a confusion that does not plague the analysis of agency costs in the corporate context, where the separation of share ownership and corporate management has been scrupulously documented for decades, beginning with Adolf Berle and Gardiner Means,[69] if not before.[70]

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66. *See, e.g.*, Paul H. Rubin, *Unions, Bureaucracy and Change: Comment*, 12 J. LAB. RES. 406, 406 (1991).

67. *See id.* at 408.

68. *See id.*; *see also* Richard A. Epstein, *Agency Costs, Employment Contracts, and Labor Unions*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 127-48 (John W. Pratt & Richard Zeckhauser eds., 1985) (examining agency costs in various contexts, including the union context); Don Bellante & Philip Porter, *Agency Costs, Property Rights and the Evolution of Labor Unions*, 13 J. LAB. RES. 243, 248-50 (1992) (observing that unions have not matched corporate innovations to reduce agency costs). A notable exception is Sam Estreicher. *See* Estreicher, *supra* note 22 (proposing various reforms to make unions more democratic and responsive and to encourage rivalrous competition among public and private entities for the right to represent workers in collective bargaining).

69. ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933); *see also* William Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 753-59 (2001) (discussing the enduring separation of ownership and control); Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430, 430 (2008) ("Over the last 20 years, both academic and practical approaches to corporate governance have increasingly focused on the problem of investor expropriation, sometimes also referred to as self-dealing or tunneling. Specifically, those who control a corporation, whether they are managers, controlling shareholders, or both, can use their power to divert corporate wealth to themselves rather than sharing it with the other investors."); Gardiner Means, *The Separation of Ownership and Control in*

The second problem is that attacking union corruption is politically "incorrect" and politically unwise.[71] Criticizing, "or even studying labor union corruption and racketeering," is considered "bad for the labor movement (and is even 'anti-labor')"[72] despite the fact that "it is a plausible hypothesis that corruption and racketeering have done incalculable harm to the goals of the labor movement, while efforts to expose and combat labor corruption and racketeering are a positive contribution to the labor movement."[73] In short, as shown below, politicians view even the most constructive criticisms of labor unions as attacks on workers and the labor movement, rather than what they often are: efforts to address the significant agency-cost problems that characterize the labor union movement.

A. Ignoring Agency Costs by Ignoring the Existence of the Agency Relationship

The point here is simple. People generally understand that while certain agents, such as corporate officers and directors, politicians, and class-action attorneys, are *supposed* to represent their respective principals (shareholders, voters, and class action members) faithfully, there is a significant need to utilize regulatory, market, and contractual mechanisms to ensure that they do. The general recognition that there is a problem that needs to be solved in the corporate context prompts efforts to devise mitigation techniques.

In contrast, in the union context, there is a general tendency to collapse unions and workers such that union representation is conflated with worker representation. For example, labor-union appointees to corporate boards are generally perceived as "worker representatives," despite the fact that agency theory predicts union officials will be inclined to put their own private interests ahead of the interests of the workers they ostensibly represent. For example, when one googles "union representation on corporate boards of directors," the first webpages shown by the search engine are for "worker representation on corporate boards."[74] Similarly, de-

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American Industry, 46 Q.J. ECON. 68, 95-97 (1931) (documenting the separation of ownership and control); Gardiner C. Means, *The Diffusion of Stock Ownership in the United States*, 44 Q.J. ECON. 561, 592 (1930) (describing the separation of ownership and control as "a marked feature of our modern economy").

70. *See generally* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT (1914) (documenting the separation of ownership and control).

71. *See* Jacobs, *supra* note 20, at 1079.

72. *Id.*

73. *Id.*

74. *Union Representation on Corporate Boards*, GOOGLE, https://www.google.com/ [https://perma.cc/J2YW-YWTG] (search in search bar for "union representation on corporate boards") (last visited Sept. 23, 2020, 7:00 PM ET).

spite decades of corruption and secular decline in the efficacy of unions, scholars persist in characterizing unions "as representing existing members at particular workplaces,"[75] even if they are not seen as "leading social partners empowered to represent the interests of the working class more broadly."[76]

And, of course, labor unions themselves conflate unions and workers in their advertising. For example, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) defines a union as "you and your co-workers coming together as a team to make improvements at your workplace."[77] Similarly, AFL-CIO promotes unions on the grounds that "[j]oining together in unions enables workers to negotiate for higher wages and benefits and improve conditions in the workplace. There are millions of union members in America from all walks of life. These individuals know that by speaking up together, you can accomplish more than you could on your own."[78]

The point here is that, analytically, there is no basis to assume that unions are more capable of representing workers' interests than corporate directors are of representing shareholders' interests. Just as significant resources and talent are devoting to aligning the interests of shareholders and directors, so too should significant resources be devoted to aligning the interests of workers and their unions.

B. The Solidarity Concept

The second explanation for why agency costs within unions tend to be ignored stems from the critical importance of the concept of worker "solidarity" to achieving improved wages, working conditions, and job security for workers. Solidarity is the existence of a strong community of interests, feelings, and actions that creates a sense of unity and shared objectives among workers[79] and binds workers together in such a way that they are willing and able to make sacrifices for the general welfare of the entire group. Solidarity facilitates successful group action by reducing the incidence of defection and limiting collective action problems, such as free riding, that make it difficult for workers to negotiate effectively with employers. In the union context, solidarity is thought to be tied inextrica-

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75. Andrias, *Social Democracy*, *supra* note 21, at 689.

76. *See id.*

77. *Building Power for Working People*, AFL-CIO, https://aflcio.org/what-unions-do/empower-workers [https://perma.cc/S8Q5-NKJF].

78. *What Unions Do*, AFL-CIO, https://aflcio.org/what-unions-do [https://perma.cc/Z2GZ-43ZM].

79. *See* Bonnie Morr, *We Must Understand the Meaning of Solidarity*, INT'L ASS'N SHEET METAL, AIR, RAIL & TRANSP. WORKERS (May 12, 2014), https://smart-union.org/news/we-must-understand-the-meaning-of-solidarity [https://perma.cc/E53X-BSDJ].

bly to workers' loyalty and allegiance to the union. Loyalty and allegiance to a union are expressions of solidarity.[80] Failure to manifest loyalty and allegiance to a union represents a lack of solidarity.

The importance of solidarity among workers, which is a concept that does not even enter into conversations outside of the union context, inhibits dissent in general and criticism of labor union management in particular because such debate appears disloyal. The very notion that agency costs exist in the union context is antithetical to the notion of solidarity.

In order to retain the concept of solidarity and simultaneously acknowledge the problem of agency costs, solidarity should be narrowly defined as focusing on workers' commitments and allegiance to one another, rather than to the union as an institution. Where solidarity describes workers' solidarity with their fellow rank-and-file workers, instead of with the union itself as personified by its current management, agency costs can be addressed without sacrificing the important concept of solidarity.[81] In other words, union officials should be conceptualized as managers and treated as such, rather than as latter-day versions of Cincinnatus,[82] who briefly abandon their places on the assembly line selflessly to serve the workers. Specifically, union officials should not be lumped together with rank-and-file workers when thinking about union solidarity.

Any view of solidarity that collapses workers and union officials into a single, inseparable unit is misguided because it ignores the entire issue of agency costs. The point here is that, while solidarity is a valuable concept, solidarity should be perceived as solidarity among workers, not as solidarity between workers and union managers. It is no more sensible to think of union managers being in solidarity with workers than it is to think about the CEOs and directors of public companies as being in solidarity with shareholders.

Conceptualized spatially, labor union solidarity can be viewed either vertically or horizontally. Horizontal union solidarity excludes union management and conceptualizes solidarity as involving only rank-and-file workers who do not receive private benefits like salaries or office perquisites from the union. Vertical solidarity is a conception of solidarity that

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80. Of course, the concept of solidarity can be expanded to include the concept of solidarity among all workers, not just the workers in a particular firm or industry. The wider feelings of solidarity reach, the more successful unions are likely to be. For example, when customers or workers who are not in a particular union express solidarity with a striking union by refusing to cross a picket line, the power of a strike or other industrial action is enhanced. *See* George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 204-05 (1994) (arguing that solidarity is a class-based concept that encompasses all workers).

81. *See id.*

82. *See generally* GARY FORSYTH, A CRITICAL HISTORY OF ANCIENT ROME: FROM PREHISTORY TO THE FIRST PUNIC WAR 205-07 (2005) (telling the famous story of Quinctius Cincinnatus's dictatorship).

includes union managers as part of the cohort of people with whom union workers should feel solidarity. The problem with vertical solidarity from an agency cost perspective is that it collapses the interests of union management with the interests of the rank-and-file workers that these managers are supposed to represent. Put simply, vertical solidarity mistakenly supposes that what is good for union management is good for union workers. Clearly, in light of union managers' ability to divert resources from workers to themselves, this is not the case.

Solidarity is important, indeed critical to a successful labor movement. Without solidarity, unions are unlikely to experience success in improving wages and working conditions for workers. To be clear, nothing here should be construed as casting even a scintilla of doubt on either the desirability or the existential value of solidarity to the union mission. Rather, the point is that vertical solidarity and horizontal solidarity are different things and that the misguided notion of vertical solidarity both ignores the reality of agency costs within unions. The concept of vertical solidarity also creates obstacles to ameliorating agency costs for the simple reason that when solidarity is viewed from a vertical perspective, agency costs are ignore because they are presumed not to exist.

On the other hand, horizontal solidarity permits a frank assessment of the agency cost problem within unions without undermining the important goal of achieving solidarity among workers. Interestingly, the agency cost perspective taken in this Article holds the promise of simultaneously increasing solidarity and reducing agency costs for the simple reason that workers' understanding and appreciation of the agency costs in the worker/union management relationship constitutes another important issue around which workers can unite. In addition, conceptualizing solidarity from a horizontal perspective rather than from a vertical perspective sends a strong signal to union management that they *serve* the rank-and-file and that what is good for them in their capacities as union managers is not necessarily good for the workers.

C. The Political Benefits of Ignoring Union Corruption

As NYU School of Law professor and sociologist James Jacobs observes, "corruption control in the labor union context is . . . distinctive for the responses that its illumination provokes. Allegations, charges, and prosecutions of labor racketeering are often criticized as motivated by anti-labor animus."[83] Similarly, noted labor-law scholar Clyde Summers remarks that criticizing union management is costly and difficult for union dissidents:

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83. Jacobs, *supra* note 20, at 1078.

> [O]pposition to union policies and union leaders is viewed as disloyalty . . . . [T]he leaders and the supporting bureaucracy identify themselves with the organization, treating all criticism of the officers or their policies as an attack on the organization itself, undermining it in the face of its enemies. This attitude is not limited to those with a lust for power. The greatest intolerance to criticism often comes from a profound and sincere conviction by the leadership that it is serving the best interests of the membership and that the great majority of members approve.[84]

Moreover, the social norms that make it difficult to combat agency costs in labor unions assume very concrete forms. In particular, the notion expressed in the excerpt above—that opposition constitutes disloyalty—manifests itself in union constitutional provisions that subject members to discipline for vague expressions of dissent that are characterized as "disloyalty," "undermining the union," "slandering union officers," "organizing factions," or "discussing union business outside of union meetings."[85] According to Summers, the attitude that dissent constitutes disloyalty "is commonly shared by many union members who are inculcated with narrow notions of loyalty . . . . The fact that the leaders are elected does not reduce, but reinforces, this attitude."[86]

Jacobs catalogues instances where efforts to enforce anti-corruption laws against unions have been met with a "firestorm of high-profile opposition from politicians and labor leaders."[87] From a public-choice perspective, the political opposition to anti-corruption efforts by law enforcement agencies is not surprising in light of the considerable political influence and clout enjoyed by union officials.[88]

Jacobs describes the response to the filing of a "blockbuster" anti-corruption lawsuit against the International Brotherhood of Teamsters (IBT) in 1988—*United States v. International Brotherhood of Team-*

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84. Clyde W. Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93, 96 (1984) (citing R. MICHELS, POLITICAL PARTIES; A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 229 (1949)).

85. *Id.*

86. *Id.*

87. Jacobs, *supra* note 20, at 1078.

88. *See generally* DAVID GREENSTONE, LABOR IN AMERICAN POLITICS (1977) (discussing the political influence that unions exercise); Harold L. Sheppard & Nicholas Masters, *Union Political Action and Public Opinion Polls in a Democratic Society*, 5 SOC. PROBS. 14, 14 (1957) (discussing "the provocative question of rank-and-file approval of union political activity and of the use of members' dues and union funds for political purposes"); David J. Sousa, *Organized Labor in the Electorate, 1960-1988*, 46 POL. RES. Q. 741, 756 (1993) ("Organized labor was a major player in the New Deal order, central in Democratic party politics, in campaigns and campaign finance, in major legislative battles."); Arthur C. Wolfe, *Trends in Labor Union Voting Behavior, 1948-1968*, 9 INDUS. REL. 1, 10 (1977) (analyzing the voting behavior of members of labor unions).

sters[89]—after "organized crime's influence in the IBT and its Central Pension and Welfare Fund had been exposed over many years by dozens of criminal prosecutions, media exposés, and Congressional hearings."[90] Stunningly, as Jacobs observes, "given the documented history of organized crime penetration of the IBT and the fact that the politicians had not yet even seen the Department of Justice's complaint, 264 members of Congress delivered a petition to Attorney General Edwin Meese in December 1987 urging that the Department of Justice not file the [Racketeer Influenced and Corrupt Organizations Act] lawsuit."[91]

Upon the filing of the complaint, "Detroit Mayor Coleman Young denounced the lawsuit as 'a danger to the freedom of the American people,'"[92] and AFL-CIO President Lane Kirkland complained that the lawsuit "doesn't sound to me like the proper relationship between a government and a private institution in a free society."[93] Other criticisms came from the Secretary-Treasurer of the California Federation of Labor who worried that the litigation "would smear millions of union members who are in no way involved."[94] Democrat Senator Paul Simon admonished that the Department of Justice's lawsuit "ought to frighten every American,"[95] and Ohio Governor Richard Celeste called the lawsuit "just plain wrong."[96]

The attacks on the efforts to clean up the union were bipartisan. Republican Senator Orrin Hatch opined that the lawsuit's filing "flies in the face of democratic principles"[97] and, strangely, that it "smacks of totalitarianism."[98] And Buffalo Republican Congressman Jack Kemp expressed the similar sentiment that "the United States government is not

89. 726 F. Supp. 943 (S.D.N.Y. 1989), *aff'd*, 899 F.2d 143 (2d Cir. 1990).

90. Jacobs, *supra* note 20, at 1078.

91. *Id.* at 1079 (citing JAMES B. JACOBS & KERRY T. COOPERMAN, BREAKING THE DEVIL'S PACT: THE BATTLE TO FREE THE TEAMSTERS FROM THE MOB 211 (2011)).

92. *Id.* at 1078 (citing JAMES B. JACOBS & KERRY T. COOPERMAN, BREAKING THE DEVIL'S PACT: THE BATTLE TO FREE THE TEAMSTERS FROM THE MOB 34-36 (2011)).

93. *Id.* (citing Henry Weinstein, *Unionists, Lawyers and Law Professors Tell Discomfort: U.S. Move Against Teamsters Jolts Labor*, L.A. TIMES (June 14, 1987, 12:00 AM), https://www.latimes.com/archives/la-xpm-1987-06-14-mn-7403-story.html [https://perma.cc/SH6Z-APAT].

94. *Id.*

95. *Id.* (citing JAMES B. JACOBS & KERRY T. COOPERMAN, BREAKING THE DEVIL'S PACT: THE BATTLE TO FREE THE TEAMSTERS FROM THE MOB 1078 (2011)).

96. *Id.*

97. Kenneth R. Wallentine, *A Leash upon Labor: RICO Trusteeships on Labor Unions*, 7 HOFSTRA LAB. & EMP. L.J. 341, 346 (1990).

98. Laurence Zuckerman, Raji Samghabadi & Elaine Shannon *Breaking a Devil's Pact*, TIME (July 11, 1988), http://content.time.com/time/magazine/article/0,9171,967865,00.html [https://perma.cc/5VM2-4Z34].

meant to be in the business of taking things over. . . . It shouldn't take over your union."[99]

It seems clear that special-interest-group politics have played a major role in impeding any effort to structure solutions to the agency costs plaguing unions. Politicians are not just refraining from exposing union corruption, they actively are stymieing efforts by law enforcement officials to confront this corruption. As such, it is hardly surprising that, despite the documentation of rampant agency costs in unions that manifest themselves in the form of persistent corruption, less is done in the union context to mitigate agency costs than is done in other contexts where agency costs pose challenges for principals.

The following Part of this Article describes the mechanisms and market processes that reduce agency costs in other contexts. While some of these mechanisms and processes cannot easily be transferred to the union context, others seem like likely candidates for addressing the agency problems in unions, should a societal and political consensus to confront such costs ever materialize.

IV. Applying Corporate Governance Mechanisms for Controlling Agency Costs to Unions: An Exercise in Policy Arbitrage

A. The Unique Challenges of Controlling Agency Costs in the Union Context

While it is worthwhile to apply the strategies for controlling agency costs that routinely are employed in the corporate context to union governance, significant differences between corporations and unions exist. These differences make it difficult or impossible to transfer certain corporate governance mechanisms for mitigating agency costs from the corporate setting to the union setting. For example, shareholders' investments in corporations take the form of ownership interests in financial assets, while workers' investments in their employment relationships take the form of investments in their own "human capital," which cannot simply be transferred to other workers the way that a share of stock can be transferred. This rules out devices like the hostile tender offer as a viable mechanism for controlling agency costs in unions. On the other hand, rival unions should be able to compete with an incumbent union for the right to bargain collectively on behalf of workers and the results of this competition should be determined by a direct vote of the workers.

99. JAMES B. JACOBS & KERRY T. COOPERMAN, BREAKING THE DEVIL'S PACT: THE BATTLE TO FREE THE TEAMSTERS FROM THE MOB 35-36 (2011).

At least one key corporate mechanism, shareholder voting for directors, is already utilized to some extent in the union setting, but, as discussed here, there are significant flaws in the way such voting is structured that diminish the efficacy of voting in the union context.

The strategies for controlling agency costs in corporations would seem to be a particularly rich point of reference for those interested in controlling agency costs in unions because both contexts feature multiple principals—shareholders in the case of corporations and rank-and-file workers in the case of unions. As John Armour, Henry Hansmann, and Reinier Kraakman observe, "the challenge of assuring agents' responsiveness [to the interests of principals] is greater where there are multiple principals—and especially so where they have different interests, or 'heterogeneous preferences' as economists say. Multiple principals will face information and coordination costs, which will inhibit their ability to engage in collective action."[100]

I will note in passing but not dwell on the obvious, fundamental and perennial problem of indirect elections for union officials as a pathological characteristic of union democracy. The union-voting problem and the desirability of direct elections have been known for decades. As a law student noted forty-eight years ago, officer elections appear to be the most effective means for achieving "internal responsiveness" to the interests, concerns, and needs of the rank-and-file workers by union officials.[101]

Unfortunately, rather than making decisions by direct voting, delegates who are elected by workers generally make decisions at national conventions.[102] For example, the UAW holds a "Constitutional Convention" every four years,[103] as does the Service Employees International Union.[104] It is at these conventions that delegates adopt resolutions that set the union's position on important workplace and societal issues, de-

100. John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems, Legal Strategies, and Enforcement*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 29, 30 (2009) (emphasis omitted).

101. Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 YALE L.J. 407, 424 (1972).

102. *See id.* at 423 n.59 ("The LMRDA allows officers of intermediate labor organizations to be elected directly or by delegates elected by the members. Officers of national organizations can be elected at a convention of delegates chosen by the members, as well as by direct referendum vote of all members. National officers are elected at conventions in 138 of 189 national unions." (citing LMRDA § 401(d), (a), 29 U.S.C. § 481(d), (a) (1970)).

103. *See, e.g.*, *UAW Basics*, UAW EDUC. DEP'T 3 (June 2020), https://uaw.org/wp-content/uploads/2015/09/515-UAW-Basics-071318-1.pdf [https://perma.cc/9SSD-JCUT].

104. SEIU Local 99, *Constitution and Bylaws* 11 (2017), https://www.seiu99.org/wp-content/uploads/2014/08/SEIU-Local-99-Constitution-and-Bylaws-English.pdf [https://perma.cc/BK7Z-6JX7].

cide constitutional changes, and elect officers and regional directors.[105] Delegate numbers and votes are based on the membership size of the local unions electing the directors.[106] It is clear that agency costs would be reduced, and responsiveness to the needs of rank-and-file workers would increase, if union officials were elected directly, rather than indirectly. The lack of direct election increases the rational apathy of worker-voters by attenuating the connection between their vote and the selection of top union officials. Directly electing union officers at the national level, as well as at all other levels of the union governance structure, would provide workers with a direct means for controlling their union representatives and significantly ameliorate the agency problems identified in this Article.

To be sure, direct elections would ameliorate agency problems only to a limited extent. Even if union officers were elected directly rather than through delegates at conventions, certain innate, structural characteristics of workers' property rights in their union memberships that exacerbate agency problems would remain. Of particular importance is the difference between the *form* of the investment that shareholders have in corporations and the form of the investment that workers have in their employment relationship. Shareholders' investment takes the form of mere ownership interests in financial assets (e.g., shares of stock) that are readily alienable, and are continuously appraised and evaluated in markets. In particular, for public corporations, stock markets and other secondary markets for shares provide constant, reliable, and unbiased information for principals in corporations.

In contrast, workers' investments in their employment relationships take the form of "human capital," which describes the skills, knowledge, and experience possessed by an individual worker, or group of workers, expressed in terms of their value to an organization.[107] Human-capital skills often are firm-specific, rather than generic, which means that they cannot be transferred easily from one employer to another. This lack of transferability reduces the bargaining power of workers by limiting the

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105. *UAW Basics*, *supra* note 103; *see also Electing Chapter Delegates to the AAUP June Biennial Meeting*, AM. ASS'N UNIV. PROFESSORS 38, https://actionnetwork.org/user_files/user_files/000/038/514/original/Election_webinar_power_point_012920.pdf [https://perma.cc/BH9K-YCNG] ("Officers [and] Council members will be elected via delegate voting.")

106. *UAW Basics*, *supra* note 103.

107. The Organization of Economic Cooperation and Development defines human capital as "the knowledge, skills, competencies and attributes embodied in individuals that facilitate the creation of personal, social and economic well-being." *Human Capital: The Value of People*, ORG. ECON. COOPERATION & DEV. 29 (2007), https://www.oecd.org/insights/37967294.pdf [https://perma.cc/8FDP-C8GG]. Individual human capital consists of the skills and abilities of individual workers.

credibility of threats to quit working for one employer and shift over to a rival.

The ready observability of market prices for shares significantly limits the agency-cost problems in public corporations in myriad ways. First, such prices, combined with a separation of share ownership and managerial power, allow the emergence of a market for corporate control. This market, in turn, strongly incentivizes manager-agents to further the interests of shareholder-principals in order to avoid being ousted in a change-in-control battle by an investor who can garner arbitrage profits by replacing inefficient managers with efficient management teams.[108]

There is no remotely close substitute in the world of union governance for the salutary disciplinary effects of the market for corporate control in corporate governance. In U.S. labor law, unions become "certified" to engage in collective bargaining on behalf of employees by garnering signatures on a petition showing support from at least 30% of employees and filing that petition with the National Labor Relations Board (NLRB). NLRB agents then verify that the NLRB has jurisdiction, the union is qualified, and there are no existing labor contracts or recent elections that would bar an election. Next, the employer whose place of business is being unionized is required to post a Notice of Petition for Election in conspicuous places, as well as where notices to employees are customarily posted, and to distribute the Notice of Petition for Election electronically.[109] The NLRB then obtains an election agreement with the employer and the union regarding details such as the date, time, and place for balloting, the ballot languages, the appropriate voting and bargaining unit, and the methodology for determining who is eligible to vote. After, the parties authorize the NLRB Regional Director to conduct the election.[110]

Efforts to change control of unions from an existing, corrupt union to a more responsive and honest union are exceedingly rare. For example, "[w]hen a union is already in place, a competing union may file an election petition if the labor contract has expired or is about to expire,

108. *See* Adrian Corum & Doron Levit, *Corporate Control Activism*, 133 J. FIN. ECON. 1, 1-2 (2019); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1198 (1981) (replacing underperforming management is one of the primary reasons why takeovers occur)); Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5, 6-7 (1983); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112-15 (1965).

109. *See Conduct Elections*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections [https://perma.cc/JQ5A-BJSB].

110. *See id.* ("If an agreement cannot be reached, the Regional Director of the [National Labor Relations Board (NLRB)] will hold a hearing and potentially order an election under conditions determined by the Board's policies as informed by its rules and prior decisions.").

and it can show interest by at least 30% of the employees."[111] Where a rival union obtains such an election petition there usually will be a three-way election, with workers deciding whether to be represented by the incumbent union, the insurgent union, or no union.

Decertification describes the process whereby the NLRB allows employees to call for a special election to remove a union as their "exclusive representative."[112] A variety of impediments deter efforts to decertify unions. First, unionized companies are barred from assisting workers in their efforts to decertify a union and terminate the union's right to represent a particular cohort of workers.[113] Second, under the "contract bar" rule, a petition cannot be filed for a decertification election within the first 3 years of labor contract except during a 30-day "window period," which typically opens 90 days prior to the contract expiration and closes again 60 days before the contract expires.[114] Third, employees need to draft a decertification petition for employee signatures.[115] If at least 30% of bargaining unit members sign a decertification petition, the NLRB will have a secret ballot election.[116] Employees can engage in decertification efforts only during non-work times and in non-work areas, and management cannot be involved in any way in this effort.[117] If at least 50% of the employees vote against union representation then the workers will no longer have union representation.[118] Unions "may try to pressure or coerce" workers into refraining from decertification efforts, although such threats and coercion by union representatives are "illegal and constitute an unfair labor practice."[119]

Thus, in the corporate context, the shareholder may choose between different directors, and the corporation will carry on. In the union context, employees are often faced with a Hobson's choice: a corrupt union, or no union at all.

Certifying and decertifying unions is not a viable or effective substitute for the market for corporate control because there is no pricing mechanism by which bidders can credibly and effectively signal their value to shareholders. In the context of the market for corporate control,

111. *Id.*

112. *See Decertification*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/decertification-election [https://perma.cc/8ZCQ-AKUV]; *How to Decertify a Union*, NAT'L LAB. REL. INST., https://lrionline.com/decertification/ [https://perma.cc/D4R6-PASV].

113. *See How to Decertify a Union*, *supra* note 112.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *Id.* (emphasis omitted).

bidders can signal the enhanced value they will bring to the corporation by the price that they are willing to pay for target company shares. In colloquial terms, in the corporate context, bidders have "skin in the game." They put their own money, often measured in the hundreds of millions if not billions of dollars, behind their efforts to reform and improve the corporate governance of the companies they target. In stark contrast, unions are unable credibly to offer workers anything other than empty promises that they will be faithful stewards of the workers' hard-won earnings.

Turning to other market mechanisms for reducing agency costs that are not available in the union context, corporations' ability to return money to shareholders by paying dividends (and, presumably, by engaging in share repurchases) is a further way of ameliorating agency costs:

> Suppose a firm has an initial capitalization of 100, of which 50 is debt and 50 equity. It invests the 100 in a project. The firm prospers, and earnings raise its holdings to 200. The creditors now have substantially more security than they started with, and correspondingly the residual claimants are paying the [firm's] creditors a rate of interest unwarranted by current circumstances. They can correct this situation by paying a dividend of 50 while issuing new debt worth 50. The firm's capital continues to be 200, but the debt-equity ratio has been restored, and the interest rate on the original debt is again appropriate to the creditors' risk. Expected, continuing dividends compel firms to raise new money in order to carry out their activities. They therefore precipitate the monitoring and debt-equity adjustments that benefit stockholders. Moreover, even when dividends are not accompanied by the raising of new capital, they at least increase the debt-equity ratio so that shareholders are not giving (as much) wealth away to bondholders. In other words, *dividends set in motion mechanisms that reduce the agency costs of management and that prevent one group of investors from gaining, relative to another, by changes in the firm's fortunes after financial instruments have been issued*.[120]

Similarly, share repurchases and dividend payments reduce managers' ability to divert such cash to their own private ends simply by depleting a company's available cash through returning it to shareholders.[121]

Another highly effective mechanism for ameliorating agency costs in the corporate context that appears to be unavailable in the union context is the use of compensation contracts that tie the pay of corporate executives (agents) to the performance of company. The most common methods of agents' compensation include stock options, profit sharing, and de-

120. Frank H. Easterbrook, *Two Agency-Cost Explanations of Dividends*, 74 AM. ECON. REV. 650, 655 (1984) (emphasis added).

121. *See* Michael C. Jensen, *The Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323, 328-29 (1986).

ferred compensation.[122] More fundamentally, as more of the compensation of corporate management becomes tied to the performance of the corporation, the less agency costs pose a problem for shareholders and other corporate principals.

While many of the strategies for ameliorating agency costs in the corporate context are not readily available in the union context, shareholder voting is a control mechanism that is not only theoretically available to workers in the union context but actually utilized in fact. Unfortunately, voting, whether by shareholders in the corporate context or by workers in the union context, is a singularly ineffective mechanism for controlling agency costs. As Frank Easterbrook and Daniel Fischel have observed in the corporate context, voting generates results that simply are not good for the principals exercising their rights to vote.[123] In addition, in the corporate context, voting rights are a very poor substitute for market mechanisms as a method for reducing agency costs:

> The more shareholders govern, the more poorly the firms do in the marketplace. Shareholders' interests are protected not by voting but by the market for stock (and the managers' need to raise new capital), the market for goods, and the market for managers' services. It would make little difference if shareholders, like bondholders, could not vote at all. Funds spent providing shareholders with a more effective voice are wasted at best and harmful beyond their costs if they hamper the firms' effective pursuit of profits. On this view it is a puzzle that shareholders have, or exercise voting rights.[124]

Shareholder voting is used very sparingly in the corporate context, and for good reason. The very reason that principals, such as union members or shareholders, utilize agents, such as union officials or professional managers, in the first place is that it is efficient to delegate the management of the organization to dedicated, specialized officers, thereby freeing up workers and shareholders to go about the activities in which they specialize.

Rational apathy and other collective action problems indicate that it is only efficient for shareholders to vote when the stakes are very high.[125] Rational apathy refers to the fact that it is inefficient for voters to inform

122. *See* *Principal-Agent Problem*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/other/principal-agent-problem [https://perma.cc/F4QP-JDL2].

123. *See* Frank H. Easterbrook & Danial R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 397 (1983).

124. *Id.*

125. *See* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 613 (2006) ("[T]he phenomenon of rational apathy nevertheless limits the extent to which shareholders can be expected to act on those incentives.").

themselves adequately about an issue being brought to a vote because the unavoidable costs of learning about the issue outweigh any potential benefit one could reasonably expect to gain from casting a vote. Thus, rational voting posits that over a wide range of issues it would be an irrational waste of time to become informed. A significant collective action problem exists in voting because in any given election the probability of any single voter affecting the outcome is so close to zero that the expected value of voting is substantially less than its cost.

On the bright side, however, various factors can mitigate the rational apathy and collective action problems that limit shareholder voting. Some people may derive personal utility from following politics and voting. Others may find that going to the polls provides an opportunity for enjoyable social interactions with fellow voters or produces a rewarding sense of civic engagement.

But in the union context these benefits do not appear to be nearly sufficient to counter the rational-apathy problem.[126] The rational apathy of union members has been well documented in the literature. One leading textbook on the internal organization of unions observes that historically "the bulk of [union] members . . . do not desire to take part" in the governance of the unions to which they belong.[127] Another textbook points out that "[o]nly a small minority [of union members] find the rewards from participation in union affairs and politics great enough to sustain a high level of interest and activity."[128] The same problems of rational apathy and free riding deter reform-minded union workers from running for office.[129] Rational apathy seems particularly likely in the context of union voting where fraud in union elections, including stuffing ballot boxes and miscounting ballots in union elections, appears to occur regularly.[130]

The point here is not that the voting power of union members should be ignored or that elections cannot serve a salutary role in union governance. In fact, the absence of any viable "exit option" makes voting relatively more important in the union context.[131] In the corporate setting, dissatisfied shareholders can sell their shares:

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126. *See* JULIUS G. GETMAN, STEPHAN B. GOLDBERG & JEANNE B. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 74-76 (1976) (observing that workers do not pay much attention to union election campaigns).

127. MARTEN ESTEY, THE UNIONS: STRUCTURE, DEVELOPMENT AND MANAGEMENT 60 (3d ed. 1981).

128. WALTER GALENSON & SEYMOUR MARTIN LIPSET, LABOR AND TRADE UNIONISM: AN INTERDISCIPLINARY READER 225 (1960).

129. *See* JACK BARBASH, AMERICAN UNIONS: STRUCTURE, GOVERNMENT, AND POLITICS 53 (1967) ("Most union members have no great ambition to be union leaders.").

130. *See, e.g.*, Greenhouse, *supra* note 28.

131. For shareholders in corporations whose stock is publicly traded, selling one's shares is a viable and relatively inexpensive exit option. Unionized workers generally will have

> [T]here is no reason why shareholders who supply capital to the firm should have any interest or expertise in managing the firm's affairs. Because of the easy availability of the exit option through the stock market, the rational strategy for dissatisfied shareholders in most cases, given the collective action problem, is to disinvest rather than incur costs in attempting to bring about change through the voting process.[132]

The exit option in the corporate context makes up for the fact that voting is not a particularly useful device for controlling agency costs. In addition, the ability of a single entity to accumulate large blocks of shares in a corporation is a powerful practical means to overcome the collective action problems associated with shareholder voting. But these options are essentially unavailable in the union context. Exiting in the union context often involves not only changing one's job but changing industries because entire industries in the United States (e.g., trucking, automobile manufacturing) tend to be organized by the same union. And, of course, changing one's job is significantly costlier than selling one's shares in a corporation. Thus, while voting is generally understood to be a costly, ineffective, and rarely used governance mechanism in the corporate context, it is an even less effective device for controlling agency costs in the union context.

Certain innovations in the corporate realm, however, do appear to hold some considerable promise in the labor union context. Those will be the subject of the four sections that follow.

B. Proxy Advisory Firms

From a theoretical perspective, and perhaps from a practical perspective, it is useful to consider the role of proxy advisory firms as a source of policy arbitrage between corporate governance and labor law. Proxy advisory firms provide advice to investors who want assistance in determining how to vote their shares in corporate elections of precisely the kind that union workers might find of value in voting in corporate elections. Though not without controversy,[133] the dominant proxy advisory firms, which are Institutional Shareholder Services (ISS) and Glass

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to take the very expensive step of quitting their jobs in order to disassociate themselves from a corrupt union. *See* Kornelius Kraft, *Exit and Voice in the Labor Market: An Empirical Study of Quits*, 142 J. INSTITUTIONAL & THEORETICAL ECON. 697, 697 (1986) ("The exit-voice hypothesis states that workers can choose between quitting the firm (exit-option) or expressing their dissatisfaction with certain work conditions (voice-option).").

132. Easterbrook & Fischel, *supra* note 123, at 420.

133. Charles S. Spatt, *Proxy Advisory Firms, Governance, Failure, and Regulation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 25, 2019), https://corpgov.law.harvard.edu/2019/06/25/proxy-advisory-firms-governance-failure-and-regulation/ [https://perma.cc/H2JX-6XPY].

Lewis, are independent for-profit consulting companies that provide highly valuable research and voting recommendations on management- and shareholder-sponsored initiatives regarding board structure, compensation design, and other corporate governance issues—including the election of directors, approval of equity-based compensation programs, and advisory approval of management compensation.[134]

There is considerable evidence that the recommendations of these advisory firms have significant influence on corporate governance issues, including executive compensation.[135] In fact, a major concern about proxy advisory firms is that the industry is highly concentrated and that the small number of dominant proxy advisory firms (particularly ISS and Glass Lewis)[136] may exert a disproportionate, outsized influence on corporate elections.[137] ISS and Glass Lewis are the two largest proxy advisory firms in terms of the number of corporate issuers covered, proxy voting recommendations provided, and the number and size of institutional investors served by a large margin. Researchers estimate that ISS and Glass Lewis together have a ninety-seven percent share of the investor advisory market.[138]

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134. The broad influence of proxy advisory firms is testament to their value to investors because investors must pay to receive the recommendations generated by such firms. Ike Brannon & Jared Whitley, *Corporate Governance Oversight and Proxy Advisory Firms*, HARV. L. SCH. FOR. ON CORP. GOVERNANCE (Sept. 17, 2018), https://corpgov.law.harvard.edu/2018/09/17/corporate-governance-oversight-and-proxy-advisory-firms [https://perma.cc/T6WG-4L22]; *see also* David Larcker, Allan L. McCall & Brian Tayan, *And Then a Miracle Happens!: How Do Proxy Advisory Firms Develop Their Voting Recommendations?*, STAN. CORP. GOVERNANCE RES. INITIATIVE 1 (Feb. 25, 2013), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-31-proxy-firms-voting-recommendations.pdf [https://perma.cc/DF99-44DG].

135. A survey conducted by the Conference Board, NASDAQ, and the Stanford Rock Center for Corporate Governance found that over seventy percent of directors and executive officers claimed that their compensation programs were influenced by the policies or guidelines of proxy advisory firms. David F. Larcker, Allan L. McCall & Brian Tayan, *The Influence of Proxy Advisory Firm Voting Recommendations on Say-on-Pay Votes and Executive Compensation Decisions*, CONF. BOARD 4 (Mar. 2012), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-survey-2012-proxy-voting_0.pdf [https://perma.cc/HF6U-TPZ5].

136. As the largest proxy advisor, Institutional Shareholder Services (ISS) covers almost 40,000 meetings in 115 countries and has over 1,600 institutional clients. Nadya Malenko & Yao Shen, *The Role of Proxy Advisory Firms: Evidence from a Regression-Discontinuity Design*, 29 REV. FIN. STUD. 3394, 3394 (2016). ISS clients manage $25 trillion in investment assets. Glass-Lewis clients manage $15 trillion in investment assets. *See* Larcker et al., *supra* note 134, at 1.

137. *See Examining the Market Power and Impact of Proxy Advisory Firms: Hearing Before the Subcomm. on Capital Mkts. & Gov't Funded Enters. of the H. Comm. on Fin. Servs.*, 113th Cong. (2013); Jennifer E. Bethel & Stuart L. Gillan, *The Impact of Institutional and Regulatory Environment on Shareholder Voting*, 31 FIN. MGMT. 29, 45-47 (2002); Malenko & Shen, *supra* note 136, at 3394.

138. James K. Glassman & Hester Peirce, *How Proxy Advisory Services Became So Powerful*, MERCATUS CTR. 1 (June 18, 2014), https://www.mercatus.org/system/files/Peirce-Proxy-Advisory-Services-MOP.pdf [https://perma.cc/R2M9-W3MB].

There is a market for proxy advisory firms in the United States because shareholder voting is dominated by institutional investors, such as mutual funds, index funds, pensions, and hedge funds, which collectively own seventy percent of the outstanding shares of publicly traded corporations.[139] As explained below, these institutional investors have been incentivized by their primary regulator, the Securities and Exchange Commission (SEC), to retain proxy advisory firms.

Because of the sheer numerical dominance by institutional investors in the ownership of equity in U.S. public companies, and because they actually vote their shares much more regularly than the retail investors who constitute the remaining thirty percent of voters in corporate elections, institutional investors have a "disproportionately large influence on voter outcomes."[140] Since voting in corporate elections is costly and requires a significant allocation of time, expertise, and personnel, most small and mid-sized institutional investors find it cost effective to outsource much of the necessary work to outside proxy advisory firms, who essentially perform the task of centralizing shareholder voting research "across multiple investment firms."[141]

The SEC provided a significant boost in demand for proxy advisory firms in 2003 when it began to require that the large swathe of institutional investors known as mutual funds develop and disclose their own proxy voting policies and disclose their votes on all issues subject to shareholder vote.[142] The SEC incentivized the use of proxy advisory firms by stipulating that institutional investors could satisfy their regulatory obligations to explain their voting policies by relying on the voting policies developed by independent, third-party agencies (i.e., proxy advisors).[143] These regulations cemented the use of proxy advisory forms as a "cost-effective means of satisfying fiduciary and regulatory voting obligations for institutional investors."[144]

Proxy advisory firms provide an effective resource for combatting agency costs because such firms address in the corporate context precisely the same market failures that plague voting in the labor union con-

139. *Proxy Pulse: 2017 Proxy Season Review*, BROADRIDGE & PRICEWATERHOUSECOOPERS 2 (Sept. 2017), https://proxypulse.broadridge.com/proxypulse/_assets/docs/broadridge-2017-proxy-season-review.pdf [https://perma.cc/2PF4-TETU].

140. James R. Copland, David F. Larcker & Brian Tayan, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, STAN. CORP. GOVERNANCE RES. INITIATIVE 2 (May 30, 2018), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-72-big-thumb-proxy-advisory.pdf [https://perma.cc/CEZ2-7KJM].

141. *Id.*

142. Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6,563 (Feb. 7, 2003) (codified at 17 C.F.R. 239, 249, 270, 274 (2020)).

143. *Id.*

144. Copland, Larcker & Tayan, *supra* note 140, at 2.

text.[145] Specifically, workers, like shareholders, face the collective-action and information-deficit problems described above and incur significant resource costs in collecting and analyzing the information required to engage in informed voting as a union member. It seems clear that governance in labor unions would improve dramatically if workers could receive the same high-quality recommendations and monitoring that institutional investors receive from ISS and Glass Lewis.

There is serious and, to some extent, legitimate concern about the use of proxy advisory firms.[146] The point here is merely that proxy advisory firms provide significant benefits. My intention is not to suggest that proxy firms are costless or perfect. The primary complaints about proxy advisory firms are two-fold. First they are accused of using a "one-size-fits-all," algorithmic approach in formulating recommendations that may not be suitable for every company.[147] Second, proxy advisory firms are accused of having an inherent conflict of interest in issuing recommendations due to the desire to preserve and continue the ongoing relationship with their clients.[148] In particular, ISS has conflicts because it "provides governance advice to the same public companies it provides shareholder voting recommendations and receives fees from them, while Glass Lewis avoids such conflicts."[149] I fully acknowledge the issues and concerns with proxy advisory firms in providing recommendations to workers about voting in union elections. However, there is no reason to believe that these conflicts would be more acute in the union context than in the corporate context. And proxy advisory firms provide significant value-added to voters in corporate elections by ameliorating the collective action

145. The recommendations of proxy advisory firms have a substantial influence on the outcome of proxy contests. *See* Cindy R. Alexander, Mark A. Chen, Duane J. Seppi & Chester S. Spatt, *Interim News and the Role of Proxy Voting Advice*, 23 REV. FIN. STUD. 4419, 4420, 4423-25 (2010); Malenko & Shen, *supra* note 136; Alon Brav, Wei Jiang, Tao Li & James Pinnington, *Picking Friends Before Picking (Proxy) Fights: How Mutual Fund Voting Shapes Proxy Contests* (Columbia Bus. Sch. Working Paper No. 18-16, 2019), https://ssrn.com/abstract=3101473 [https://perma.cc/6WHF-AJDW].

146. *See* Copland, Larcker & Tayan, *supra* note 140, at 6; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-765, CORPORATE SHAREHOLDER MEETINGS: ISSUES RELATING TO FIRMS THAT ADVISE INSTITUTIONAL INVESTORS ON PROXY VOTING (June 2007); Tao Li, *Outsourcing Corporate Governance: Conflicts of Interest Within the Proxy Advisory Industry*, 64 MGMT. SCI. 2951, 31-32 (2018) (finding that proxy advisory firms that have simultaneous consulting relationships with companies demonstrate bias toward management, indicating that the available evidence supports the conclusion that proxy advisory firms are subject to conflicts of interest by serving both investors and corporations).

147. Yaron Nili, *Proxy Advisory Firms and Corporate Governance Practices: One Size Does Not Fit All*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 18, 2014), https://corpgov.law.harvard.edu/2014/06/18/proxy-advisory-firms-and-corporate-governance-practices-one-size-does-not-fit-all [https://perma.cc/W2UG-YBGN].

148. *See* Spatt, *supra* note 133.

149. *Id.*; *see also* Copland, Larcker & Tayan, *supra* note 140, at 6.

problems of rational ignorance and free-riding that plague both shareholder voting and voting by unionized workers.

Further, some complain that "a fundamental source of conflict that is inherent in the business model of any proxy advisory firm is the implicit incentive to stir controversy to increase the value of advice about proxy questions. This incentive is illustrative of the broader incentive of firms to undertake actions that raise the value of their services."[150] It seems likely that proxy advisory firms would not do better in the union context than in the corporate context. However, the fact is that proxy firms do not vote. They merely issue recommendations about how others might vote. Like shareholders, workers are free to ignore the recommendations made by advisory firms.

The available evidence indicates that advice of the kind that proxy advisory firms offer would be of particular value to workers, because workers are more like small asset managers than large institutional investors. Studies have found that smaller asset managers are much more likely to follow recommendations from proxy advisory firms than large investors are.[151] Similarly, asset managers with small positions in particular companies rely to a greater degree upon proxy advisory firms, and smaller fund families are more responsive to the recommendations of proxy advisory firms.[152]

Proxy advisory firms play a major role in corporate governance.[153] They play no role whatsoever in union governance. One explanation for this is that collective action problems make it impossible for workers to form an effective coalition to pool their resources to hire proxy advisory firms.

A major practical obstacle to using proxy advisory firms to provide voting advice and recommendations to workers is that proxy advisory firms are for-profit entities, providing advice is costly to such firm, and it is not clear who would compensate the proxy advisory firms for provide voting recommendations to workers.

Unions should not be required to pay for proxy advisory firm recommendations. The funds to pay the proxy firms' fees necessarily would come out of the pockets of workers who can ill-afford increased union

150. Spatt, *supra* note 133.

151. *See* Comment Letter from Barbara Novick & Ray Cameron, BlackRock, to Brent J. Fields, Sec'y, Sec. & Exch. Comm'n, Comments on the SEC Staff Roundtable on the Proxy Process, File No. 4-725 (Nov. 16, 2018), https://www.sec.gov/comments/4-725/4725-4656351-176506.pdf [https://perma.cc/ZK6D-3937]; Barbara Novick, Opinion, *BlackRock Makes Its Own Proxy-Voting Choices*, WALL ST. J. (Sept. 27, 2018, 3:10 PM ET), https://www.wsj.com/articles/blackrock-makes-its-own-proxy-voting-choices-1538075415 [https://perma.cc/8XG5-3HQU].

152. *See, e.g.*, Alexander, Chen, Seppi & Spatt, *supra* note 145.

153. *See* Spatt, *supra* note 133.

dues. The dues increases necessary to amass the funds to pay advisory firms would reduce workers' compensation, and such a reduction is indefensible in light of the growing income inequality between rank-and-file corporate workers and corporate executives.

One possible source of funding for the work of proxy advisory firms would be simply to have Congress compel unionized companies to pay for the services of proxy advisory firms. I also reject this source of funding because it would provide a further ground upon which companies could oppose unions and it would impose significant costs on smaller companies, particularly on non-publicly traded companies. In addition, corporate funding of unions' advisory firms might compromise the independence of the advice rendered by such firms.

The significant problems with funding proxy advisory forms by either unions or corporations indicate that new federal legislation will be required to render operational the recommendation made here to utilize proxy advisory firms to provide voting recommendations for workers. The broad outlines of such legislation would take the following form.

First, the DOL should be provided with the authority to create a new regulatory designation, the Nationally Recognized Proxy Advisory Firm. The inspiration here, of course, is the SEC's creation of the Nationally Recognized Statistical Rating Organization (NRSRO) designation for credit rating agencies.[154] In 1975, Congress developed the concept of NRSROs in order to identify particular companies supplying credit ratings that could be relied upon by the SEC for regulatory purposes. The term NRSRO was originally adopted by the Commission solely for the purposes of Rule 15c3-1, which relates to capital requirements for broker-dealer firms. The rule allowed the SEC to distinguish financial assets that had high ("investment-grade") ratings from an NRSRO from other assets, and to allow only those financial assets with an investment-grade rating from an NRSRO to be included in calculating the regulatory net capital of SEC-regulated broker-dealer firms.[155]

Second, after inventing a new regulatory designation for proxy advisory firms, the legislation I propose would provide for funding such that, after designating a firm as a Nationally Recognized Proxy Advisory Firm, the DOL could contract with this firm to provide recommendations to unionized workers.[156] Third, the legislation that I propose would bar the

154. *See* Jessica Kane, Dir., Office of Credit Ratings, Sec. & Exch. Comm'n, The SEC's Office of Credit Ratings and NRSRO Regulation: Past, Present, and Future (Feb. 24, 2020), https://www.sec.gov/news/speech/speech-jessica-kane-2020-02-24 [https://perma.cc/37LL-3NTP].

155. *See* Adoption of Amendments to Rule 15c3 1 and Adoption of Alternative Capital Requirement for Certain Brokers and Dealers, Exchange Act Release No. 11497, 40 Fed. Reg. 29,795 (July 16, 1975).

156. I envision that competing proxy advisory firms would submit bids to the DOL for the right to issue recommendations to workers at particular firms.

DOL or unionized companies from attempting to influence or to interfere with the recommendations of the Nationally Recognized Proxy Advisory Firms. With government funding, in addition to Glass-Lewis and ISS, specialized advisory firms with particular expertise in union governance would have incentives to emerge to compete for such funds.

C. Say-on-Pay Voting Rights

In the United States and elsewhere, populist discontent and concerns about apparently runaway executive compensation have led to the proposal and adoption of so-called "say-on-pay" voting rules in the context of corporate elections.[157] Such rules give shareholders the right to vote on the compensation packages of the firm's senior executives. In the union context, a say-on-pay rule would give rank-and-file workers the right to vote on the compensation packages of union officials.

Say-on-pay votes can take a wide variety of forms. For example, in the United States, say-on-pay takes the form of periodic—and purely advisory—votes to accept or reject the board's proposed executive-compensation package. Other say-on-pay plans provide for binding votes on compensation or are part of the annual report with the votes applying to compensation packages, including salaries and incentive plans like option grants, severance arrangements, and pension agreements. Votes sometimes occur annually and sometimes bi-annually or tri-annually. The vote may be on specific pay packages, specific components of pay packages, or on general compensation policies. Say-on-pay voting schemes also vary in terms of how many executives are covered by such schemes. Some say-on-pay votes are directed at assessing executives' compensation, while others are directed at ratifying compensation arrangements that were provided in the past.

A recent survey of forty-one countries found significant variation in say-on-pay arrangements,[158] with twenty-five countries requiring disclosure of firms' remuneration policies by law or stock exchange rule, eight

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157. See Sandeep Gopalan, *Say on Pay and the SEC Disclosure Rules: Expressive Law and CEO Compensation*, 35 PEPP. L. REV. 207, 208 (2007), which observed that when say-on-pay regulations were being discussed in the United States at the beginning of 2007, 80% of Americans believed that executives were overpaid and 90% of institutional investors believed that corporate CEOs were overcompensated. More surprisingly, even a majority of corporate directors, 61%, believed that executive compensation models were problematic. *Id.*; Robert Wilmers, *Why Excessive Pay Is Bad for the Economy*, AM. BANKER (Mar. 14, 2014), https://www.americanbanker.com/opinion/why-excessive-ceo-pay-is-bad-for-the-economy [https://perma.cc/QY52-CVWT]; Regan Adamson & Daniel Lumm, *Shareholder Democracy and the Say on Pay Movement: Progress, But How Do You Define Success?* (Wake Forest Law Review Working Paper, 2009) (showing strong disapproval by individual investors of executive pay levels).

158. Stephani A. Mason, Ann F. Medinets & Dan Palmon, *Say-on-Pay: Is Anybody Listening?*, 20 MULTINAT'L FIN. J. 273, 275 (2016).

recommending such disclosure, and eight leaving the matter to be decided later.[159] In a sample of Organization of Economic Cooperation and Development countries with mechanisms in place for shareholder approval of compensation policy, fourteen of these mechanisms were found to be binding, eleven (like the United States's) were merely advisory, and six allowed some degree of choice.[160]

Empirical research by Randall Thomas, Alan Palmiter, and James Cotter found that shareholders generally support the executive pay packages proposed by the compensation committees of the companies in which they have invested.[161] But such support does not show that voting on compensation is an empty gesture because "placement of the issue on the company's ballot may have changed the dynamics of the shareholder-management dialogue."[162] Most relevant for purposes of union corporate governance, Thomas, Palmiter, and Cotter find that shareholder votes focused "attention on poorly performing firms with relatively high pay levels."[163] As a result, corporate managers at a number of companies changed the company's pay practices in response to the possibility of an unfavorable shareholder vote, and sometimes they offered additional disclosure explaining pay practices that had come onto the shareholders' radar screens.[164]

Based on these findings, say-on-pay voting, if required in union elections, would lead workers, as it has shareholders, "to become more attentive to pay issues," and may lead union management "to become more responsive to [worker] concerns."[165]

Moreover, say-on-pay voting in the union context would work synergistically with the proposal in the previous Section that proxy advisory firms be used in union elections. Proxy advisory firms are alert to problems of excessive executive compensation.[166] Mandating some sort of say-on-pay program, particularly a binding program, would improve the qual-

159. *Id.*

160. *Id.* at 275-79.

161. Randall S. Thomas, Alan R. Palmiter & James F. Cotter, *Dodd-Frank's Say on Pay: Will it Lead to a Greater Role for Shareholders in Corporate Governance*, 97 CORNELL L. REV. 1213, 1215 (2012).

162. *Id.* at 1216.

163. *Id.* at 1265.

164. *Id.* at 1217.

165. *Id.* at 1265.

166. *See* Joseph E. Bachelder III, *Proxy Advisors' Impact on Executive Pay Decisions by Directors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 11, 2016), https://corpgov.law.harvard.edu/2016/04/11/proxy-advisors-impact-on-executive-pay-decisions-by-directors [https://perma.cc/TY9Q-VMSK] ("It is clear that proxy advisors impact say-on-pay vote results."); *Proxy Advisory Firms*, CTR. ON EXECUTIVE COMPENSATION, http://www.execcomp.org/Issues/Issue/proxy-advisory-firms [https://perma.cc/GT7K-MRNJ] ("[T]he research and voting recommendations proxy advisory firms provide can have a significant impact on the level of support a shareholder proposal receives.").

ity of labor-union governance, particularly when coupled with advice and recommendations on such compensation packages from proxy advisory firms.

In fact, I would go further and use say-on-pay votes as a catalyst to energize the moribund market for control of unions. The casting of repeated negative say-on-pay votes by union membership on the proposed compensation of union officials should automatically trigger a decertification election. The justifications for such a strong response are two-fold. First, repeated negative say-on-pay votes are tantamount to a vote of no-confidence in union management. Second, there is no functional market for corporate control for unions, and therefore there is little oversight of union management. The threat of a decertification vote would provide strong incentives for union management to act in the best interests of workers. I fully acknowledge that the possibility of triggering a decertification election might actually discourage negative say-on-pay votes. But this is a natural consequence of the fact that the specter of a decertification election would raise the stakes for union officials of acting in ways that are inconsistent with the interests of the rank-and-file workers they are supposed to represent.

Moreover, decertifying a union should not result in leaving workers without representation. Other unions could and should emerge to provide substitute representations for workers whose union is decertified. Of course, in implementing this proposal, there should be sufficient time and notice of the election to encourage other unions to seek to replace the incumbent union as the workers' representative in collective bargaining with the employer.

Implementation of a scheme of say-on-pay votes would be relatively simple because one could simply follow the model employed in the precatory say-on-pay votes in corporate elections. In the corporate context, public companies must periodically (at least every three years) provide their shareholders with an advisory vote on the compensation of the most highly compensated executives. Companies are required to disclose how their compensation policies and decisions have taken into account the results of their most recent say-on-pay vote.[167] I recommend that similar disclosure be made every time union rank-and-file members are called upon to vote in a union election for either direct or indirect representatives.

167. *Say-on-Pay Vote*, U.S. SEC. & EXCHANGE COMMISSION, https://www.investor.gov/introduction-investing/investing-basics/glossary/say-pay-vote [https://perma.cc/8R9F-Y56K].

D. Shareholder Proposals

An additional mechanism for improving union governance would be for rank-and-file workers to be given the right to submit proposals for change and reform that their fellow workers could vote on at the time of regular union elections. In the corporate context, a voting proposal is a briefly worded resolution that is voted on at a regular or special shareholder meeting.[168] Shareholder proposals can be used both to collect and register shareholders' preferences and to determine policy outcomes on various important issues, such as the election of members of a company's board of directors, the issuance of additional stock by the company, amendments to the corporation's charter (i.e., articles of incorporation), and executive compensation. Shareholder proposals can cover almost any issue relevant to the business of the company, including social and environmental issues as well as corporate governance issues.

Proposals for shareholders' consideration can come from two sources. First, there are proposals by management. Second, where shareholders are displeased with management or simply want to propose an alternative course of action to an existing corporate policy, proposals can be made by a company's shareholder. Proposals by shareholders are governed by the SEC Rule 14a-8, which requires companies to include in their proxy materials shareholder proposals for votes at their annual meetings.[169]

Rule 14a-8, in a nutshell, allows shareholders to put policy and reform proposals before their fellow shareholders at company expense. There is a large body of regulation in the corporate governance context that aims to limit the ability of shareholders to force companies to include shareholder proposals in their own solicitations for votes. The remainder of this Section describes the elaborate infrastructure that has emerged to ensure that shareholders do not abuse their right to submit shareholder proposals under Rule 14a-8.

To begin with, in order to be eligible to submit a proposal under SEC Rule 14a-8, a shareholder must own at least $2,000 in market value or 1% of a company's outstanding stock for at least one year, and the

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168. The SEC has imposed a 500-word cap on shareholders' submissions. Rule 14a-8(d) of the Securities Exchange Act of 1934 permits the exclusion of shareholder proposals which exceed 500 words. 17 C.F.R. § 240.14a-8(d) (2020).

169. *See* Amendments to Rules on Shareholder Proposals, Securities and Exchange Commission Release No. 34-40018, 63 Fed. Reg. 29,106 (May 21, 1998) (codified at 17 C.F.R. § 240 (2020)); Div. of Corp. Fin., *SEC Staff Legal Bulletin No. 14*, U.S. SEC. & EXCHANGE COMMISSION (July 13, 2001), https://www.sec.gov/interps/legal/cfslb14.htm [https://perma.cc/K2YB-8VAH].

shareholder must continue to hold those shares through the meeting date.[170]

Shareholders submit proxy proposals to the company. Once the company receives a shareholder proposal, it may voluntarily elect to include the proposal in its proxy materials, suggest to the shareholder some alternative strategy (which may include withdrawal of the proposal in exchange for some promised reform in the company), or submit a no-action request to the SEC to deny the shareholder's request to include the proposal in the company's material. If the company denies the shareholder's request to include the proposal, such a denial may be appealed to the SEC and challenged in court. In particular, the SEC provides for thirteen substantive grounds upon which a shareholder proposal may properly be excluded.[171] Among the most important substantive grounds for exclusions are for proposals that: (a) are not a proper subject for shareholder action under state law; (b) would, if adopted, violate a state, federal, or foreign law to which the company is subject; (c) are materially false or misleading; (d) relate to a personal claim or grievance against the company; (e) fail to meet an objective threshold of materiality; (f) relate to a matter of the company's ordinary business operations; or (g) have already been substantially implemented by the company.[172]

In November 2019, the SEC proposed changes in the procedures it uses to review shareholder proposals submitted pursuant to SEC Rule 14a-8. These changes were intended further to reduce the potential for abuses of the process by shareholders with idiosyncratic views about corporate policy. In addition, they aimed to ensure that shareholders do not "excessively or inappropriately" use Rule 14a-8, since shareholder proposals "draw upon company resources to command the time and attention of other shareholders."[173]

Currently, Rule 14a-8(b) establishes eligibility requirements a shareholder must satisfy to include a proposal in a company's proxy statement.[174] Recently, the SEC proposed amendments that would increase the ownership requirements to submit a shareholder proposal. These changes would increase the amount of securities one must own and the length of time such securities must held for eligibility to include a shareholder proposal under 14a-8. The proposal envisions that a shareholder would only be eligible to submit a Rule 14a-8 proposal

170. 17 C.F.R. § 240.14a-8(b)(1) (2020).

171. *See id.* § 240.14a-8(i)(1)-(13) (2020) (listing exclusions).

172. *See id.*

173. Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 84 Fed. Reg. 66,458, 66,459 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240) [hereinafter Procedural Requirements].

174. 17 C.F.R. § 240.14a-8(b)(1) (2020).

for inclusion in a company's proxy materials if the shareholder has continuously held the following amounts of the company's securities entitled to vote on the proposal for the following lengths of time: (a) at least $2,000 of the company's securities for at least three years; (b) at least $15,000 of the company's securities for at least two years; or (c) at least $25,000 of the company's securities for at least one year.[175]

While the proposed amendment thus maintains the current $2,000 threshold under Rule 14a-8(b), it requires shareholders to hold the securities for at least three years (rather than one year) to be eligible to submit a proposal. Also, the proposed amendment would eliminate the current 1% ownership threshold, apparently on the grounds that it has not been utilized historically.[176]

The current incarnation of Rule 14a-8 does not address a shareholder's ability to submit a proposal for inclusion in a company's proxy materials through a representative, which is sometimes referred to as "proposal by proxy." Instead, this practice is presently governed by state agency law. The SEC has expressed concern that using a representative in the shareholder-proposal process allows third-party representatives who have no genuine or meaningful interest in the company to commandeer the proposal process.[177]

Proposed changes to Rule 14a-8 would require shareholders using a representative in the shareholder-proposal process to sign and date a statement supporting the proposal, describe the shareholder-proposal being submitted, identify the designated representative, describe the particular annual or special meeting at which the proposal is to be submitted, and provide documentation attesting that the shareholder being represented by a third party actually supports the proposal and has authorized the representative to submit the proposal on the shareholder's behalf. The documentation would also have to identify the company to which the proposal is directed.[178]

In addition, the proposed changes to Rule 14a-8 would for the first time require that shareholders make themselves available to companies to discuss their shareholder proposals. The proposed changes to Rule 14a-8 support meetings between shareholders and companies on the grounds that they "would encourage greater dialogue between shareholders and companies in the shareholder-proposal process, and may

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175. Procedural Requirements, *supra* note 173, at 66,463.

176. *Id.* at 66,464.

177. Unlike the SEC itself, the SEC's Division of Corporation Finance Staff has reiterated its view that a shareholder's ability to submit proposals through a representative is consistent with Rule 14a-8. *See* Div. of Corp. Fin., *SEC Staff Legal Bulletin No. 14*, *supra* note 169.

178. Procedural Requirements, *supra* note 173, at 66,466.

lead to more efficient and less costly resolution of these matters."[179] A proposed amendment to current Rule 14a-8(c), which bars shareholders from submitting more than one proposal to a company for a particular shareholders' meeting, would extend the "one-proposal" limit by making it applicable to "each person" rather than "each shareholder." This amendment would prevent shareholders from submitting more than one proposal by submitting multiple proposals through multiple representatives.[180]

Still other proposed changes to limit the use of Rule 14a-8 would strengthen the ability of companies to utilize Rule 14a-8(i)(12). This Rule allows companies to exclude a shareholder proposal that deals with substantially the same subject matter as another proposal that has been included in the company's proxy materials within the preceding five calendar years, unless the proposal met certain shareholder approval thresholds in previous elections. The proposed amendment would allow a company to exclude a shareholder proposal from a company's proxy materials if it addresses substantially the same subject matters as a proposal that was included in a company's proxy materials within the preceding five calendar years, if the most recent vote occurred within the preceding three calendar years, and if the level of shareholder approval for that vote was: (a) less than 5% of the votes cast if voted on once in the preceding five years; (b) less than 15% of the votes cast if voted on twice in the preceding five years; or (c) less than 25% of the votes cast if voted on three times or more in the preceding five years.[181] These amendments represent a modest increase in existing thresholds.

The purpose of this excursion into the interstices of SEC Rule 14a-8 is two-fold. First, the content and structure as well as the history and practice of Rule 14a-8 all demonstrate that it is possible to craft a set of regulations that empower individual, relatively small-stakes shareholders to make shareholder proposals, while providing the corporation that bears the costs of distributing such proposals—as well as the remaining shareholders who bear the costs of considering and voting on such proposals—with plenty of protection against abuses of the right to make such proposals.[182] An elaborate and workable infrastructure has

179. *Id.* at 66,467.

180. *Id.* at 66,568.

181. *Id.* at 66,460.

182. On September 6, 2019, the SEC announced a proposal to streamline slightly the process it uses to review decisions by companies to exclude shareholder proposals. Requests by corporations for SEC review of their decisions to exclude shareholder proposals come in the form of requests for so-called no-action letters, which are declarations by the SEC that it will refrain from taking any enforcement action in response to a company's decision to exclude a particular shareholder proposal. Such a no-action letter indicates acquiescence by the SEC in the

arisen around Rule 14a-8 that has not impeded the voting or disclosure process for shareholders or for companies.

Second, there is no reason to believe that a similarly functional process could not be developed by which workers could submit policy and governance proposals to unions for inclusion in the voting materials that unions distribute to workers at election time. Unions could use rules similar to those in Rule 14a-8 for determining whether they were obliged to include workers' proposals, and unions' refusals to include proposals could be appealed to the DOL and the courts.

In fact, there likely would be fewer problems in implementing a worker-proposal rule for unions than there are in implementing the shareholder-proposal regulatory rule of SEC Rule 14a-8. As indicated in the discussion above, the largest concern with shareholder proposals appears to be that small-stakes, short-term shareholders will make proposals that do not reflect the interests of more significant or longer-term investors. However, while there are many small-stakes and short-term shareholders, there are few, if any, small-stakes workers because all full-time employees have the majority of their human capital tied up in the companies they work for. And, while there are plenty of short-term workers, unlike short-term shareholders, these workers generally do not have short-term employment contracts by choice. And such workers clearly have significant interests worth protecting and expressing in policy proposals to the union membership.

Tolerance of dissent and freedom to express and disseminate opposing ideas is critical to reform. There are significant institutional obstacles in the union context to the creation of an environment that tolerates dissent and permits the free expression and dissemination of ideas. As Clyde Summers has observed, the incumbent managers of American unions have achieved "oligarchic control" through "domination of the channels of communications" between unions and rank and file workers.[183] In particular, union publications in periodicals, newsletters, and other official publications are characterized by:

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company's decision to exclude a proposal. The SEC has announced that it: (1) will now respond to some no-action requests orally, rather than in writing, and (2) may decline to state a view with respect to some requests. *See* Div. of Corp. Fin., *Announcement Regarding Rule 14a-8 No-Action Requests*, U.S. SEC. & EXCHANGE COMMISSION (Sept. 6, 2019), https://www.sec.gov/corpfin/announcement/announcement-rule-14a-8-no-action-requests [https://perma.cc/L236-2P6X]. With respect to this policy change, the SEC made clear that parties should not interpret the SEC's decision to decline to take a position on a particular request for no-action to mean that the company must include the proposal. Where the SEC declines to take a position, it "is not taking a position on the merits of the arguments made, and the company may have a valid legal basis to exclude the proposal under Rule 14a-8. And, as has always been the case, the parties may seek formal, binding adjudication on the merits of the issue in court." *Id.*

183. Summers, *supra* note 84, at 97.

> [a]dulation of incumbent officers, unqualified support of their policies, and exclusion of effective presentation of other positions . . . . Educational conferences and training classes promote the administration's views with no provision for dissent. The incumbent officers, their appointees, and paid staff representatives have daily opportunities to carry the message to the members, whether that message is promoting the administration and its policies or denigrating any opposition. The administration not only has the names and addresses of all the members, but knows the leaders of subordinate units and how to reach them. Through its contacts, it can identify its supporters and potential opponents, mobilize the former and isolate the latter.[184]

Implementation of this worker-proposal mechanism simply should track the corporate model. Specifically, I envision that any worker who has been a member of a union for a certain requisite minimum time period (six months seems about right) should have the right to submit a statement of 500 words proposing the change of an existing or the implementation of a new union policy. This statement would be circulated to the union membership simultaneously with the distribution of any voting materials for the direct or indirect election of union officials. While voting on proposals submitted by union members is subject to the rational apathy problems generally associated with voting, the proposals being voted on in this context are proposals that are promulgated by the workers themselves. As such, it seems likely that the usual rational apathy problems would be limited in this context because the workers would find these particular proposals to be of particular relevance and interest. Further, because the proposals likely would relate to working conditions, wages, and issues related to workplace dignity, workers would be uniquely qualified to make informed voting choices.

Similarly tracking the 14a-8 framework, unions would have the right (but not the obligation) to omit the particular proposal of a member of the rank-and-file under certain limited circumstances. For example, I envision that proposals to engage in conduct that violates a valid law or regulation should be excludable. Proposals that are beyond the ability of the union to effectuate also should be excludable. Proposals identical to proposals that previously have been submitted and did not garner a material (5%) percentage of workers' votes should be excludable.[185] It would be a relatively straightforward exercise for the DOL to apply to proposals by workers a slightly modified version of the framework already in place for regulating shareholders' proposals under Rule 14a-8.

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184. *Id.* at 98.

185. For a full list of the thirteen grounds for excluding a shareholder proposal under SEC Rule 14a-8, see 17 C.F.R. § 240.14a-8 (2020).

E. Independent Directors

A major problem—if not *the* major problem—in unions is the lack of effective monitoring. Unions' complete lack of independent directors is a significant departure from well-accepted norms of conduct in the world of corporate governance. Examination of the constitutional governance structures of major U.S. unions indicates that all members of relevant governing bodies are insiders, with no representation on the board by independent directors. Examples include the United Autoworkers' International Executive Board;[186] the National Education Association's Representative Assembly,[187] Executive Committee,[188] and Board of Directors,[189] as well as its Review Board;[190] the United Steelworkers' International Executive Board;[191] and the Service Employees International Union's International Executive Board.[192]

Independent directors serving on boards are subject to capture, confirmation bias, hindsight bias, and a host of other problems, and in no way should be considered a panacea for all of the agency problems that plague corporations,[193] much less unions. However, requiring a majority of independent directors on union boards would provide significant benefits in reducing corruption for two reasons. First, independent directors serve an important role in regulating conflict-of-interest transactions.[194] Second, independent directors are instrumental in implementing and monitoring systems that are designed to identify risks of corruption and other issues that might harm the firm and then dealing with such threats.[195] Since unions would benefit significantly from reducing conflicts

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186. *See Constitution of the United Automobile, Aerospace and Agricultural Implement Workers of America*, UAW, at arts. 8, 10, 12-14, 32, 51 (2018), https://uaw.org/wp-content/uploads/2019/01/2018-UAW-Constitution.pdf [https://perma.cc/K3LT-BXPT].

187. *See Constitution of the National Education Association of the United States*, NAT'L EDUC. ASS'N, at art. III, § 1 (2018-2019), https://ra.nea.org/wp-content/uploads/2018/12/NEA-Constitution-2018-19.pdf [https://perma.cc/YLN2-PQYT].

188. *See id.* art. VI, § 1.

189. *See id.* art. V, § 1.

190. *See id.* art VII, §§ 1, 3.

191. *See Constitution of International Union United Steelworkers*, UNITED STEELWORKERS, at art. IV, §§ 1, 3, 5-7, 11-13 (2017), https://uswlocals.org/system/files/intl_constitution_4-2017_0_0.pdf [https://perma.cc/373P-5HSC]; *see also id.* art. V, § 1 (establishing procedures for the nomination and elections of international executive board members).

192. *SEIU 2016 Constitution and Bylaws*, SERV. EMP. INT'L UNION, at arts. IV, V, VI, VIII, XVII (2016), https://d3jpbvtfqku4tu.cloudfront.net/img/constitution-2016.pdf [https://perma.cc/6U6K-PXQJ].

193. *See generally* JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN (2008) (analyzing the phenomenon of management capture of boards of directors and discussing mechanisms used to capture independent directors).

194. *See* James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Independent Counsel*, 48 VILL. L. REV. 1077, 1077 (2003).

195. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) (Allen, C.).

of interest and from better monitoring and oversight of potentially corrupt activities, unions, like public corporations, should as a matter of routine have governing boards that are comprised of a majority of independent directors.

Independent directors are specifically charged with overseeing conflict-of-interest transactions, and such transactions are automatically void unless they are deemed "fair" to the corporation.[196] Moreover, under applicable corporate law, independent directors are exposed to liability unless they "ensure the company has an appropriate enterprise risk management system that is reviewed at the board level, ensure the company has an appropriate legal and regulatory compliance system that is reviewed at the board level, [and] ensure the company and the board pays special attention to 'hot button' matters like . . . employee safety . . . bribery and money laundering."[197]

Regulators would have to take only limited concrete actions in order to require that union boards have a majority of independent directors. Here the DOL could simply transfer to the union governance the rules related to director independence, all of which are well-known in the corporate context.[198] For example, a candidate for union office ought not to be considered independent if he or she is employed by the union or has a relative that is employed by the union. A person who has any sort of contractual relationship with the union or has accepted any sort of compensation or payment from the union cannot reasonably be considered to be independent. Finally, a candidate for union office should not be considered independent if they have a relationship with the company that, in the opinion of the DOL, could interfere with the exercise of that person's independent judgment in carrying out the responsibilities of a director.[199]

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196. *See* DEL. CODE ANN. tit 8, § 144 (2019); Marciano v. Nakash, 535 A.2d 400, 404 (Del. 1987).

197. Martin Lipton & William Savitt, *Director Liability:* Caremark *Protection*, COMPLIANCE & ENFORCEMENT (Nov. 20, 2019), https://wp.nyu.edu/compliance_enforcement/2019/11/20/director-liability-caremark-protection [https://perma.cc/8MPD-M7ZK]. Of course, the efficacy of these corporate governance devices depends on the availability of an enforcement mechanism. For this reason, union members should be able to bring derivative and class action lawsuits against union officials and directors, and attorneys' fees should be available to entrepreneurial attorneys who bring such suits on behalf of workers.

198. For a definition of the term "independent director" in the corporate context, see, for example, *NASDAQ Marketplace Rule 4200(a)(15) – Definition of "Independent Director*," MEDIA.CORPORATE-IR.NET, http://media.corporate-ir.net/media_files/irol/87/87823/corpgov/nasdaq_marketplace_rule_4200.pdf [https://perma.cc/4RPZ-7G9B].

199. This variant of the NASDAQ rule would consider a director to lack independence if he or she has a relationship with the company could interfere with the exercise of independent judgment in carrying out the responsibilities of a union director. *See id.*

F. How These Recommendations Relate to One Another

In this Article I have endorsed the long-standing recommendation that union officials be elected directly by workers, rather than indirectly in conventions. I also have made four additional proposals of my own that, I believe, would strengthen the legitimacy (and hence the power) of unions by reducing agency costs. This reduction in agency costs will mean that unions will be less corrupt, and that they will be more responsive to workers' needs and interests and less inclined to benefit their own leadership at the expense of the rank-and-file worker.

The recommendations here are independent of one another. Each policy proposal made here—whether it be to utilize proxy advisory firms, to grant workers the right to cast say-on-pay votes regarding union executives' compensation, to allow workers to circulate their own proposals for approval by the membership, or to require independent directors for union board members—could be implemented either by itself or in combination with any of the other proposals made here.

These proposals are not substitutes for one another. Each provides the particular benefits identified in this Article, but none of these proposals reasonably should be expected on its own to eliminate agency costs in unions. Agency costs are ubiquitous. In my view, implementing any single one of these proposals would reduce agency costs, and implementing more of them would increasingly reduce agency costs.

The most problematic of my proposals relates to the use of proxy advisory firms in the context of union voting. This proposal is problematic for two reasons. First, the other proposals could be implemented without any out-of-pocket expenses being incurred by workers, unions, or government. Extending the requirement that directors be independent or that shareholders be given certain voting rights or the right to offer proposals might be annoying to entrenched or corrupt union officials, but it would not cost workers anything. On the other hand, proxy advisory firms are for-profit enterprises, and they would be unwilling to make recommendations in union elections unless somebody could figure out a way to compensate them for their advisory services.

A second problem with proxy advisory firms is that such firms' recommendations are imperfect at best and deeply flawed at times. In particular, there is a danger that the proxy advisory firms do not understand the needs and interests of workers and therefore are not competent to make recommendations. Worse, there is the danger that a corrupt union will "capture" their proxy advisors either by bribing them or by providing them with profitable consulting arrangements in exchange for an implicit promise to make recommendations to voting workers that are consistent with the union's interests rather than with the interests of the rank-and-file.

Conclusion

The rampant corruption and concomitant decline of labor unions has harmed workers, increased inequality, and degraded the quality of our democracy. The inability of unions, workers, and policymakers to manage agency costs is a significant factor in the decline of unions. Controlling unions' agency costs presents a uniquely difficult challenge because the market mechanisms and contractual tools that are used to manage and control agency costs in other settings are not readily available in or easily applicable to the union context.

A promising way to deal with this problem is to engage in the simple policy arbitrage advocated here where I propose that the devices and structures used to control agency costs in other settings, particularly the corporate setting, be introduced in the context of union governance. The use of proxy advisory firms to monitor and evaluate voting proposals appears to be a particularly attractive candidate for import into the union context. The problem with using proxy advisory firms is the lack of a source of payment for their services. Since the proxy advisory industry is highly concentrated, with two firms enjoying a dominant market share, this Article proposes a bargain, in which the existing dominant proxy advisory firms, ISS and Glass Lewis, be designated as official proxy advisory services and tasked with generating voting recommendations on union issues for the use of rank-and-file workers.

In addition to using proxy advisory firms, I endorse not only strengthening unions' disclosure obligations in ways that already have been proposed (and fiercely challenged by unions), but also "weaponizing" these enhanced disclosure obligations by giving rank-and-file workers the right to vote up-or-down on union officials' compensation with "say-on-pay" voting rights.

Third, following SEC Rule 14a-8, I suggest reforms in union voting procedures that would give workers the right to make shareholder proposals that are distributed along with the union's voting materials to workers at union expense. Such proposals would include not only suggestions for governance reforms of unions, but also the right to nominate rival slates of union directors and officers.

Finally, following well-established norms of corporate governance, independent directors should be introduced to union boards and certain decision-making power should be removed from the board as a whole and delegated to these independent board members. In particular, the responsibility for nominating union directors, determining compensation for top union officials, setting internal governance rules, and selecting the union's independent, outside auditors should all be allocated to independent, outside directors.