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## Introduction

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## INTRODUCTION

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Theodore J. St. Antoine\*

The desirability of union democracy is generally regarded today as a self-evident proposition. In this Symposium Clyde Summers treats it as a “fundamental premise.”<sup>1</sup> But there have always been reputable scholars who would support the thesis, in greater or lesser degree, that “democracy is as inappropriate within the international headquarters of the UAW as it is in the front office of General Motors.”<sup>2</sup>

Part of the problem, of course, lies in the use of that slippery term, “democracy.” If one merely means such rights as free speech, the choice of qualified leaders, and guarantees against intimidation and corruption, there is hardly room for dissent. If one wishes to transform labor organizations into latter-day versions of the storied town meeting, however, with every determination open for full debate and membership vote, then serious difficulties develop. In some of its quintessential activities, a union is more akin to a military organization than a civil polity, and a failure to recognize that will operate only to the union’s detriment.<sup>3</sup> Contrary to much populist rhetoric, few rank-and-file workers have the time or inclination to master the data necessary for wholly independent judgments on the making of industrial war and peace. Union members’

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\* James E. & Sarah A. Degan Professor of Law, University of Michigan. A.B., Fordham College, 1951; J.D., University of Michigan, 1954.

1. Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J.L. REF. 689, 689 (1991).

2. Magrath, *Democracy in Overalls: The Futile Quest for Union Democracy*, 12 INDUS. & LAB. REL. REV. 503, 525 (1959); see also R. HOXIE, *TRADE UNIONISM IN THE UNITED STATES* 177 (2d ed. 1936) (“natural and necessary” that power “centers in the hands of officers and leaders”); S. LIPSET, M. TROW & J. COLEMAN, *UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* 403 (1956) (“[T]he functional requirements for democracy cannot be met most of the time in most unions . . . .”); D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 91 (1970) (“[T]he question should be, not whether any given change will make the union more democratic, but whether it will serve the ends of the modern union—to respond to the interests of the membership, to promote them effectively . . . .”); O. KAHN-FREUND, *LABOUR AND THE LAW* 210 (2d ed. 1977) (“[I]f union democracy is understood as giving effective rule- and decision-making powers to mass meetings then it will . . . produce a smile or a smirk on the faces of the augurs . . . .”).

3. For a classic statement of a union’s dual nature as “army” and “town meeting,” see Muste, *Factional Fights in Trade Unions*, in *AMERICAN LABOR DYNAMICS* 332, 332–33 (J. Hardman ed. 1928).

more sensible and constructive role in conflict situations is to serve as checkreins on the exercise of unbridled discretion by their elected leadership.

It is no secret that the principal push in Congress for federal union-democracy legislation, in the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959,<sup>4</sup> and particularly its Title I, the "Bill of Rights,"<sup>5</sup> came from a conservative coalition that was less concerned with promoting the individual rights of working people than with blunting the economic effectiveness of labor unions. Harvard Law School Professor Archibald Cox, who served as technical advisor to John Kennedy, floor manager of the bill in the Senate, put it bluntly:

Business groups showed no genuine interest in [union] reform. Spokesmen for such groups as the United States Chamber of Commerce and the National Association of Manufacturers beat the drums in an effort to swell the public outcry against the abuses revealed at the McClellan hearings in order to obtain support for laws which would strengthen the bargaining power of management in relation to labor organizations.<sup>6</sup>

Thus, while I applaud both the *Journal* and the Association for Union Democracy for arranging this Symposium, as well as the March 17, 1990 conference on which it is based, I must introduce some cautionary words. My first point would probably not be disputed by any participant in the Symposium. I state it only for the purposes of emphasis and perspective. The major problem confronting the labor movement in the 1990s is not a matter of governance; it is a matter of survival, or at least survival as a significant institution in American society. Union membership has declined steadily since the 1960s, from a high of 34.7 percent

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4. Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (1988)).

5. 73 Stat. 519, 522 (1959) (codified as amended at 29 U.S.C. §§ 411-415 (1988)).

6. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 258 (1959); see also Dunau, *Some Comments on the Bill of Rights of Members of Labor Organizations*, 14 N.Y.U. CONF. ON LAB. 77, 77-78 (1961); cf. Taft, *Reflections on the Present State of the Labor Movement*, 14 ANN. INDUS. REL. RES. A. PROC. 2, 6-7 (1961).

of the employed work force in 1954<sup>7</sup> to 16.1 percent in 1990.<sup>8</sup> I do not mean to belittle the concern of this Symposium about the quality of American unionism; indeed, that quality could have a direct bearing on the continuing viability of the institution. Yet, at a time when organized labor is under siege, realistic priorities may call for greater efforts to preserve the vitality of the movement as a whole than to ensure the purity of its every part.

Second, and perhaps much more important as a practical matter, the present Symposium, excellent as are its individual components, could easily mislead the casual reader about the pressing day-to-day issues of union democracy. Those issues are *not* the imposition of trusteeships over union locals, or the deferral by the National Labor Relations Board of employees' unfair labor practice charges to the grievance and arbitration procedures established under collective-bargaining agreements, or even the institution of lawsuits by the government or private parties against Mafia-ridden unions under the Racketeer Influenced and Corrupt Organizations Act<sup>9</sup> (RICO). In short, the subject matter of this Symposium is atypical if not aberrational. It involves either egregious transgressions of law, of the sort that have largely been confined to four or five international unions, or substantial breakdowns in the traditional triangular relationship that exists among unions, employers, and employees.

For the past eighteen years I have been a member of the United Automobile Workers' Public Review Board. The PRB consists of seven impartial outsiders—currently, five labor law professors, one industrial relations professor, and, as chair, a cleric long associated with social action programs—who pass upon claims by UAW members that the union has deprived them of democratic rights and procedures in some fashion.<sup>10</sup>

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7. BUREAU LAB. STATISTICS; U.S. DEP'T LAB., RELEASE NO. 91-34, UNION MEMBERS IN 1990 (Feb. 6, 1991).

8. *Union Membership Down to 16.1 Percent*, 136 Lab. Rel. Rep. (BNA) 174 (Feb. 18, 1991).

9. 18 U.S.C. § 1961 (1988).

10. For a fuller discussion of the Public Review Board, see Oberer, *Voluntary Impartial Review of Labor: Some Reflections*, 58 MICH. L. REV. 55, 56 (1959); Klein, *Public Review Boards: Their Place in the Process of Dispute Resolutions*, 27 ANN. NAT'L ACAD. ARB. PROC. 189 (1975); Linn, *The American Federation of Teachers Public Review Board*, 27 ANN. NAT'L ACAD. ARB. PROC. 205 (1975); Feller, *The Association of Western Pulp and Paper Workers Public Review Board*, 27 ANN. NAT'L ACAD. ARB. PROC. 221 (1975).

We meet nearly every month and decide about thirty cases each year. In most instances we find no union violation. The usual problem areas include local election improprieties, *e.g.*, incumbent officers campaigning on paid union time, and misapplications of disciplinary standards and procedures. We also receive a number of complaints that the union has breached its duty of fair representation in the processing of members' grievances, but only a handful of such charges have been sustained. Almost never do I encounter conduct that I would say comes close to "shocking the conscience." Now, I recognize that the UAW is one of the "cleanest," most responsible of American unions. It is also the only one to have had a "public review board" for any substantial period of time. Nonetheless, my best judgment is that the behavior of the UAW is much closer to that of the mainstream of the labor movement than most of the examples cited in the papers that follow.

Finally, lest I seem too cavalier and unappreciative of the very substantial contributions by the participants in this Symposium, let me deal briefly with their presentations on their own terms. Clyde Summers can fairly be described as the godparent (after reading his piece, no one will doubt why I refrain from saying "godfather!") of the modern law of union democracy. Over the years, a series of classic articles by him has been of inestimable influence in setting the judicial and legislative agendas in this area.<sup>11</sup> In this Symposium Summers tackles the troubling task of trying "to reconcile union democracy and government trusteeship" over mob-dominated labor organizations.<sup>12</sup> While he finds the trusteeship device "distasteful and disturbing,"<sup>13</sup> he ultimately concludes that it is justified in extreme situations when democracy in a particular union is already "dead."<sup>14</sup> Furthermore, he argues that the court decree establishing the trusteeship "should state explicitly that the trusteeship will continue for as long as is needed to reestablish the democratic

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11. See, *e.g.*, Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960); Summers, *The Impact of Landrum-Griffin in State Courts*, 13 N.Y.U. CONF. ON LAB. 333 (1960); Summers, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273 (1962); Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977).

12. Summers, *supra* note 1, at 691.

13. *Id.*

14. *Id.* at 694.

process.”<sup>15</sup> Only after closely supervised, truly free elections should union autonomy be restored. If trusteeships have not worked as effectively as hoped, Summers insists it is “not because judicial intervention has reached too far, but because it has been too limited and too quickly withdrawn.”<sup>16</sup>

Randy Mastro, Steven Bennett, and Mary Donlevy provide a comprehensive account of the federal government’s use of civil RICO actions against unions plagued by “systematic corruption” in some ten leading cases during the two decades since the statute’s enactment.<sup>17</sup> Private litigants should now be able to draw upon this body of precedent, the authors contend, to forge a powerful new tool to reshape corrupted labor unions through private RICO suits. I expressed some skepticism earlier about the soundness of any judgment that would place internal union reform at the top of the priority list of the problems of organized labor in the 1990s. But I must acknowledge that the rehabilitation of any human institution is probably going to call for strong medication administered by persons who are not necessarily the institution’s most loyal and ardent supporters. The latter are all too likely to be defensive and compromising rather than bold and aggressive. So, despite my reservations, I find considerable merit in the authors’ stern prescription. Yet, I would continue to stress, disruptive RICO actions should be entertained only as a last resort, when the courts are satisfied that an organization is a union in name alone, and just an extension of the rackets in reality.

The two Symposium articles on the National Labor Relations Board’s policy of “deferral” to arbitration—one by Paul Alan Levy and the other by Leonard Page and Daniel Sherrick—return us from the dark underworld of the Mafia and its hit men to the workaday life of unions, employers, and employees, attempting to resolve their disputes in a peaceful and orderly manner. The deferral problem arises because of a frequent overlap between statutory rights under the National Labor Relations Act and contractual rights under a collective-bargaining agreement. For example, sections

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15. *Id.* at 701.

16. *Id.* at 705.

17. Mastro, Bennett & Donlevy, *Private Plaintiffs’ Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions*, 24 U. MICH. J.L. REF. 571 (1991).

8(a)(3) and (b)(2)<sup>18</sup> forbid employer and union discrimination against employees. Many labor agreements contain a similar guarantee. Similarly, section 8(a)(5)<sup>19</sup> forbids an employer to refuse to bargain with the union representing its employees, and section 8(d)<sup>20</sup> defines that duty to bargain as including the employer's obligation to keep in force the terms of an existing labor contract. At the same time, however, Congress did not make breaches of collective agreements as such unfair labor practices subject to the jurisdiction of the NLRB; instead, it left the enforcement of union-employer contracts to "the usual processes of the law."<sup>21</sup>

The vast majority of collective-bargaining agreements provide that disputes about their interpretation and application will be decided through grievance and arbitration procedures established by the contracts. In the case of many section 8(a)(3), (a)(5), and (b)(2) violations, therefore, an employee or a union would seem on the face of it to have an option to pursue either unfair labor practice charges under the statute or a grievance claim under the contract. But in *Collyer Insulated Wire*,<sup>22</sup> where a union had alleged an employer had violated section 8(a)(5) by certain unilateral changes in wages and working conditions, the Labor Board held it would defer to arbitration because the dispute arose under the parties' contract and should be resolved as the contract prescribed. Later, after vacillating on the issue, the Board extended this deferral doctrine to 8(a)(3) and (b)(2) discrimination cases as well.<sup>23</sup>

Paul Levy is counsel for the Public Citizen Litigation Group, which has frequently represented individual employees against both unions and employers. Understandably, he argues that the NLRB is abdicating its responsibility when it defers to contractual arbitration procedures to resolve what in

18. 29 U.S.C. §§ 158(a)(3), (b)(2) (1988).

19. *Id.* § 158(a)(5).

20. *Id.* § 158(d).

21. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 42 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 505, 546 (1948).

22. 192 N.L.R.B. 837, 839 (1971).

23. *United Technologies Corp.*, 268 N.L.R.B. 557, 559-60 (1984), overruling *General Am. Transp. Corp.*, 228 N.L.R.B. 808 (1977), overruling *National Radio Co.*, 198 N.L.R.B. 527 (1972). The Board retains the power, however, to review the validity of the result reached in arbitration. *United Technologies*, 268 N.L.R.B. at 560.

effect are statutory claims of discrimination prohibited by section 8(a)(3) and (b)(2). The practical problem for the dissident member, as Levy sees it, is the grave risk that the organization will betray the dissident in the arbitration proceedings. As a subsidiary matter, Levy maintains that at least the Board should not continue deferring to such "joint" union-employer arbitration tribunals as those sponsored by the Teamsters Union, which operate without even the involvement of an impartial third party.

Page and Sherrick are counsel for the UAW. Despite the obvious client concerns that might tilt them otherwise, they largely agree with Levy that the NLRB has erred in routinely deferring to arbitration in cases of individual employee discrimination charges. As could be expected, the authors are especially incensed when discrimination charges against an employer are deferred. It can certainly be argued that when a union secures a contract clause forbidding the same kind of discrimination against employees as is forbidden by section 8(a)(3), that should be regarded as an *added* protection, not as a waiver of the preexisting statutory right. Toward the end of the Page-Sherrick piece, the demands of special pleading seem to become too much to resist. Thus, the authors insist that the NLRB should require an employee to exhaust a union's internal remedies before processing a charge that the union has breached its duty of fair representation. Urging the requirement of such exhaustion is not frivolous; it promotes the worthy objective of encouraging union self-policing. But it does tend to diminish the force of the earlier argument that there should be no deferral in instances of employer discrimination.

The pros and cons of NLRB deferral are so nicely balanced, on both doctrinal and policy grounds, that I doubt we shall ever find a totally satisfactory solution. To complicate matters, as the two fine Symposium articles make clear, the issue can arise in a bewildering variety of factual situations, far more than I have even hinted. Nonetheless, there are some fundamental principles that will assist our analysis if they are kept firmly in mind. The primary task of the Labor Board is to interpret and apply statutory rights under the NLRA, not contract rights. The primary task of arbitrators is to interpret and apply contract rights under collective-bargaining agreements, not statutory rights. When a labor contract plainly covers a question that is central to resolving

a section 8(a)(5) refusal-to-bargain charge, Board deferral to arbitration is generally going to be appropriate. Not only does this reflect proper respect for the special (or assumed) expertise of the parties' chosen arbiter; more often than not the rights at stake are truly group or collective rights, the product of union-employer contract negotiations.

On the other hand, if an individual employee is charging discrimination under section 8(a)(3) or (b)(2), she is claiming a violation that exists wholly independent of contract, to which any contractual claim may arguably be just supplemental, and which may actually implicate the employee's union as a possible offender. Such individual claims, I believe, should not be subject to deferral, at least in the absence of the clearest and most unmistakable waiver on the part of the bargaining agent. And, naturally, any alleged waiver needs the closest scrutiny to ensure that employee rights are not subtly subverted. There should probably be a flat policy, for example, against deferral when the employee's union is a charged party.<sup>24</sup>

Paul Levy believes the NLRB simply does not have the legal "power" to defer unfair labor practice charges to arbitration. He relies on section 10(a) of the NLRA, which provides that the Board's "power [to prevent ULPs] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."<sup>25</sup> But of course the Board is not suggesting that its "power" is diminished through deferral; it still has the *capacity* to act. The Board is merely withholding the assertion of its authority in order to advance other policies, such as the private self-correction of wrongdoing through voluntary means. The recent *en banc* decision of the D.C. Circuit in *Hammontree v. NLRB*<sup>26</sup> endorses the Board's position. My hunch is the Supreme Court would agree. But respecting the Board's

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24. Cf. *Laborers Local 294*, 275 N.L.R.B. 278, 287-88 (1985) (ALJ decision) (finding, in a case under sections 8(b)(1)(A) and (b)(2), that "deferral to the grievance-arbitration machinery of the governing collective-bargaining agreements is inappropriate . . . because of the conflicting interests of the aggrieved employees and Respondent Unions"); *Iron Workers Local 433*, 266 N.L.R.B. 154, 162 (1983) (ALJ decision) (finding, in an 8(b)(1)(A) case, that "in this case which . . . involves a clear conflict of interest between [the employee] and the Union. . . deferral is . . . inappropriate").

25. 29 U.S.C. § 160(a) (1988).

26. 925 F.2d 1486, 1490 (D.C. Cir. 1991) (*en banc*) (one judge dissenting).

(quite fluctuating) exercise of discretion as a matter of law does not necessarily mean it has made all the right policy determinations.

In fulfilling the modest assignment of writing an Introduction for a set of essays, I usually do not ramble on as long as I have here. For all my carping about this point or that point, that is a measure of my regard for the authors and their accomplishment. If they have gone farther afield in search of subject matter than I might have proposed, they have also had the courage to get off the beaten path and to plunge deep into difficult and troubling terrain. The result is a signal contribution to our understanding of two substantial but often neglected areas of union democracy.

