

DEMOCRACY IN THE PRIVATE SECTOR: THE RIGHTS OF SHAREHOLDERS AND UNION MEMBERS

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INTRODUCTION

The wave of corporate scandals that began with Enron in 2001, and another wave of scandals associated with the financial meltdown of 2008, brought with them demands for more regulation of corporate governance.¹

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1. Post-Enron reforms included the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745-810 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C. (2013), new SEC regulations, and changes in stock exchange listing standards. By mid-decade a backlash had set in. *See, e.g.*, Douglas M. Branson, *Too Many Bells? Too Many Whistles? Corporate Governance in the Post-Enron, Post-WorldCom Era*, 58 S.C.L. REV. 65, 66 (2006) (discussing Sarbanes-Oxley and noting that “[w]hen the pendulum swings, it swings too far.”); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1602 (2005) (noting that the Sarbanes-Oxley Act’s substantive mandates “were seriously ill-conceived”). Then, the financial meltdown

This led to renewed debates over the optimal allocation of power within public corporations among their shareholders, boards of directors, management, and with respect to other stakeholders.² One of the liveliest of those debates has been over the value of shareholder democracy as a means to improve corporate performance and reduce the likelihood of future Enrons or Lehman Brothers.³ The theory is that by expanding the role of shareholders in selecting corporate boards and influencing corporate policy, shareholders, as the owners of the corporation,⁴ will be in a better position to monitor the performance of directors who may be asleep at the switch, and of managers who may be pursuing their own agendas at the expense of the shareholders.

The debate over shareholder democracy as a means to improve performance and curb wrongdoing, or even as an end in itself,⁵ has perhaps naturally led scholars to compare corporate governance and public government. Scholars have explored public financing of election

reenergized reform efforts, leading to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223 (2010) (codified as amended in scattered sections and titles of U.S.C.), more SEC regulations, and a renewed focus on the relationship between corporate governance and corporate failure and malfeasance. *See, e.g.*, Symposium, *Corporate Governance After the Financial Crisis*, 6 N.Y.U. J.L. & BUS. 171, 178-80 (2010) (discussing the potential impact of corporate governance legislation).

2. *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 (1999) (advocating for team production theory); Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1044-45 (2008) (arguing in support of stakeholder governance).

3. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1758 (2006) (suggesting divisions between ownership and control are beneficial); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005) (arguing for shareholder empowerment); William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 728 (2010) (suggesting limited effectiveness of shareholder empowerment); Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 106 (2008) (arguing shareholder and stakeholder interests can align); Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 790-91 (2007) (advocating board governance over shareholder governance). For an argument that the debate over shareholder democracy is more about rhetoric than reality, see Marcel Kahan & Edward B. Rock, *Symbolic Corporate Governance Politics* 94 B.U. L. REV. 1997 (2014) (arguing that corporate governance debates are largely symbolic).

4. Closely related to the shareholder democracy debate is the question whether it is either accurate or useful to characterize shareholders as the “owners” of the corporation. *See, e.g.*, LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 37-38 (2012) (arguing shareholders contract with corporations, but do not own them).

5. James McConvill, *Shareholder Empowerment as an End in Itself: A New Perspective on Allocation of Power in the Modern Corporation*, 33 OHIO N.U. L. REV. 1013, 1015 (2007).

campaigns as a model for director elections in public corporations,⁶ and have compared the relationship between one-share one-vote principles in corporate law and one-person one-vote principles in public elections.⁷ One scholar, who explored similarities between corporate boards and the presidential Electoral College, noted that such comparisons are “intellectually tempting,” but concluded they “ultimately falter because participation in a corporation fundamentally differs from participation in a nation.”⁸

Some commentators have expressed concern that the parallels between corporate and public governance can be misleading because they sometimes enhance the credibility of capital markets and the public’s confidence in them.⁹ Of course, during periods of partisan gridlock in Washington and record low poll numbers for Congress, comparisons with public government can just as likely undermine an institution’s image as enhance it.

This article explores corporate governance through a different comparison, between corporations and their sometime adversaries across bargaining tables and picket lines—labor unions. The article compares the regulation of corporate governance and the regulation of the internal affairs of unions, and the rights of shareholders and union members in each of these two regulatory models.

Since long before Enron, in the parallel universe of union governance, the democratic rights of union members have been protected by the Labor—Management Reporting and Disclosure Act of 1959 (LMRDA, or

6. Lee Harris, *Shareholder Campaign Funds: A Campaign Subsidy Scheme for Corporate Elections*, 58 UCLA L. REV. 167, 218-19 (2010).

7. Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1350-51 (2006); Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 450-63 (2008).

8. Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1390, 1393-97 (2006). As one court famously put it when upholding SEC proxy regulations:

Appellants’ fundamental complaint appears to be that stockholder disputes should be viewed in the eyes of the law just as are political contests, with each side free to hurl charges with comparative unrestraint, the assumption being that the opposing side is then at liberty to refute and thus effectively deflate the ‘campaign oratory’ of its adversary. Such, however, was not the policy of Congress as enacted in the Securities Exchange Act.

Sec. & Exch. Comm’n v. May, 229 F.2d 123, 124 (2d Cir. 1956).

9. See, e.g., Thomas W. Joo, Comment, *Corporate Governance and the “D-Word”*, 63 WASH. & LEE L. REV. 1579, 1586-88 (2006) (arguing that to describe corporate governance as democratic is problematic); cf. Cary Coglianese, *Legitimacy and Corporate Governance*, 32 DEL. J. CORP. L. 159 (2007) (discussing common but possibly misleading elements between governments and corporations).

Landrum-Griffin Act).¹⁰ In the 1950's, when American unions were at their peak, the labor movement was rocked by public scandals and congressional investigations into union corruption and labor racketeering that were every bit as big a story then as the corporate scandals of recent years. In terms of galvanizing public attention on the need for reform, the prosecutions of Enron executives, or even Martha Stewart, did not hold a candle to the larger than life confrontations between Teamsters President Jimmy Hoffa and committee counsel—and future Attorney General and Senator—Robert F. Kennedy during televised hearings of the U.S. Senate's Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee).¹¹ The LMRDA was passed in the aftermath of those scandals and the congressional investigations that exposed them.¹²

The LMRDA combined various approaches to the reform of unions that resemble both some traditional corporate law remedies and some more recent strategies for reforming corporate governance. These included new requirements that unions and their officers file financial and other reports;¹³ a cause of action against union officials for fiduciary breaches;¹⁴ protection against retaliation for members seeking to reform their unions;¹⁵ and most significant, new guarantees of internal union democracy.¹⁶ These would enable members to clean up their unions for themselves, avoiding the need for heavy-handed government interventions into internal union affairs. The LMRDA is supplemented by another judicially created union member cause of action against unions for breaches of the duty of fair

10. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (2013)). Specifically, 29 U.S.C. §§ 411(a)(1), 481 protect democratic voting rights for union members.

11. The Committee held 270 days of hearings over a two-year period. JANICE R. BELLACE & ALAN D. BERKOWITZ, *THE LANDRUM-GRIFFIN ACT: TWENTY YEARS OF FEDERAL PROTECTION OF UNION MEMBERS' RIGHTS* 3 (1979).

12. Legislation to ensure union democracy and achieve other reforms was recommended by the McClellan Committee, S. REP. NO. 85-1417, at 450-53 (1958) (Interim Rep.), although proposals for the federal regulation of internal union affairs had been circulating since at least 1935. See Michael J. Goldberg, *An Overview and Assessment of the Law Regulating Internal Union Affairs*, 21 J. LAB. RES. 15, 17 (2000) (chronicling history of internal union affairs regulation).

13. 29 U.S.C. §§ 431-40.

14. *Id.* § 501(b).

15. *Id.* §§ 412, 529.

16. *Id.* §§ 411, 481 (protecting members' freedom of speech, rights to equal treatment, due process, and opportunities to attend and participate in union membership meetings, and rights to run for office, nominate candidates, and vote in regular and fair elections of union officers).

representation (DFR),¹⁷ which unions owe their members when negotiating and enforcing collective bargaining agreements.¹⁸

This article, then, is an exercise of comparative legal scholarship. But instead of comparing the laws of different nations, it examines distinct bodies of law within one nation that seek to achieve often similar goals in the context of regulating two different types of organizations, each important to the nation's economic and political well-being. The article compares these parallel regimes for regulating the governance of publicly traded corporations on the one hand and labor unions on the other.¹⁹ It also

17. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 182-83 (1967); Clyde W. Summers, *The Individual Employee's Rights Under the Collective Bargaining Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 252 (1977) (discussing the duty of fair representation).

18. In extreme cases of union corruption involving organized crime, LMRDA and DFR remedies are supplemented by powerful structural injunctions available under the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, 84 Stat. 922-3 (codified at 18 U.S.C. §§ 1961-68 (2013)). See JAMES B. JACOBS, *MOBSTERS, UNIONS, AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* 138-253 (2006) (providing examples of RICO use against labor unions); Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903, 946-83, 994-1010 (highlighting instances of RICO use against labor unions).

19. The corporate focus of this article is exclusively on publically traded corporations; it does not consider the governance of closely held corporations. Also beyond the scope of this article, although I would be remiss if I did not at least mention them in this comparison of union governance and corporate governance, are several ways in which unions can impact or participate in corporate governance. See generally Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, 22 COMP. LAB. L. & POL'Y J. 97 (2000) (exploring why American workers do not have corporate governance rights while pension funds do). First, while it is much less common in this country than in Germany and some other countries, unions are occasionally given seats directly on corporate boards of directors. See, e.g., Agence France-Presse, *UAW Gets Seat on Chrysler Board*, INDUS. WK. (June 15, 2012), <http://www.industryweek.com/public-policy/uaw-gets-seat-chrysler-board> (reporting appointment of a United Automobile Workers' representative to Chrysler's board of directors). Second, unions and collectively bargained pension funds are important institutional investors, and it is common for them to engage in shareholder activism. See generally Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism By Labor Unions*, 96 MICH. L. REV. 1018 (1998) (discussing the power that unions have in influencing corporate governance). Finally, unions have a strong interest in the success of the corporations with which they bargain. They can serve as watchdogs against corporate waste, and in many ways have interests that overlap with those of shareholders. For example, where unions are able to obtain wage and benefit increases, they have incentives to help the corporation remain competitive by achieving efficiencies in other areas. It may be no coincidence that in unionized companies, excesses in executive compensation are less of a problem than in nonunion firms. See Rafael Gomez & Konstantinos Tzioumis, *Unions and Executive Compensation 2* (Centre for Economic Performance, Discussion Paper No. 720 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1032796 (finding union presence lowers executive compensation). For previous work comparing corporate and union governance, see JOHN T. DUNLOP, *THE MANAGEMENT OF LABOR UNIONS* 3-8 (1990) (examining decision-making processes in

examines how the nature of democratic governance can vary in different contexts, depending on whether it is valued simply as a tool for achieving good governance, or also as an end in itself.

Section I of this article considers just how similar, and dissimilar, unions and corporations are to each other because it is important not to overstate their parallels. Section II then focuses on several key elements of shareholder and union democracy: the nomination and election of corporate board members and union officers, and shareholder and union member rights to make proposals, campaign for them or for candidates they support, and vote. Section III examines shareholder and union member litigation, with a particular focus on derivative actions. Section IV draws some lessons from these comparisons and offers some thoughts on the themes of democracy in the regulation of corporate and union governance. Further, Section IV contrasts their instrumental and normative values, and concludes that while the instrumental arguments for and against more democracy in union and corporate governance are quite similar, the normative arguments are much more central to the cause of union democracy.

I. APPLES AND APPLES, OR APPLES AND ORANGES?

This article makes no argument for importing union democracy principles or practices into the law of corporate governance, or vice versa. Nevertheless, cross-fertilization of ideas is one of the benefits of comparative scholarship, so it is important to know whether one is crossing one variety of apples with another, or working with different types of fruit altogether.

There are major differences in the purpose and nature of corporations and unions that may require different approaches to their governance and reform. A central purpose of unions, for example, is to give employees a voice—the voice of collective bargaining—in their workplaces. Also important, although not formally acknowledged in labor law, are the social and political roles unions play in our pluralistic civil society. They provide a collective voice for workers not only on the job, but in larger social and

organizations); DONALD MARTIN, AN OWNERSHIP THEORY OF THE TRADE UNION (1980) (discussing the different conceptual models of ownership in unions); Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061 (1984) (comparing labor and corporate interests); Bruce A. Herzfelder & Elizabeth E. Schriever, *The Union Judgment Rule*, 54 U. CHI. L. REV. 980 (1987) (arguing for judicial deference to the decisions of union officials similar to the business judgment rule in corporate law); Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 368 (comparing union member and corporate shareholder relationships with management).

political arenas as well.²⁰ Those representative functions may justify placing a higher priority on union democracy than on shareholder democracy,²¹ since corporations generally do not purport to represent shareholders for any other purpose than to maximize returns on their investments.²²

Another important difference between unions and corporations that has policy implications for governance reform is the role of *exit* and *voice* as means by which dissatisfied members or shareholders can act on their dissatisfaction.²³ For most shareholders of publicly traded corporations, exit simply means selling one's stock in the company. For the majority of union members, on the other hand, exit is usually not a viable alternative.²⁴

One obvious form of exit for disgruntled members is simply to resign from the union. In roughly half of the states, however—other than the so-called “right-to-work” states²⁵—those employees would still have to pay

20. See generally CLAYTON SINYAL, *SCHOOLS OF DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN LABOR MOVEMENT* (2006) (exploring the similarities between labor unions and democracy, which both bestow power to members of larger groups); Paul Johnston, *Organize for What? The Resurgence of Labor as a Citizenship Movement*, in *REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE 21ST CENTURY* 27 (arguing that unions attempt to achieve the same goals as citizenship) (Lowell Turner, Harry C. Katz & Richard W. Hurd eds., 2001); MICHAEL D. YATES, *WHY UNIONS MATTER* (2d ed. 2009) (detailing both the positive and negative impacts of unions on America); Barbara J. Fick, *Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society*, 12 *WORKINGUSA: J. LAB. & SOC'Y* 249 (2009) (explaining that advocates for democracy should support unions because of union's strong contributions to democratic principles); Thomas C. Kohler, *Civic Virtues at Work: Unions as the Seedbeds of the Civic Virtues*, 36 *B.C. L. REV.* 279 (1995) (arguing that the ambivalence towards unions is unwarranted because of their positive democratic attributes).

21. See Clyde W. Summers, *The Public Interest in Union Democracy*, 53 *Nw. U. L. REV.* 610, 624 (1958) (detailing the advantages that shareholders have over union members).

22. Corporations, of course, also participate in the political process, at least for purposes of influencing the regulatory and tax climates in which they operate. Opportunities for corporate participation in politics are more expansive than ever in the aftermath of *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), which lifted restrictions on corporate political contributions.

23. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970) (explaining that dissatisfied members of an organization or polity can act on their dissatisfaction by exiting the relationship, or by asserting their voices within it).

24. Difficulty of exit also can distinguish unions from other types of nonprofit and voluntary organizations. See generally Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 *U.C. DAVIS L. REV.* 821 (2002) (discussing different options of exit in voluntary organizations).

25. These are states that have exercised their option under the Taft-Hartley Act, 29 U.S.C. § 164(b) (2013), to outlaw provisions in collective bargaining agreements compelling nonmembers in a unionized bargaining unit to join the union or, as nonmembers, pay agency fees in lieu of dues.

some portion of the union's dues as a fee for representation by the union.²⁶ And in unionized workplaces anywhere, including right-to-work states, the employees' terms of employment would still be governed by the collective bargaining agreements negotiated by the incumbent unions, pursuant to the doctrine of exclusive representation.²⁷ Thus, resigning from membership might save the employee some money, but it would also likely weaken the union as an institution, which might be a goal of employees who oppose unions on principle, but not for those who simply seek free-rider status, enjoying the benefits of union representation without paying for them. More importantly for our purposes, it would leave the former member disenfranchised, unable to vote on collective bargaining agreements or on the union officers who negotiate them and handle grievances arising under them.²⁸

Another form of exit is voting the union out of the workplace altogether through a decertification vote conducted by the National Labor Relations Board (NLRB).²⁹ That cannot work; however, unless a majority of the workers in the unit agree with that goal. Sometimes, the NLRB's ballot will present three choices: keeping the incumbent union; decertifying that union and proceeding "union free;" or certifying a different union as the bargaining agent.³⁰ Where the moving force is a rival union, this might be considered the labor law equivalent of a hostile takeover,³¹ but because many national unions are bound by American Federation of Labor and Congress of Industrial Organizations' (AFL-CIO)

26. See *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 751 (1988) (holding that unions are allowed collection from nonmembers to prevent free-riders). Union expenses related to collective bargaining and contract enforcement are considered "chargeable" as agency fees, but political or ideologically motivated expenditures are not. See *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 453 (1984) (holding that the union could not charge nonmembers for litigation that was not connected to bargaining). For at least some public sector employees, however, agency fees may be constitutionally suspect pursuant to the Supreme Court's recent decision in *Harris v. Quinn*, 134 S. Ct. 2618, 2641 (2014) (holding that Illinois' law mandating union fees for nonmember personal health assistants violated the First Amendment).

27. See *infra* text accompanying note 43.

28. See 29 U.S.C. § 411(a)(1) (2013) (equal voting rights for "[e]very member of a labor organization . . .") (emphasis added).

29. See Section 9(c) of the National Labor Relations Act of 1935, 29 U.S.C. § 159(c) (2013). State or local labor relations agencies conduct these votes for public employees, and the Federal Labor Relations Authority conducts them for federal employees.

30. See, e.g., Janice R. Bellace, *Union Decertification under the NLRA*, 57 CHI.-KENT L. REV. 643, 644 (1981) (discussing types of decertification).

31. See, e.g., Schwab, *supra* note 19, at 386 (discussing the costs and benefits of taking over a union as opposed to starting a new union, and emphasizing that taking over a union might have greater benefits).

no raiding pacts,³² there may be no alternatives available other than weak, independent unions. For these reasons, Professor Schwab's comparison of "the market for union control" with the market for corporate control concludes that the market is significantly less effective in the union context.³³

The most literal form of exit for dissatisfied union members is to leave their jobs and trade them in for others where there is better union representation or no representation, if that is the preference. The problem is that even in a good economy it is often difficult to find a new job with comparable wages and benefits.³⁴ This is particularly true for workers who are older,³⁵ have skills that are industry or job specific, or are tied down geographically. Needless to say, prospects for greener pastures are severely diminished during economic downturns. Put another way, a union member's investment in a particular job, and the union that comes with it, is typically a huge one relative to the member's other assets. It is an investment of human capital that is not liquid and is nearly impossible to diversify. Quitting one's job, therefore, should be an option of last resort. Thus, for many members who are dissatisfied with the quality of their unions' representation, it is not exit from the union but a voice inside it that can provide the means to improve their situation.³⁶

32. Cf. Lea Vaughn, *Article XX of the AFL-CIO Constitution: Managing and Resolving Inter-Union Disputes*, 37 WAYNE L. REV. 1 (1990) (explaining the history and procedures for Article XX of the AFL-CIO Constitution, which prevents raiding). Additionally, Federal antitrust laws do not apply to unions. 15 U.S.C. § 17 (2013).

33. Schwab, *supra* note 19, at 414-16. Other factors weakening the market for union control include the election, certification, and contract bar rules under the National Labor Relations Act, all of which limit the frequency of potential decertification votes. Schwab, *supra* note 19, at 411.

34. Before the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119-1025 (2010) (codified as amended in scattered sections and titles of U.S.C.), if an otherwise more desirable job did not come with health insurance, pre-existing conditions could discourage switching because of difficulty obtaining coverage. Portability issues with defined benefit pension plans pose similar disincentives for changing jobs. Although the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections and titles of U.S.C.) requires private sector pensions to vest after three years, the combined proceeds of, for example, three pensions covering eight years of service each can be far less than the proceeds of a single pension covering the same twenty-four years.

35. The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2013)), is generally more useful in protecting a job one already has than in obtaining a job one does not have.

36. See generally HERMAN BENSON, *REBELS, REFORMERS, AND RACKETEERS: HOW INSURGENTS TRANSFORMED THE LABOR MOVEMENT* (2005) (describing reformers' efforts to pursue more democracy and better representation inside their unions); MIKE PARKER & MARTHA GRUELLE, *DEMOCRACY IS POWER: REBUILDING UNIONS FROM THE BOTTOM UP* (1999) (arguing that membership control is essential for strong unions).

On the other hand, the most common exit strategy for shareholders in large, public corporations is to sell their shares under the so-called “Wall Street Rule”³⁷ when they are dissatisfied with corporate performance. Withdrawing money from one company and investing in another is usually an easy and low cost transaction. The alternative of using shareholder voice to improve the corporation—by electing new directors, proposing resolutions, waging proxy fights, or bringing shareholder suits—is usually too expensive, too slow, or too much of a long shot to pursue.

Moreover, unlike union members, who have most if not all of their employment eggs in one basket, corporate shareholders, at least outside of close corporations, typically diversify their investments, thereby reducing their risks and making exit easier.³⁸

Nevertheless, the parallels between unions and corporations remain substantial. Even in public corporations exit is not always a viable alternative. This is particularly true for institutional investors, but can be true of any shareholders, especially those with substantial holdings, depending on a variety of factors related to the tax consequences of selling and whether share value is up or down at any particular time.³⁹

Moreover, both unions and public corporations have a major impact on the nation’s economic health and political climate. Both are forms of organization that have been officially sanctioned and granted significant rights and powers by the state. This gives government more of a justification for regulating the internal affairs of these otherwise private entities. Corporations, of course, have traditionally been viewed as artificial “persons” whose very existence and authority to act on behalf of their shareholders is a result of corporate charters issued by the states.⁴⁰ The insulation from personal liability and the ability to raise capital that the

37. As Professor Bainbridge explains the rule, “it’s easier to switch than fight.” Stephen M. Bainbridge, *Redirecting State Takeover Laws at Proxy Contests*, 1992 Wis. L. REV. 1071, 1080.

38. For shareholders of close corporations, like union members, exit is often difficult. These shareholders typically have a greater portion of their assets invested in the business than shareholders of public companies, and there may be no ready market if they wish to cash out their investments. Moreover, the shareholders are often employees of the business as well as part owners, making exit even more complicated. Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J. CORP. L. 371, 384 (2003).

39. See LISA M. FAIRFAX, *SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION* 31-32 (2011) (explaining why it is not always possible to exit a publicly traded corporation); see also, Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 716 (2007) (noting that selling shares at a low price “is hardly an adequate remedy” for poor board performance) (internal footnote omitted).

40. See 1 JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 1:2 (3d ed. 2010) (defining the legal status of corporations).

modern corporate form provides are significantly reduced when a corporate charter disappears.⁴¹

The government does not officially charter most unions, as unincorporated associations;⁴² however, many of their powers are derived from federal law or from state law for unions representing state or municipal employees. For example, a union selected by a majority of the employees in an appropriate bargaining unit is granted by the National Labor Relations Act exclusive bargaining rights for all the employees in that unit, not just those who voted for or joined the union.⁴³ The same statute protects employees interested in joining or organizing unions from employer interference, restraint, or coercion regarding, or discrimination in response to, the exercise of their rights to “bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁴⁴ In addition, a union’s right to strike—its greatest source of leverage at the bargaining table—is expressly protected in the private sector by federal law.⁴⁵ Moreover, unions share with corporations three of the four “distinctive legal features of the corporate form: (1) centralized management and right of control; (2) limited liability; [and] (3) separate legal personality.”⁴⁶

41. *See id.* at § 1:5 (noting that “[a] primary advantage of the [corporate form] is the shareholders’ limited liability.”). Limited liability is also available through entities like limited liability companies. *Id.*

42. One exception is the Oregon Public Employees Union, Service Employees International Union (SEIU) Local 503, a non-profit corporation. *See DiNicola v. Serv. Emp. Int’l Union Local 503*, No. 12C18681 (Or. Cir. Ct. Marion Cnty. Ct. June 27, 2013), <http://media.oregonlive.com/mapes/other/Judge%20Graves%20Order%20Dated%20June%202026.pdf> (identifying the union as a non-profit corporation in an order granting injunctive relief).

43. 29 U.S.C. § 159(a) (2013).

44. *Id.* § 157 (2013); *see also id.* §§ 158(a)(1), (3) (2013) (protecting the rights declared in § 157).

45. *Id.* § 163 (2013). Judicial and agency decisions interpreting the Act, however, have significantly weakened these rights. *See, e.g., ELLEN DANNIN, TAKING BACK THE WORKERS’ LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* 80-89 (2006) (describing cases where courts have given employers the power circumvent striking workers); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 527-34 (2004) (discussing how NLRB v. Mackay Radio & Tel. Co. 304 U.S. 333, 345-46 (1938) allowed employers to permanently replace striking workers).

46. Schwab, *supra* note 19, at 405 (citing ROBERT C. CLARK, CORPORATE LAW 2 (1986)). Limited liability for union members and a union’s separate legal personality were established by the Taft-Hartley amendments to the National Labor Relations Act. The Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 185(b) (2013)). As discussed, the fourth distinctive feature, free transferability, *i.e.*, exit, is not as readily available for union members. Schwab, *supra* note 19, at 405.

Executive officers and board members of both unions and corporations serve, in a fiduciary capacity, the interests of large numbers of individual members or shareholders. Both corporate and union leaders need, and are assured, substantial discretion under the business judgment rule in corporate law⁴⁷ or the duty of fair representation in labor law,⁴⁸ to be bold risk takers when the occasion calls for it, without fear of being second guessed every step of the way by overly intrusive courts or administrative agencies. Yet it is also true that both corporate and union leaders control huge sums of money and other resources that are not theirs. In both cases, the potential conflicts of interest are enormous, and temptations for manipulation and abuse are often hard to resist. Thus, a fundamental focus of corporate governance—the separation of ownership from control—is a central concern of union governance as well.

Finally, both unions and corporations are governed through structures that bring political dynamics into the foreground.⁴⁹ Union members have the right to elect their officers, vote on dues increases, and usually, to ratify collective bargaining agreements.⁵⁰ Shareholders have the right to elect the board members, who select and oversee senior corporate officers, and to vote on fundamental corporate transactions.⁵¹ Often, these votes in both unions and corporations are sleepy, uncontested affairs, generating little interest.⁵² But sometimes they are hotly contested, involving rival slates of candidates or factions of members or shareholders. Elections and votes in both unions and corporations, therefore, raise similar issues regarding the nomination of candidates or the making of proposals, ensuring that voting is conducted in a fair manner, giving interested parties opportunities to campaign, providing access to information, some modicum of free speech to discuss candidates and issues, and protection against retaliation from incumbents who might favor a particular outcome. These are some of the topics that will be addressed in the next section of this article.

47. See generally Kenneth B. Davis, Jr., *Once More, the Business Judgment Rule*, 2000 WISC. L. REV. 573 (explaining the rationale of the business judgment rule).

48. See generally WILLIAM W. OSBORNE, JR., ED., *LABOR UNION LAW AND REGULATION* 277-420 (2003) (explaining the duty of fair representation).

49. See Blair & Stout, *supra* note 2, at 323 (discussing “the fundamentally political nature of the corporation” and “the use of political tools” in corporate governance).

50. See *infra* text accompanying note 110 (discussing the discretion unions have to determine the matters on which they vote).

51. FAIRFAX, *supra* note 39, at 12-16.

52. See Bebachuk, *supra* note 39, at 732 (noting that in corporations, “[e]lectorate challenges are rare, and the risk of replacement via a proxy contest is extremely low”).

II. RIGHTS TO NOMINATE, PROPOSE, CAMPAIGN, AND VOTE

A. *The Nomination and Election of Board Members and Officers*

No one would confuse the governance of large corporations or unions with the direct democracy of a New England town meeting. Instead, the governance of corporations and unions takes the form of representative democracies, where the shareholders or members, whose interests those institutions are intended to promote, vote for the top leaders of those entities, or at least for the people who select them. But as this section explores, voting for candidates is one thing, while getting them on the ballot is quite another.

The differences between corporations and unions in this area are significant, as are variations among unions themselves. The election rights of union members exceed those of shareholders in two respects: the number and variety of offices for which elections are held, and the membership's opportunity to participate in the nomination process. On the other hand, shareholders usually have the opportunity to vote at more frequent intervals, and when they do, they vote directly (although often through proxies) for the candidates in question. This differs from union members, who, rather than voting directly for candidates, can sometimes vote only for convention delegates who in turn elect officers.

Most major American labor unions are organized on a national scale,⁵³ but they conduct much of their day-to-day work through local and regional unions they have chartered.⁵⁴ Each union entity, from local to international, elects officers and board members whose terms and elections are determined by the union's constitution, and must be in compliance with the LMRDA.⁵⁵ Unions are free to determine the number, titles, and

53. Michael J. Goldberg, *Top Officers of Local Unions*, 19 LAB. STUD. J. 3, 9 (1995) (noting that most of the unions in a study of 298 local unions were affiliated with a national or international union). Unions with Canadian affiliates often have the term "International" in their names. Alan Hyde, *Rights for Canadian Members of International Unions Under the (U.S.) Labor-Management Reporting and Disclosure Act*, 61 WASH. L. REV. 1007, 1008-10 (1986).

54. Locals typically represent workers in a single, often large, workplace, or in multiple, often smaller, workplaces, within the same trade in a single city or region. Locals can vary greatly in size. One survey of private sector locals revealed that 39.3 percent had 100 or fewer members, and 10.4 percent had 1,000 or more members, with some over 10,000. Goldberg, *supra* note 53, at 11.

55. 29 U.S.C. § 481(e) (2013). The LMRDA does not regulate elections in labor federations like the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). *Id.* § 481(a). Perhaps this is because they generally do not engage in collective bargaining with employers; it is the unions affiliated with them that do, and most of them are regulated by the LMRDA. Unions that represent public employees exclusively are not

responsibilities of their officers, but they cannot avoid LMRDA requirements by mere labels if the positions in question meet the statutory definition of “officer.”⁵⁶

The LMRDA requires all national unions to elect their officers at least every five years.⁵⁷ These unions can decide for themselves whether the elections will be conducted by direct secret ballot votes of the members, or by the votes of delegates to union conventions, if those delegates are themselves elected by the secret ballot votes of the members they represent.⁵⁸ In contrast, local unions must elect their officers at least every three years by the direct secret ballot votes of the members.⁵⁹ Intermediate bodies must conduct their elections at least every four years, and as with national unions, the voting can be done by members directly, or by delegates they elect.⁶⁰ Most intermediate bodies use the delegate method. This has raised concerns among union democracy advocates due to trends in many unions, such as the Carpenters, to consolidate and transfer many collective bargaining functions previously handled by locals, to regional entities. The concern is not so much with consolidation itself, which may be justified by efficiency and industry changes; rather, the concern is that delegate elections move the selection of officers one step away from the members, and place it in the hands of delegates who either may be

covered, but if any of their members work in the private sector, the LMRDA applies. *Id.* §§ 402(e)(2),(i). Unions representing federal employees must in effect comply with the LMRDA pursuant to the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1210 (codified as amended at 5 U.S.C. § 7120 (2013)), and Department of Labor (DOL) regulations issued thereunder.

56. The statutory definition includes “any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.” 29 U.S.C. § 402(n) (2013).

57. *Id.* § 481(a) (2013).

58. *Id.* Most national unions use the convention method. For years, the major exceptions were the Mine Workers and Steelworkers. In 1991, the Teamsters joined their ranks pursuant to a consent decree with federal prosecutors settling a civil RICO case seeking to rid the union of its infiltration by organized crime. The theory, promoted by union reformers, was that the members themselves, through direct elections, would be more likely to “vote the rascals out” than convention delegates who could be more easily pressured by an entrenched “old guard” or who might themselves be part of that old guard. *See generally* Goldberg, *supra* note 18, at 997-98 (discussing the change in the Teamsters election process to prevent improper influence from organized crime). A similar RICO settlement later brought direct elections to the Laborers’ Union as well. *See* JACOBS, *supra* note 18, at 221-27 (detailing the Laborers’ Union settlement with the DOJ that prompted changes in their election process).

59. 29 U.S.C. § 481(b) (2013).

60. *Id.* § 481(d).

pressured for their votes by entrenched incumbents, or may be part of an entrenched power structure.⁶¹

In contrast to union members, who vote directly or through elected convention delegates for both the governing boards and the officers of their unions, shareholders cannot vote for their corporations' top executives.⁶² Not even the most ardent supporters of corporate democracy support shareholder elections of CEOs.⁶³ Rather, the only positions in corporate governance chosen by shareholders are directors, who in turn select CEOs and other top executives.

Corporation statutes of most states require annual shareholder meetings at which members of the board are elected by shareholders on a one-share, one-vote basis.⁶⁴ Since corporations are to be managed "by or under the direction of" their boards,⁶⁵ these annual shareholder votes have

61. The DOL, which enforces the LMRDA's election provisions, and the courts, have rejected reformers' arguments that when collective bargaining functions traditionally handled at the local level are taken over by intermediate entities, those intermediate bodies should be treated as locals for purposes of election frequency and method. *See* Harrington v. Chao, 372 F.3d 52, 59 (1st Cir. 2004) (emphasizing that unions have hierarchies, which distinguishes the different duties and responsibilities at different levels in the hierarchy).

62. MODEL BUS. CORP. ACT § 8.40(b) (2010). In Delaware, where the General Corporation Law permits officers to be chosen in the manner prescribed in the bylaws, DEL. CODE ANN. tit. 8, § 142(b) (2014), such votes are theoretically possible, but observers of Delaware corporate practice who are much more knowledgeable than the author are unaware of any Delaware corporations whose bylaws call for shareholder elections of corporate officers. Interview with Professor Larry Hamermesh, Ruby R. Vale Professor of Corporate and Business Law at Widener's Institute of Delaware Corporate Law (Mar. 23, 2014).

63. However, some have called for periodic votes on the retention of CEOs, *see* Lee Harris, *CEO Retention*, 24 FLA. L. REV. 1753, 1782-83, 1801-02 (2013), or for the election of CEO's by a variety of stakeholders, including not only shareholders but employees and debt holders as well, *see* Lawrence E. Mitchell, *On the Direct Election of CEOs*, 32 OHIO N.U. L. REV. 261, 280 (2006).

64. *See, e.g.*, DEL. CODE ANN. tit. 8, § 211(b) (2014); MODEL BUS. CORP. ACT § 8.03(c) (2010) (describing the procedure through which stockholders elect directors, either through annual meeting or written consent (requiring unanimity or that all directorships are vacant and can be filled by this action)); Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. CORP. L. 117, 120 (2014) (explaining that corporate statutes provide stockholders with the right to vote for directors with one vote for each share of capital stock owned, unless the articles of incorporation indicate otherwise). There are exceptions to the one-share one-vote principle, and a variety of mechanisms for watering it down. *See infra* text accompanying note 140 (providing voting trusts and vote buying as examples of mechanisms for watering down a corporate vote).

65. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2014); MODEL BUS. CORP. ACT § 8.01(b) (2010) (instructing that a corporation's business and affairs must be managed by a board of directors, unless otherwise specified in the certificate of incorporation). In reality, corporate boards delegate most management authority to their companies' officers, retaining for themselves power to select senior executives, determine their compensation, monitor their performance, and make major corporate decisions like responding to acquisition offers.

been hailed as “the ideological underpinning upon which the legitimacy of directorial power rests.”⁶⁶ Most observers, however, recognize that the shareholder franchise, as a center of corporate decision-making power, is, in the words of Professor Bebchuk, “a myth.”⁶⁷ “In fact,” says Professor Bainbridge, “shareholder control rights are so weak that they scarcely qualify as part of corporate governance.”⁶⁸

There are a number of reasons why so many believe that the shareholder franchise is a myth, but they add up to the same thing: “[S]hareholders in public corporations do not in any realistic sense elect boards. Rather, *boards elect themselves*.”⁶⁹ This is primarily because of the solicitation and use of proxies for shareholder votes cast at annual meetings. In the overwhelming majority of board elections, it is only the incumbent board that solicits proxies for the election of directors, and the solicitation is exclusively for candidates nominated by that board or its nominating committee.⁷⁰ True, shareholders can directly nominate additional candidates from the floor of the annual meeting,⁷¹ but it is typically meaningless because proxies have already been collected, and therefore, most votes have already been cast.⁷²

Bebchuk, *supra* note 39, at 679-80.

66. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988).

67. Bebchuk, *supra* note 39, at 677.

68. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 569 (2003); *see also* CLARK, *supra* note 46, at 95 (specifying that shareholder voting is “a mere ceremony designed to give a veneer of legitimacy to managerial power”).

69. Blair & Stout, *supra* note 2, at 311 (emphasis in the original).

70. From 1996 to 2005, only 118 board elections involved proxy solicitations on behalf of challengers seeking to replace incumbent directors, outside the context of a sale or takeover fight. Takeover fights added another eighty-eight proxy solicitations to the total. Bebchuk, *supra* note 39, at 686. Another study pegs the frequency of contested director elections at less than one percent. Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1364 (2011).

71. Curiously, this right to nominate director candidates is not mentioned in state corporation statutes, and while it is widely recognized, its legal foundation and enforceability remain murky. *See* Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. CORP. L. 117, 133 (2014) (no state corporation statute, with the single exception of Maryland’s, addresses the question who can nominate directors).

72. Shareholder meetings convened electronically may make it feasible for shareholders to vote directly by online ballot, or to revoke or modify proxies already submitted, during the shareholder meeting itself. Lisa M. Fairfax, *Virtual Shareholder Meetings Reconsidered*, 40 SETON HALL L. REV. 1367, 1387-88 (2010) (discussing electronic voting at remote-only meetings); Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 487-91 (2008) (exploring e-proxy as an alternative for shareholders to the traditional proxy statement, for use by shareholders); Hamermesh, *supra* note 71, at 139 n.112 (noting how shareholders’ meetings can be broadcast instantaneously in real time and can replace in-person meetings).

The only way unhappy shareholders can realistically run board candidates of their own is if they are willing to bear the enormous costs of preparing and distributing proxy materials regarding their nominees.⁷³ The high cost of proxy fights have made them rare, and this is exacerbated by free rider problems, and rational apathy on the part of shareholders with easy exit available through the Wall Street Rule.⁷⁴ In contrast, an incumbent board's proxy solicitation, win or lose, is paid for by the corporation.⁷⁵

Proponents of greater shareholder democracy have advocated for easier shareholder access to the proxy for decades.⁷⁶ Within individual corporations, however, shareholder proposals to provide proxy access for shareholders' nominations to the board were blocked by SEC Rule 14a-8(i)(8), which until 2010 barred proxy access for shareholder proposals related to corporate elections.⁷⁷ As a result, any change had to come through SEC rulemaking or amendments to the federal securities laws. The SEC considered adopting proxy access rules in 1942, 1982, 2003, and 2007, but each time declined to follow through.⁷⁸ Finally, in 2010, prompted by the Dodd-Frank Act,⁷⁹ the SEC promulgated rules that would have opened up the process.⁸⁰ The new mandate allowing shareholders access to the proxy for their own nominees if certain prerequisites were met, however, was struck down by a controversial decision from the D.C.

73. Median costs can range from several hundred thousand dollars to well into the millions. See Bebhuk, *supra* note 39, at 688-89 (discussing the procedural and additional costs that a rival teams must bear if they want to run a campaign with their own candidate); Kahan & Rock, *supra* note 70, at 1365 (describing a study that indicated costs ranging from \$30,000 to \$9 million). If challengers prevail, shareholder's costs can be reimbursed by the corporation, but if they lose, they bear the full cost of the challenge. Kahan & Rock, *supra* note 70, at 1408-09.

74. See CLARK, *supra* note 46, at 389-400 (discussing the rational apathy problem, the free rider problem, and the fairness problem).

75. See FAIRFAX, *supra* note 39, at 100 (stating that generally, corporations pay for costs associated with incumbent or directors supported by management).

76. See FAIRFAX, *supra* note 39, at 129-31 (discussing the proxy access debate).

77. See Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668 (Sept. 16, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240 and 249) (adopting "changes to Federal proxy rules to facilitate the effective exercise of shareholders' traditional State law rights to nominate and elect directors to company boards of director.")

78. See FAIRFAX, *supra* note 39, at 131-36 (outlining the SEC's first four attempts to adopt proxy access rules).

79. Earlier versions of Dodd-Frank would have mandated proxy access rulemaking, but as enacted, the law simply clarified that it is within the SEC's powers to do so. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1915 (2010) (codified as amended at 15 U.S.C 78n (Supp. IV 2011)).

80. Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668 (Sept. 16, 2010).

Circuit before it went into effect.⁸¹ Still intact, however, is a change in SEC Rule 14a-8(i)(8) that now permits shareholder proposals to change the way board nominations and elections are conducted,⁸² although there have been fewer of such proposals than many observers had anticipated.⁸³

Even when unhappy shareholders are willing and able to mount a proxy fight under the current process, they sometimes face the obstacle of staggered terms on the board of directors.⁸⁴ The corporation statutes of most states mandate annual elections, but they do not mandate terms of only one year. Instead, they permit corporations to elect their directors for staggered terms of up to three years each.⁸⁵ These staggered terms have the effect of requiring dissident shareholders to wage and prevail in not one but two consecutive proxy fights in order to take over a corporation's board.

In unions, on the other hand, all officers and board members are elected at the same time for the same term, allowing challengers to win

81. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (holding that the SEC's cost-benefit analysis of the rule was inadequate); *see also* Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 695, 698-709 (2013) (analyzing the *Bus. Roundtable*, 647 F.3d 1144 decision); Grant M. Hayden & Matthew T. Bodie, *The Bizarre Law and Economics of Business Roundtable v. SEC.*, 38 J. CORP. L. 101, 120 (2012) (criticizing the *Bus. Roundtable*, 647 F.3d 1144 court's analysis of law and economics).

82. SEC Shareholder Proposals, 17 C.F.R. § 240.14a-8(i)(8) (2014) (allowing shareholder proposals for director elections as long as they are permitted under state law); *see also*, DEL. CODE ANN. tit. 8, §§ 112-13 (2014) (permitting shareholder proposals and solicitation of proxies in connection with an election of directors, under Delaware state law).

83. *See* Catherine G. Dearlove & A. Jacob Werrett, *Proxy Access by Private Ordering: A Review of the 2012 and 2013 Proxy Seasons*, 69 BUS. LAW. 155, 156 (2013) (observing that support for such proposals may be growing, but at a slower rate than previously anticipated).

84. As of the mid-2000s, a majority of corporate boards had staggered terms, but there has been a trend away from these so-called classified boards, partly in response to shareholder activism on the subject. *See* Bebchuk, *supra* note 3, at 861 (noting at that time that a majority of public companies in the United States had staggered terms for board members). *See generally* Mira Ganor, *Why Do Managers Dismantle Staggered Boards?*, 33 DEL. J. CORP. L. 149 (2008) (exploring the motivations behind the decision of many firms to eliminate staggered terms for board members, including shareholder pressure or the agent's own interests). According to a recent survey, only eleven of the top 100 public companies still use staggered boards. SHEARMAN & STERLING, LLP, CORPORATE GOVERNANCE 2014: 12TH ANNUAL SURVEY OF THE LARGEST US PUBLIC COMPANIES 48 (2014), *available at* https://reaction.shearman.com/reaction/corpgov/2014/SSGC_CorpGov-CompleteBook-0908.pdf.

85. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(d) (2014) (detailing the procedure of splitting up members of the board into up to three classes to expire in three different years); MODEL BUS. CORP. ACT § 8.06 (2010) (describing a similar process of dividing directors into up to three groups with the terms for each group expiring after a different shareholders meeting).

control of the union in just one election cycle if they have the votes.⁸⁶ Additionally, in great contrast to corporate elections, no union funds can be expended in support of any candidates, whether incumbents or challengers.⁸⁷ Moreover, all members have equal rights to nominate candidates, so access to the ballot is not as easily controlled by the incumbents.⁸⁸ At the national level, however, even where national officers are elected by direct membership vote, candidates are nominated by convention delegates and those nominations must receive a minimum percentage of delegate support to win a place on the members' ballots.⁸⁹

Challengers in union elections may have easier access to a place on the ballot than challengers in corporate elections, but they still have to overcome the incumbents' substantial advantages.⁹⁰ One important advantage involves campaign fundraising, which is most keenly felt at the national level where the electorate can involve millions spread across all

86. Nothing in the LMRDA prohibits staggered terms for officers, so long as the terms are no longer than the statutory maximums. 29 U.S.C. § 481 (2013). Nevertheless, I am not aware of any unions that stagger the terms of their officers. Perhaps this is because it avoids the costs of running additional elections or staging additional conventions. It may also be that incumbent officers have no reason to support changes resulting in midterm elections that could weaken their positions in their unions.

87. *Id.* § 481(g).

88. "Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates . . ." *Id.* § 411(a)(1). Similarly, "every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title [barring certain felons from office] and to reasonable qualifications uniformly imposed) . . ." *Id.* § 481(e). The DOL and the courts have found unreasonable, and therefore impermissible, eligibility requirements that have the effect of barring from candidacy a very high percentage of the union's membership. *See, e.g., Local 3489, United Steelworkers v. Usery*, 429 U.S. 305 (1977) (holding an eligibility rule requiring attendance at fifty percent of union meetings for three years prior to an election unreasonable because it disqualified 96.5 percent of the members).

89. *See, e.g., INT'L BHD. OF TEAMSTERS CONST.* art. IV, § 2(a) (2011) (requiring support from at least five percent of the delegates to be placed on the ballot). While that might seem like an easy standard for a serious candidate to meet, a disproportionately high percentage of convention delegates are usually loyal to the incumbent faction. In the Teamsters' election of 1991, for example, the winning slate of reformers won a three-way race with a forty-eight percent plurality, but it had been nominated by only fifteen percent of the convention delegates. JAMES B. JACOBS & KERRY T. COOPERMAN, *BREAKING THE DEVIL'S PACT: THE BATTLE TO FREE THE TEAMSTERS FROM THE MOB* 98 (2011). In the 2006 election, a reform slate running against a unified incumbent slate was barely nominated, with six percent of the delegates, yet ended up with a respectable, though still losing, thirty-five percent of the membership vote. *Id.* at 194, 197.

90. When an incumbent officer is planning to step down voluntarily, a common tactic to preserve the advantages of incumbency for that officer's faction is for the outgoing officer to resign before the term ends. Then, the executive board, which typically has the constitutional power to do so, appoints a hand-picked successor to finish out the term and run for election in his or her own right as an incumbent.

fifty states.⁹¹ Whether nominators and voters are the members themselves or elected delegates, waging a successful national campaign requires significant funds for travel, printing, mailing, and potentially campaign staff and consultants.⁹² National campaigns also require legal advising and at times involve litigation. In some unions, particularly those operating under RICO consent decrees,⁹³ free space in the union magazine, which is distributed by the union to all members, is made available to all candidates to level the playing field.⁹⁴ Often, however, incumbents can skirt the law and pressure appointed officials, staff, and sometimes members, to “voluntarily” contribute time and money to the campaign.⁹⁵ On the other hand, union rules prohibiting “outsider” support for candidates have a significant and disproportionate impact on challengers’ abilities to raise funds for their campaigns.⁹⁶

Differences in terms of policies and process related to nominations and campaign fundraising can affect the frequency with which director

91. For example, in the 2001 Teamsters election, the incumbent slate had a campaign war chest of over \$3.5 million, more than ten times the approximate \$340,000 raised by their challengers. JACOBS & COOPERMAN, *supra* note 89, at 173. In union locals, on the other hand—the vast majority of which have 1000 or fewer members, *see* Goldberg, *supra* note 53, at 11—face-to-face campaigning can usually reach a high percentage of voters, so campaign costs may be relatively modest.

92. JACOBS & COOPERMAN, *supra* note 89, at 144.

93. *See* Goldberg, *supra* note 58, at 997-98 (discussing a consent decree between Teamsters and federal prosecutors that called for direct elections by union members themselves, rather than by convention delegates in a union infiltrated by organized crime).

94. *See, e.g.*, INT’L BHD. OF TEAMSTERS, RULES FOR THE 2010-11 IBT INTERNATIONAL UNION DELEGATE AND OFFICER ELECTION 38-40 (2010) (listing the rules governing the publication and distribution of a candidate’s campaign literature in the union magazine, as well as explaining the equal rights of each candidate to have his or her literature distributed, so long as the candidate is willing to pay for the costs of distributing the material).

95. *See* JACOBS & COOPERMAN, *supra* note 89, at 165 (explaining the advantage of an IBT incumbent due to his or her ability to rely on donations from thousands of IBT officials); *see also* Edgar James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 HARV. C.R.-C.L. L. REV. 247, 331-32 (1978) (describing Boyle’s failed attempt to characterize the contributions made by the union’s staff as “voluntary,” since in truth, he collected upwards of \$140,000 from all but nine of the 198 non-clerical staff members with incomes above \$10,000).

96. *See* JACOBS & COOPERMAN, *supra* note 89, at 165 (discussing a rule imposed after a 1996 scandal, prohibiting candidates from taking donations from non-Teamsters, putting insurgent candidates who could get contributions from outsiders at a disadvantage). The LMRDA quite properly prohibits employer funding of candidates for union office. 29 U.S.C. § 481(g) (2013). Beyond that, many unions have adopted rules banning contributions from non-employer union “outsiders,” such as retirees and candidates’ own family members. These rules have been upheld under the LMRDA. *See* United Steelworkers v. Sadlowski, 457 U.S. 102 (1982) (holding that it was not a violation of the LMRDA for a union rule to prohibit candidates from accepting contributions from nonmembers).

elections in public corporations, and officer elections in national unions, are contested. In both cases, however, challenges are rarely successful.⁹⁷ This trend could provide ammunition to opponents of enhanced shareholder voting rights. Arguably, the projected low success rates of challenges do not justify the costs of adopting enhanced voting rights provisions, whether in terms of increased election expenditures or a reduction in efficiencies associated with director-centered governance.⁹⁸

B. Rights to Propose, Campaign, and Vote

Beyond the right to elect directors, state corporation laws give shareholders the right to vote on amendments to corporate charters and bylaws, and on fundamental changes in the corporation's structure, like mergers and dissolutions.⁹⁹ As a result of the Dodd-Frank Act, shareholders in public corporations also have an annual, but merely advisory, "say on pay" with respect to executive compensation.¹⁰⁰ Furthermore, SEC rules authorize shareholders to make proposals of their own that must be included in the corporation's proxy materials, assuming they can satisfy the rule's prerequisites and subject matter limitations.¹⁰¹

97. One study of corporate elections found a surprisingly high success rate of about fifty percent for the challengers (obtaining at least some board representation through ballot success or settlements with the incumbents), but noted that only thirteen percent of the contested director elections were in large or mid-cap corporations. Thirty-one percent were in small-cap companies and almost sixty percent in micro-cap firms. Kahan & Rock, *supra* note 70, at 1369.

98. See, e.g., Harry G. Hutchison & R. Sean Alley, *The High Costs of Shareholder Participation*, 11 U. PA. J. BUS. L. 941, 945-48 (2009) (arguing that limited participation is more beneficial to investors in that it holds fewer costs and creates more happiness than a culture that promotes shareholder participation); see also Kahan & Rock, *supra* note 70, at 1426 (positing that shareholder proxy access would have both desirable and undesirable effects that would balance each other out, with a net effect of around zero).

99. FAIRFAX, *supra* note 39, at 15-17. This includes the growing trend of management-led buyouts to make public companies private. See, e.g., Steven Davidoff, *In American Greetings Deal, Echoes of Larger Buyout for Dell*, N.Y. TIMES, Aug. 6, 2013, <http://dealbook.nytimes.com/2013/08/06/in-american-greetings-deal-echoes-of-larger-buyout-for-dell/> (telling the stories of two management-led buyouts, one by Michael S. Dell and Silver Lake Partners of the personal computer maker founded by Mr. Dell, and another by the Weiss family of the American Greetings Corporation).

100. 15 U.S.C. § 78n-1 (Supp. IV 2011). Union members have no comparable right to vote on their officers' compensation, unless a vote is required by the union's constitution or bylaws. They can, however, challenge unreasonably high officer compensation through union member derivative suits pursuant to the LMRDA. See *infra* text accompanying notes 193-197.

101. See 17 C.F.R. § 240.14a-8 (2012) (outlining the requirements necessary in order for a shareholder's proposal to be included in a company's proxy statement). Proposals cannot, for example, be improper under state law or cause the company to violate a law; be

Shareholder proposals generally focus on social issues or corporate governance. Social issues raised in recent years include climate change and other environmental concerns, health care costs and reform, global human and labor rights, and EEO and diversity matters.¹⁰² Governance proposals have sought to eliminate classified boards, limit poison pills as obstacles to hostile takeovers, require a majority of votes cast to elect directors,¹⁰³ bar board chairs from simultaneously serving as CEOs, and facilitate shareholder proxy access for nominations to the board.¹⁰⁴ In the wake of *Citizens United v. FEC*,¹⁰⁵ proposals seeking greater disclosure about corporate political spending have become the single most common subject of shareholder proposals.¹⁰⁶

based on personal grievances or special interests; involve management functions relating to ordinary business operations; or be of no relevance to the company. 17 C.F.R. § 240.14a-8(i) (2012). An earlier SEC ban on shareholder proposals, to change the way board members are nominated or elected, was substantially lifted in 2010. See 17 C.F.R. § 240.14a-8(i)(8) (2012) (reflecting the current rules governing shareholder elections). See generally FAIRFAX, *supra* note 39, at 63-83 (discussing the shareholder proposal rule originating from Rule 14a-8 of the Exchange Act, including substantive exclusions, as well as the evolution and future of the rule, and the impact of shareholder proposals).

102. See INVESTOR RESEARCH RESPONSIBILITY CTR. INST., KEY CHARACTERISTICS OF PROMINENT SHAREHOLDER-SPONSORED PROPOSALS ON ENVIRONMENTAL AND SOCIAL TOPICS, 2005-2011 8 (2013) (providing a list of environmental and social proposal topics from 2005 through 2011, including the highest and lowest supported proposals, and describing the key characteristics of those proposals).

103. In union officer elections, a plurality of votes cast is sufficient, although in NLRB certification and decertification votes, runoffs would be necessary to determine whether a union seeking to represent the employees in question has the majority support required by section 9(a) of the NLRA. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449, 453 (codified as amended at 29 U.S.C. § 159(c) (2013)).

104. See generally Barry B. Burr, *Fewer Shareholder Proposals, Greater Board Outreach Seen*, PENSIONS & INVS. ONLINE (Jan. 21, 2013), <http://www.pionline.com/article/20130121/PRINTSUB/301219980> (explaining how companies are increasingly reaching out to institutional investors regarding issues of executive compensation, creating a trend resulting in fewer shareholder proposals and more shareholder support for directors and executive compensation); James R. Copland, *2013 Proxy Season Review*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Aug. 5, 2013, 9:07 AM), <http://blogs.law.harvard.edu/corpgov/2013/08/05/2013-proxy-season-review-2/> (providing a summary of 2013 shareholder proposals, including proposal types, proposal sponsorship, and the voting results associated with those proposals).

105. 558 U.S. 310 (2010).

106. See Copland, *supra* note 104 (attributing the increased focus of proposals on 2012 and 2013 on political spending and lobbying to the Supreme Court's decision in *Citizens United*, 558 U.S. 310). Some reformers see this, as well as the question of who gets to decide how money raised for political campaigns is spent, as potential topics for SEC rulemaking. See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 925-28 (2013) (presenting the case for mandatory SEC rules calling for public companies to disclose their political spending, arguing that this

Like shareholder “say on pay,” shareholder votes on their own proxy proposals usually have only a precatory or advisory effect. They do not bind the board or management.¹⁰⁷ But that does not mean shareholder proposals are of no value to activist shareholders. They can lead to direct negotiations with management, sometimes resulting in the voluntary adoption of the proposed changes. If a board refuses to adopt proposals that have won the proxy vote, shareholders can exert further pressure in the form of “vote no” campaigns in subsequent board elections.¹⁰⁸

Union members’ rights to vote extend beyond the election of officers and board members, but the only additional member votes required by law relate to dues increases.¹⁰⁹ Whether members can vote on other matters—even as important as the ratification of collective bargaining agreements or mergers with other unions—is left up to the unions themselves.¹¹⁰ There is

disclosure is essential for safeguarding the interests of shareholders); *see also* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 85-117 (2010) (positing that the *Citizens United*, 558 U.S. 310 decision increases the need for lawmakers to design special rules regarding how public corporations can make political speech decisions, and proposing a framework for designing such rules).

107. This is because “[p]roposals by security holders that mandate or direct the board to take certain action may constitute an unlawful intrusion on the board’s discretionary authority under the typical statute.” Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, Investment Company Act Release No. 9,539, 1976 SEC LEXIS 326, at *20 (Nov. 22, 1976). Under certain circumstances, shareholders can propose binding amendments to corporate bylaws. There is so much uncertainty, however, regarding what those circumstances might be that even bylaw proposals usually take a precatory form. Andrew R. Brownstein & Igor Kirman, *Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions*, 60 BUS. LAW. 23, 52-59 (2004). Moreover, bylaw amendments cannot be inconsistent with corporate charters, and under the Delaware statute and the Model Act, only the directors can initiate amendments in these corporate charters. DEL. CODE ANN. tit. 8, § 242(b) (2014); MODEL BUS. CORP. ACT § 10.03 (2010).

108. *See* Brownstein & Kirman, *supra* note 107, at 45-52 (discussing “vote no” campaigns, a method utilized by shareholders to withhold votes from nominees for director when the public is dissatisfied with the board of directors, and wants to pressure the board to adopt certain changes).

109. 29 U.S.C. § 411(a)(3) (2013). Union members also retain their right to vote in decertification and change of certification elections conducted by the NLRB or other labor relations agencies. *See supra* text accompanying note 29.

110. Member litigation to compel votes provided for in union constitutions or bylaws can be brought as state contract law claims, and sometimes as federal claims, for violation of labor contracts. *See, e.g.,* *Korzen v. Local 705, Int’l Bhd of Teamsters*, 75 F.3d 285, 288 (7th Cir. 1996) (holding that a local union’s constitution is a contract between the local union and its members and is therefore enforceable under state common law whereas suits enforcing provisions of international union constitutions fall within federal jurisdiction). Circuits are split on whether a union’s denial of the right to vote on a particular issue can constitute a violation of the LMRDA’s equal right to vote guaranteed by 29 U.S.C. § 411(a)(1), if all of the union’s members are denied that vote. *Compare* *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 470 (5th Cir. 1981) (holding that a breach of § 411(a)(1)

one major caveat, however, that if any members have a right to vote on a particular matter pursuant to the union's constitution or bylaws, then all members have equal rights to vote as well.¹¹¹ This differs from the corporate setting, where different classes of stock can have different voting rights.¹¹²

Opportunities for union members to propose resolutions or amendments to union constitutions and bylaws vary, depending on whether the union is national or local. National union constitutions are typically amended by the votes of elected convention delegates. In some unions, for a proposed amendment to be considered on the floor, it must be reported out by a relevant committee, which is likely under the control of the union's incumbent leadership.¹¹³ In locals, on the other hand, meeting agendas typically provide the opportunity to discuss "new business" or "good and welfare," during which members can make motions in support of their proposals.¹¹⁴ Members can generally propose and vote on amendments to local bylaws, although the process typically extends beyond one membership meeting.¹¹⁵ Amendments to local bylaws, however, often require the approval of the national union before they can go into effect.¹¹⁶

of the LMRDA occurs if all members of a union are equally denied the right to vote), *with* *Angel v. Paperworkers Local 1967*, 221 F. App'x. 393, 399-400 (6th Cir. 2007) (holding that since the alleged violation of the union's constitution and bylaws led to a universal denial of a ratification vote, the plaintiffs did not successfully allege the discrimination required by §411(a)(1) of the LMRDA), *and* *Stelling v. Int'l. Bhd. Of Elec. Workers*, 587 F.2d 1379 (9th Cir. 1978) (concluding that since voting rights related to a particular question were universally denied, a claim under §411(a)(1) of the LMRDA was not properly stated).

111. 29 U.S.C. § 411(a)(1) (2013). *See infra* note 138 (observing that the voting rights conferred by § 411(a)(1) can be limited by provisions set out in a union's constitution and bylaws).

112. *See infra* text accompanying note 139 (noting that preferred stock in corporations are, ironically, often not granted voting rights).

113. *See, e.g.*, INT'L BHD. OF TEAMSTERS, INT'L BHD. OF TEAMSTERS CONST., art. III, § 8, at 26, § 9, at 26-28 (2011), *available at* <http://teamster.org/sites/teamster.org/files/IBT-Constitution-2011.pdf> (illustrating the committee approval process required before union amendments can be voted on by the broader membership).

114. *See, e.g.*, AM. FED'N OF STATE, CNTY. & MUN. EMPS., AFL-CIO, AFSCME INT'L CONST. 158-59 app. c (2012), *available at* afscme13.org/ckfinder/userfiles/files/AFSCME_International_Constitution_2012.pdf (offering an example of the suggested order of business at local union meetings including an allocation of time for "New Business" and "Good and Welfare").

115. *See, e.g., id.* at 144 app. e (providing for the amendment of local Constitutions by a majority vote of the members through a process that requires approval at two consecutive meetings).

116. *See, e.g.*, UNITED AUTO., AEROSPACE & AGRIC. IMPLEMENT WORKERS OF AM., UAW, CONST. OF THE INT'L UNION, art. 37, § 3, at 104 (2010) *available at* uaw.org/sites/default/files/UAW-2010-constitution.PDF (providing that all Local Unions' by-laws are not effective until submitted to the International Executive Board, with few exceptions).

Incumbent officers, sometimes trying to deny their political opponents victories of any kind, find creative ways to prevent proposals from coming to a vote. In the Teamsters Union, for example, reformers for many years waged bylaws campaigns in local unions, seeking to make business agents and shop stewards elected rather than appointed positions or attempting to end multiple salaries for officers.¹¹⁷ In order to deny reformers the opportunity to present their amendments at a regularly scheduled membership meeting as the bylaws required, the officers of one local conducted an illegal mail referendum, encouraging members to vote against even convening a meeting for that purpose.¹¹⁸ Years later, the union's national leadership succeeded in institutionalizing another way to block reformers' efforts to convert business agent positions from being determined by appointment rather than election. The national leadership simply pushed through an amendment to the International Constitution that entirely bars local unions from making that change.¹¹⁹

Once member or shareholder proposals make it to the ballot, those in power can manipulate votes by bundling popular proposals with unpopular ones with the aim of either blocking the approval of popular proposals or enhancing the prospects of unpopular ones. With respect to unions, courts have sometimes found that bundling violates the LMRDA when a vote on a dues increase is tied to the ratification of a wage increase.¹²⁰ Otherwise, however, bundling is left to the discretion of union leadership. In the

117. See Michael J. Goldberg, *Teamster Reformers: Their Union, Their Jobs, Their Movement*, 72 J. TRANSP. L., LOGISTICS & POL'Y 13, 16 (2005) (describing the types of issues union members have organized around in regards to union governance, including democratic local union bylaws that provide for the election rather than appointment of business agents and shop stewards and the end to multiple salaries for union officials).

118. *Wade v. Teamsters Local 247*, 527 F. Supp. 1169, 1178-79 (E.D. Mich. 1981) (detailing how a local Teamsters Executive Board sent a letter to its members presenting a biased portrayal of a proposed bylaw amendment in an attempt to prevent it from being voted on).

119. See INT'L BHD. OF TEAMSTERS *supra* note 113, art. XXII, § 8, at 26 (2011), available at <http://teamster.org/sites/teamster.org/files/IBT-Constitution-2011.pdf> (stating that "no [l]ocal [u]nion may amend its [b]ylaws to provide for the election of [b]usiness [a]gents").

120. See, e.g., *Sertic v. Cuyaghoga Carpenters Dist. Council of United Bhd. of Carpenters*, 423 F.2d 515, 521 (6th Cir. 1970) (holding that by combining the authorization to negotiate a wage assessment with a vote on a wage increase violated the LMRDA in denying union members' right to a "meaningful vote on increases in dues or assessments."). But see, e.g., *Sheldon v. O'Callaghan*, 497 F.2d 1276, 1280 (2d Cir. 1974) (bundling permissible where dues increase and other proposals all are interrelated parts of a proposed new union's constitution). Where the bundling does not involve a dues increase, courts are more inclined to permit it. See, e.g., *Johnson v. Kay*, 671 F. Supp. 268, 274-75 (S.D.N.Y. 1987), *aff'd on other grounds*, 860 F.2d 529 (2d Cir. 1988) (holding that the packaging of a proposed set of amendments was appropriate where they all shared an intent to shift the locus of power in the union and breaking them apart could lead to internal inconsistency).

corporate setting, while SEC Rule 14a-4 limits bundling,¹²¹ one study has demonstrated that it remains an issue at least in the context of merger votes being combined with votes on staggered boards.¹²²

In both unions and corporations, issues arise in relation to the distribution of campaign materials. In the corporate context, stockholders can gain access to shareholder names and addresses for campaigning,¹²³ but only at their own expense in contrast to incumbent officers and directors who campaign on the corporation's dime.¹²⁴ As noted previously, union resources cannot be expended to support any candidate in elections.¹²⁵ Any other distributions of campaign literature are undertaken at the expense of the candidates, although the LMRDA facilitates this dispersal by requiring unions to provide opportunities for candidates to use union mailing lists to distribute their materials.¹²⁶ The LMRDA does not provide a similar express right for mailing material related to votes on other matters, such as dues increases or contract ratifications, and the circuit courts are split on whether such a right can be implied.¹²⁷ Union officers are generally free to

121. 17 C.F.R. § 240.14a-4(b)(1) (2014); *see also* Greenlight Capital, L.P. v. Apple, Inc., No. 13 Civ. 900, 2013 WL 646547, at *5, *14 (S.D.N.Y. Feb. 22, 2013) (holding that unbundling rules demand that when proposals are separate matters such that shareholders would treat them differently in denying or approving them, they may not be combined in a single package for voting purposes).

122. Lucian A. Bebchuk & Ehud Kamar, *Bundling and Entrenchment*, 123 HARV. L. REV. 1549 (2010).

123. DEL. CODE ANN. tit. 8, §§ 219(a), 220(b)(1) (2014); MODEL BUS. CORP. ACT § 16.02 (2010).

124. *See supra* text accompanying note 75 (asserting that corporations typically pay for any costs associated with incumbent officers or directors that have the support of management).

125. 29 U.S.C. § 481(g) (2013). Thus, it is an election violation for incumbents to use union newsletters or magazines to promote their own candidacies, but the union is free to make equal space available to all candidates for their campaign messages. Nothing in the LMRDA mandates this, but such "battle pages" have been required in Teamsters elections since the 1989 RICO consent decree. *See supra* text accompanying note 94 (listing the rules governing the campaign literature of candidates, noting the equal rights in regards to literature distributed, depending on the candidate's willingness to pay for the costs of distributing the material).

126. 29 U.S.C. § 481(c) (2013). Candidates have a right to inspect, but not copy the union's mailing list. As a result, their mailings are typically completed by the union with costs billed to the candidate or by commercial mailing houses obliged to keep the lists confidential. A recent decision extends this right to lists of email addresses. *Diamondstein v. Am. Postal Workers Union*, 964 F. Supp.2d 37 (D.D.C. 2013).

127. *Compare* *Carothers v. Presser*, 818 F.2d 926, 928 (D.C. Cir. 1987) (ruling that the LMRDA does not afford an absolute right of access to a union's mailing list and that access may only be provided as a remedy to an independent violation of the statute) *with* *Sheldon v. O'Callaghan*, 497 F.2d 1276, 1282-83 (2d Cir. 1974) (holding the LMRDA required a union to make a list of its members available to ensure members could fairly express their view on a referendum).

distribute at union expense their views on pending proposals without any obligation to provide equal access to their opponents.¹²⁸ Members, however, have rights under the LMRDA's free speech protections to speak regarding pending proposals at meetings,¹²⁹ distribute materials to the members, and picket the meeting.¹³⁰

In electing corporate directors, the debate over shareholder proxy access is not restricted to the nomination of candidates; it also concerns whether the corporation should pay for distributing information about candidates not nominated by the board.¹³¹ Access to the proxy for shareholder proposals covers distribution at the corporation's expense of sponsors' statements supporting their proposals. However, that alone does not level the playing field. Shareholders' statements of support are limited to 500 words while opposing board statements have no length restrictions.¹³² In addition, while proposals that corporations reimburse

128. In extreme cases of misrepresentation or significant omissions in materials distributed by a union, however, some courts have found violations of members' equal right to vote or of officers' fiduciary duties, pursuant to 29 U.S.C. § 411(a)(1) and § 501. *See, e.g.,* Christopher v. Safeway Stores, Inc., 644 F.2d 467 (5th Cir. 1981) (holding that 29 U.S.C. § 411(a)(1) guarantees that every union member has an equal right to vote and participate and a categorical denial of all members' right to vote on collective bargaining agreements violates this right); Wade v. Teamsters Local 247, 527 F. Supp. 1169 (E.D. Mich. 1981) (ruling that the union violated a general fiduciary duty granted under 29 U.S.C. § 501 by failing to hold monthly membership meetings and thereby denying members an ability to vote on a by-law amendment). *But see, e.g.,* Members for a Better Union v. Bevona, 152 F.3d 58 (2d Cir. 1998) (concluding that 29 U.S.C. § 411 was not violated by a claim that an union vote was tainted as the statute narrowly prohibits only clearly discriminatory treatment in members' voting rights); Ackley v. W. Conf. of Teamsters, 958 F.2d 1463 (9th Cir. 1992) (holding the LMRDA does not require that union leadership fully disclose all the terms and information relate to a collective bargaining agreement before subject it to a vote for ratification). One court found an LMRDA free speech violation when a national union, which regularly sold ads in its magazine, refused to sell space to a local union soliciting opposition to a proposed contract up for a ratification vote. Knox Co. Local, Nat'l Rural Letter Carriers Ass'n v. Nat'l Rural Letter Carriers Ass'n, 720 F.2d 936, 939-41 (6th Cir. 1984).

129. This right is subject to a union's "established and reasonable rules pertaining to the conduct of meetings." 29 U.S.C. § 411(a)(2) (2013).

130. *See* Graham v. Soloner, 220 F. Supp. 711, 714-15 (E.D. Pa. 1963) (concluding, in part, that union members' rights to picket union meetings is protected by the LMRDA).

131. Challengers nominated through traditional proxy fights can have their election costs paid by the corporation if they are successful in taking control of the board, but until recently, in Delaware at least, if dissident shareholders ran only a "short slate" of candidates—less than the number it takes to win a board majority—the winning candidates on such a slate could not be reimbursed even pursuant to shareholder proposals mandating reimbursement in such circumstances. CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 240 (Del. 2008). In 2009, the Delaware statute was amended to permit such shareholder proposals. 8 DEL. CODE ANN. tit. 8, § 113(a) (2014).

132. *See* FAIRFAX, *supra* note 39, at 65-66 (explaining that the 500 word limit is included for expense purposes).

sponsors of successful proposals for promotional expenses are permissible under Rule 14a-8, some commentators are skeptical that this approach will be widely utilized.¹³³

There is greater regulation of the content of campaign materials in the corporate setting than in unions because of SEC proxy rules mandating certain disclosures and prohibiting fraud and deceptive nondisclosure.¹³⁴ Corresponding requirements are not included in the LMRDA.¹³⁵ In fact, the statute's protection of members' freedom of speech has been broadly construed to protect even defamatory speech from union retaliation.¹³⁶

133. See Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 903 (2013) (pursuing such proposals "is both highly speculative and dilutes the activist's single minded campaign to increase the target's stock price and thus the activist's credibility.").

134. Solicitation of Proxies, 17 C.F.R. §§ 240.14a-1, -15, -101 (2014). Before 1992, the SEC's rules significantly interfered with shareholders' ability to communicate with each other about upcoming proxy contests by treating all such communications as proxy solicitations. This required shareholders to bear all the expense associated with filing formal proxy statements with the SEC. The 1992 amendments, however, make clear that if the communication does not contain an actual request for shareholders' proxies, no proxy statement need be filed. This change made it much easier for institutional shareholders to coordinate their efforts on corporate governance matters. See FAIRFAX, *supra* note 39, at 117-18 (explaining the SEC's reasoning in amending the 1992 rule and noting the significant increase in communications following the rule).

In labor law, where the focus is protecting the right of employees to engage in "concerted activities for . . . mutual aid and protection," 29 U.S.C. § 157 (2013) (emphasis added), it is hard to imagine any statute or rule prohibiting members from communicating with one another on governance matters. In addition, union attempts to limit communications among members run afoul of the members' LMRDA free speech rights. 29 U.S.C. § 411(a)(2) (2013)

135. Indeed, there are no statutory protections against fraud in the labor market in American labor law. Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715, 722 (1997). In rare cases, however, some courts entertain challenges to union referenda where extreme distortions or material omissions from materials accompanying mail ballots might violate the LMRDA's protection of union members' equal right to vote or the fiduciary duties union officers owe their members. See *e.g.*, *supra* text accompanying note 127 (discussing LMRDA referendum requirements). Not only do union members have minimal, if any, protections against fraud in the labor market, but they do not even have the standard protections from fraud available in the securities market when their own employer provides them with misleading information, encouraging them to purchase or retain shares in their employing company. Jennifer O'Hare, *Misleading Employer Communications and the Securities Fraud Implications of the Employee as Investor*, 48 VILL. L. REV. 1217 (2003). In conducting union certification and decertification votes, the NLRB has at times attempted to regulate the truthfulness of union or management campaign materials. But it ultimately abandoned that effort due to the belief that voters could recognize campaign propaganda for what it is and due to difficulties in administering the standard that could lead to delays in finalizing election results. *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982)

136. See *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir. 1963) (finding that the LMRDA

However, even in corporate contests, once a proxy statement is approved, “contestants are free to send out supplementary materials without significant oversight.”¹³⁷

There are also major differences between corporate and union campaigning in terms of who can vote. In unions, *all* members have equal rights to vote.¹³⁸ Corporations by default adhere to the one-share one-vote principle, but in practice can issue different types of shares with enhanced, reduced, or no voting rights.¹³⁹ In addition, there are other strategies and mechanisms for watering down a corporate vote, such as voting trusts and legal forms of vote buying.¹⁴⁰

Departures from the one-share, one-vote principle—and arguments against enhancing the shareholder voice in corporate governance generally—are often justified by the fact that there are shareholders with different objectives and levels of commitment to the company. Further justification is derived from the fact that some of these shareholders’ short term interests may be in direct conflict with the long term success of the enterprise.¹⁴¹ A heterogeneous electorate can also be present in unions.

protects union members’ right to make critical charges regarding the activities of the union and that any provisions of a union’s constitution that restrict such criticism are unenforceable). The offended party is free to pursue a defamation claim in court, but plaintiffs in the context of labor disputes face the same heightened standard for proving a claim that faces public figures. *See* Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 62, 65-66 (1966) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)) (noting that the malice test is applied in the cases of defamation in a labor context, such that defamatory statements are recoverable only if published with the knowledge of there being false or in reckless disregard of their accuracy).

137. Lee Harris, *The Politics of Shareholder Voting*, 86 N.Y.U. L. REV. 1761, 1766 n.27 (2011).

138. 29 U.S.C. § 411(a)(2) (2013). This right is “subject to reasonable rules . . . [in the union’s] constitution and bylaws.” *Id.* For example, it is acceptable for a union to allow only members working in a particular department, or on a specific shift, to vote to elect the shop stewards representing that department or shift. Members working in other departments or shifts, however, should have the right to vote for their stewards as well.

139. In the context of shareholder rights, it is perhaps ironic that preferred stock typically lacks voting rights. *See* COX & HAZEN, *supra* note 40, § 18.12 (discussing the generally limited voting rights of preferred stockholders).

140. *See* Robert B. Thompson & Paul E. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 158-66 (2009) (analyzing the decoupling of voting rights and financial interest in the context of corporate governance through voting trusts and buying shareholder votes).

141. *See, e.g.,* Hayden & Bodie, *supra* note 7, at 448 (“hedged shareholders might vote against the interests of the corporation”); Roberta S. Karmel, *Voting Power Without Responsibility or Risk: How Should Proxy Reform Address the Decoupling of Economic and Voting Rights*, 55 VILL. L. REV. 93 (2010) (describing “empty voting” by proxies of “shareholders with little or no economic interest in the shares they vote”); Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1 (2010) (describing tension between interests of short term and long

For example, older members might have different collective bargaining priorities than younger ones (pensions and health care, as opposed to more take-home pay), and working mothers might have different priorities than other members (perhaps more flexible work hours).¹⁴²

In any governance system based on elections and voting, concerns arise about the integrity of the ballot, the fairness of the count, and voters' protections against retaliation, intimidation, or coercion in exercising their rights. Those concerns are quite serious in unions, given notorious examples in labor history of important unions infiltrated by organized crime or headed by ruthless autocrats willing to do anything to hold onto power.¹⁴³ For that reason, the LMRDA not only protects members' freedom of speech, rights to nominate, and rights to vote, but it also prohibits unions from disciplining members without due process,¹⁴⁴ provides members with federal claims against unions or officers who interfere with their rights,¹⁴⁵ and makes it a federal crime to interfere with those rights using threats, intimidation, or violence.¹⁴⁶ The statute gives the Secretary of Labor exclusive jurisdiction over post-election challenges to

term stockholders). *But see, e.g.*, George W. Dent, Jr., *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35 DEL. J. CORP. L. 97, 101 (2010) (noting that different shareholders have different goals for the performance of the stock); Mark J. Roe, *Corporate Short-Termism - In the Boardroom and in the Courtroom*, 68 BUS. LAW. 977 (2013) (providing an evaluation of the short-termist point of view).

142. *See* Schwab, *supra* note 19, at 401 (describing the differences in desires between the younger and older generation, with the subsequent justifications for the differences).

143. A prime example is organized crime's impact on union governance in the Teamsters union in the decades before the government's RICO consent decree. *See generally* JACOBS & COOPERMAN, *supra* note 89 (discussing how organized crime influenced the Teamsters Union); DAN E. MOLDEA, *THE HOFFA WARS* (1978); CLARK R. MOLLENHOFF, *TENTACLES OF POWER: THE STORY OF JIMMY HOFFA* (1965) (chronicling the involvement of prominent American labor union leader Jimmy Hoffa in organized crime including fraud, tampering, and bribery); JAMES NEFF, *MOBBED UP 245* (1989) (describing relationships between Cleveland mob bosses and Teamster president Jackie Presser). Organized crime, on the other hand, was not involved with a murderous attempt to destroy the opposition in the United Mine Workers in 1969. Tony Boyle, the union's corrupt and autocratic president, faced an election challenge from reformers led by Joseph (Jock) Yablonski, a UMW district president and member of the union's executive board. Boyle's response was to order the murders of Yablonski and his family. PAUL F. CLARK, *THE MINERS' FIGHT FOR DEMOCRACY* 23-26 (1981).

144. 29 U.S.C. § 411(a)(5) (2013). Union discipline can include suspensions or expulsion from membership, temporary or permanent bars from running for union office, and monetary fines, which if lawfully imposed, are enforceable in court. OSBORNE, *supra* note 48, at 45.

145. 29 U.S.C. §§ 412, 529 (2013). Members can also sue for breach of the duty of fair representation if they can prove the union failed to adequately represent them in contractual grievances, including discharges, in retaliation for their dissident activities. Summers, *supra* note 17, at 274-75.

146. 29 U.S.C. § 530 (2013).

elections of officers;¹⁴⁷ but until the election is completed, candidates can bring their own actions to enforce their election rights.¹⁴⁸ There is no DOL oversight or enforcement when it comes to union votes on other matters, although members can sometimes obtain remedies in the courts for unfairly conducted referenda if they can show violations of their equal right to vote or a breach of fiduciary duty on the part of the conducting officers.¹⁴⁹ A refusal by the union's leadership to implement the results of a vote can also violate the members' equal right to vote.¹⁵⁰ If the vote is to ratify a contract, however, the remedies may be quite limited. Even if serious violations occurred during the ratification process, or a required vote was not held at all, once a collective bargaining agreement has been put into place, it is virtually impossible to undo the results.¹⁵¹

Because most shareholders in public corporations do not have secondary relationships with corporations that are "both valuable to the shareholder and terminable by the board",¹⁵² shareholders are less likely than union members to encounter retaliation or coercion for positions they take or votes they cast.¹⁵³ But that does not mean corporate voting does not

147. *Id.* § 483. Union democracy advocates have been critical of the DOL for the way it exercises, or refuses to exercise, its post-election enforcement powers. *See, e.g.*, HERMAN BENSON, *DEMOCRATIC RIGHTS FOR UNION MEMBERS: A GUIDE TO INTERNAL UNION DEMOCRACY* 95-113 (1979); Joseph L. Rauh, *LMRDA—Enforce It or Repeal It*, 5 GA. L. REV. 643, 645-46 (1971) (lamenting how the DOL does not prioritize these powers).

148. *See, e.g.*, 29 U.S.C. § 481(c) (2013) (codifying the right to mail out campaign literature). The Department of Labor has issued extensive guidance on what constitutes a fair union election. 29 C.F.R. § 452.1 (2014).

149. *See* 29 U.S.C. § 411(a)(1) (2013) (codifying that every member of a labor organization has equal voting rights); *id.* § 501 (2013) (codifying the duties of union officers and procedures for suing officers for a violation of their duties); *supra* text accompanying note 128 (discussing cases where courts have found a violation of members' equal right to vote).

150. *See* *Pignotti v. Local #3 Sheet Metal Workers Int'l Ass'n*, 343 F. Supp. 236, 243 (D. Neb. 1972), *aff'd*, 477 F.2d 825 (8th Cir. 1973) (declaring that it is a statutory violation to deny this right to vote in this context).

151. *See* Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 796 (1984) (explaining that a victory on the merits would more likely result only in prospective relief, making sure the same violations are not repeated in future ratification votes).

152. K.A.D. Camara, *Shareholder Voting and the Bundling Problem in Corporate Law*, 2004 WISC. L. REV. 1425, 1458 (internal footnote omitted).

153. Shareholders who do have such relationships, perhaps as employees of the corporation or contractors with it, can be vulnerable to "special punishment" that can influence how they vote. *Id.* For example, in litigation challenging Hewlett-Packard's acquisition of Compaq in 2002, there were allegations that one of HP's major institutional shareholders, Deutsche Bank, switched its votes at the last minute to support the acquisition out of fear of losing HP's existing banking business or in hope of acquiring more of HP's business. *See* *Hewlett v. Hewlett-Packard*, No. Civ. A. 19513-NC, 2002 WL 549137, at *2-3, *12 (Del. Ch., April 8, 2002) (explaining the reasoning behind Deutsche Bank's decision to change their votes). To the extent employee-shareholders' communications blow the

suffer from pathologies of its own.¹⁵⁴ For that reason, improperly conducted votes can be the basis for breach of fiduciary duty claims; both the Delaware statute and the Model Act authorize the appropriate courts to hear shareholder challenges to the conduct or the outcome of director elections or shareholder votes on any other matters.¹⁵⁵ Where appropriate, courts can order reruns of challenged votes under the supervision of court appointed masters.¹⁵⁶

III. SHAREHOLDER AND UNION MEMBER LITIGATION

Shareholders and union members have much in common when it comes to the causes of action, remedies, and procedural devices available to them. These can be used to enforce their individual rights as shareholders or members in direct litigation or to enforce claims on behalf of their corporations or unions in shareholder and union member derivative litigation.¹⁵⁷ For example, members and shareholders can bring direct actions against their unions or corporations for access to books and records, if they can demonstrate a “proper purpose”¹⁵⁸ or “just cause.”¹⁵⁹ Similarly,

whistle on corporate misconduct, Sarbanes-Oxley’s anti-retaliation provisions might apply, although their effectiveness is debatable. See Richard Moberly, *Sarbanes-Oxley’s Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 35 (2012) (using the 2008 financial crisis as an example of the ineffectiveness of the whistle blowing).

154. See generally Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1249-65 (2008) (noting the corporate voting pathologies of complexity, confusion in ownership, and misalignment between voting rights and economic interest).

155. DEL. CODE ANN. tit. 8, § 225 (2014); Corporate Law Committee, ABA Section of Business Law, *Changes in the Model Business Corporation Act – Amendment to Section 7.22 Relating to Irrevocable Proxies and Adoption of Section 7.29A Providing for Judicial Review of Corporate Elections, Shareholder Votes, and Other Corporate Governance Disputes*, 67 BUS. LAW. 729 (2012).

156. DEL. CODE ANN. tit. 8, § 227 (2014); Corporate Law Committee, ABA Section of Business Law, *Changes in the Model Business Corporation Act – Proposed Adoption of Section 7.29A Providing for Judicial Review of Corporate Elections, Shareholder Votes, and Other Corporate Governance Disputes*, 66 BUS. LAW. 963, 972 (2011).

157. Direct litigation can be brought on behalf of other members or shareholders as well, through class actions, particularly securities class actions in the corporate arena. See generally Symposium, *Litigation Reform Since the PSLRA: A Ten-Year Retrospective*, 106 COLUM. L. REV. 1479 (2006). Derivative cases are always, in effect, collective actions, because they are brought on behalf of entities in which other shareholders or members share common interests.

158. DEL. CODE ANN. tit. 8, §§ 220(b), (c) (2014); MODEL BUS. CORP. ACT §§ 16.02, 16.04 (2010).

159. 29 U.S.C. § 431(c) (2013).

they can bring direct actions to enforce their voting rights in their unions or corporations.¹⁶⁰

This section focuses most closely on the derivative actions shareholders and union members also have in common. Those are suits brought by shareholders or members on behalf of their corporation or union, where the organization's officers and board have refused to bring the case themselves. Any damages recovered go into the corporate or union coffers, not the plaintiffs' pockets, but their attorneys may be entitled to substantial fee awards.¹⁶¹ In 1959, when Congress created the federal cause of action for union member derivative suits,¹⁶² it modeled this cause of action on the shareholder derivative suit as it existed at the time.¹⁶³ We are about to explore the very different paths these two types of cases followed from that point fifty-five years ago.

A. *The Derivative Claims of Shareholders and Union Members*

A shareholder derivative suit is brought by one or more shareholders on behalf of the corporation itself, where the corporation, through its officers or directors, has failed to bring or authorize, the case. If the plaintiffs can overcome the daunting procedural obstacles to bringing a derivative action,¹⁶⁴ they can pursue claims on behalf of the corporation that generally target current or former officers or directors who were disloyal or dishonest in their dealings with the corporation, or who failed to exercise due care on its behalf.¹⁶⁵ These cases typically seek substantial damage awards, but plaintiffs can also seek equitable relief, and settlements of these cases often include non-pecuniary remedies such as appointments of financial advisors or monitors, or the adoption of governance reforms intended to prevent the types of abuses that were the subject of the litigation.¹⁶⁶

160. *See id.* §§ 411(a)(1), (4) (codifying a labor organization's members' equal rights and privileges with respect to voting and protecting members' right to sue); DEL. CODE ANN. tit. 8, § 227 (2014) (enforcing the Chancery Court's power to determine the "right and power of persons claiming to own stock" in any various proceedings connected to voting.)

161. *See generally* DEBORAH A. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE* (2003) (covering the procedural and substantive questions posed by shareholders' derivative suits on behalf of corporations); OSBORNE, *supra* note 48, at 137-79 (discussing the LMRDA fiduciary standards and procedures for enforcing them).

162. 29 U.S.C. § 501(b) (2013).

163. *See infra* text accompanying note 179.

164. *See infra* text accompanying notes 233-239.

165. DEMOTT, *supra* note 161, at 3 (Supp. 2010-2011). Shareholders can also assert claims against third parties on behalf of the corporation. DEMOTT, *supra* note 161, at 1-2.

166. *See generally* DEMOTT, *supra* note 161, at § 7:6, at 7-42 to -49 (discussing various remedies of derivative litigation).

Unlike the shareholder derivative suit, which was a creation of the courts of equity,¹⁶⁷ the union members' derivative suit was primarily the creation of Congress.¹⁶⁸ But there is no doubt that Congress had shareholder suits in mind when § 501 was enacted. Certainly the chief sponsor of that portion of the bill did,¹⁶⁹ describing the cause of action created by § 501(b) this way: "[I]f the union fails to bring suit upon the request of the member, the member may apply to . . . court for leave to bring an action on behalf of the organization similar to a minority shareholder's suit against a corporation."¹⁷⁰ The courts have also recognized, and acted upon, that similarity. In one of the earliest § 501(b) decisions, the court mentioned the "repeated reference[s] in the [LMRDA's] legislative history to the similarities between the duties of a union official and a corporate officer."¹⁷¹ The court then held that state law governing shareholder derivative suits could be a source of guidance in construing Title V.¹⁷²

The Committee Report, however, also recognized that "the detailed application of [general] fiduciary principles to a particular trustee, officer, or agent has always depended upon the character of the activity."¹⁷³ Accordingly, § 501(a) expressly requires union officers' fiduciary duties to

167. See, e.g., Ann M. Scarlett, *Shareholder Derivative Litigation's Historical and Normative Foundations*, 61 BUFF. L. REV. 837, 887-91 (2013) (discussing the creation and development of shareholders' derivative suit).

168. 29 U.S.C. § 501 (2013). State causes of action for union officers' breach of fiduciary duties, which also had their roots in equity, were available before the LMRDA but were little used. See, e.g., Archibald Cox, *Internal Affairs of Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 827 (1960) (noting that "union officers and employees have always been subject to the usual common-law fiduciary duties Violations are repressible in the state courts. . . . The duty is so seldom enforced . . .").

169. Title V of the LMRDA, which contains § 501, was taken virtually unchanged from H.R. 8342, 86th Cong. § 501 (1959), commonly known as the Elliott bill. See, e.g., Cox, *supra* note 168, at 822-23 (discussing the Landrum-Griffin Bill that integrated the Elliott proposals).

170. 105 CONG. REC. 15,549 (1959) (remarks of Rep. Elliott). The Committee Report invoked "centuries [of] the law of fiduciaries" when explaining what would become 29 U.S.C. § 501. H.R. REP. NO. 86-741, at 10 (1959). The RESTATEMENT (SECOND) OF AGENCY (1958), was cited as a source for the statute's description of the fiduciary duties of union officers "in an effort to incorporate the whole body of common law precedents defining the fiduciary obligations of agents and trustees with such adaptations as might be required to take into account 'the special problems and functions of a labor organization.'" Cox, *supra* note 168, at 828 (internal footnote omitted).

171. *Nelson v. Johnson*, 212 F. Supp. 233, 298 (D. Minn.), *aff'd* 325 F.2d 646 (8th Cir. 1963).

172. *Id.*; see also *McNamara v. Johnston*, 522 F.2d 1157, 1162 (7th Cir. 1975) (following by analogy the precedents of shareholder derivative cases).

173. H.R. REP. NO. 86-741, at 81 (1959) (dictating the supplementary views of Rep. Elliott, among others).

be construed as “taking into account the special problems and functions of a labor organization.”¹⁷⁴ An example of a court doing that is *Morrissey v. Curran*,¹⁷⁵ where the Second Circuit rejected corporate law’s lenient business judgment rule for evaluating allegations that the defendant union officers’ compensation was excessive. The court highlighted three distinctions between unions and corporations in this context: first, that exit is much more difficult for union members than for shareholders; second, that there are fewer market forces working to constrain union abuses than there are checking abuses by corporate management; and third, that there are no union counterparts to outside directors setting the compensation of union officers.¹⁷⁶

§ 501(b) creates the union members’ derivative cause of action to seek remedies, on behalf of the union, for fiduciary breaches when the union refuses to bring suit on its own after being requested to do so.¹⁷⁷ If successful, plaintiffs can recover “for the benefit of the labor organization” damages, an accounting, or “other appropriate relief,” including injunctive relief and attorneys fees.¹⁷⁸

When Congress modeled the union member derivative suit on shareholder derivative actions,¹⁷⁹ those suits were viewed as “the most important procedure the law has yet developed to police the internal affairs of corporations.”¹⁸⁰ As the Supreme Court described them, shareholder derivative suits were “long the chief regulator of corporate

174. 29 U.S.C. § 501(a) (2013).

175. 650 F.2d 1267, 1274-75 (2d Cir. 1981).

176. *Id.* at 1273-74. Another distinction noted by the court, this time between unions and trusts, was that “union goals of advancing membership interests would result in economic policies or decisions different from those expected of a traditional trustee, whose sole legitimate aim is to preserve the trust corpus.” *Id.* at 1275.

177. 29 U.S.C. § 501(b) (2013). The fiduciary duties in § 501 actions should be distinguished from the types involved in duty of fair representation (DFR) litigation. § 501 cases are derivative actions and generally focus on matters of internal union governance or union finances. DFR cases, on the other hand, are direct actions that involve the negotiation of collective bargaining agreements or their enforcement through contractual grievance procedures. OSBORNE, *supra* note 48, at 277-420.

178. 29 U.S.C. § 501(b) (2013).

179. More precisely, the drafters of the Elliot bill modeled much of what became § 501 on a recently enacted New York statute, N.Y. LAB. LAW §§ 720-732 (McKinney), that had modeled *its* union member derivative action on shareholder suits. See Michael J. Goldberg, *Present at the Creation: Clyde Summers and the Field of Union Democracy Law*, 14 EMP. RTS. & EMP. POL’Y J. 121, 134 (2010) (stating that the bill served as a model for Title V of the LMRDA).

180. Eugene V. Rostow, *To Whom and For What Ends Are Corporate Management Responsible?*, in THE CORPORATION IN MODERN SOCIETY 46, 48 (Edward S. Mason ed. 1960) (quoted in Kenneth B. Davis, *The Forgotten Derivative Suit*, 61 VAND. L. REV. 387, 411 (2008)).

management.”¹⁸¹ In recent decades, corporate derivative suits, at least in Delaware, have lost much ground to direct shareholder class actions brought under state law and federal securities laws.¹⁸² At the time Congress enacted the LMRDA, however, private causes of action under the Securities Exchange Act of 1934 were still emerging,¹⁸³ and the class action device in its modern form became available only after the 1966 amendments to the Federal Rules of Civil Procedure.¹⁸⁴ Shareholder derivative suits were where the action was with respect to litigation remedies for many corporate governance problems.

Derivative actions are procedural devices for bringing claims on behalf of the corporation or the union. But what of the substance of those claims? On the shareholder side, derivative suits generally enforce fiduciary duties established by state law.¹⁸⁵ In theory, plaintiffs can assert fiduciary claims based on a breach of either the duty of care or the duty of loyalty. In practice, however, plaintiffs rarely prevail on duty of care claims and bring relatively few of them.¹⁸⁶ This is in part because a defendant’s conduct is measured against the very deferential business judgment rule, and in part because liability is usually excused under exculpatory clauses of corporate charters authorized by state law.¹⁸⁷ Fiduciary claims based on a breach of the duty of loyalty, on the other hand, constitute the bulk of shareholder derivative actions in Delaware,

181. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949).

182. *Davis*, *supra* note 180, at 413; *see also* Randall S. Thomas, *The Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation*, 61 VAND. L. REV. 299, 305 (2008) (explaining that the number of derivative suits has decreased over the last few years). *But see* Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 FLA. L. REV. at 1089, 1016 (2013) (indicating a possible shift back towards derivative suits).

183. *See Kardon v. Nat’l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (establishing a private cause of action for Rule 10b-5 violations); *see also* *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (implying a private shareholder cause of action under section 14(a) of the Securities Exchange Act of 1934).

184. *See* Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1757 (2004).

185. *DEMOTT*, *supra* note 161, at 1-2 (Supp. 2010-2011).

186. *See* Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 60-61 (1991) (explaining that plaintiffs win less than six percent of cases, none of which awarded damages or equitable relief); Thompson & Thomas, *supra* note 184, at 1773, 1775-76 (weighing the risks and benefits of bringing a derivative action and concluding that the low rate of success deters such actions from being brought).

187. *See* *Davis*, *supra* note 180, at 405 (“While the right of recovery for breakdowns of judgment or oversight may have been more theoretical than real, it no longer even exists in theory.”). *But see* Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1774 (2010) (showing that duty of care claims are still common in the context of derivative suits in the federal courts).

although a smaller portion of the derivative actions brought in federal court.¹⁸⁸

On the union side, the statute rather than the common law defines the fiduciary duties of union officials.¹⁸⁹ However, the statutory language is sufficiently general that courts have concluded, “Congress made no attempt to ‘codify’ the law in this area. . . . [It] intended the federal courts to fashion a new federal labor law in this area”¹⁹⁰ The statute is quite specific, on the other hand, that general exculpatory provisions in union constitutions or bylaws are void as against public policy.¹⁹¹ This differs from the corporate laws of most states, which expressly permit corporate charters to contain provisions relieving directors of liability for duty of care violations.¹⁹²

In union member derivative suits challenging union expenditures, the courts generally uphold expenditures properly authorized pursuant to the union’s constitution and bylaws when the defendant officers have no personal stake in the expense.¹⁹³ When the defendants are personally

188. See, e.g., Erickson, *supra* note 187, at 1778 (noting that shareholders were likely to “reserv[e] state court claims for more traditional duty of loyalty claims.”); Thompson & Thomas, *supra* note 184, at 1773 (“[A]most 60 percent of the complaints [in state court] raise principally a duty of loyalty claim.”).

189. 29 U.S.C. § 501(a) (2013) provides in pertinent part:

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

190. See *Highway Truck Drivers Local 107 v. Cohen*, 182 F. Supp. 608, 617 (E.D. Pa.), *aff’d*, 284 F.2d 162 (3d Cir. 1960), *quoted in* *Johnson v. Nelson*, 325 F.2d 646, 650-51 (8th Cir. 1963), *and* *Morrissey v. Curran*, No. 69 Civ. 442, 1972 WL 1051 at *6, *7 (S.D.N.Y. June 29, 1972), *aff’d*, 483 F.2d 480 (2d Cir. 1973). The Cohen court drew an analogy to the federal common law of collective bargaining developed under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185. 182 F. Supp. at 617, *citing* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

191. 29 U.S.C. § 501(a) (2013).

192. See, e.g., DEL. CODE ANN. tit 8, § 102(b)(7) (2014) (permitting a charter provision limiting the liability of a director who breaches her fiduciary duty of loyalty); MODEL BUS. CORP. ACT § 2.02(b)(3) (2010) (allowing any provision that is permitted to be included in the bylaws to also be included in the charter).

193. See, e.g., *Gabauer v. Woodcock*, 594 F.2d 662, 669-70 (8th Cir. 1979) (upholding

interested, however, the expenditure must be reasonable, and some courts put the burden on the defendants to demonstrate that reasonableness.¹⁹⁴ Typical claims might be for abusing expense accounts;¹⁹⁵ providing excessive compensation;¹⁹⁶ or remedying many other creative ways of stealing from union treasuries or pension funds.¹⁹⁷ Financial abuses covered by § 501 need not directly line officers' pockets. It is sufficient for those abuses to more firmly entrench the offenders in office.¹⁹⁸

The biggest question about the reach of union members' derivative suits is whether the defendants can be found liable for fiduciary breaches that do not directly involve union property or finances.¹⁹⁹ In a longstanding split in the circuits, the Second Circuit has read § 501(a) narrowly, limiting it to claims involving union property or finances.²⁰⁰ The remaining circuits

expenditures because they "were clearly authorized by the union's constitution and resolutions of the union's national convention" and noting the outcome would have been different if a conflict of interest existed.). Conversely, failure to follow proper authorization procedures generally results in liability, because § 501(a) expressly requires union officials "to manage, invest, and expend [union money and property] in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder." *Id.* at 666. Where a determination whether an expenditure was properly authorized requires an interpretation of the union's constitution or bylaws, the courts give great deference to the union's interpretation, so long as it is reasonable and was not made in bad faith. *Monzillo v. Biller*, 735 F.2d 1456, 1459 (D.C. Cir. 1984).

194. *See, e.g.*, *Brink v. DaLesio*, 667 F.2d 420, 424 (4th Cir. 1981) (relying on *Morrissey v. Curran*, 650 F.2d 1267, 1274-75 (2d Cir. 1981) for the proposition that "the official bears the burden of proving that the transaction was validly authorized in accordance with the union's constitution and bylaws after adequate disclosure, and that it does not exceed a fair range of reasonableness.").

195. *See, e.g.*, *Noble v. Sombrotto*, 525 F.3d 1230, 1235-37 (D.C. Cir. 2008).

196. *See, e.g.*, *Brink v. DaLesio*, 667 F.2d 420 (4th Cir. 1981).

197. *See, e.g.*, *Hood v. Journeymen Barbers*, 454 F.2d 1347 (7th Cir. 1972) (indicating union officials' fiduciary duties under § 501 extend to their roles as administrators or trustees of union controlled pension or benefit funds). *But see* OSBORNE, *supra* note 48, at 146 (asserting union officials' fiduciary duties under § 501 does not to their similar roles with respect to jointly administered collectively bargained pension or benefit plans).

198. *See, e.g.*, *Guzman v. Bevona*, 90 F.3d 641, 645 (2d Cir. 1996) (spending over \$19,000 to conduct surveillance of outspoken member violates officers' duty "to hold [the union's] money and property solely for the benefit of the organization and its members"); *Wade v. Teamsters Local 247*, 527 F. Supp. 1169 (E.D. Mich. 1981) (spending union funds on an unlawful mail referendum to prevent consideration of dissident members' proposed bylaws amendments).

199. *See* OSBORNE, *supra* note 48, at 147-54 (discussing a narrow and broad approach to union officials' fiduciary obligations).

200. *See, e.g.*, *Gurton v. Aarons*, 339 F.2d 371, 375 (2d Cir. 1964) (stressing that most of the specific language of § 501(a) focuses on union property and finances; much of the legislative history focused on financial abuses exposed by the McClellan Committee, and expressed concern about too much judicial interference in union affairs); *see also* *Head v. Ry. Clerks*, 512 F.2d 398, 401 n.3 (2d Cir. 1975) (noting that § 501(a) concerns "the fiduciary duties of union officers solely in terms of their treatment of the money and

that have clearly addressed the issue have given the provision a broad reading. They rely on the broadly drafted first sentence of § 501(a)²⁰¹ and on the Committee Report on the Elliott bill.²⁰² Thus, courts have recognized claims where officers violated their union constitutions by failing to submit collective bargaining agreements, constitutional amendments, or other matters to membership votes,²⁰³ failing “to keep the membership informed on matters which they, the rank and file, must decide”,²⁰⁴ failing to disband local unions with fewer than ten members,²⁰⁵ failing to hold required membership meetings,²⁰⁶ rigging officer elections,²⁰⁷ and failing to protect members’ democratic rights under the LMRDA.²⁰⁸

There do not appear to be many shareholder derivative suits comparable to these union member suits that are unrelated to the

property of the union and their financial dealings vis-à-vis the union.”) (internal quotation marks omitted).

201. “The officers . . . of a labor organization occupy positions of trust in relation to such organization and its members as a group.” 29 U.S.C. § 501(a) (2013).

202. H. REP. NO. 86-741, at 81 (1959). According to the supplemental views of Elliott and others:

We affirm that the committee bill is broader and stronger than the provisions of S. 1555 . . . [which] applied the fiduciary principle to union officials only in their handling of ‘money or other property’ [T]he committee bill extends the fiduciary principle to *all* the activities of union officials and other union agents or representatives.

Id. (emphasis added).

203. See, e.g., *Stelling v. Int’l Bhd. Elec. Workers Local Union No. 1547*, 587 F.2d 1379, 1387 (9th Cir. 1978) (stating that “[t]he allegation that [the officers] have denied the membership of the union the constitutionally guaranteed right to vote is a sufficient assertion of a breach of trust on the part of the [the officers] to invoke the jurisdiction of section 501.”).

204. *Blanchard v. Johnson*, 388 F. Supp. 208, 214 (N.D. Ohio 1975), *aff’d in part and rev’d in part, on other grounds*, 532 F.2d 1074 (6th Cir. 1976).

205. *Sabolsky v. Budzanoski*, 457 F.2d 1245, 1250-51 (3d Cir. 1972). The issue here is not just the inefficiency of maintaining barely functioning or non-functioning locals. There are union democracy implications as well. On some matters, union voting can be conducted on a one-local, one-vote basis, rather than one-member, one-vote, meaning that incumbent national officers can inflate their votes on those matters by maintaining and controlling empty “paper” locals.

206. See *Wade v. Teamsters Local 247*, 527 F. Supp. 1169 (E.D. Mich. 1981) (holding that a failure to hold requisite monthly membership meetings can be a violation of the union constitution and is actionable under § 501).

207. See *Hearn v. McKay*, 184 L.R.R.M. (BNA) 2817, 2826 (S.D. Fla. 2008), *aff’d on other grounds*, 603 F.3d 897 (11th Cir. 2010) (holding that election-related claims are actionable under § 501, especially where a plaintiff is not aiming to set aside an election).

208. *O’Rourke v. Crosley*, 847 F. Supp. 1208, 1221 (D.N.J. 1994), *citing Semancik v. United Mine Workers Dist. 5*, 466 F.2d 144, 155 (3d Cir. 1972) (stating that union officers have a fiduciary duty under “Section 501 . . . to insure the political rights of all union members.”).

organizations' finances, although it would seem shareholders can bring them. Directors or officers who have violated their corporate charters or bylaws in ways not directly affecting the corporate treasury have presumably nevertheless violated their fiduciary duties by doing so, even in the absence of financial harm to the corporation.²⁰⁹ Moreover, such defendants could lose the protection of the business judgment rule if their primary motivation was perpetuating themselves in control of the corporation, thus violating their duty of loyalty.²¹⁰ In theory, many of these claims could be brought as derivative suits, but in practice, direct actions are far preferable because they avoid the procedural hurdles associated with shareholder derivative actions.²¹¹

In both the union and corporate contexts, direct and derivative claims can be brought within a single case,²¹² but the combination is more likely to be seen in union litigation. A combination of claims is more likely because the screening union member derivative suits receive is not nearly as lethal as that faced by plaintiff shareholder suits. Moreover, union members have not always had direct access to federal court to remedy violations of union constitutions or bylaws,²¹³ so derivative actions were sometimes the only alternative.²¹⁴

209. *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (“[T]he fiduciary duty of loyalty is not limited to cases involving financial or other cognizable fiduciary conflict of interest. . . . Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.”) (internal citations omitted).

210. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1387 (Del. 1995) (noting that where a director's primary motivation is to perpetuate herself in office, she might fail the proportionality test of the business judgment rule).

211. *See infra* text accompanying notes 233-239.

212. *See, e.g., Guzman v. Bevona*, 90 F.3d 641 (2d Cir. 1996); *Stelling v. Int'l Bhd. Elec. Workers Local Union No. 1547*, 587 F.2d 1379 (9th Cir. 1979) (combining, in the union context, direct claims under 29 U.S.C. §§ 411-415 with derivative claims under § 501); 3 COX & HAZEN, *supra* note 40, § 15:3 n.23 (citing and discussing, in the corporate context, shareholder cases permitting similar joinder).

213. *See, e.g., Smith v. United Mine Workers*, 493 F.2d 1241 (10th Cir. 1974) (asserting that before the Supreme Court's ruling for plaintiffs in *Woodell v. Int'l Bhd. Elec. Workers Local 71*, 502 U.S. 93 (1991), a number of circuits had denied federal subject matter jurisdiction to direct member suits seeking to enforce union constitutions and bylaws.) The Court in *Smith v. United Mine Workers* construed § 301 of the Taft-Hartley Act, as applying only to disputes directly impacting labor management relations, not to internal union disputes. 493 F.2d at 1243-44. *See also Korzen v. Local Union 705, Int'l Bhd. of Teamsters*, 75 F.3d 285, 288 (7th Cir. 1996) (maintaining that some courts, even after *Woodell*, 502 U.S. 93, have held that while section 301 provides jurisdiction for suits based on national union constitutions, it does not for suits based on local unions constitutions or bylaws).

214. For example, in *Stelling v. Int'l Bhd. Elec. Workers Local Union No. 1547*, 587

B. Procedural Filters and Roadblocks

Part of what makes the comparison between shareholder and union member derivative suits interesting are the different paths the two types of cases took after the union member variation was created in the image of the shareholder suit more than fifty years ago. Union member suits have changed very little, but shareholder derivative actions during that period have morphed significantly. This is true not only in terms of their smaller role in the regulation of corporate governance,²¹⁵ but even more so with respect to procedural changes that have the effect of blocking most shareholder derivative actions altogether.²¹⁶

When Congress created the union member derivative suit in 1959, it sought to protect union officers from harassment and strike suits, and to protect unions from too much interference from the courts.²¹⁷ Of course, courts have long had comparable concerns about shareholder derivative actions.²¹⁸ Not surprisingly, the solutions chosen by Congress for § 501 actions were similar to the responses developed by the courts in the corporate context.

F.2d 1379 (9th Cir. 1979), union members challenged the failure of local and national officers to conduct a contract ratification vote before entering into an agreement with an employers' association, as plaintiffs alleged the union constitution required. On appeal, the Ninth Circuit first held that it had no section 301 jurisdiction over plaintiffs' direct claim that the defendants' conduct violated the union's constitution. *Id.* at 1384. Then the court held that the plaintiffs could not bring a direct action enforcing the LMRDA's guarantee of equal voting rights, 29 U.S.C. § 411(a)(1), because the union did not discriminate against them with respect to their voting rights; it treated all members equally by denying all of them the right to vote. *Id.* at 1384-85. In the end, plaintiffs' only basis for a remedy in federal court was a derivative claim under 29 U.S.C. § 501. *Id.* at 1386-87.

215. See *supra* text accompanying note 182.

216. There is a bit of a chicken and egg phenomenon here. Have new procedural obstacles brought about the reduced role of shareholder derivative suits, or has the emergence of alternative corporate governance remedies created a legal environment where a reduced role for derivative actions is more acceptable as a matter of public policy? Cf. Davis, *supra* note 180, at 450 ("For [c]orporate [i]mpropriety, efficient securities markets, media scrutiny, and public enforcement combine to provide shareholders with much of the protection traditionally associated with the derivative suit, without the cost and distraction associated with nuisance litigation.").

217. See *Highway Truck Drivers v. Cohen*, 182 F. Supp. 608, 622 n.10 (E.D. Pa. 1960), *aff'd*, 284 F.2d 162 (3d Cir. 1961) (explaining that the "good cause" requirement under 29 U.S.C. § 501(b) is intended to stop frivolous litigation); R. Theodore Clark, Jr., *The Fiduciary Duties of Union Officials Under Section 501 of the LMRDA*, 52 MINN. L. REV. 437, 465 (1967) (quoting *Highway Truck Drivers*, 182 F.Supp. at 622 n.10 to support the same interpretation of "good cause" in 29 U.S.C. § 501(b)).

218. See Bert S. Prunty, Jr., *The Shareholders' Derivative Suit: Notes on its Derivation*, 32 N.Y.U. L. REV. 980, 983-84 (1957) (citing examples of courts favoring the self-government of corporations rather than judicial interference).

In both settings, plaintiffs must give the corporation or union, operating through its officers or board, the opportunity to bring its own lawsuit against the officers or board members who have allegedly breached their fiduciary duties, or to otherwise remedy the underlying problem.²¹⁹ In both settings, this demand requirement may be excused where the plaintiffs can show that it would be a futile gesture, typically due to conflicts of interest on the part of the corporate or union officials responding to the demand.²²⁰

The LMRDA does not specify a particular format for the demand, and courts recognize that union members are often unsophisticated and, at the demand stage, unrepresented by counsel.²²¹ The courts therefore construed the demand requirement liberally, finding it satisfied where the member raised complaints about the offending officers' misconduct and sought action on the part of the union without spelling out a request that the union

219. See, e.g., Del. Ch. Ct. R. 23.1 (governing actions brought against the corporation); MODEL BUS. CORP. ACT § 7.42 (2010) (laying out the formalities for a derivative action to be brought against the corporation). 29 U.S.C. § 501(b) provides in relevant part:

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court . . . to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization.

220. In Delaware, the standard for excusing demand is whether the facts alleged create a reasonable doubt "that . . . the directors are disinterested or independent" or that "the challenged transaction was otherwise the product of a valid exercise of business judgment." *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000) (citations omitted). In Delaware, once a plaintiff has made a demand, he or she cannot later contend that demand should be excused as futile. *Spiegel v. Buntrock*, 571 A.2d 767, 775 (Del. 1990). Thus, plaintiffs in Delaware tend to forgo making any demand at all. *Thompson & Thomas*, *supra* note 184, at 1782. In most other states, and according to the Model Act, demand must be made in every case, unless excused by the likelihood of irreparable harm while awaiting a response. MODEL BUS. CORP. ACT § 7.42 (2010). In those states, however, a board's rejection of plaintiff's demand will not be entitled to the judicial deference of the business judgment rule, and will therefore not block the plaintiff from proceeding with the derivative suit, if that decision was made by directors who are not disinterested or independent. On the union side, there is a split in the circuits on whether circumstances demonstrating the futility of making the demand might excuse the demand requirement altogether. Compare *Flaherty v. Warehousemen, Garage & Serv. Station Employees Local 334*, 574 F.2d 484 (9th Cir. 1978) (stating that futility is no reason to excuse the demand requirement) with *Sabolsky v. Budzanoski*, 457 F.2d 1245 (3d Cir. 1972) (excusing the demand requirement when it is demonstrated that doing so may be futile).

221. *Dinko v. Wall*, 531 F.2d 68, 73 (2d. Cir. 1976).

file suit.²²² In the corporate setting, on the other hand, the demand must specifically request that the board take legal action on behalf of the corporation, and any ambiguity is likely to be resolved against the plaintiff.²²³

There was initially some uncertainty whether union plaintiffs in derivative suits had to satisfy a prerequisite for most other types of member litigation: that plaintiffs exhaust any additional internal union remedies that may be available, or demonstrate that exhaustion would be futile.²²⁴ Exhaustion usually means filing internal union charges against offending officers or pursuing any internal union appeals available under the union's constitution. The consensus now is that § 501(b)'s demand requirement is the only form of exhaustion required,²²⁵ although some courts consider exhaustion of further union remedies as part of the court's determination that plaintiffs have good cause to pursue their derivative claims.²²⁶

Virtually all union member derivative suits are brought in federal court,²²⁷ but despite their similarity to shareholder derivative suits, only one case has ever held they are governed by Federal Rule of Civil Procedure 23.1.²²⁸ While the rule's drafters presumably did not have union member suits in mind,²²⁹ its text is consistent with its application: "This rule applies

222. See, e.g., *Cowger v. Rohrbach*, 868 F.2d 1064, 1067 n.5 (9th Cir. 1989) (explaining that a request satisfies the demand requirement even if it is only made in general terms).

223. DEMOTT, *supra* note 161, at 5-23, 5-44.

224. See, e.g., 29 U.S.C. § 411(a)(4) (2013) (explaining that exhaustion is typically required for a period of four months before filing a claim under the LMRDA's bill of rights for union members); *Clayton v. United Auto Workers*, 451 U.S. 679 (1981) (stating that exhaustion is typically required in duty of fair representation litigation).

225. See, *Cowger*, 868 F.2d at 1066 (holding that exhaustion of internal union remedies prior to filing a § 501 complaint is not required).

226. See, *Sabolsky*, 457 F.2d at 1252 (stating that exhausting other internal remedies might affect the "good cause" requirement).

227. Plaintiffs can file in state or federal court under § 501(b) but a Westlaw search revealed no reported state cases brought pursuant to § 501(b). This may be because plaintiffs' lawyers in these cases prefer federal court, or because cases brought in state court are routinely removed to federal court by the defendants. To the extent there are state law remedies for union officer breaches of fiduciary duty, the LMRDA does not preempt them. See 29 U.S.C. § 523(a) (referring to both state and federal law as controlling). But such remedies for the most part have lain dormant since the LMRDA's enactment.

228. *Martinez v. Barasch*, No. 01 Civ. 2289, 2004 WL 1555191, *8 (S.D.N.Y. July 12, 2004). Other courts have on occasion looked to interpretations of FED. R. CIV. P. 23.1 for guidance without holding that the rule applies directly to § 501 cases. See, e.g., *Hood v. Journeymen Barbers, Hairdressers & Cosmetologists Int'l Union*, 454 F.2d 1347, 1354 n.23 (7th Cir. 1972) (stating the demand requirement of Rule 23.1 is not always necessary).

229. Rule 23.1 had its origins in Equity Rules 27 and 94, which applied only to shareholder derivative actions. 7C CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1821, at 15-16 (3d ed. 2007). When Equity Rule 27 became Rule 23(b) in the new Federal Rules in 1938, however, its language

only when one or more shareholders *or members* of a corporation *or an unincorporated association* bring a derivative action to enforce a right the corporation *or association* may properly assert but has failed to enforce.”²³⁰ On the other hand, most shareholder derivative suits to which Rule 23.1 applies are state law based claims brought in federal court on diversity of citizenship grounds, whereas union member suits are based on a federal statute which, one could argue, contains all the procedural prerequisites Congress thought necessary. The most important impact of Rule 23.1 on § 501 claims would be the requirement that settlements be approved by the court, after notice to the union’s members.²³¹ The rule’s remaining requirements would be unnecessary in light of section 501(b)’s demand requirement and its additional requirement that plaintiffs obtain, upon a verified application, leave of the court to file their action.²³²

When shareholders or union members make the required demand on the appropriate corporate or union officials, what usually happens is a refusal to proceed.²³³ This is not surprising, because unless there has been a change in the organization’s leadership, the demand—sometimes known as a “go sue yourself” letter²³⁴—often must be made upon individuals who are close allies of the offending actors, and perhaps even upon the offending actors themselves.

was broadened to cover unincorporated associations as well as corporations, although plaintiffs were still characterized as shareholders. 5 MOORE’S FEDERAL PRACTICE § 23.1App.01, at 23.1App.-1 (3d ed. 2005). That change, of course, was made long before the LMRDA’s enactment in 1959. In 1966, when Rule 23(b) became Rule 23.1, its language was again broadened, this time expressly recognizing “members” of unincorporated associations as potential plaintiffs. *Id.* § 23.1App.04, at 23.1App.-6.

230. FED. R. CIV. P. 23.1(a) (emphasis added). Shareholder derivative plaintiffs in federal court must, according to Rule 23.1(a), “fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.” Rule 23.1(b) also requires the complaint to be verified and to “allege that the plaintiff was a shareholder or member at the time of the transaction complained of” and “that the action is not a collusive one to confer jurisdiction.” The complaint must also “state with particularity” the plaintiff’s efforts “to obtain the desired action from the directors or comparable authority” and “the reasons for not obtaining the action or not making the effort.” Finally, Rule 23.1(c) provides that any settlement of the case must be approved by the court after notice to the shareholders or members.

231. FED. R. CIV. P. 23.1(c).

232. FED. R. CIV. P. 23.1(b)(2)’s concern about collusive jurisdiction is not applicable because LMRDA claims raise federal questions for purposes of subject matter jurisdiction.

233. See 3 COX & HAZEN, *supra* note 40, § 15:7 (explaining the difficulty in making a demand on directors includes the discretion of the directors to refuse to sue based on the business judgment rule).

234. The author first heard that description of demand letters in the union context from Ken Paff, head of the rank-and-file reform caucus Teamsters for a Democratic Union. Cf. 3 COX & HAZEN, *supra* note 40, at § 15:7 (“directors cannot be expected to sue themselves in order to enforce corporate rights.”) (internal footnote omitted).

What happens then? Here is where the most dramatic changes have taken place since the LMRDA's enactment in 1959. At that time, if corporate officers or directors refused a demand from potential derivative plaintiffs, the courts ended up being the gatekeepers. The courts filtered out shareholder claims that were abusive, frivolous, or otherwise would do the corporation—the real party in interest—no good.²³⁵ Therefore, § 501 requires that before a union member derivative suit can proceed, the court must formally give its blessing, “upon verified application and for good cause shown.”²³⁶

That is still how the screening of derivative suits on the union side works. In the corporate arena, however, a new player emerged in the mid-1970's: the special litigation committee.²³⁷ These devices operate to keep the courts at arms length in the screening process. Instead, it is a committee of the corporation's independent directors, sometimes with the assistance of independent counsel, who in effect get the last word on whether or not a derivative suit can proceed.²³⁸ The result is that

235. See generally Note, *Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit*, 73 HARV. L. REV. 746 (1960) (discussing court's broad conception of the demand requirement). In carrying out their screening function, courts frequently considered the merits of the plaintiffs' allegations, even in demand-required cases. Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball*, 77 MINN. L. REV. 1339, 1356 (1993).

236. 29 U.S.C. § 501(b) (2013). The circuits have divergent views as to what constitutes good cause, turning mostly on whether plaintiffs must demonstrate a likelihood of success on the merits. Compare *Loretangeli v. Critelli*, 853 F.2d 186, 191 (3d Cir. 1988) (rejecting the likelihood of success standard on grounds that it “permits summary elimination of meritorious as well as vexatious suits.”) and *Erkins v. Bryan*, 663 F.2d 1048, 1053 (11th Cir. 1981) (explaining that courts can consider whether plaintiffs are union members or the claim is barred by the statute of limitations or res judicata, but should not consider the substance of the case) with *Hoffman v. Kramer*, 362 F.3d 308, 319 (5th Cir. 2004) (holding that plaintiffs must show “some evidence exists” supporting their claims, that the remedies sought “would realistically benefit the union,” and that the union's rejection of plaintiffs' demand “was objectively unreasonable”) and *Dinko v. Wall*, 531 F.2d 68, 75 (2d Cir. 1976) (holding that plaintiff must show a reasonable likelihood of success).

237. See, e.g., *Burks v. Lasker*, 441 U.S. 471, 486 (1979) (holding that independent directors have the authority to halt a derivative suit as long as it is consistent with certain federal legislation); *Gall v. Exxon Corp.*, 418 F. Supp. 508, 516-17 (S.D.N.Y. 1976) (discussing the power of the special committee's judgment).

238. Even in situations where a demand would be excused because a majority of directors is implicated in the challenged transaction, a special litigation committee comprised of uninvolved, independent directors can move to have the derivative suit dismissed, and courts, applying the business judgment rule, generally grant those motions. See 3 COX & HAZEN, *supra* note 40, § 15:8 (explaining that special committees were created to enable disinterested parties to determine the corporation's interest in a derivative suit when the board is otherwise self-interested).

procedures that started out as filters—and that remain so for union member derivative cases—have now become often insurmountable roadblocks.²³⁹

Nothing comparable to special litigation committees—even recognizing the structural bias that can undermine the objectivity of independent directors serving on them²⁴⁰—operates on the union side to stop officers directly or indirectly targeted by § 501 suits from deciding what the union’s response to a demand letter should be. Thus, there is a greater need for courts to play the principal gatekeeper role in determining whether there is good cause for the case to proceed. The closest analogies to independent, or outside directors in unions would be individuals who are asked to serve on Public Review Boards in the handful of unions that have them.²⁴¹ Other analogies can be drawn to individuals serving as court appointed monitors of various types pursuant to RICO consent decrees,²⁴² or as “Ethical Practices Counsel” in unions that have voluntarily created such positions.²⁴³

There are other differences between shareholder and union member derivative suits that also help explain why procedures that are still filters on the union side have become roadblocks for shareholder plaintiffs. The most important are probably the enormous differences in scale, with respect

239. For recent studies of the responses of special litigation committees to shareholder demands, see Erickson, *supra* note 187, at 1786 (“[b]y and large, the SLC’s . . . recommended dismissal of the claims.”) and Minor Myers, *The Decisions of the Corporate Special Litigation Committees: An Empirical Investigation*, 84 IND. L.J. 1309, 1311 (2009) (noting that SLC’s “sought some form of formal relief much more frequently than heretofore recognized.”).

240. See generally Kenneth B. Davis, Jr., *Structural Bias, Special Litigation Committees, and the Vagaries of Director Independence*, 90 IOWA L. REV. 1305 (2005) (arguing that structural bias can weaken the objectivity of independent directors); Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L. Q. 821 (2004) (recognizing that the central problem of structural bias must be addressed).

241. The United Automobile Workers is the leading union with an Independent Review Board, which functions as the union’s supreme court for intra-union grievances and is the ultimate arbiter of alleged violations of the union’s Ethical Practices Code. Over the years its members have included a former Secretary of Labor, NLRB General Counsel, and Solicitor General, as well as many prominent academics. Goldberg, *supra* note 18, at 923-25; *Public Review Board Members*, UAW PUBLIC REVIEW BOARD <http://www.uawpublicreviewboard.com/prb/> (last visited Feb. 18, 2015).

242. See, e.g., JACOBS, *supra* note 18, at 143 (noting how negotiated consent decrees, that include appointment of a trustee or monitor, are a common resolution to civil RICO labor racketeering cases).

243. See, e.g., INT’L LONGSHOREMEN’S ASS’N, CODE OF ETHICS 5-6 (2007), available at <http://www.ilaunion.org/pdf/CodeOfEthics.pdf> (explaining the purpose of establishing an ethical practices counsel). A cynic might wonder whether the ILA created this position to head off more intrusive remedies that could result from a pending civil RICO case. Second Amended Complaint, *United States v. Int’l Longshoremens’s Ass’n*, No. CV-05-3212 (E.D.N.Y. filed Jan. 2, 2008).

to both potential damages and attorneys' fee awards. In shareholder suits, damage awards can reach into the billions of dollars, and attorneys' fees into the hundreds of million.²⁴⁴ Nothing of that magnitude is even imaginable in union litigation, which lowers the incentive for plaintiffs or their lawyers to bring even meritorious claims, much less strike suits.

Moreover, while the costs of litigating union cases tend to be smaller, it is still difficult for most union members, or their lawyers when they can find them, to finance such litigation until a victory or favorable settlement is obtained.²⁴⁵ Perhaps because potential payoffs are so much smaller, no plaintiffs' bar specializing in § 501 litigation has ever emerged. In addition, the plaintiffs are still members of the unions whose officers they are suing. This could make them potential targets for economic, or even physical, retaliation, which would not be an irrational fear if their union has been infiltrated by organized crime.²⁴⁶ Finally, with far fewer unions than there are corporations, even if other factors were the same, the volume of union member derivative litigation would be far smaller than shareholder cases. This reduces the pressure on crowded courts to tolerate, or actively seek, ways to reduce the number of such cases on their dockets.

IV. VARIATIONS ON A THEME

I came to this project from the union democracy side, firmly committed to protecting and expanding the democratic rights of union members,²⁴⁷ and I anticipated that this article would take up the cause of shareholder democracy as well. As one union president once explained:

[T]he individual union member, so poignantly depicted by some . . . as captive of the "labor bosses," has an infinitely better chance to be heard . . . than all the little old ladies who hold shares but are captive of the "corporation bosses." Union

244. See, e.g., *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012) (awarding more than \$2 billion in damages and \$304 million in attorneys' fees). A major adjustment to litigation incentives in Delaware may be underway following a decision which permitted corporations to adopt fee-shifting bylaws that would require plaintiffs in unsuccessful shareholder suits to reimburse the defendants for their defense costs. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014); see also, Steven Davidoff Solomon, *A Ruling's Chilling Effect on Corporate Litigation*, N.Y. TIMES (May 23, 2014, 5:01 PM), http://dealbook.nytimes.com/2014/05/23/a-rulings-chilling-effect-on-corporate-litigation/?_r=0.

245. Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFF. L. REV. 89, 143 n.198 (1985).

246. Goldberg, *supra* note 18, at 912-13.

247. I sit on the board of the Association for Union Democracy (AUD), a small nonprofit that is the only organization devoted exclusively to the cause of union democracy.

meetings are held before the event; stockholders' meetings are held after it, and the few individual dissidents are buried under an avalanche of proxies. After all, there is no Landrum-Griffin act for management.²⁴⁸

True, those words were written before the emergence of institutional investors on a large scale, before hostile takeovers became a potential means for the market to discipline ineffective managers,²⁴⁹ and before the reforms in corporate governance that followed Enron and the 2008 economic meltdown. Nevertheless, as a "small 'd'" democrat committed to democracy in the public sphere and in labor unions, I found it troubling that virtually everyone who weighed in on the shareholder democracy debate, regardless of the position taken, acknowledged that the shareholder franchise is little more than a myth.²⁵⁰

Recognizing that something is a myth, of course, does not necessarily mean one would prefer it to be real. Not everyone who agrees that the shareholder franchise has more significance in theory than in practice believes that is a bad thing.²⁵¹ Much of the debate over proposals to increase shareholder democracy turns on one's answers to two questions. First is the normative question of whose interests directors should serve—exclusively those of shareholders, as the owners of the corporation, or the interests of other stakeholders as well, including employees, creditors, and the communities in which corporate facilities are located? Second is the instrumental question of whether increasing shareholder influence and decision-making authority in the corporation is an effective means of assuring that directors will, in fact, properly serve the interests of

248. See JOSEPH A. BEIRNE, CHALLENGE TO LABOR: NEW ROLES FOR AMERICAN TRADE UNIONS 209 (1969), *quoted in* Schwab, *supra* note 19, at 368 n.1 (quoting a former president of the Communications Workers of America).

249. In recent years, the hostile takeover has become "virtually obsolete." JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 10 (2008).

250. See *supra* text accompanying notes 67-69 (arguing that the shareholder franchise carries such little power in terms of corporate decision-making that it is hardly more than a myth).

251. See, e.g., Bainbridge, *supra* note 3, at 1758 (explaining that empowering shareholders would not have an overall positive effect); Bratton & Wachter, *supra* note 3, at 653 (describing how shareholder empowerment is not a proper response to the financial crisis, but that the financial crisis actually exposed major weaknesses in the shareholder empowerment case); Lawrence E. Mitchell, *The Legitimate Rights of Public Shareholders*, 66 WASH. & LEE L. REV. 1635 (2009) (advocating for the position that public shareholders' rights should ideally be eliminated and not expanded); Stout, *supra* note 3, at 792 ("reminding readers of the dangers of policymaking based on myth," and that increasing shareholder control would not benefit the economy).

whomever is identified in the answer to the first question as the stakeholders whose interests the board should serve.²⁵²

A somewhat analogous debate within the labor movement is that between “bread and butter” or “business unionism” on the one hand, and “social movement unionism” on the other.²⁵³ To some degree, that debate is over means,²⁵⁴ but like the debate over corporate social responsibility²⁵⁵ and team production models of the corporation,²⁵⁶ the debate in the labor movement is also over ends. Does a union owe its primary duty to its current members, or does it also have obligations to working people more generally?²⁵⁷ Even if its primary duty is to current members, to what extent does organizing the unorganized, and promoting a particular social and political agenda, help fulfill that duty?²⁵⁸

To the extent that labor laws protecting union democracy were a response to the corruption and labor racketeering exposed by the McClellan Committee in the 1950’s,²⁵⁹ and recent expansions of shareholder

252. For brief introductions to the various approaches to answering these questions, see WALTER A. EFFROSS, CORPORATE GOVERNANCE: PRINCIPLES AND PRACTICES 1-22 (2010) (explaining the purposes and priorities of corporate governance) and FAIRFAX, *supra* note 39, at 35-43 (explaining the pros and cons of increased shareholder power).

253. See generally PAUL BUHLE, TAKING CARE OF BUSINESS: SAMUEL GOMPERS, GEORGE MEANY, LANE KIRKLAND, AND THE TRAGEDY OF AMERICAN LABOR (1999) (describing the history of that tension within the labor movement).

254. In the late 19th and early 20th centuries, the debate over means for improving the lot of workers focused on a perceived choice between collective bargaining on the one hand, and political action on the other. A more significant difference between business and social movement unionism today is whether union functions like organizing, bargaining, and waging strikes take a predominantly top down approach or one based on empowering the membership more from the bottom up. In recent years, bitter fissures within and among unions attempting to organize health care workers grew out of that fault line. See generally STEVE EARLY, THE CIVIL WARS IN U.S. LABOR: BIRTH OF A NEW WORKERS’ MOVEMENT OR DEATH THROES OF THE OLD? (2011).

255. See, e.g., LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT 29-30 (2001) (arguing that corporations should be held accountable for their actions, and that our initial design of them not being held accountable must change).

256. See generally Blair & Stout, *supra* note 2 (discussing team production theory and when team production problems arise).

257. See Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 796-98 (1989) (explaining that there is some question whether union activity that is purely altruistic is even protected under the National Labor Relations Act).

258. Cf. *Eastex, Inc. v. Nat’l Labor Relations Bd.*, 437 U.S. 556 (1978) (holding that a union’s support of a minimum wage increase was protected activity, even though the union’s members earned more than the minimum, because the minimum wage influences collectively bargained wages).

259. See *supra* text accompanying notes 11-12 (explaining the seriousness of that corruption and comparing its impact on union democracy to that of the convictions of Enron executives and Martha Stewart on corporate democracy).

democracy were a reaction to corporate scandals like Enron,²⁶⁰ many of the instrumental arguments in favor of more democracy are strikingly similar. For example, the union democracy provisions of the LMRDA were seen as a way to avoid heavy-handed governmental interference with the internal affairs of unions by empowering union members to deal with the problems of autocratic and corrupt leaders. As Senator McClellan explained, “I believe that if you would give to the individual members of the unions the tools with which to do it, they would pretty well clean house themselves.”²⁶¹ Similarly, one of the leading advocates of expanded shareholder democracy argues that once the shareholder franchise moves from myth to reality, “shareholders will have ‘self-help’ tools to address governance flaws, and public officials will have less need to intervene.” Otherwise, “evidence that existing arrangements fail to provide adequate checks necessarily calls for intervention by ‘outsiders’—be they legislators, SEC officials, courts, or exchanges”²⁶²

Instrumental arguments favoring more democracy in unions and corporations are also similar in another way. In both contexts, proponents contend that even apart from any reductions in corruption, scandal, or malfeasance, more democracy leads to better performance in carrying out these institutions’ basic functions—providing effective representation for union members, and making money for shareholders.²⁶³ The juries may still be out,²⁶⁴ but there are empirical studies in both fields lending credence to those arguments.²⁶⁵

260. See *supra* text accompanying notes 1-4 (noting the impact of the Enron scandal and the 2008 financial crisis on demands for regulation of corporate governance and enhanced shareholder democracy).

261. 105 CONG. REC. S5810 (daily ed. April 22, 1959) (statement of Sen. McClellan).

262. Bebchuk, *supra* note 3, at 870.

263. See, e.g., PARKER & GRUELLE, *supra* note 36, at 85, (describing why it is crucial to labor that union members control the union); Bebchuk, *supra* note 3, at 836, (explaining that giving shareholders more power will provide them with proper representation and improve all corporate governance arrangements). It is noteworthy that during the period leading to the passage of the LMRDA, some of the statute’s principal supporters, like Professor Summers, who might be considered the father of union democracy law, did not stress that greater internal democracy would strengthen unions. Instead, they pulled their punches, “to avoid frightening off from the coalition supporting union reform legislation some of those strange political bedfellows who were supporting the right legislative result for the wrong, anti-union reasons.” Goldberg, *supra* note 179, at 130 (internal footnote omitted). After the LMRDA was enacted, Professor Summers acknowledged that some of the statute’s support came from “employers’ organizations which sought to weaken unions. In part, they hoped that internal democracy would reduce the effectiveness of unions economically and politically” Clyde W. Summers, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273, 278 (1962).

264. See STOUT, *supra* note 4, at 47-57 (explaining how, while there are no absolutely clear results, there seem to be serious doubts regarding the supposed advantages of

By the same token, the arguments against more democracy in unions and corporations also have much in common. For example, most union leaders opposed passage of the LRMDA as unduly burdensome and intrusive, and some supporters of the labor movement had long feared that too much democracy would play into management's hands, weakening labor at the bargaining table by undermining solidarity and promoting factionalism.²⁶⁶ One of the classic arguments is that a union going into an organizing campaign, calling a strike, or trying to survive a lockout by management, is like an army going into battle, and it must be led by a

shareholder primacy).

265. For studies of the effects of greater democracy on union effectiveness, see Robert Bruno, *Democratic Goods: Teamster Reform and Collective Bargaining Outcomes*, 21 J. LAB. RES. 83 (2000) (asserting that democratic decision-making procedures should be implemented, as they will elicit membership input which will increase the ability of the institution to represent its members' interests); Jack Fiorito & Wallace E. Hendricks, *Union Characteristics and Bargaining Outcomes*, 40 INDUS. & LAB. REL. REV. 569 (1987) (arguing that there is strong evidence that union characteristics affect bargaining outcomes and that democracy frequently alters the shape of the outcomes); Patricia M. Maranto & Jack Fiorito, *The Effect of Union Characteristics on the Outcome of NLRB Certification Elections*, 40 INDUS. & LAB. REL. REV. 225 (1987) (claiming that union success is positively influenced by internal democracy). For studies on the corporate side, see Bo Becker, Daniel Bergstresser & Guhan Subramanian, *Does Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable's Challenge*, 56 J.L. & ECON. 127 (2013) (using the business roundtable's challenge to show that proxy access can cause a firm to lose value); James F. Cotter, Alan R. Palmiter & Randall S. Thomas, *The First Year of Say-on-Pay under Dodd-Frank: an Empirical Analysis and Look Forward*, 81 GEO. WASH. L. REV. 967 (2013) (finding that the Dodd-Frank say-on-pay mandate has not broadly unleashed shareholder opposition to executive compensation, but has only affected pay practices at outlier companies experiencing weak performances); Paul Gompers, Joy Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q.J. ECON. 107 (2003) (finding that firms with stronger shareholder rights had higher firm value); Reena Aggarwal, Jason Schloetzer & Rohan Williamson, *The Impact of Corporate Governance Mandates on Poorly Governed Firms* (October 25, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2023879> (claiming that firms had lower value before complying with corporate governance mandates compared to after their compliance).

266. See, e.g., Arthur J. Goldberg, *A Trade Union Point of View*, in LABOR IN A FREE SOCIETY 102, 109 (Michael Harrington & Paul Jacobs eds., 1959) (noting that "permanent factions that are desirable in political democracy" are intolerable for unions striving for "collective-bargaining strength."); A.J. Muste, *Army and Town Meeting*, in UNIONS, MANAGEMENT, AND THE PUBLIC 187, 188-89 (E. Wright Bakke & Clark Kerr eds., 1948) (juxtaposing an army general and a town hall chairman to illustrate the dilemma of the union leader as he must listen to the views of the members while not letting factions form that will harm union influence); Edwin S. Smith, *The Case Against Regulation: An Answer to the Demand for Regulation of Labor Unions*, in FEDERAL REGULATION OF LABOR UNIONS 139-40 (J.V. Garland ed. 1941) (noting that industrialists would pray on badly run unions to promote factionalism). While many union leaders undoubtedly make these arguments in good faith, it must be acknowledged that incumbent union officers had in 1959, and still have, a very personal stake in these issues as well, since laws promoting union democracy necessarily make their continued tenure in office less secure.

general, not a town meeting.²⁶⁷ Minus the military imagery,²⁶⁸ that sounds a lot like one of the leading arguments against expanding shareholder democracy:

Active investor involvement in corporate decisionmaking seems likely to disrupt the very mechanism that makes the widely held public corporation practicable: namely the centralization of essentially nonreviewable decisionmaking authority The chief economic virtue of the public corporation is . . . that it provides a hierarchical decisionmaking structure well-suited to the problem of operating a large business enterprise with numerous employees, managers, shareholders, creditors, and other constituencies. In such an enterprise, someone must be in charge.²⁶⁹

Another argument shared by skeptics about the value of shareholder and union democracy is that there is so much rational apathy on the part of shareholders and union members that electoral challenges to incumbent slates of directors or officers and shareholder access to the proxy for proposals of various sorts are so often futile that providing greater opportunities for such access is simply not worth the cost.²⁷⁰ It is true, after all, that, nearly always, in the settings of most national unions and most public companies, any democracy present exists in a “one-party state.”²⁷¹ In such settings, “[t]he enormous advantages of the incumbents obviously discourage potential challengers, and many . . . elections . . . go

267. See *Muste*, *supra* note 266, at 190 (noting that a union must unify its message to be effective).

268. American labor history is rife with strikes that turned into pitched battles involving strikers, armed security guards, police, and militia, making *Muste*'s military reference more than just a metaphor—despite the fact that *Muste* himself was not just a labor leader; he was also a lifelong pacifist. Jon Bloom, *Muste, Abraham Johannes*, in *BIOGRAPHICAL DICTIONARY OF AMERICAN LABOR* 264 (Gary M. Fink ed., rev. ed. 1984).

269. Bainbridge, *supra* note 3, at 1749.

270. See, e.g., Hutchison & Alley, *supra* note 98, at 949 (noting that “[r]ational shareholders demand participation in their investments only when doing so (in the broadest sense) are greater than the costs.”); Kahan & Rock, *supra* note 154, at 1231 (stating that the “issues of shareholders’ rational apathy and free rider problems detract from the case for shareholder voting.”).

271. See generally Clyde W. Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93 (1984) (explaining that the law does not require a two-party system and that unions, thus, will remain in one-party states). This is another reason why a comparative study of corporate governance and union governance may be more fruitful than comparisons between corporate governance and public government.

uncontested. In contested elections the challengers seldom have a realistic chance of winning, and the number of victories is small.”²⁷²

Nevertheless, Professor Summers in defense of union democracy and Professor Bebchuk and others in defense of shareholder democracy make very similar arguments about the value of opportunities for union member and shareholder voting despite its seeming futility. First, “although challengers [and shareholder proposals] seldom win, they do not always lose,”²⁷³ so the “mere existence of viable shareholder [or union member] power” to replace incumbent directors or officers “would often improve matters . . . indirectly, by changing the incentives of incumbents. . . . The benefits of reform . . . would not be limited to cases in which actual contests, with their accompanying costs, take place.”²⁷⁴ Similarly, challenges that are attempted and lost can have important benefits to the union or corporation:

[W]hen the votes are counted, the tabulation does more than decide the winner. Although the incumbent wins, . . . [if significant votes are cast] for the insurgents in spite of the advantages favoring the incumbents, this signals a level of dissatisfaction far beyond what the [incumbents] believed to exist or want to continue. Practices and policies may be modified to meet the criticism and lower the level of discontent. Although the incumbent oligarchy stays in power, it becomes responsive to the election returns.²⁷⁵

Moreover, elections incumbents win by narrower than expected margins can create a delayed reaction for democratic change by exposing vulnerabilities that mark those incumbents as potential targets for perhaps more successful challenges in the future.²⁷⁶ Finally, whatever their

272. *Id.* at 105.

273. *Id.* at 106.

274. Bebchuk, *supra* note 39, at 719; *see also* Summers, *supra* note 271, at 106 (“Even an occasional unseating keeps other officers aware that they cannot afford to be indifferent to . . . their members; responsiveness is encouraged by the desire for self-preservation.”).

275. Summers, *supra* note 271, at 106; *see also* Bebchuk, *supra* note 3, at 878 (“[T]he benefits of shareholder intervention power should not be measured solely, or even primarily, by the rate of actual shareholder intervention. . . . Introducing the power to intervene would induce management to act differently in order to avoid shareholder intervention.”).

276. *See* Summers, *supra* note 271, at 106-07 (arguing that close, contested elections make incumbents more responsive, and that supporters of incumbents may be emboldened to become challengers in future elections); *see also* Lee Harris, *Corporate Elections and Tactical Settlements*, 39 J. CORP. L. 221, 226 (2013) (explaining that election data can “reveal what types of boards of directors are vulnerable and . . . help[] clarify the type[s] of targets that activist investors might move into their cross hairs.”).

outcome, shareholder and union member votes provide valuable opportunities, one hopes, for constructive debates on the incumbents' integrity and judgment, as well as the organization's strategic direction.²⁷⁷

In sum, the instrumental arguments for, and against, enhanced shareholder and union member democracy are quite similar. But what of the normative arguments? That is where my initial, "small 'd'" almost instinctive support for more shareholder democracy has given way to a more agnostic position.²⁷⁸ I remain receptive to the instrumental arguments in favor of shareholder democracy as simply a set of tools in the corporate governance toolbox that can be applied, and dialed up or dialed back as appropriate, along with other tools like shareholder litigation, state corporation laws, federal securities statutes and regulations, and the business judgment rule that together, "like all of corporate law, reflects an inherent tension between two competing values: the need to preserve the board of directors' decision-making discretion and the need to hold the board accountable for its decisions."²⁷⁹

But accountable to whom? Who are these shareholders that would benefit from shareholder democracy being valued as a norm, rather than as a mere tool to further economic efficiency? Unlike union members or citizens voting in the public sphere, shareholders are not necessarily even human beings; they can be other corporations, mutual funds, pension plans, hedge funds, and other entities.²⁸⁰ True, the ultimate investors in these entities may be actual people, but despite the seeming democratization of the stock market, with nearly half of all households directly or indirectly owning stock, in 2007 half of those stock-owning households had portfolios of less than \$10,000.²⁸¹ In fact:

277. See Harris, *supra* note 276, at 226 ("[P]eriodic challenges have a disciplinary effect on managerial behavior [and] encourage debate regarding the firm's strategic direction."); Summers, *supra* note 271, at 106 (explaining that elections bring about debates where incumbents are challenged to justify their conduct and policies).

278. The cause of shareholder democracy has what Professors Bratton and Wachter describe as "a progressive overlay"—an image, they argue, that is unjustified. William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L. REV. 489, 513 (2013); cf. Summers, *supra* note 21, at 611 (Americans "accept as faith that democracy is not merely a device for governing the state but is an ethic which should permeate all of life.").

279. STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 107 (2008); see also MACEY, *supra* note 249, at 209 ("It is far from clear that it matters *how* poor performers are replaced. . . . [T]he result . . . is the same.").

280. See Gilson & Gordon, *supra* note 133, at 865 (stating that "institutional investors owned over 70% of the outstanding stock of the thousand largest U.S. public corporations" in 2011) (footnote omitted).

281. Bratton & Wachter, *supra* note 278, at 514, 516.

The modal shareholder in the data is rich, old, and white. It follows that there is nothing inherently democratic or progressive about the shareholder interest in corporate politics. Indeed, shareholder politics is better described as a contest between two elite groups: corporate managers and investment intermediaries, which act as delegates of the same elite class of shareholder beneficiaries.²⁸²

Unions, on the other hand, may represent a small and shrinking segment of the workforce,²⁸³ but in terms of income, race, age, and other demographic characteristics, their members are much closer to being representative of the population as a whole than are shareholders.²⁸⁴

Poison pills and other defensive tactics adopted by corporate boards to fend off hostile takeovers are generally seen as anti-democratic, intended to protect the incumbent boards and top management of takeover targets, arguably at the expense of shareholders who might profit by high share prices paid in a takeover, or by the supposedly better management that would replace incumbents whose underperformance made the companies takeover targets to begin with. But if, as Professors Bratton and Wachter argue, these fights are largely power struggles within the same elite class,²⁸⁵ favoring shareholder democracy on normative, rather than on narrower instrumental grounds, can have the result of pushing even further off the management radar screen the interests of other corporate stakeholders, like employees and the communities in which corporations are located.²⁸⁶

282. Bratton & Wachter, *supra* note 278, at 491. Further complicating the normative considerations is the influential role of proxy advisors like Institutional Investor Services in shareholder votes. “[T]he separation of ‘ownership from ownership’ created by the emergence of institutional investors is . . . exacerbated by the willingness of institutional investors to defer to other agents” who neither “owe fiduciary duties to the corporations whose policies they seek to influence” nor bear the same risks of poor voting decisions as “the individual investors whose capital they use to wield influence.” Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1765 (2006). See generally Tamara C. Belinfanti, *The Proxy Advisory and Corporate Governance Industry: The Case for Increased Oversight and Control*, 14 STAN. J.L. BUS. & FIN. 384, 438-39 (2009) (criticizing Institutional Shareholder Services’ role in proxy voting).

283. In 2013, union density in private and public sector workplaces combined was 11.3 percent, down from 20.1 percent in 1983. News Release, Bureau of Labor Statistics, Union Members — 2013 (Jan. 24, 2014) available at http://www.bls.gov/news.release/archives/union2_01242014.pdf.

284. *Id.*

285. See *supra* text accompanying note 282 (arguing shareholders generally have similar demographic characteristics).

286. State corporation laws, e.g., 15 PA. CONS. STAT. ANN. § 1715(a)(1) (West 1990), and court decisions often explicitly authorize directors to consider the impact of their

To return for a moment to comparisons between corporate governance and public government, as then Vice Chancellor—now Delaware Chief Justice—Leo Strine wrote:

In the context of political elections, the ability to express oneself freely at the ballot box has more than instrumental value. The chance to have a say, to speak one's mind, and to have a fair chance to persuade others to one's point of view about how to govern the community is a legitimate end in itself. But the traditionalist knows there is nothing sacred about the governance of corporate entities. The right to elect directors is an important tool for stockholders But the director election process is only one of many methods by which accountability to stockholder interests is assured²⁸⁷

Democracy in union governance, on the other hand, has a much greater claim to support on normative grounds, in addition to having some of the instrumental benefits it shares with shareholder empowerment. One important reason is the larger role a union plays in the daily lives of its members, compared to the role a publicly traded corporation plays in the lives of its typically diversified investors. Union members must usually invest the bulk of their human capital in a single job, and their unions help shape the very terms and conditions of those jobs. As Professor Summers put it, the "public purpose of collective bargaining is the cornerstone of the public interest in union democracy."²⁸⁸ Further:

With a union acting as their representative in collective bargaining, workers . . . become participants with a voice in

business decisions "on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985). Nevertheless, overemphasizing shareholder democracy can mean that "[e]ven if directors are permitted by law to engage in socially responsible behavior, they may fear retaliation for acting against the interests of the shareholders who elect them." Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 461-62 (2006). The counterargument is that "[r]educing directors' accountability to shareholders . . . would increase the ability of directors to behave opportunistically without increasing their incentives to attend to nonshareholder interests." *Id.* at 462. A different dynamic would be present in corporations certified as Benefit, or B Corporations, organized with the intent of creating public benefits in addition to making profits. See Hillary Howard, *A New Yardstick for Socially Conscious Companies*, N.Y. TIMES, Nov. 8, 2012, <http://www.nytimes.com/2012/11/09/giving/a-new-yardstick-for-socially-conscious-companies.html> (noting the increased prevalence of B Corporations).

287. Strine, *supra* note 282, at 1776-77.

288. Summers, *supra* note 21, at 615.

determining the terms and conditions of their employment, and to at least this extent have a share in controlling the economic system within which they live and work. . . . Once it is clearly recognized that unions are economic legislatures engaged in determining the laws by which men work . . . the importance of guaranteeing workers the right to share in making those laws is self-evident.²⁸⁹

Another reason for valuing union democracy is labor's role as a political voice for its members.²⁹⁰ There are very few organizations in America, besides unions, that even purport to represent working people *as working people*, not as taxpayers or consumers, in the political arena.²⁹¹ In light of that unique political role of unions, it is critical that the political positions they take be reached through a democratic process. Without internal democracy, the result can be what happened, for example, in 1984, when the Teamsters union endorsed the reelection of President Ronald Reagan, pursuant to a bogus mail referendum of the rank and file which the union claimed favored Reagan by a ten point margin over Democratic challenger Walter Mondale. Years later, the head of the union's public relations department admitted that the actual vote favored Mondale by

289. Clyde W. Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 73-74 (1947).

290. For comparisons of the nature and legal treatment of union and corporate political speech, see Matthew T. Bodie, *Labor Speech, Corporate Speech, and Political Speech: A Response to Professor Sachs*, 112 COLUM. L. REV. SIDEBAR 206, 207 (2012) (highlighting the differences between union and corporate speech post *Citizens United*); Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after Knox v. SEIU Local 1000*, 98 CORNELL L. REV. 1023, 1025 (2013) (describing how union speech is treated under the First Amendment); Todd E. Pettys, *Unions, Corporations, and the First Amendment: A Response to Professors Fisk and Chemerinsky*, 99 CORNELL L. REV. ONLINE 23, 27 (July 22, 2013) (discussing recent court decisions regarding union speech); and Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 802 (2012) (noting how *Citizens United* changed how the courts view union and corporate speech rights).

291. "The worker" has virtually disappeared from the social and political imagination, replaced instead by the more amorphous figure of "the consumer," whose interests are often seen as conflicting with those of the worker. The irony, of course, is that consumers are for the most part comprised primarily of workers or their dependents. RICK FONTANA & KIM VOOS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* 27 (2004). Historically, the labor movement, together with its allies in the civil rights and women's movements, has been the most important and best-organized segment of the polity that has consistently struggled for a more equitable distribution of wealth and power in society. See *id.* at 162 (discussing and giving examples of labor organizations' social and political power); RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 192 (1984) (noting ways in which unions distribute political power).

more than two-to-one before the union's staff discarded thousands of Mondale votes and stuffed the ballot boxes with phony Reagan votes.²⁹²

Beyond electoral politics, unions are important mediating organizations in civil society helping to protect and insulate individuals from overreaches by the state and by large corporations.²⁹³ Unions, if democratic themselves, are “‘schools for democracy’ where the habits of self-governance and direct responsibility are instilled.”²⁹⁴ In many ways, “[c]itizens are not born; they are made,”²⁹⁵ and unions can serve as “seedbeds of the civic virtues.”²⁹⁶ This is a particularly important role for unions because the workplace “is the chief (and . . . for many, the only) place outside the family where people directly are involved in a common undertaking.”²⁹⁷ As Professor Estlund points out, “We may be ‘bowling alone,’ but we are working together.”²⁹⁸ Moreover, because of anti-discrimination laws, workplaces, and the unions that represent workers in them, are among the most racially and ethnically integrated areas in our society.²⁹⁹

Unions can be part of the “civic infrastructure” that a democracy requires.³⁰⁰ As one labor educator explains, at least in unions that are democratic and believe in empowering their members, union members:

[L]earn to develop strategies to change existing conditions in their workplaces, neighborhoods, and in their unions. And they will understand how to organize and mobilize themselves and others for action as they evaluate and learn together. . . . Every action of the union, such as bargaining for a new contract, resolving a grievance, or conducting a job action, becomes a

292. F.C. DUKE ZELLER, *DEVIL'S PACT: INSIDE THE WORLD OF THE TEAMSTERS UNION* 127 (1996).

293. Cf. Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 *CORNELL J.L. & PUB. POL'Y* 555, 556 (1998) (arguing that the nonprofit sector insulates individuals from the power of governmental and for-profit organizations).

294. Kohler, *supra* note 20, at 299.

295. BARBARA CRUIKSHANK, *THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS* 3 (1999).

296. Kohler, *supra* note 20, at 297.

297. Kohler, *supra* note 20, at 300.

298. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *GEO. L.J.* 1, 5 (2000) (citing ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000)).

299. Estlund, *supra* note 298 at 4, 17.

300. Cf. Harold A. McDougall, *Social Change Requires Civic Infrastructure*, 56 *HOW. L.J.* 801, 803 (2013) (arguing that civic infrastructure fills roles that governments and corporations cannot).

learning experience that, in practice, demonstrates how organizing, mobilizing, and educating are all aspects of the same effort.³⁰¹

But union success as seedbeds of civic virtue depends on unions being democratic themselves. Either way, they educate their members, but the lessons they teach may be very different. In undemocratic and autocratic unions, “the message conveyed, sometimes brutally, sometimes subtly, is: Sit down and shut up, and pay your dues. Don’t rock the boat.”³⁰² That is not a message we should want union members taking with them into the public sphere.

CONCLUSION

This article has compared the legal regulation of the internal governance of publicly traded corporations with that of labor unions. It began by asking whether unions and corporations are similar enough in form and function to make such comparisons fruitful, and concluded that the similarities are sufficiently strong to make the endeavor, at a minimum, more valuable than comparisons between corporate governance and public government. The article found that in some respects, union governance and corporate governance are remarkably similar, while in other respects, the differences are substantial. In the case of shareholder and union member derivative suits, it observed that while the union member derivative suit was specifically modeled on shareholder suits as they existed at the time the LMRDA was enacted, the two causes of action have diverged substantially since, with significant changes in the way shareholder derivative suits proceed (or more likely, do not proceed at all). While it was not the purpose of this article to recommend specific features of union democracy law that should be imported into the corporate context, or vice versa, it is hoped that scholars, policymakers, and practitioners in either field can find some insights here that might be valuable in the other field as well.

The article also explored the policy arguments for and against more democracy in unions and in corporations and found the similarities striking, at least with respect to instrumental arguments. However, while there are also strong normative arguments supporting democracy in unions, the arguments in favor of shareholder democracy are exclusively instrumental.

301. Jose La Luz, *Education for Worker Empowerment*, in *AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA* 85, 87 (Steven Fraser & Joshua B. Freeman eds., 1997).

302. BENSON, *supra* note 36, at 213.

Democracy in unions is closely related to the very purposes of collective bargaining itself and plays an important role in making unions “seedbeds of the civic virtues” in the larger political and social arena. Shareholder democracy, on the other hand, is simply one tool among many in the corporate governance toolbox that can be used to strike an appropriate balance between board decision-making authority on the one hand, and the need for board accountability on the other.