

# EXCLUSIVE UNION CONTROL OF PENSION FUNDS: TAFT-HARTLEY’S ILL-CONSIDERED PROHIBITION

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I.	INTRODUCTION .....	215
II.	BACKGROUND .....	216
	A. Pension Funds and Union Capitalism .....	216
	B. The History of the Pension Provision .....	222
III.	WHY THE PENSION PROVISION IS FLAWED .....	223
	A. The Pension Provision Imposes Inefficient Restrictions on the Bargaining Process .....	224
	B. The Pension Provision is Grossly Overinclusive .....	225
	C. The Pension Provision is Grossly Underinclusive .....	231
	D. The Pension Provision is Superfluous.....	233
IV.	THE ALTERNATIVE .....	234

## I. INTRODUCTION

This comment focuses on a poorly designed provision (the “pension provision,” as I shall call it) of the Taft-Hartley Act.<sup>1</sup> The provision makes it unlawful for a union to have exclusive control of a pension fund if the employer contributes to it.<sup>2</sup> This comment will demonstrate that the

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1. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 186(c) (1994). This section targets not only pension funds, but any “welfare fund” to which the employer contributes (for example, a fund that pays employees’ medical expenses or provides vacation benefits would be covered, as well). 29 U.S.C. § 186(c)(5)(A). To keep the discussion focused, I will, for the most part, concentrate on those aspects of Section 186 that affect pension funds, to the exclusion of other sorts of funds that a collective bargaining agreement might establish.

2. A “willful and intentional” violation of the section is a felony punishable by a fine of not more than \$15,000, or imprisonment for not more than five years (unless the amount

pension provision bears no rational relationship to its avowed objective—the prevention of union fraud and abuse in the administration of a pension fund. I shall argue that this objective would be much better served by repealing the pension provision and replacing it with statutory prohibitions targeting union abuse directly.

## II. BACKGROUND

### A. *Pension Funds and Union Capitalism*

In his book, *Which Side Are You On?*, labor lawyer Thomas Geoghegan recounts a conversation he once had with a delegation of Chinese officials.<sup>3</sup> One member of the delegation asked him, “Why are American workers so powerless?”<sup>4</sup> Another asked, “Why don’t American workers own more stock?”<sup>5</sup> In Geoghegan’s mind these questions came to the same thing. To the extent that workers own stock, in his view, the distinction between “capitalist” and “laborer” blurs, and the power that comes from “owning the means of production” is placed in the workers’ hands.<sup>6</sup>

Geoghegan is not alone in making this observation. Other commentators and theorists who have noted the relationship, however, maintain that, to a large extent, this merging of the capitalist and laborer classes has already taken place. The way in which a “life cycle” model of saving replaces the classical segregated model in which a capitalist (i.e., nonworking) class provides the necessary investment to fuel production provides one illustration of this viewpoint.<sup>7</sup> According to this life cycle model, people borrow money in young adulthood in order to finance their education and develop marketable skills.<sup>8</sup> As they grow older, they pay back these loans and save for retirement.<sup>9</sup> In retirement, they live off the savings of their productive years.<sup>10</sup> Thus, the source of capital for production lies not in a class, but rather in a generation, namely, the

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of money involved is less than \$1,000, in which case it is a misdemeanor subject to a fine of not more than \$10,000, or imprisonment for not more than one year). 29 U.S.C. § 186(d)(1).

3. THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON?* 244 (1991).

4. *Id.*

5. *Id.*

6. *Id.*

7. William H. Simon, *The Prospects of Pension Fund Socialism*, 14 BERKELEY J. EMP. & LAB. L. 251, 252 (1993).

8. *Id.*

9. *Id.*

10. *Id.*

generation currently saving for retirement.<sup>11</sup>

In the life cycle model, then, we should expect to find that a substantial portion of society's productive equity is held in the assets of pension funds—one of the primary means by which working people save for retirement.<sup>12</sup> Indeed, these pension assets have been described as “the predominant source of capital for the economy.”<sup>13</sup> According to the Federal Reserve Statistical Release, approximately 4.6 trillion dollars is held in the pension funds of private employees.<sup>14</sup> In 1995, these funds owned almost eighteen percent of outstanding U.S. corporate equity.<sup>15</sup> In that same year, institutional investors, of which pension funds represent the largest share, held 57.2% of the equity of the top 1,000 corporations.<sup>16</sup> So, the life cycle model of saving and investment appears to be corroborated by the fact that employees' pension funds own a significant portion of the companies who employ them.

Nevertheless, in the realm of pension funds, to own is not to control. “Though vested participants [in a pension fund] have a recognized ownership interest in the assets held for their benefit, there is no legal right to control deriving from this reality.”<sup>17</sup> As a result, some commentators maintain that, rather than deriving the benefits of ownership from their pension funds, the interests of many workers have in fact been undermined by them.<sup>18</sup> In particular, unions, establishing through collective bargaining approximately forty percent of all private sector plans,<sup>19</sup> have “looked with disgust at the investment of their pension assets in foreign and domestic nonunion competition in industry . . . .”<sup>20</sup> These funds, in their estimation, have been “used to finance the loss of their members' jobs and retirement income security.”<sup>21</sup> The past two decades have seen “unanticipated employment and wage losses . . . associated with deindustrialization in the manufacturing sector and deregulation in the transportation and

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11. *Id.*

12. *Id.*

13. NEW YORK STATE INDUSTRIAL COOPERATION COUNCIL, COMPETITIVE PLUS: ECONOMICALLY TARGETED INVESTMENTS BY PENSION FUNDS I (1990).

14. *Flow of Funds Accounts of the United States*, FED. RESERVE STAT. RELEASE, Fourth Quarter, 2000, at 111 [hereinafter *Flow of Funds*].

15. *Private Pension Plans, Participation, and Assets*, EMPLOYEE BENEFIT RESEARCH INSTITUTE FACTS FROM EBRI, 1998, available at <http://www.ebri.org/facts/0697fact.htm>. The latest figures in EBRI's report are from 1997.

16. CAROLYN KAY BRANCATO, INSTITUTIONAL INVESTORS AND CORPORATE GOVERNANCE 24 (1997).

17. Paul J. Wessel, Comment, *Job Creation for Union Members Through Pension Fund Investment*, 35 BUFF. L. REV. 323, 328-29 (1986).

18. *Id.* at 330.

19. *Id.* at 328.

20. *Id.* at 324.

21. *Id.*

communication sectors . . . .”<sup>22</sup> In the Chicago area alone, to take one example, 70,000 steelworkers lost their jobs in the 1980s.<sup>23</sup> Some have suggested that perhaps “worker-owners would be more careful and less opportunistic about laying off their fellows than would investor owners.”<sup>24</sup>

It should come as no surprise, then, that many commentators have advocated worker control of pension funds to go along with their acknowledged ownership interest. It is likewise unsurprising that these advocates should look upon unions as the natural conduit for this control. What could be more natural than a union, having established a pension fund for its members, managing that fund’s investments? Indeed, the virtues of such an arrangement have been exhaustively catalogued. As Paul Wessel has discussed, unions could use the leverage provided by pension funds in several ways, among them: in “coordinated capital investment boycott campaigns against antiunion industries,”<sup>25</sup> in the “exercise of shareholder voting rights,”<sup>26</sup> in the use of funds to “finance home mortgages or other loans” for union members,<sup>27</sup> and in the “investment of assets in unionized businesses to create jobs . . . .”<sup>28</sup>

Geoghegan goes a step further and asserts that the key to union and worker power lies in the control of pension funds.<sup>29</sup> As he sees it, before the Taft-Hartley Act was passed in 1947, unions “had [the] chance to buy up the country.”<sup>30</sup> John L. Lewis, the United Mine Workers of America President, had struggled to create a pension and welfare fund financed by contributions from the coal industry.<sup>31</sup> When he finally succeeded, he “had the money at last to be a player. . . . He began using the fund to buy up stock, buy up companies, even buy up a bank, the National Bank of Washington.”<sup>32</sup> His actions would not, however, usher in an era of “worker capitalism.” In an effort to prevent a union from “shaking down”<sup>33</sup> an employer, Section 302 of the Taft-Hartley Act of 1947 made it unlawful for an employer to “pay, lend, or deliver . . . any money or other thing of

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22. Simon, *supra* note 7, at 253.

23. GEOGHEGAN, *supra* note 3, at 84. Geoghegan goes on to ask: “Now where were they? Nobody really knows. . . . Despite all our universities, research grants, etc., we don’t know ultimately where these people went.” *Id.* at 88.

24. Simon, *supra* note 7, at 253-54.

25. Wessel, *supra* note 17, at 325.

26. *Id.*

27. *Id.* at 326.

28. *Id.*

29. GEOGHEGAN, *supra* note 3, at 245.

30. *Id.*

31. *Id.*

32. *Id.* See discussion *infra* Part II.B.

33. 93 CONG. REC. 4876 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 1310 (1985) (quoting Sen. Taft).

value” to a representative of her employees.<sup>34</sup> Since this language would prohibit an employer from contributing to a pension fund established by a union, the drafters of Taft-Hartley were careful to include an exception covering such contributions, *provided that* the pension fund is jointly administered by the employer and the union.<sup>35</sup> This “pension provision,” as I am calling it, is the principal factor that has undermined organized labor’s ability to own and control stock according to Geoghegan.<sup>36</sup> The drafters of Taft-Hartley were protecting American business from a new threat—the threat of ‘union capitalism,’ a labor dominated-economy, with labor leaders like Lewis making the deals.”<sup>37</sup>

Whether a “labor dominated economy” was the danger foremost in Congress’ mind when it enacted Taft-Hartley is unclear. As we shall see shortly, this was not the stated target, although it may emerge as the most plausible motive when the stated rationale of the pension provision buckles under scrutiny.<sup>38</sup> Regardless of Congress’ fears, however, a labor dominated economy would not at present be quite in reach, even if unions controlled their members’ pension funds. It is estimated that in 1997, pension funds for union members at private companies held just over \$350 billion.<sup>39</sup> Unions have direct control only over the portion of this money held in so-called “Taft-Hartley” funds jointly administered with employers.<sup>40</sup> Estimates of the number of these jointly administered plans, as well as the amount of assets they hold, vary.<sup>41</sup> In 1992, the Department of Labor, estimated the number of such funds to be 3,109, with \$215 billion in assets.<sup>42</sup> This is a small fraction of the \$4.6 trillion held in private pension funds.<sup>43</sup> It is, nevertheless, a substantial enough fraction that “labor-union shareholders cannot be taken lightly.”<sup>44</sup> Perhaps, then, since a labor dominated economy is at present out of reach, unions could nevertheless use the substantial fraction of pension fund assets they do control to further their own ends.

34. 29 U.S.C. § 186(a) (1994).

35. 29 U.S.C. § 186(c)(5)(B).

36. GEOGHEGAN, *supra* note 3, at 245.

37. *Id.* at 246.

38. *See* discussion *infra* Part III.

39. Aaron Bernstein, “*Working Capital*”: *Labor’s New Weapon?*, BUS. WK., Sept. 29, 1997, at 110.

40. Wessel, *supra* note 17.

41. *Id.* at 325 n.6 (explaining that “the Department of Labor does not require that pension plans disclose whether or not they are established through collective bargaining, making statistics difficult to compile”).

42. Paul Sweeney, *Clash by Proxy*, ACROSS THE BOARD, May 1996, at 21, 22; *see also* JAMES MELTON & MATTHEW KEENAN, THE SOCIALLY RESPONSIVE PORTFOLIO 2 (1994) (estimating the assets of Taft-Hartley plans to be \$216 billion in 1992).

43. FLOW OF FUNDS, *supra* note 14, at 111.

44. Sweeney, *supra* note 42, at 22.

Working within Taft-Hartley's framework of joint administration, some unions have had moderate success advancing their interests with pension fund leverage.<sup>45</sup> Fifty-nine unions joined The United Mine Workers in a capital boycott campaign against a Duke Power Company plant in Kentucky where the Mineworkers were striking.<sup>46</sup> When the unions threatened not to buy Duke Power stock unless the company signed the contract, the company "caved in almost immediately."<sup>47</sup>

There has also been a rise in recent years of so-called "shareholder activism" by unions. In the 1980s, commentators remarked on the seeming apathy of unions concerning their shareholder voting rights.<sup>48</sup> In the 1990s, however, unions became much more active, submitting more shareholder proposals at corporate annual meetings than many other groups,<sup>49</sup> and occasionally winning majorities.<sup>50</sup>

Finally, there have been efforts by unions to use pension funds to create union jobs. The AFL-CIO, for instance, maintains a Housing Investment Trust and a Building Investment Trust, to finance union construction projects.<sup>51</sup> Additionally, in the case of *Donovan v. Walton*,<sup>52</sup> the Department of Labor sued officers of Local 675, International Union of Operating Engineers, claiming that they had violated their fiduciary obligations under ERISA by investing their pension fund primarily in real estate projects involving union labor.<sup>53</sup> The trial court held in favor of the defendants, ruling that the union officers had taken adequate precautions to ensure that the investments were prudent.<sup>54</sup>

These examples show that while Taft-Hartley's pension provision dramatically limits the control a union may exercise over a pension fund by

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45. JEREMY RIFKIN & RANDY BARBER, *THE NORTH WILL RISE AGAIN: PENSIONS, POWER, AND POLITICS IN THE 1980S* 155-56 (1978).

46. *Id.* at 164.

47. *Id.*

48. *E.g.*, Ruth Kenner Thompson, *Union Use of Public Proxy Resolutions*, *LAB. STUD. J.*, Fall 1988, at 40.

49. *See* BRANCATO, *supra* note 16, at 119-25. According to Brancato, unions submitted thirty-two proposals in 1994, and forty-eight in 1995. *Id.* at 124. In 1991, 1992, and 1993, these numbers were 26, 32, and 30, respectively. MELTON & KEENAN, *supra* note 42, at 114. These proposals have ranged from "corporate governance" issues (e.g., rescinding poison pills, declassifying boards, instituting confidential voting, adopting cumulative voting), to social or labor issues (e.g., plant closings, workplace safety, equal employment, and health care policy). *Id.* at 115.

50. *See* Sweeney, *supra* note 42, at 25; *see also* BRANCATO, *supra* note 16, at 121.

51. ARTHUR B. SHOSTAK, *ROBUST UNIONISM: INNOVATIONS IN THE LABOR MOVEMENT* 240 (1991).

52. 609 F. Supp. 1221 (S.D. Fla. 1985), *aff'd sub nom.*, *Brock v. Walton*, 794 F.2d 596 (11th Cir. 1986). *Donovan* is discussed thoroughly in SHOSTAK, *supra* note 51. *See infra* discussion Part III.C.

53. *Donovan*, 609 F. Supp at 1245.

54. *Id.*

imposing the requirement that the fund be jointly administered with employer representatives, the union can still use the fund to advance worker interests if it is able to garner the support of the employer trustees.<sup>55</sup> Moreover, in some cases, the union will not encounter much resistance in this connection.<sup>56</sup> For instance, the employer may choose to cooperate with the union investment plans in the interests of labor peace.<sup>57</sup> It also might readily agree to use pension fund leverage to force the unionization of unorganized competitors.<sup>58</sup>

Still, it should be pointed out that unions have had the most success in using *multi-employer* funds to their advantage.<sup>59</sup> A fund of this sort is easier for a union to dominate because “it puts the union in the position of having more trustees on the board than any single employer, creating de facto control of the fund by the union.”<sup>60</sup> Thus, the requirement of joint administration does not alleviate all obstacles to a pro-union investment agenda. Clearly, if there were no requirement of joint administration, a union agenda would be much easier to carry out. Accordingly, an advocate of “union capitalism” would do well to examine the pension provision closely, to understand its rationale, and expose its defects. That is my aim in Part III of this comment. Further discussion of the provision itself, however, first warrants an examination the historical context in which the pension provision was born.

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55. See W. Michael Kaiser, *Labor's New Weapon: Pension Fund Leverage; Can Labor Legally Beat its Plowshares into Swords?*, 34 RUTGERS L. REV. 409, 415 (1982) (explaining why no union has complete control over the investment of a pension fund).

56. *Id.*

57. *Id.*

58. *Id.* at 415-16; see also Simon, *supra* note 7, at 270 n.66 (“Unionized employers are generally sympathetic to efforts to organize and improve working conditions for their competitors’ employees.”).

59. Taft-Hartley permits a union to establish a pension fund through collective bargaining with several employers simultaneously. 29 U.S.C. § 186(c)(5) (1994). Each of the employers contributes to the fund, and each is represented on the board of trustees. *Id.* The Local 675 fund, discussed *supra* text accompanying notes 52-54, and *infra* Part III.C, is a multi-employer plan of this sort. See SHOSTAK, *supra* note 51, at 241 (elaborating on the details of the fund).

60. Wessel, *supra* note 17, at 332; see also Kaiser, *supra* note 55, at 415 (asserting that in multi-employer situations “union trustees are more likely to stand united than employer trustees”). Some multi-employer plans follow a “unit bloc rule” that requires a majority of both union and employer representatives to carry a proposal. See RALF C. JAMES & ESTELLE DINERSTEIN JAMES, *HOFFA AND THE TEAMSTERS: A STUDY OF UNION POWER* 221-22 (1965). Such a rule clearly limits union control even in the multi-employer context. See *id.* (discussing Hoffa’s insistence on a simple majority rule in administering the Teamster’s Central and Southern States Pension Fund, “leaving him virtual control of the fund”).

*B. The History of the Pension Provision*

Why did Congress feel compelled to include in Taft-Hartley a prohibition against a union having exclusive control of a pension fund if the employer contributes to it? If one examines the legislative history, it appears that the immediate impetus for the prohibition was the United Mine Workers fund that Geoghegan mentions.<sup>61</sup>

In negotiations with mine operators in 1946, Lewis demanded that a health and pension fund be created and financed by a ten cent royalty on each ton of coal mined.<sup>62</sup> The negotiations deadlocked, and the miners struck.<sup>63</sup> When, after several weeks, the miners and operators had still not reached an agreement, President Truman ordered Secretary of the Interior Julius A. Krug to seize the mines under the War Labor Disputes Act.<sup>64</sup> Krug and Lewis then signed an agreement that established the desired fund.<sup>65</sup> It would be administered by three trustees (one named by the union, one by the government, and a third "neutral" trustee named by agreement between the parties), and financed by a royalty of five cents paid for each ton of coal mined.<sup>66</sup> When the War Labor Disputes Act expired in 1947, and the mines were returned to the operators, a new agreement was reached that preserved the fund and the three-trustee system of administration.<sup>67</sup> While the mine operators had some say in managing the assets (they were able to name one trustee), some commentators maintain that Lewis, for practical purposes, achieved complete control when he succeeded in having his friend Josephine Roche named as the neutral trustee.<sup>68</sup>

The drafters of Taft-Hartley explicitly acknowledged that its pension provision was formulated in response to these developments:

The occasion of the amendment [the provision] was the demand made by the United Mine Workers of America that a tax of 10 cents a ton be levied on all coal mined, and that the tax so levied

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61. 93 CONG. REC. 4876 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1310 (1985); see *supra* notes 31-32 and accompanying text.

62. RAYMOND MUNTS, BARGAINING FOR HEALTH 33 (1967); see also MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS: A BIOGRAPHY 460-61 (1977).

63. DUBOFSKY & VAN TINE, *supra* note 62, at 460-61.

64. MUNTS, *supra* note 62, at 33; see also DUBOFSKY & VAN TINE, *supra* note 62, at 461.

65. MUNTS, *supra* note 62, at 33.

66. *Id.*

67. *Id.*

68. George S. Goldstein, *The Rise and Decline of the UMWA Health and Retirement Funds Program, 1946-1995*, in THE UNITED MINE WORKERS OF AMERICA: A MODEL OF INDUSTRIAL SOLIDARITY? 239, 248 (John H. M. Laslett ed. 1996); MUNTS, *supra* note 62, at 35.



be paid into a general welfare fund to be administered by the union for practically any purpose the union considered to come within the term "welfare." Of course, the result of such a proceeding, if there is no restriction, is to build up a tremendous fund in the hands of the officers of the labor union . . . which they may use indiscriminately.<sup>69</sup>

It is clear, however, that in the view of the drafters, it was not only the Mineworkers who could not be trusted to manage a pension fund:

The tendency is to demand a welfare fund as much in the power of the union as possible. Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union, and that the employees for whose benefit it is supposed to be established, for certain definite welfare purposes, will have no legal rights . . .<sup>70</sup>

Thus was born the pension provision of Taft-Hartley, making it illegal for a union to have exclusive control of a pension fund to which the employer contributes. The provision is odd for a number of reasons, not the least of which is that the United Mine Workers fund inspiring the provision was not exclusively controlled by the union. As discussed above, both the agreement with the government and the follow-up agreement with the mine operators provided for joint administration of the fund. Thus, in point of fact, the pension provision did not legislate out of existence a dangerously out-of-control fund. Quite the contrary, Lewis had agreed to the very sort of fund required by the pension provision. Hence, it is not clear that the historical situation warranted the panicked tone evidenced in the legislative history of the Taft-Hartley Act. However, in addition to this absence of an actual historically valid rationale for the pension provision, it is also deeply flawed in its very design. This is the subject of the next section.

### III. WHY THE PENSION PROVISION IS FLAWED

The pension provision has four flaws. First, it imposes inefficient restrictions on the bargaining process by prohibiting an employer from "bargaining away" her right to (partial) control of a pension fund, even if she deems such abdication to be in her best interest. Second, it is grossly overinclusive insofar as it targets union abuse by prohibiting the *existence* of a union controlled fund to which the employer contributes, rather than

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69. 93 CONG. REC. 4876 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1310-11 (1985) (statement of Sen. Taft).

70. *Id.* at 1877.

prohibiting *abuse* of such a fund directly. Third, it is grossly underinclusive insofar as it fails to reach union controlled funds to which an employer does not contribute. And fourth, it is superfluous, since federal laws dealing with the fiduciary obligations of fund trustees are sufficient to deter the abuse the pension provision targets. I shall consider these in turn.

A. *The Pension Provision Imposes Inefficient Restrictions on the Bargaining Process*

One can easily imagine that an employer engaged in the process of negotiating a collective bargaining agreement would regard it as in her best interest to agree to contribute to a pension fund that benefits her employees. One might also take it for granted that the employer would want to exert some control over the fund, insofar as she contributes to it. Indeed, the pension provision seems to be based on this assumption, to the extent that it guarantees the employer at least equal voice in the administration of a pension fund to which she contributes, but does not give a similar guarantee to the union.<sup>71</sup> The implication is that the employer would (rightfully) wish to have a say in the administration of the fund since her money is at stake. The union, however, is not an interested party in the same fashion as the employer, and is thus not entitled to any measure of control over the fund (though the employer might agree to allow joint administration).<sup>72</sup> Natural as this assumption may be, on reflection it is clear that certain employers might conclude that they have no interest in taking on the burdens associated with jointly administering a pension fund.<sup>73</sup> They ought, therefore, to be able to bargain out of these burdens. However, the pension provision will not allow for this option.

Several senators anticipated this problem when they first debated the pension provision on the Senate floor. Senator Ball of Minnesota, who introduced the amendment containing the provision, explained that it would give employees the “right to go into court to protect their interest in . . . [their] benefits, if necessary.”<sup>74</sup> Senator Morse of Oregon recognized that

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71. *See* *Indep. Assoc. of Mut. Employees of N.Y. State v. N.Y. Racing Assoc.*, 398 F.2d 587, 591 (2d Cir. 1968).

What Congress wished to accomplish by enacting Section 302 [the pension provision] was to give the employer an equal voice with the union in the administration of union-established welfare funds. . . . There is nothing in the history of the legislation to indicate that it was meant to require an employer to give a union equal voice in employer-established welfare funds.

*Id.*

72. *Id.*

73. *Id.*

74. 93 CONG. REC. 4805 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE

this aspect of the provision would discourage some employers from agreeing to contribute to a fund.<sup>75</sup> They would “not want to be involved in the event some member of the union had a complaint and went to court.”<sup>76</sup> He maintained that many employers “do not want to have any participation in welfare funds; they certainly do not want to be required, by the compulsion of law, to take part in welfare funds.”<sup>77</sup> Indeed, where “employers were given equal participation, many of them voluntarily asked to be relieved of it.”<sup>78</sup>

Developments in the law since the pension provision was originally debated have added to the burdens associated with control of a pension fund. Under the Employee Retirement Income Security Act of 1974 (“ERISA”), an employer who jointly administers a pension fund would have the status of a fiduciary, and would have all of the obligations that go with that status.<sup>79</sup> An employer might well conclude that she is not interested in undertaking fiduciary responsibilities and wish the union to be fully accountable to the employees instead. An efficient collective bargaining process would allow the parties to reach terms that reflect such a judgment on the employer’s part. Such an arrangement would leave both parties better off, since the union would presumably prefer to have exclusive control of the pension fund, and the employer would be relieved of burdens she prefers not to take on. Nonetheless, as it is, the pension provision interferes with the bargaining process, and will thus, in some instances, lead to a result neither party prefers.<sup>80</sup>

### B. *The Pension Provision is Grossly Overinclusive*

As we have seen, the pension provision was intended to target the perceived potential for abuse by unions in the administration of pension funds, and to prevent such funds from becoming “rackets” in the words of

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LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1304 (1985) (statement of Sen. Ball).

75. *Id.* at 4882 (statement of Sen. Morse).

76. *Id.*

77. *Id.*

78. *Id.*

79. Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1002 (1994); see DAN M. MCGILL ET AL., *FUNDAMENTALS OF PRIVATE PENSIONS* 54 (7th ed. 1996) (discussing the duties of fiduciaries in the management of pension funds).

80. Senator Murray of Montana maintained that the pension provision “constitutes a direct threat to . . . [one of] our most precious heritages.” 93 CONG. REC. 4879 (1947), reprinted in 2 NLRB, *LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947*, at 1316 (1985). He asserted: “The right of liberty to contract has always been regarded by us as an essential condition to the functioning of a free society. Why should we interfere with this right, when the subject of the contract is a health and welfare fund hurting no one and benefiting many?” *Id.*

senators Ball and Taft.<sup>81</sup> The pension provision does not, however, directly prohibit such abuse. Rather, it goes further and prohibits the *existence* of union controlled funds. The pension provision thus creates a “proxy crime.” That is, it prohibits innocent behavior as a means of reaching offensive behavior.<sup>82</sup> If it is deemed too difficult to root out union abuse of exclusively controlled funds, a much simpler course is to merely prohibit unions from having exclusive control of pension funds altogether. This is the advantage of proxy crimes in general - the cost of enforcing a prohibition that covers innocent conduct thought to be characteristically associated with some offensive behavior is often much lower than if the prohibition were directed only to the offensive behavior itself.<sup>83</sup> Proxy crimes save costs in two respects. First, they are less expensive for the state to enforce *ex post*, for it would often be much more difficult for the state to prove that an agent had engaged in the targeted offensive conduct than it would be for the state to prove the innocent conduct associated with it.<sup>84</sup> From this perspective, it is clearly much easier to prove the existence of an exclusively union controlled pension fund than it would be to prove that the union had abused that fund. Second, proxy crimes can provide more efficient deterrence *ex ante*, since they enable the state to prevent offensive conduct from occurring in the first place, by preventing innocent activity that leads to it.<sup>85</sup> Here again, the proxy crime embodied in the pension provision might seem justified inasmuch as preventing the *existence* of a union controlled fund appears to be a highly effective means of preventing *abuse* of such a fund.

Despite these advantages that attach to the pension provision, the

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81. *Id.* at 4805, 4877.

82. See MICHAEL S. MOORE, PLACING BLAME 783 (1997) (“[I]n the criminal law we sometimes use one morally innocuous act as a proxy for another, morally wrongful act or mental state.”).

83. *Id.* at 784.

84. See *id.* at 783.

Thus, many states criminalize the possession of certain sorts of tools useful exclusively for burglaries. The state can prove knowing possession of burglary tools more easily than it can prove intent to burgle, or attempted burglary, so such laws are argued for on this evidentiary ground.

*Id.*

85. See *id.* at 784.

Sometimes proxy crimes are defended . . . on the preventive ground that they isolate a convenient point in time from which it is predictable that some moral wrongs will occur, and such wrongs can thus be efficiently prevented by preventing the earlier, non-wrongful act. It may be easier for the police to prevent burglaries by allowing them to arrest people for possession of burglary tools, for example, than it is to do so by waiting for the possessor to actually attempt a break-in with such tools.

*Id.*

prohibition comes with significant costs of its own. By prohibiting any and all union controlled pension funds, the provision reaches many funds that might be fairly and effectively administered under the exclusive control of the union.<sup>86</sup> It may be that in some instances, the union can best administer the fund. Some of the senators who debated the pension provision before its adoption. As Senator Pepper put it, pension funds are established for the benefit of the workers. Is it not reasonable to suppose that if the funds are for the benefit of the workers, the workers will be the ones chiefly concerned in their proper administration and disbursement? Can any union leader escape accountability, first, to the law, and secondly, to his own union membership, for the misuse, misapplication, or diversion of welfare funds?<sup>87</sup>

In addition, Senator Murray pointed to the potential inefficiencies of a system of joint administration. For many employers as he put it:

it would mean additional record keeping, resulting in increased costs, . . . requiring them to devote a part of their time and energy to the supervision of activities which are not of direct concern to them. Time and energy so lost could be better applied directly to increasing production, with a consequent beneficial effect to the entire economy.<sup>88</sup>

So, for at least two reasons, a union might administer a pension fund more cheaply and efficiently than the employer. First, the union is accountable to its members in a way the employer is not. Union officers, therefore, have an added incentive to manage funds appropriately. Second, the union is in the business of protecting the interests of the employees, while the employer is not. Seeing that a pension fund is appropriately managed, therefore, falls squarely in the purview of the union, but seems tangential to the concerns of the employer. Such a task would, in consequence, often be best left in the hands of the union.

We must thus balance the potential benefits of the pension provision and its possible effectiveness in preventing union abuse against its potential costs, namely the potentially inefficient system of administration it establishes.<sup>89</sup> This requires information we do not, unfortunately, possess.

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86. 93 CONG. REC. 4806 (1947), *reprinted in* 2 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 1306 (1985) (remarks of Sen. Pepper) (noting that Congress has been presented with information showing that multiple organizations and unions had welfare funds administered by the employees themselves and suggesting that Congress encourage unions to continue this practice until a national principle is adopted).

87. *Id.*

88. *Id.* at 4879 (remarks of Sen. Murray).

89. *See* FREDERICK F. SCHAUER, *PLAYING BY THE RULES* 145-49 (1991) (discussing the "efficiency argument" for the overinclusiveness or underinclusiveness of a rule when the benefits of such over or underinclusiveness outweigh the costs).

Specifically, we need some indication of how frequently unions would abuse pension funds if they obtained exclusive control. If such abuse would be comparatively rare, then the advantages of the pension provision are unlikely to outweigh its costs. However, if unions are inherently corrupt, as some would maintain, so that nearly every union would abuse exclusive control, then the balance presumably tips in the other direction. Since we have no track-record of exclusive union control, it is difficult to assess the tendency for abuse.

There are certainly vivid examples of union improprieties that one could point to in support of the pension provision. Perhaps the most striking example in this connection is the series of transactions involving the Teamsters' Central and Southern States Pension Fund ("CSPF") that led to the convictions of James R. Hoffa and six of his associates in 1964.<sup>90</sup> Hoffa, as he himself put it, was in the pension business "to make friends"<sup>91</sup> (i.e., to forge alliances useful to the Teamsters and to the cause of labor generally). When the CSPF was first established, the initial funds were placed in banks in cities throughout the central and southern states.<sup>92</sup> These banks were chosen on the basis of strategic importance and influence, and not on the basis of economic considerations such as interest rates and handling fees.<sup>93</sup> Over the next few years, these bank trust accounts became an increasingly smaller percentage of the CSPF's holdings as Hoffa became more attracted to investments in real estate.<sup>94</sup> By 1962, sixty-nine percent of the fund's assets were invested in mortgages, most of which were not government guaranteed.<sup>95</sup> Hoffa was interested in real estate investments because they seemed to offer a more effective means of furthering his influence.<sup>96</sup> In 1956, for example, Hoffa pressured the other CSPF trustees to approve a loan to Hank Greenspun, editor of the *Las Vegas Sun*, who planned to build a golf course.<sup>97</sup> Hoffa's rationale was that "this gentleman is an influential man in Las Vegas."<sup>98</sup> More generally,

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90. JAMES & JAMES, *supra* note 60, at 21-22.

91. *Id.* at 269 (relating a personal communication with Hoffa).

92. *Id.* at 242.

93. *See id.* at 229 (quoting Hoffa at a meeting of the CSPF Board of Trustees: "Each one of these cities is in a powerful situation in my opinion. If you can get it going round right you will do yourselves a lot of good to take care of our industry here"). According to James and James, "[T]his dispersion of reserves has cost the Fund at least \$150,000 thus far and would have cost much more had the practice continued as originally planned." *Id.* at 229.

94. *Id.* at 233-37.

95. *Id.* at 238. The figure of 69% contrasts with a 3.2% investment in mortgages by corporate pension funds in the same year, most of which were government guaranteed. *Id.* at 238.

96. *Id.* at 237.

97. *Id.* at 235.

98. *Id.* (quoting minutes of the meeting of trustees).

the CSPF has specialized in speculative mortgages on ventures which, because of their geographic and functional peculiarities, or because of the lack of experience and financial stability of their backers, other lending institutions are reluctant to touch. The Fund, apparently, aims to keep its borrowers happy even if this means it is not maximizing its yield, protecting its capital, or making a social contribution. Thus, large loans are offered, based on a generous percentage of optimistic appraisals, and interest rates charged which are more appropriate for better quality borrowers. Understandably, the customers seem highly satisfied with their bargain packages of money.<sup>99</sup>

As a result of mortgage foreclosures, and the failure to charge a market interest rate, the CSPF lost \$5 to \$10 million under Hoffa's leadership.<sup>100</sup> While the fund grew from approximately \$10 million in 1956 to \$169 million in 1962,<sup>101</sup> most of this increase was due to the continued influx of employer contributions, totaling roughly \$6 million per month.<sup>102</sup> The CSPF purportedly had an average rate of return of 4% during this period, compared with an average of 3.5% for all corporate pension plans, but this rate was artificially inflated by adept accounting and refinancing techniques.<sup>103</sup>

Hoffa and some of his associates also personally profited from many of the CSPF's transactions.<sup>104</sup> One of the largest borrowers from CSPF at this time was Morris Dalitz, a Las Vegas hotel owner.<sup>105</sup> When the employers in the Detroit Laundry Institute were unable to settle a dispute with the laundry drivers' local, Dalitz (also one of the laundry owners) introduced them to Joe Holtzman, a labor consultant "close to Hoffa."<sup>106</sup> Hoffa subsequently instructed the local to sign the contract in dispute.<sup>107</sup> Holtzman was paid a consulting fee of \$17,500, which was "at least partially passed on to Hoffa."<sup>108</sup>

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99. *Id.* at 260. The authors, it should be recalled, wrote this passage in 1965. See JAMES & JAMES, *supra* note 60, at 221-22.

100. JAMES & JAMES, *supra* note 60, at 296.

101. *Id.* at 240.

102. *Id.* at 216.

103. *Id.* at 294.

104. *Id.* at 273.

105. *Id.*

106. *Id.*

107. *Id.* at 273.

108. *Id.* There are a multitude of examples of inappropriate CSPF dealings by which Hoffa and others directly or indirectly profited. *Id.* at 269-83 (listing other examples). The CSPF connection in the transaction described here is, admittedly, somewhat tenuous. Still, Hoffa at least indirectly profited from his relationship with Dalitz. *Id.* at 273. The example shows also that Hoffa was not necessarily interested in "union capitalism" or "pension fund socialism," and might be induced to undermine labor's interests for the sake of personal financial gain. *Id.* at 258-60.

These dealings involving the CSPF might well incline one to support the pension provision. But cases of this sort must be balanced by cases in which unions have properly, indeed admirably, managed pension funds. The pension fund of Local 675, International Union of Operating Engineers, at issue in *Donovan v. Walton*,<sup>109</sup> is a leading example. When Dennis Walton became business manager of Local 675 in 1976, the pension fund, jointly managed with several employers, was earning only a 1.8% return.<sup>110</sup> At the time, the Florida real estate market was strong, and accordingly the fund, under Walton's leadership, began carefully investigating potential real estate investments.<sup>111</sup> Such investments would serve the dual strategy of, first, improving the fund's rate of return, and second, of providing union jobs.<sup>112</sup> This was achieved by the fund's resolve only to invest in construction projects built by union contractors.<sup>113</sup>

Among these carefully selected real-estate investments, was the purchase of a ninety-five acre tract on which the fund planned to build an office park.<sup>114</sup> The fund paid \$25,000 per acre, and an additional \$4 million on roads, sewers, and other improvements.<sup>115</sup> It also built an office complex, part of which it rented to Local 675 at a rate equal to a ten percent return on the building's cost.<sup>116</sup> The fund retained an independent party to negotiate the union's lease and hired an independent consulting firm to evaluate the project's overall viability.<sup>117</sup> The fund later sold much of the land to a developer for \$174,000 per acre.<sup>118</sup> As a result of this and other real estate transactions, Local 675's pension fund grew from \$16 million in 1979 to \$44 million in 1986.<sup>119</sup> In contrast to the CSPF fund,<sup>120</sup> most of this growth was due to return on the fund's investments.<sup>121</sup> Employer contributions during this period amounted only to approximately \$8 million dollars.<sup>122</sup> Thus, the Local 675 fund earned an exemplary return, and in the

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109. 609 F. Supp. 1221 (S.D. Fla. 1985); *see supra* notes 52-54 and accompanying text.

110. SHOSTAK, *supra* note 51, at 242.

111. *Id.*

112. *Id.* at 243.

113. *See id.* (stating that the Fund's developer was legally bound to hire only union labor for 84,000 hours of building work). It is not surprising that employer trustees cooperated in these investments, since they themselves represented union contractors. *See supra* note 58 and accompanying text.

114. SHOSTAK, *supra* note 51, at 243.

115. *Id.*

116. *Id.*

117. *Id.* at 246.

118. *Id.* at 243.

119. *Id.* at 249.

120. *See supra* note 71 and accompanying text.

121. SHOSTAK, *supra* note 51, at 249.

122. *Id.* (stating that employee contributions accounted for about one million dollars per year for the eight year period between 1979-1986).



process, generated more than \$300 million in union construction work.<sup>123</sup>

In 1981, the Department of Labor sued Walton and the other trustees of the Local 675 fund, claiming they had violated their ERISA fiduciary obligations.<sup>124</sup> In 1985, the trial court held that by consulting with outside agents and charging the union rent equal to a ten percent return, the trustees had acted in the interests of the fund's participants, and had satisfied ERISA's prudent investor standard.<sup>125</sup> This judgment was affirmed on appeal.<sup>126</sup>

The Local 675 fund stands in marked contrast to the CSPF under Hoffa. It provides a useful antidote to any anti-union sentiments the latter might instill. Surely, if the trustees of the Local 675 fund can generate union jobs while earning a fourteen percent return, then we cannot say there is an inherent tendency for unions to abuse their pension funds. It would therefore seem reasonable to at least experiment with exclusive union control—the benefits might well outweigh the costs.

### C. *The Pension Provision is Grossly Underinclusive*

Despite all of the concerns about union abuse expressed in the legislative history, the pension provision does not in actuality prohibit a union from having exclusive control over a pension fund.<sup>127</sup> It merely prohibits the union from having exclusive control over a fund *if* the employer contributes to it.<sup>128</sup> Nothing prevents a union from establishing a pension fund for itself with the members' dues. Nothing in the pension provision will prevent the union from abusing such a fund either. Thus, by prohibiting exclusive control even in cases where the union is not at all likely to abuse the fund, the pension provision is both overinclusive and underinclusive, since it will not prevent union abuse in instances where the employer does not contribute to the fund.

This seems to cast some doubt on the pension provision's stated rationale. If that provision was indeed motivated by a sense that unions are inherently prone to abuse funds given to them in trust,<sup>129</sup> then Congress

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123. *Id.*

124. *Id.* at 244.

125. *Donovan v. Walton*, 609 F. Supp. 1221, 1242 (S.D. Fla. 1985).

126. *Brock v. Walton*, 794 F.2d 596 (11th Cir. 1986).

127. 93 CONG. REC. 4805 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1305 (1985) (remarks of Sen. Pepper, reading from a committee report).

128. *Id.*

129. *Id.* (statement of Sen. Pepper, reading from a committee report) ("The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, to the union treasury or the union officers, except under the process of strict accountability.")

should have enacted a more stringent prohibition. The Taft-Hartley Act, or some ancillary piece of legislation, should have made it altogether illegal for unions to hold funds in trust for their members. Since Congress stopped short of this, its stated fear of union abuse<sup>130</sup> must not have been the driving consideration.

What then could have motivated the pension provision? One possible suggestion is that Congress felt that a union would be more likely to abuse a fund financed by employer contributions than a fund financed by members' dues. The union might feel beholden to its members, but might have less incentive to treat employer contributions with care. This, nevertheless, seems implausible. Whether money is deposited in a pension fund via employer contributions or members' dues, it is in either case the employees' money, paid in exchange for their labor. Thus, the union's incentive to manage the fund properly should be the same under both arrangements.

Another suggestion might be that the pension provision was not in fact motivated by a fear of union abuse, but rather simply by a sense that an employer is entitled to have say in the management of its pension fund contributions. This rationale would not, however, justify the pension provision, since that provision, as we saw above, makes the employer's right of joint administration inalienable.<sup>131</sup> Even if one feels that an employer is entitled to some measure of control over the investment of its contributions, one ought also to recognize an employer's right to waive this entitlement. In view of the weakness of this suggested rationale, then, it seems unlikely that Congress would have relied on it.

What in actuality appears to drive the pension provision is an anti-union animus. When Senator Taft spoke of a union controlled pension fund as a "war chest," he was not expressing the worry that a union would make poor investments with its fund.<sup>132</sup> His primary fear, simply, was that unions would use their funds as leverage in advancing a pro-labor agenda.<sup>133</sup> This lends credence to Geoghegan's suspicion that the pension provision was in reality a response to "the threat of 'union capitalism,' a labor-dominated economy, with labor leaders like Lewis making the deals."<sup>134</sup> If this was indeed the moving spirit of the pension provision, then it would be best to abrogate it entirely. The fear of a labor dominated economy is a chimera. In the absence of a showing that some tangible economic benefit derives from the regime of joint administration, the

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130. *Id.*

131. *See supra* Part III.A.

132. 93 CONG. REC. 4876 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 1311 (1985) (remarks of Sen. Taft).

133. *Id.*

134. GEOGHEGAN, *supra* note 3, at 246. *See supra* text accompanying notes 29-37.

pension provision is nothing but a naked attempt to impair union bargaining power. This is not enough to warrant its continued existence.

*D. The Pension Provision is Superfluous*

According to Senator Ball, the pension provision was intended to ensure that any pension fund established by a union would be a “legitimate trust fund, used actually for the specified benefits to the employees of the employers who contribute to them.”<sup>135</sup> This puzzled some of the senators at the time, because existing state law, as well as the common law of trusts, seemed already to provide that a union fund would be a “legitimate trust fund.”<sup>136</sup> Moreover, today it is even more apparent that the pension provision’s requirement of joint administration is not necessary to ensure that a fund established by the union is indeed a trust fund. Under the current federal regulatory scheme, union officers involved in the administration of a pension fund are fiduciaries.<sup>137</sup> Hence, a union officer who breaches that duty would be both personally liable to the pension plan for any losses that result from the breach,<sup>138</sup> and also subject to civil fines under certain conditions.<sup>139</sup> These sanctions should be sufficient to ensure that the pension fund is actually used for the benefit of the employees.<sup>140</sup>

The legitimacy of the pension provision can only be maintained by assuming that the penalties established by ERISA for breach of fiduciary obligations will not deter abuse by union officers, and that the only solution for keeping such irresponsible individuals in line is to force them to work with the employer in administering the fund. However, thinking again of the Local 675 case, this assumption seems rather doubtful. For it is far

135. 93 CONG. REC. 4805 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1305 (1985). Ironically, “[i]n application, both prior to ERISA and since, Taft-Hartley has been treated as concerned primarily with fraudulent fund dealings by unions and not as applying general fiduciary standards for fund management.” Wessel, *supra* note 17, at 333-34.

136. “[I]t would seem to me, as a lawyer, that if such funds are established the trade-union officials who administer them thereby become trustees, subject to all of the common law and State safeguards against misuses of funds by trustees.” 93 CONG. REC. 4881 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1318 (1985) (statement of Sen. Morse).

137. ERISA, 29 U.S.C. § 1002 (1994); DAN M. MCGILL ET AL., FUNDAMENTALS OF PRIVATE PENSIONS 54, 58 (7th ed. 1996).

138. ERISA, 29 U.S.C. § 1109; MCGILL ET AL., *supra* note 137 at 57.

139. *See* MCGILL ET AL., *supra* note 137, at 58.

140. *But see* GEOGHEGAN, *supra* note 3, at 152 (stating that ERISA has become “a sweeping grant of immunity that lets trustees do whatever they like”); *see also* Dana M. Muir, *Fiduciary Status as an Employer’s Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 394 (2000) (arguing that while ERISA’s fiduciary protections “set appropriate standards for asset administration,” they are deficient in regard to benefit administration).

from clear that the union trustees of Local 675's fund would have acted any less responsibly had they not shared control with employer representatives.

#### IV. THE ALTERNATIVE

The foregoing discussion shows that the pension provision is deeply flawed and ought to be repealed. The question then is what should take its place. One possibility is to remove all restrictions on a union's having exclusive control of a pension fund to which the employer contributes. The administration of such funds would be subject to the requirements of ERISA, but there would be no specific legislation aimed at union controlled funds. However, this proposal might be considered by some to be too radical to be credible. Some might feel that while the pension provision is defective, we still need particular legislation in addition to ERISA that targets union controlled funds. In that case, I want to outline two additional proposals.

First, one could institute criminal penalties in the case of union abuse to go along with the civil penalties provided by ERISA. The implication of this proposal is that the tendency for union abuse is strong enough that, while not requiring joint administration with the employer, some added incentive is needed to make the union behave.

The problem with this proposal is that it rests on the same bias that animated the original pension provision, namely the feeling that unions are more likely than other pension plan sponsors to abuse the fund and breach their fiduciary obligations. It would be better to move away from this sort of bias. If after a trial period it were determined that ERISA's civil penalties are insufficient to deter union misconduct, then it might be appropriate to consider criminal penalties. Of course, more severe civil penalties could also be considered. For instance, the union could be made liable for double or treble damages.<sup>141</sup>

The second proposal I want to consider is more complicated. In the legislative history of the pension provision, Senator Barkley recognized that one important check on the behavior of union officers is their accountability to union members.<sup>142</sup> As he put it, the feeling behind the pension provision seemed to be that:

the employees for whose benefit this fund is established cannot

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141. See JONATHAN SCHONSHECK, ON CRIMINALIZATION 69 (1994) (arguing that less intrusive means of discouraging behavior ought to be considered before criminal sanctions are employed).

142. See 93 CONG. REC. 4883 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1321 (1985) (remarks of Sen. Barkley) (questioning the need for a provision that essentially protects the union members from themselves).

be trusted to administer it in their own behalf . . . . [T]he employees who have the right to select the business agent, ought to be protected against their own right to select the business agent on the theory that he may not represent their interest, and may not properly administer their funds, although he is chosen by them to do so . . . .<sup>143</sup>

Recognizing that the members of a union exert some measure of influence in the conduct of the union, control of the pension fund could be predicated on some minimal standards of union democracy. That is, the union could be allowed exclusive control of the pension fund only if the members of the union, or the employees generally, are allowed some degree of participation in the administration of the fund.

In this connection, various degrees of worker participation could be required. On the lowest level, it could be required that the workers vote for the fund trustees, perhaps on the nomination of the union officers, or on their own nomination. The model here would be the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund.<sup>144</sup> Since early in its history, participants in TIAA were permitted to vote for some of the fund's trustees.<sup>145</sup> Also, since 1990, only participants elect CREF trustees.<sup>146</sup> These funds are much larger than the average fund that would be administered by a typical local.<sup>147</sup> If participant election of trustees is feasible on such a scale, then it ought to be possible on the scale of local-administered funds as well.

The law could go beyond this minimal degree of worker participation as well. As discussed at the outset, one advantage of allowing unions to have exclusive control of pension funds is that workers would be able to use their assets to further their own interests.<sup>148</sup> Rather than investing their money in corporations hostile to unions and workers, the union could use the workers' resources to promote expansion of union jobs. Furthermore, to insure that the union's investment decisions truly promoted the workers' interests, some provision could be made to allow worker participation in the making of investment policy. The fiduciary duties of trustees require that they make investment decisions in the best interest of the fund,<sup>149</sup> thus

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143. *Id.*

144. WILLIAM C. GREENOUGH, *IT'S MY RETIREMENT MONEY, TAKE GOOD CARE OF IT: THE TIAA-CREF STORY* 3 (1990).

145. *Id.* at 35.

146. *Id.* at 362.

147. During the events at issue in the *Walton* case, Local 675's pension fund grew from \$16 million to \$44 million. SHOSTAK, *supra* note 51, at 249. In contrast, TIAA-CREF assets grew from \$10 billion to \$83 billion during roughly this same period (1977 to 1989). See GREENOUGH, *supra* note 144, at 367.

148. See MCGILL ET AL, *supra* note 137, at 58-60.

149. *Id.*

limiting their ability to make investments for the purpose of promoting union jobs.<sup>150</sup> Workers, however, could still insist on a policy that, as between two equally prudent investments, the trustee is to choose the investment least hostile to the workers' interests, or the one that creates the greatest number of union jobs.

The question of which of the foregoing proposals is superior is beyond the scope of this comment, and must be left for another occasion. The basic principle that underlies them, however, seems beyond doubt. There is simply no justification for a blanket prohibition against unions having exclusive control of pension funds.

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150. For a full discussion of this problem, see Wessel, *supra* note 17.