The Framework of Democracy in Union Government

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THE FRAMEWORK OF DEMOCRACY IN UNION GOVERNMENT*

Roger C. Hartley**

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I. Introduction

Whether the authoritative decision-maker knows it or not, his every decision makes community policy. When the values affected by decision are left unarticulated or confused, the chances of irrational decision are in comparable measure enhanced.1

From time to time American labor law seems endangered by doctrinal fragmentation. Decisions seldom coalesce into coherent patterns. Rather, as Derek Bok observed over a decade ago, "an early articulation of simple

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standards is typically followed by constant embellishment of exceptions, qualifications, complex reformulations, and ad hoc decisionmaking.”

This pattern is likely to continue, Bok argued, as long as those evaluating labor policy remain unwilling “to study the actual impact of the laws upon workers, unions, and employers in ways that will identify rules that fail to achieve their intended result or rest upon fallible suppositions of human behavior.”

Although Bok’s conclusions did not relate primarily to that slice of national labor policy regulating union government, his observations likewise apply to this body of labor law. Whether one looks to the law of fair representation, union security, union fines, fiduciary duty of union officers, internal union elections, or most other related topics, incoherence has largely displaced an understandable pattern.

Bok argued that this condition is caused by the “cumulative and circular quality” of our labor laws: that they condition and are conditioned by our unique industrial relations system. One suspects, however, that this for-
mulation is somewhat underinclusive. The industrial relations system is but one social process. Yet, as McDougal observed some years ago, all legal doctrine develops in a larger context composed of many social and power processes that together “constitute . . . a 'seamless web,' with each process both affecting and being affected by all the other processes.” Legal decisions, therefore, are policy decisions resulting from the combined efforts of individuals and groups, using a variety of strategies, to effect a demanded accommodation of competing interests involving power, wealth, status, and other important human values. Accordingly, attaining doctrinal unity and coherence requires clarification of the larger contextual framework of legal decisionmaking and the competing but legitimate interests at stake.

This article ventures into, and attempts to clarify, the context that affects and is affected by the law regulating union government. Drawing extensively from disciplines other than law, it posits a unified role for this body of law by focusing on unions' assigned societal functions and the realities of their structure and government. Part II traces the context in which the law regulating union government develops. It first describes the dual governments unions administer, and the competing interests within each that law must accommodate. It then suggests possible causes of the doctrinal fragmentation observed in the law regulating union government, and shows how uncertainty regarding the definition of union democracy, its possibility and desirability, and the necessity of public intervention to attain it can contribute to doctrinal fragmentation. Seeking to resolve these uncertainties, the article, in parts III and IV, analyzes unions' assigned societal functions and their governing structures, because in part V union function and structure are shown to condition significantly the preferred definition of union democracy, its possibility and desirability, and the necessity of public regulation to attain it. The article concludes by advancing a preferred model of union democracy—one that is possible and would not rather than by seeking doctrinal unity. Id. at 1462. The same, however, can be said of advocates' behavior throughout our adversarial system. In any event, this theory leaves unanswered the question of why decisionmakers have not brought unity to the law regulating union government.

6. Bok readily acknowledged that “the process of social causation is rarely unilinear, but more often displays a cumulative and circular quality.” Id. at 1400.

7. McDougal, supra note 1, at 71.

8. Id. at 63, 71-72. Mr. Justice Holmes recognized the relationship between labor law adjudication and value allocation eighty-five years ago. He argued: “The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes.” Vegelahn v. Guntner, 167 Mass. 92, 106, 44 N.E. 1077, 1080 (1896) (dissenting opinion).
frustrate unions' fulfilling assigned societal functions—and by suggesting a unified role for law and legal institutions attempting to preserve and promote such democracy.

In short, this article describes the framework of democracy in union government from a policy-oriented perspective. It offers the contesting parties, decisionmakers, and other interested persons a tool for analysis rather than a calculus for exact answers. The descriptive, predictive, and prescriptive functions of legal analysis can then proceed in a more orderly manner.

II. BROAD CONTOURS OF THE FRAMEWORK

A. The Dual Union Governments

An important component of the context shaping union democracy and the role of law is union government itself. American unions participate in two distinct but inexorably related private governments. First, they participate in a bilateral industrial government jointly administered with the employer and formalized through the collective bargaining agreement. Here a union asserts collective authority over, and on behalf of, all employees in an appropriate bargaining unit by virtue of its status as the exclusive bargaining representative. Within this bilateral workplace government, law and legal institutions attempt to promote democracy by adjusting conflict between individual employee rights and union collective authority. Law addresses, for example, issues such as individual employee rights in the collective bargaining process, the right to fair representation, and employee rights not to support the incumbent union versus the competing claims of union security.

Unions also administer their own internal governments, asserting insti—
stitutional authority to govern themselves and their members through internal rules, customs, and procedures. Conflicts here, arising between individual member rights and union institutional authority, require accommodation of the always present, often eruptive, and sometimes intractable competing interests of the union leadership, membership majority, and membership minority. Law attempts to promote internal union democracy by resolving conflicts such as those related to the right to union membership, the conduct of union elections, financial management of unions, union discipline, parent and union-affiliate relations, and the protection of rights and enforcement of duties in union constitutions.

14. The statutory, common law, and constitutional issues related to the claimed right to union membership are discussed in Lang, Toward a Right to Union Membership, 12 Harv. C.R.-C.L. L. Rev. 31 (1977). See also Givens, The Enfranchisement of Employees Arbitrarily Rejected For Union Membership, 11 Lab. L.J. 809 (1960).

15. See supra note 4.


19. State courts have for many years adjusted the conflicts arising out of the interpretation and application of union constitutions. See P. Taft, Rights of Union Members and the Government 22-27 (1975); Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951); Summers, Judicial Settlement of Internal Union Disputes, 7 Buffalo L.
B. Causes of Doctrinal Fragmentation

The dual union governments, the disparate union democracy issues, the competing legitimate interests, and the various legal doctrines adopted to promote union democracy at the workplace and within unions represent intersecting lines defining the broad contextual contours that condition the law regulating union government. Complexity alone no doubt contributes to doctrinal fragmentation, but hardly seems sufficient to explain it. Deeper causes also operate.

First, at some critical points, national labor policy has a built-in disunity contributing to incoherence. It has developed over many years with each strand having its unique history and primary policy goals. Many of these goals often compete and sometimes even conflict. For example, national labor policy seeks to promote industrial peace, in part, by encouraging "responsible" unions that help control and discipline the work force. Yet, In 1947 Congress enacted the Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1976 & Supp. IV 1980)) [hereinafter cited by section number and either LMRA or Taft-Hartley Act]. Section 301, creating federal jurisdiction to adjudicate controversies arising out of contracts between labor organizations, authorizes federal courts to adjudicate controversies arising under union constitutions. United Ass'n of Journeymen v. Local 334, 452 U.S. 615 (1981) (suit between labor organizations); Kinney v. IBEW, 669 F.2d 1222 (9th Cir. 1982) (amended opinion) (suit between member and union); Wolfe v. Road Sprinkler Fitters Local 669, No. C-82-352 (N.D. Ohio Oct. 7, 1982) (collecting cases).


the concurrent goal of promoting union democracy checks a union's ability to discipline members: "[u]nion officers must on the one hand control membership and on the other be elected by it." Likewise, member control over leaders' decisions may threaten the stability of the labor-management relationship if, for example, high rates of union officer turnover or membership rejection of collective bargaining decisions result. One of the more evident examples of disunity is the policy commitment to permit union majority control over the individual while concurrently protecting individual rights enforceable against the majority will. Moreover, labor policy harps the value of independent unions, autonomous from the state, while concurrently imposing public regulation over many integral internal union activities. The tensions noted above do not exhaust the list, nor is their incorporation in labor policy necessarily ill-advised. Rather, tensions exist, and their clarification is an important step toward coherence.

In addition to built-in policy disunity, the overlapping enforcement strategies used to preserve and promote union democracy also contribute to incoherence. Labor policy blends state, federal, judicial, and administrative adjudicatory processes, but provides scant guidance regarding the

Board ha[ve] to keep their members in line." Klare, supra, at 319. This argument is sound if one assumes an employer will discharge and replace those engaging in unprotected activities, or at least a union would reasonably fear such employer reaction, for a mass discharge will undermine seriously a union's economic strength. See Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981) (employer may not obtain damages for breach of contract against employees but may discharge or otherwise discipline them for striking in violation of collective bargaining agreement); Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (employer may discharge wildcat strikers demanding individual bargaining); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (employer may discharge sit-down strikers). But see Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 420-23 (1981) (Powell J., concurring) (the discharge remedy is often illusory: 1) wholesale discharge often impractical; 2) discharge often prolongs a strike; and 3) discharge of strikers seldom sustained by arbitrators).

22. James, supra note 4, at 254-55. See Munson, The Trade Union as an Organization, 88 MONTHLY LAB. REV. 497, 499 (1965) ("A trade union leader stands in a supervisory relationship to . . . the member, who is also his master . . . .").

23. See infra notes 434-37 and accompanying text.


25. See infra notes 457, 482-85 and accompanying text.


27. See supra notes 14-19 and accompanying text.

28. For other examples, and a critical analysis of national labor policy's competing goals, see Klare, supra note 21.
desired relationship among them. When, for example, the NLRB adjudicates workplace democracy disputes concerning union security, it must accommodate union collective authority and individual employee rights when filling the interstices of the LMRA. These disputes can include individual dissenters refusing to tender periodic dues because of an overriding religious conviction, or refusing to tender a portion of the periodic dues, claiming a union has expended funds collected pursuant to a collective bargaining agreement’s union security clause for purposes insufficiently related to collective bargaining. Yet, both state and federal courts must also accommodate these same interests when adjudicating constitutional or non-LMRA statutory claims of either religious or political dissenters. Union fine cases present an additional example of overlapping enforcement strategies regulating union government have generated a rich lode of scholarly work. See, e.g., Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, 51 Tex. L. Rev. 1037 (1973); Summers, Pre-Emption and the Labor Reform Act—Dual Rights and Remedies, 22 Ohio St. L.J. 119 (1961); Note, Pre-Election Remedies Under the Landrum-Griffin Act: The “Twilight Zone” Between Election Rights Under Title IV and the Guarantees of Title I and V, 74 Colum. L. Rev. 1105 (1974) (collecting authority). See generally Wellington, Labor and the Federal System, 26 U. Chi. L. Rev. 542 (1959).


enforcement strategies. The NLRB determines whether a union fine violates the LMRA by evaluating whether it frustrates an overriding labor policy, but may assess neither the reasonableness of the fine nor the adequacy of the union's disciplinary procedures. These related disciplinary issues remain with either federal or state courts.\textsuperscript{34} Similarly, union refusal to arbitrate a bargaining unit employee's grievance is a quintessential workplace democracy conflict, often raising fair representation issues adjudicated by either the NLRB or the courts.\textsuperscript{35} The same controversy, however, can easily become an internal union democracy issue raising rights under the LMRDA when, for example, the decision not to seek arbitration is alleged to be discipline within the meaning of that statute.\textsuperscript{36} Conversely, the paradigmatic internal union democracy conflict may well be the contested union election. Here, law assigns the Department of Labor and the courts primary responsibility to promote internal union democracy by adjusting the competing interests.\textsuperscript{37} Yet, the NLRB necessarily affects the internal union election contest when it decides whether an employer commits an unfair labor practice by disciplining workers distributing campaign literature at work in violation of a company rule or when it determines whether a union commits an unfair labor practice by disciplining a member for engaging in internal union political activity.\textsuperscript{38} In short, national

\textsuperscript{34} Compare NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175 (1967) (union discipline may raise LMRA issues) and Scofield v. NLRB, 394 U.S. 423 (1969) (a union rule may violate LMRA if it invades or frustrates an overriding policy of labor law) with NLRB v. Boeing Co., 412 U.S. 67 (1973) (reasonableness of fines to be decided by law of contracts or voluntary associations, not by LMRA principles) and UE Local 1012 (General Elec. Co.), 187 N.L.R.B. 375 (1970) (NLRB not authorized to assess fairness of union's disciplinary procedures).

\textsuperscript{35} See, e.g., Vaca v. Sipes, 386 U.S. 171 (1967); NLRB v. Local 396, Teamsters, 509 F.2d 1075 (9th Cir.), cert. denied, 421 U.S. 976 (1975).

\textsuperscript{36} See, e.g., Scoville v. Watson, 338 F.2d 678 (7th Cir. 1964). See also Keene v. Operating Engineers Local 624, 569 F.2d 1375 (5th Cir. 1978).

\textsuperscript{37} See LMRDA Title IV; Calhoon v. Harvey, 379 U.S. 134 (1964).


The NLRB's work touches the core of union internal democracy when, for example, it resolves questions regarding permissible incentives available to a union to encourage meeting attendance. Compare Local 171, Pulp and Paper Workers (Boise Cascade Corp.), 165 N.L.R.B. 971 (1967) (union fine for nonattendance unenforceable through the union security
labor policy assigns enforcement authority to many disparate adjudicatory
tribunals; much of their work inevitably overlaps. Some of the observed
doctrinal fragmentation may well be explained, therefore, simply by the
lack of synchronization among these enforcement institutions.

One might fairly hypothesize that the complex web of rules, procedures,
 enforcement strategies, adjudicatory institutions, and competing goals that
comprise national labor policy sufficiently explain the doctrinal fragmenta-
tion that has plagued the law regulating union government. Because
“[m]anipulation of one strand of the web of national labor policy creates a
myriad of seen and unseen stresses upon other strands,”\textsuperscript{39} perhaps the in-
digenous strains are simply so great that doctrinal unity cannot be
achieved. Proving this hypothesis is of course quite impossible, for it en-
tails proving a negative. One need only accept McDougal’s thesis, how-
ever, that the process of social causation is multilinear, to conclude that
other causes might additionally contribute to the observed disunity in the
law regulating union government. Here the lawyer can benefit from disci-
plines other than law.

During industrial relations’ “Golden Age” (1945-1960), interdisciplinary
research of unions’ internal life and government flourished. The behav-
ioral sciences united with political philosophy, history, economics, and in-
dustrial relations seeking answers to a variety of questions relating to
union democracy in general and to the existence of democracy or oligarchy
in unions in particular.\textsuperscript{40} During this period, several pioneering scholars
began to chart a role for law and legal institutions to preserve and promote
democracy in union government.\textsuperscript{41} Lipset, more than any other, at-
ttempted to bring the learning of the social sciences to bear on the ques-
tion.\textsuperscript{42} Quite abruptly, however, this wave of interest in union government
greatly diminished during the years following enactment of the LMRDA,
resulting in an erosion of “the rich linkage that once existed across the

\textsuperscript{39} Modjeska, \textit{The Supreme Court and the Diversification of National Labor Policy}, 12

\textsuperscript{40} See Anderson, \textit{A Comparative Analysis of Local Union Democracy}, 17 Indus. Rel.

\textsuperscript{41} See, e.g., Cox, \textit{The Role of Law in Preserving Union Democracy}, 72 Harv. L. Rev.
609 (1959); Summers, \textit{The Usefulness of Law in Achieving Union Democracy}, 48 Am. Econ.
Rev. 44 (1958).

\textsuperscript{42} Lipset, \textit{The Law and Trade Union Democracy}, 47 Va. L. Rev. 1 (1961). See also
Rel. Rev. 303 (1959); Seidman, \textit{Democracy and Trade Unionism: Some Requirements for
research, policymaking, and practitioner communities...''

A resurgence, led by the sociologists' interest in unions as complex organizations, has now begun to produce an abundant harvest of theoretical and empirical insights into the characteristics and organizational behavior of contemporary unions. Implicitly or explicitly, much of this work addresses threshold contextual questions that relate significantly to the appropriate role for law in preserving and promoting democracy in union government: how shall union democracy be defined; to what extent is it desirable or even possible; and what, if any, public regulation to achieve it is necessary? Should these value-laden issues remain unclarified, the law regulating union government can hardly develop coherence. Yet these issues have become the parameters of a circular debate because the possibility and desirability of democracy in union government, as well as the necessity of public regulation, depend on how one defines democracy. Yet, responsible policymakers would surely not seek to implement a model of democracy derived from abstract thought: its attainment must be possible, given traditional forms of union structure and government; its scope must be desirable, calculated to secure union compliance with standards of conduct consistent with unions' societal role as representative of employee group interests without frustrating unions' fulfilling that role; and the public regulation considered necessary to achieve it must be consonant with union independence within the larger democratic society.

This apparent impasse can be resolved by identifying the societal role assigned to unions, by examining their structure and government, and then by demonstrating how union role and structure affect the possibility and desirability of union democracy and the necessity of external regulation. This allows the construction of a democratic model for union democracy that is feasible, and will not frustrate unions' fulfilling assigned societal functions. This model also provides a basis for defining a unified role for


45. As Bok and Dunlop have urged, rather than "asking whether the formal procedures of union government satisfy some preconceived democratic norm," proper inquiry should focus on "whether these norms are well suited to all the goals and interests that labor organizations serve." D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 70-72, 90-91 (1970). Accord Barbash, Power and the Pattern of Union Government, 9 LAB. L.J. 628, 631 (1958).
public regulation that is sensitive to, and balances, the competing legitimate interests at stake.

III. Unions’ Assigned Societal Functions

Many in and out of unions share an ambivalence regarding the nature of American unions and their role in society. To understand the roots of this ambivalence is to understand the backdrop against which unions’ present societal role is defined.

A. The Roots of Ambivalence

1. English and Colonial American Historical and Legal Precedent

It would be more than a slight exaggeration to say that for want of a flea and a rat, contemporary attitudes toward unions’ societal role would be different. Yet, the bubonic plague that came to Europe in the stomach of a flea and the bloodstream of a rat, the flea’s host, had a marked impact on English social attitudes toward combinations of workers. This influence later crossed the Atlantic through the English legal traditions brought to America by the colonists.

The plague that ravished Europe in the fourteenth century killed an estimated twenty million persons. Barbara Tuchman reports:

When death slowed production, goods became scarce and prices soared . . . [T]he shortage of labor brought the plague’s greatest social disruption—a concerted demand for higher wages. Peasants as well as artisans, craftsmen, clerks, and priests discovered the lever of their own scarcity . . . In an age when social conditions were regarded as fixed, such action was revolutionary.

Landlords soon sought relief. In 1349, therefore, Edward III issued a proclamation fixing wages and prices, compelling most persons to enter the labor market, and prohibiting workers from leaving places of employment to secure higher wages. A subsequent act of Parliament, the Statute of Labourers, was required to strengthen and enforce this unpopular proclamation. The King and English Parliament thus “established a precedent of labor ordinances that was to set the pattern for labor legislation

48. B. Tuchman, supra note 47, at 120.
49. Ordinance of Labourers, 1349, 23 Edw. III, chs. 1, 2, 5, & 7.
51. For an excellent summary of this early English labor legislation and detailed ex-
over the ensuing centuries," and was to serve "as the basis for 'conspiracy laws' against labor in the long struggle to prevent unionization." Perhaps the most significant precedent was the use of labor law to maintain the social structure of the time. Specifically, public indignation over unions' adverse effect on employer success largely influenced public opinion that political action against worker groups was needed.

Most American colonies either placed in force English law relating to economic controls or enacted equivalents. Yet, by the time of the American revolution, enforcement of these codes and restrictions on skilled labor was disintegrating, owing in large measure to the need for skilled labor. Accordingly, notwithstanding that the law throughout many of the colonies made strikes and concerted action by workers illegal activities, "[a]side from one instance, masters and journeymen, except in the licensed trades, were virtually unmolested if they sought to combine . . . ."

Beneath this apparent calm, sets of conflicting values were staged for a confrontation that exploded in the early common law criminal conspiracy cases. In its most rigid form, the criminal conspiracy doctrine held that

cerpts of commentary by leading English legal historians discussing the legislation's development and significance, see 1 T. KHEEL, LABOR LAW, § 2.02 & nn.1-7 (1978).
52. Barres, supra note 47, at 280.
53. B. TUCHMAN, supra note 47, at 120.
54. English criminal law in place by 1800 banned employee concerted action and reflected the social attitude that "[t]o check the conditions of [employer] success is to impoverish the state" by threatening free trade. Barres, supra note 47, at 284. By 1800 the industrial revolution had made England the center of world trade, and worker combinations were viewed as threatening this leadership position. Accordingly, new, especially harsh, legislation was enacted to interdict combinations. The Combination Acts of 1800 (39 & 40 Geo. III, ch. 106), in force until 1825, required "that workmen give evidence against themselves and also against their fellow workmen, . . . increased [the prison sentence] to three months, . . . [and] made it illegal for workmen to assist other workmen who desired to better their position as to wages, conditions, and the quantity of work." Barres, supra note 47, at 284 (emphasis in the original). The unpopularity of the Combination Acts, combined with the unrelenting efforts of those believing industrial peace could better be served without criminal sanction being invoked to prohibit peaceful collective activity, resulted in the repeal of this legislation. In its place, the English Parliament enacted legislation making criminal only combinations of workers formed to effect certain unlawful ends or using certain coercive methods. See T. KHEEL, supra note 51, at § 2.03.
55. See Barres, supra note 47, at 286.
56. See H. PELLING, AMERICAN LABOR 9, 12-13 (1960); T. KHEEL, supra note 51, at § 2.04 nn.1-16.
57. R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 206 (1946). The exception Professor Morris refers to is the master bakers strike of 1741, often considered the "first recorded strike in American history." David Saposs has pointed out, and as Henry Pelling has noted, "it was not really a strike of labor against capital, but rather . . . of 'master merchants against regulation of prices by public authorities.'" H. PELLING, supra note 56, at 13.
58. See, e.g., Commonwealth v. Pullis, Philadelphia Mayor's Court (1806), 3 J. Com-
unions were themselves criminal organizations. "A combination of workers to raise their wages may be considered in a two-fold point of view: One is to benefit themselves . . . the other is to injure those who do not join the society. The rule of law condemns both." Even as later moderated, the rule made criminal any combination of employees to achieve either an unlawful object or to achieve a lawful object by means considered unlawful.

2. **Competing Values Raised in the Conspiracy Trials**

Though not applied in this country since 1887, the common law criminal conspiracy doctrine was, until then, the foundation of American labor law. Born from the perceived threat early trade societies posed to the master, it mirrored throughout its reign an ambivalence concerning the larger question of unions' societal role. This ambivalence is documented in the political and economic claims made by union proponents and in the rhetoric of the judicial reaction.

During the criminal conspiracy trials, the case for privileging worker combinations' assertion of group interests centered on four related claims. First, was the societal interest in fractionalization of power—that unions are necessary to advance the collective interests of workers and to resist the demands of individuals, other groups, and society as a whole. The polit-
itical system, it was argued, encourages and relies upon pluralism, and in view of the multitude of organizations existing in other walks of life, it is tyrannical to deny workers the right to combine, especially since they were merely "combining against starvation." Second, was the societal interest in industrial democracy. Worker participation in the government of the workplace helps free the worker from the emasculating and dehumanizing effects of work, and is as important to freedom as is political democracy. The third claim supporting the public interest in worker combinations focused on the permanent want resulting from the impotence of workers' bargaining power as individuals. It is a "mockery," proponents argued, to suggest that "a solitary poor workman shall resist a wealthy and powerful combination of masters . . . ." Only combination can assure "a contestation where one side endeavours to get as much wages for lawful labour as it can; the other, to get as much labour for as little money as it can." Finally, worker combinations claimed a stabilizing role. Adequate representation and compensation would attract skilled artisans to a community thereby increasing the "stock of industry, population, and revenue"; conversely, repressive prosecutions deprive the law of "dignity and efficacy . . . and tend to make the law feared, but not respected . . . ."

With some notable exceptions, the demands of workers for the privilege to act as a group within the economic and social system was found incon-

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W. Sampson, supra note 59, at 12, 139. Accordingly, workers must be permitted to combine and strike peacefully to raise wages; a dissenting worker cannot be permitted "to better himself at the expense of his fellows, when they are suffering privation to obtain terms," and private ordering of wages is preferable to centralized wage determination by others, especially governmental officers who "are not . . . qualified to judge the poor man's case." Id. at 64, 24, & 47.


64. With somewhat typical hyperbole, counsel for the New York Cordwainers, during the 1809 criminal conspiracy trial, argued for the legitimacy of worker combinations because "like the worm that spins its bowels, and perishes in the act, so they whose hands impart to the tissue its lustre of its hue, to flatter the voluptuous and the gay, pine themselves and decay in obscurity and want." W. Sampson, supra, at 13. Albert Gallatin, an entrepreneur and later Secretary of the Treasury, also argued, in 1797, that "[t]he democratic principle on which this nation was founded should not be restricted to the political process but should be applied to the industrial operation as well." See M. Derber, The American Idea of Industrial Democracy, 1865-1965, at 6 (1970). See also Summers, Industrial Democracy: America's Unfulfilled Promise, 28 Clev. St. L. Rev. 29 (1979).

65. W. Sampson, supra note 59, at 34, 120.

66. Id. at 26, 36.
istent with both individual and societal interests. In contrast to the values advanced by union proponents, the nineteenth century courts perceived four competing sets of values implicated by employee collective activity: First, the employer's property right to manage and control his business; second, the individual employee's right to sell his labor as he chooses and to associate or not associate as he chooses; third, the need to control private groups (factions) that create a threat to political stability by gaining control through the power to withhold labor; and fourth, the need to preserve the economic well-being of the nation by protecting commerce from the uncompetitive impediments of high wages and industrial instability in portions of the country, and by protecting the community from union monopoly power over wages and prices contrary to the natural forces of a free market.

Chamberlain suggests that the criminal conspiracy cases introduced two recurring themes that permeate American labor law: the relationship of the union to the individual—particularly the use of collective power to deprive individuals of certain liberties—and the relationship of the union to society at large—particularly the use of collective power to benefit a few at the expense of society. In large measure, ambivalence concerning the proper accommodation of the competing interests embraced by these themes explains society's persistent uncertainty regarding unions. As Chamberlain notes, even among those who might have agreed with the public interest claims justifying worker collective action, two questions remained:

What should the power of the group be as it affected the individual? What should be the role of the group as it affected society at large? The courts, understandably enough, felt that there must be some means of controlling the actions of groups of individuals who could so vitally affect the welfare of the community.

B. Subsequent Forces Conditioning the Right to Assert Group Interests

The transition from the nineteenth century view that worker combinations are criminal to eventual, though ambivalent, recognition that worker groups are legitimate and privileged to assert group interests was slow but

68. See N. Chamberlain, supra note 60, at 18-20; H. Wellington, supra note 4, at 9-13.
69. N. Chamberlain, supra note 60, at 18-19. Wellington has similarly noted that "[t]he linkage between the nineteenth-century labor problem and those today is in the underlying values appealed to by the courts . . . ." H. Wellington, supra note 4, at 11.
70. N. Chamberlain, supra note 60, at 20.
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inexorable. A complete catalog of the forces conditioning this transition would include the social, political, economic, and intellectual history of the country. Yet, three confluent streams, converging in the 1930's, significantly influenced the change and have shaped attitudes toward unions and their presently assigned societal role: the spontaneous and irrepressible development of informal worker control of group conduct at the workplace; the emergence of "business unionism"; and recognition of the need for unions as a countervailing force in a highly organized industrial economy.

I. Informal Worker Control of Group Conduct

Even without unions, "[i]nformal organizations of workers develop spontaneously and unconsciously to control and regulate group conduct." The literature studying shop society reveals that every workplace develops "a 'social structure': a network of reciprocal rights and obligations, supported by sentiment and formal rule." This social structure takes many forms, including employees at work binding themselves to informal codes and standards of proper social conduct with fellow employees. Usually contrary to management rules, and largely beyond management control, these informal codes often restrain production, require employees to assist one another in performing tasks, and set other norms of work-related behavior. It has been suggested that "the most powerful controls over the individual lie in the hands of the group itself and are expressed through the informal structure." Group control over the individual at the workplace is, thus, pervasive and "deeply rooted in the folkways of working people . . . ." To argue this should not be, approaches irrelevance: it amounts to saying workers are unwise to have the traditions of social control they have. These traditions, moreover, become the union's traditions when workers organize formally. They help define unions' distinctive character and societal role.

71. For an early application of Cowan's group interest theory to labor law see Blumrosen, supra note 67.
73. See W. Moore, Industrial Relations and the Social Order 9 (rev. ed. 1951).
74. W. Leiserson, supra note 72, at 21. For an entertaining but vivid example of the informal code of conduct in operation, see John R. Commons's description of his personal experience in a print shop as a college student and how the group auctioned high paid work by requiring those performing it to rebate a portion of the wage to all members of the group. J. Commons, Myself (1934), reprinted in Finkin, supra note 4, at 187-88 n.17.
2. The Development of Business Unionism

Unions have also been conditioned by the history of their institutional development. The union movement was but one of three lines of the labor movement during the nineteenth century. Worker political movements and cooperative movements also sought to advance the group interests of workers. Formerly considered substitutes for one another, they united in "business unionism," which became the residual legatee of their traditions.\(^7\)

a. Worker Political Movements

The labor movement prior to 1840 was characterized substantially, though not exclusively, by political action through workingmen's parties. "For a brief time they were highly important, and sometimes held an actual balance of power between the major parties in local elections."\(^78\) Using the newly obtained political power resulting from the removal of property qualifications for voting, "workers tried to secure participation in government by members of their own class," but with little success.\(^79\) They did attack successfully, however, many instances of special privilege until factionalism led to gradual disintegration and worker political movements merged with the larger forces of Jacksonian democracy.\(^80\) These early political movements left a legacy of conflicting attitudes toward union political action: workers' inability to elect their own candidates caused disillusionment but the workingmen's parties' success "in pushing forward measures . . . in the line of progress toward real democracy"\(^81\) provoked confidence in political action.

b. Cooperative Movements

The cooperative movements of the nineteenth century, led by social reformers, also contributed to the heritage of modern unions. Seeking panaceas to avoid the wage system itself, Thomas Skidmore sought a redistribution of property; George Henry Evans sought distribution of public lands to the unpropertied; Robert Dale Owen sought to eliminate reliance on the wage system by an elaborate educational and training system and called for state guardianship of children and public boarding schools; Albert Brisbane advanced Associationalism, an experiment in

\(^{77}\) W. Leiserson, \textit{supra} note 72, at 36.
\(^{79}\) Id. at 37. \textit{See also} J. Commons & Associates, \textit{supra} note 63, at 331.
\(^{80}\) F. Dulles, \textit{supra} note 78, at 38-52.
\(^{81}\) J. Commons & Associates, \textit{supra} note 63, at 332. \textit{See also} W. Leiserson, \textit{supra} note 72, at 34-35.
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Communal living; and William Sylvis advocated worker ownership of the means of production.\textsuperscript{82}

None of these attempts to supersede the wage system succeeded; nor did efforts by Edward Bellamy and other socialists to increase worker control by subjecting industrial ownership to the political process prevail.\textsuperscript{83} These movements did, however, generate a rich heritage of idealism and reform.

c. The Ascendancy of the Union Movement

The above approaches were ultimately discarded in favor of what has become known as "business unionism."\textsuperscript{84} Collective bargaining by the union movement had coexisted with political action and the cooperative movements during the first three-quarters of the nineteenth century. Yet, by the end of the century "skilled craftsmen, finding they could improve their own conditions by trade union action, separated themselves from the unskilled whose bargaining power was weak and who consequently looked to politics and social reform for amelioration."\textsuperscript{85} Many national unions soon developed and by the end of the century 120 were in existence.\textsuperscript{86} The new union movement, "centering in the American Federation of Labor, was based upon the conviction that it was preferable to eschew long-range reforms and concentrate upon immediate gains. It thus committed itself to an acceptance of the wage system . . . and sought only to improve the lot of its members within that system."\textsuperscript{87}

With "business unionism" came the predominance of collective bargaining as the preferred strategy. The labor agreement "led the way from an industrial system which alternatively was either despotism or anarchy to a constitutional form of government in industry."\textsuperscript{88} The traditions of the previous political and cooperative movements nevertheless continued to manifest themselves from the earliest days of the national unions. While distrustful of government regulation, the national unions undertook political action when their freedom of economic action was threatened. Thus, by the beginning of this century the American Federation of Labor (AFL)

\textsuperscript{82} By 1886, with the active support of the Knights of Labor, 135 cooperative ventures had been undertaken in 39 industries. \textit{See} N. Chamberlain, \textit{supra} note 60, at 35-40; F. Dulles, \textit{supra} note 78, at 39-42. \textit{See generally} 1 J. Commons & Associates, \textit{supra} note 63, at 235-60, 496-521; 2 id. at 430-48.

\textsuperscript{83} Summers, \textit{supra} note 64, at 30.

\textsuperscript{84} For conflicting theories accounting for the development of "business unionism" see L. Ulman, \textit{The Rise of the National Trade Union} 569-604 (1955).

\textsuperscript{85} W. Leiberson, \textit{supra} note 72, at 35.

\textsuperscript{86} L. Ulman, \textit{supra} note 84, at 3-4.

\textsuperscript{87} N. Chamberlain, \textit{supra} note 60, at 41.

\textsuperscript{88} 2 J. Commons and Associates, \textit{supra} note 63, at 520.
and its state federations routinely introduced legislation protecting the legal status of unions, and in 1906 the AFL began seeking to influence federal elections. Political action had, thus, become an essential part of unionism. Moreover, the new "business unionism" never fully abandoned its reforming, cooperative tradition, sponsoring educational programs, social services, and consumer cooperatives.

Thus, by the beginning of the twentieth century the unions had begun to mature. "Workers were to achieve a voice by forming strong independent trade unions, the economic strength of which would compel employers to listen." Yet, unions' societal role as representatives of workers' collective voice could not mature fully until the unions' social value was more fully understood. This had not yet happened.

3. Recognition of the Need for Unions as a Countervailing Force
   a. Emergence of Corporate Power

   By the end of the nineteenth century, "[t]he corporation became the accepted form of business organization . . . and a complacent government and complacent courts, wedded to the economic doctrine of laissez faire, gave free rein to policies that rapidly created a concentration of economic wealth and power that the country had never before known." During this period, the labor-management relationship became increasingly impersonal and work became increasingly dehumanizing. Moore has drawn the following portrait of the factory system:

   [E]stablishment of factories, with direct and insistent supervision of the laborer, made the relatively disadvantageous position of the employee apparent. He worked on the premises of another, often at great distance from his home. He started work at a specified hour and stopped work when the plant closed for the day. The quality of his work was subject to constant scrutiny, as were his speed and general efficiency. If he lagged in one or the other he was reprimanded by his employer or one of his employer's representatives. The controls . . . [were] formal and impersonal . . . . [W]ith the factory system [the] illusion of liberty could no longer be maintained.

   In short, rule-making and administration were considered the prerogative

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89. Id. at 531-33. See also F. Dulles, supra note 78, at 162, 184-207.
90. See N. Chamberlain, supra note 60, at 40; F. Dulles, supra note 78, at 150; W. Leiserson, supra note 72, at 36, 46.
91. Summers, supra note 64, at 30.
92. F. Dulles, supra note 78, at 95-96.
of management while "[i]nsistence by workers for a voice in management decisions was a violation of property rights and the moral order." Labor law reinforced this moral order and maintained the social structure through new doctrines barring the assertion of both individual and collective employee rights.

b. Emergence of New Legal Barriers

(1) The Employment at Will Doctrine

The English common law rule, and arguably the American rule, during the early nineteenth century was that law presumed the employment period was for a year, and absent agreement, custom, or trade usage, employees could not be discharged summarily during this presumptive employment period. The rule changed in this country by the end of the nineteenth century. Cooley first noted in 1872 that employment for an indefinite period enjoys no presumption of hiring for a year. Five years later Wood, in a treatise on master-servant relations, stated that in the American common law, the presumption had been reversed. "[A] general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." It is quite doubtful that the precedent cited by Wood supports his assertion, but American courts soon accepted the rule. "[By] the beginning of the 20th century Wood's rule was the accepted majority rule." While the doctrine has been significantly eroded in many jurisdictions, it is today, the common law rule in most states.

The implications of the employment at will doctrine to individual rights at the workplace are substantial. As an often-quoted Tennessee decision states, absent agreement to the contrary, an employer may discharge an employee "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of a legal wrong." Accordingly, employers

94. Summers, supra note 64, at 30.
98. Comment, supra note 95, at 424 & n.22. Accord Summers, supra note 95, at 485.
are free to discharge a worker without notice or cause irrespective of years of satisfactory performance, or the employee's forgoing alternative employment opportunities.\textsuperscript{101}

Many hypotheses have been advanced to explain the employment at will doctrine. Most commentators agree it reflected laissez-faire economic values that each party, employer and employee, possessed complete social freedom and was bound, therefore, only to express manifestations of assent.\textsuperscript{102} If the employee was free to leave employment without notice or cause, the employer, similarly, was free to discharge the employee.\textsuperscript{103} A somewhat less legalistic explanation suggests that a benign and supportive judiciary, seeking to foster economic growth, protected employers confronted by economic uncertainty and entrepreneurial risks.\textsuperscript{104}

However explained, the effect of the doctrine is plain. It created a legal

\textsuperscript{101} See Note, Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816, 1816-17 & nn.3-4 (1980).

In recent years this doctrine has been modified by state and federal statutes that implicitly or explicitly guarantee employees protection from certain forms of discrimination or retaliation for exercising certain statutory rights. See Summers, supra note 95, at 491-99; Comment, supra note 95, at 433-34.

In addition, some judicial opinions have ameliorated somewhat the harsh impact of the doctrine by recognizing a new tort of abusive discharge. See Blackburn, supra note 96, at 470-82; Comment, supra note 95, at 435-45 (collecting cases); Comment, Kelso v. Motorola, Inc.—A Remedy for the Abusively Discharged at Will Employee, 1979 SO. ILL. U.L. REV. 563. But see Summers, supra note 95, at 489-90.

Most recently a few courts have begun to find an implied promise in the employment contract that employment will be for a specific term or that discharge will be only for cause. See Blackburn, supra note 96, at 482-92; Note, supra, at 1820-21.

None of these efforts has protected adequately nonunion employees. Accordingly, some commentators have called for general statutory protection against unjust dismissal. See, e.g., Address by T. St. Antoine, National Academy of Arbitrators Annual Meeting (May 4, 1981) 107 LAB. REL. REP. 91 (1981) (BNA); Summers, supra note 95, at 519-31. Others have advised that "employers need not be terrorized by the possibility of wrongful discharge claims [because employers] continue to possess many legal defenses protecting them from liability." Olsen, Wrongful Discharge Claims Raised by At Will Employees: A New Legal Concern For Employers, 32 LAB. L.J. 265, 284, 297 (1981).


\textsuperscript{103} The United States Supreme Court elevated this reasoning to a constitutional principle in Adair v. United States, 208 U.S. 161 (1908) (statute prohibiting discharge of common carrier employee for union membership unconstitutional) and in Coppage v. Kansas, 236 U.S. 1 (1915) (state statute prohibiting employer requirement that employees agree not to join a union unconstitutional). In these cases the Court reasoned that regulation of the employment relation disturbing the freedom to contract for employment violates the constitutional right of property and liberty of contract. But compare NLRB v. Jones & Laughlin Steel Corp. 301 U.S. I (1937).

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barrier to individual employee rights at the workplace and deprived workers of even a limited measure of job security. Ironically, while the court-created rule relied on the individual liberty to quit employment, it highlighted the impotency of individual employee bargaining power and the need for collective action as a countervailing force to corporate power. Abandoned, as individuals, by law, employees increasingly relied on collective action to advance group interests. Here also, however, the courts reinforced the “moral order” that decisionmaking was the prerogative of management.

(2) Barriers Against Assertion of Group Interests

From the lapse of the criminal conspiracy doctrine until the Great Depression, law erected an array of interrelated barriers thwarting worker assertion of group interests. The civil conspiracy doctrine produced ad hoc tort decisions reflecting judges’ economic and social policy predilections with respect to a broad range of union objectives and methods of collective action deemed harmful to either the individual or society. Departing from the English rule, the American courts also granted employer requests to have employee concerted activity enjoined if either the means or the object was found not “justified.” Developed in railroad receivership proceedings during the 1880’s, the labor injunction spread quickly to other industries. The Sherman Antitrust Act was applied by the Supreme Court in 1908 to regulate worker collective activity. The court in 1921 found that a secondary boycott was an enjoinable restraint of trade in Duplex Printing Co. v. Deering even though Congress, seemingly, had exempted unions from the antitrust laws in section 6 of the

108. See Nelles, A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction, 40 Yale L.J. 507 (1931).
109. While lack of complete court records thwarts precise determination of the number of labor injunctions issued, Professor Witte’s exhaustive search verified that up to 1931, state and federal courts had issued 1,845 labor injunctions. E. Witte, The Government in Labor Disputes 84 (1932).
111. Loewe v. Lawlor (Danbury Hatters), 208 U.S. 274 (1908). Seven years later the court upheld a treble damages verdict of $252,000 assessed against the union and its members. Lawlor v. Loewe, 235 U.S. 522 (1915).
112. 254 U.S. 443 (1921).
Clayton Act\textsuperscript{113} and forbidden such injunctions in section 20.\textsuperscript{114} Four years later, the Supreme Court held that a strike intended to prevent the movement of products in interstate commerce creates an actionable restraint of trade.\textsuperscript{115} Finally, the United States Constitution was used by the Supreme Court in \textit{Adair v. United States}\textsuperscript{116} to rebuff legislative efforts to protect employee concerted activity. As a legal barrier to worker collective rights, the decision is historically significant. Its reasoning, however, is particularly instructive. Unwilling to recognize the impotency of individual bargaining power, Mr. Justice Harlan, writing for the court, reasoned that “the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.”\textsuperscript{117} Nor was the Court willing to view the employee group as anything but a collection of individuals: “[i]t is the employee as a man and not as a member of a labor organization who labors in the service of an interstate carrier.”\textsuperscript{118} Similar state protective legislation was found violative of the fourteenth amendment in \textit{Coppage v. Kansas}.\textsuperscript{119} Here the Court reasoned that state police power did not extend to strengthening labor organizations because “[t]hey are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented.”\textsuperscript{120} Nor may the state exercise its police power to redress the inequality of bargaining power between employers and employees, because “those inequalities are but the normal and inevitable result” of a political system committed to the right of private property and the right of free contract.\textsuperscript{121} Blumrosen, synthesizing the reasoning of these cases, has suggested they reflect the “‘constitutional blindness’ of the Court toward the group interests of employees.”\textsuperscript{122}

By the beginning of the 1930’s, therefore, an imposing structure of legis-
lative and judicial controls had been erected. Gallons of ink have been spilled over whether these controls excessively prevented the exercise of worker rights. Yet, two conclusions are inescapable. First, these barriers existed and reflected the twin concerns of the criminal conspiracy courts: the relation of the group to the individual and the relation of the group to the larger society. Second, these barriers were largely dismantled during the 1930's. The forces responsible for this dismantling explain a great deal concerning the societal role assigned to unions today.

c. Societal Recognition of Unions

The 1930's saw a startling shift in the attitudes toward unions. The Norris-LaGuardia Act,\(^{123}\) enacted in 1932, remedied the major abuses of the labor injunction in federal courts. Relying on this law, the Supreme Court undid the effect of *Duplex Printing* in *United States v. Hutcheson*.\(^{124}\) The National Labor Relations Act\(^{125}\) was passed in 1935. Moreover, the Supreme Court in *Thornhill v. Alabama*\(^{126}\) recognized picketing as a form of speech protected by the first amendment applicable to the states through the fourteenth amendment. Finally, the Supreme Court held that, subject to certain exceptions, unions are substantially exempted from the antitrust laws when they engage in self-help activities.\(^{127}\)

While the reasons for this legal revolution are numerous, complex, and interrelated, two stand out: recognition of the loss of workers' individual liberty in large business organizations, and the economic dislocations resulting from the Great Depression of the 1930's. As to the former, Chamberlain states:

> People began to see more clearly the function and the purpose of a labor union which did not deny liberty to the individual but acted as the servant of the individual as his representative . . . .

> . . . Here was a changing approach to the question of the relationship between the individual and the group with increasing acceptance of the group as the agent representative of the individual, not depriving him of liberty but guaranteeing him liberty, making his liberty real.\(^ {128}\)

Additionally, Chamberlain argues that the Great Depression of the 1930's


\(^{124}\) 312 U.S. 219 (1941).


\(^{126}\) 310 U.S. 88 (1940).


\(^{128}\) N. Chamberlain, *supra* note 60, at 24-25.
and its concomitant economic dislocations demonstrated that only "through the organized efforts of employees to secure a fairer distribution of income [could] purchasing power . . . be sustained and the economy kept on an even keel. . . . [T]he labor union had a role to play in society . . . protective in a sense of the community welfare, of its economic prosperity."\(^{129}\) In sum, this theory, now increasingly accepted, suggests that unions obtained recognition as a necessary countervailing force to perform both democratic and economic functions.\(^{130}\) The historical record strongly supports this position and helps to clarify it more fully.

The idea that unions serve an industrial democracy function began to develop actively in this country by the late 1890's. The Industrial Commission of 1898-1902, created by Congress, envisioned collective bargaining as more than a business device to secure increased economic benefits. The Commission stated: "By organization of labor, and by no other means, it is possible to introduce an element of democracy into the government of industry. By this means only the workers can effectively take part in determining the conditions under which they work."\(^{131}\)

During the next decade, another governmental commission, the Commission on Industrial Relations of 1913-1915, echoed this view, stressing that "the only hope for the solution of the tremendous problems created by industrial relationship lies in the effective use of our democratic institutions and in the rapid extension of the principles of democracy to industry."\(^{132}\) The Commission relied heavily on the testimony of Louis B. Brandeis who had urged that physical and material improvement of the individual is a necessary, though not adequate, condition for a democracy.\(^{133}\) For in addition,\(^{134}\)

\[\text{[i]t is the development of manhood to which any industrial and social system must be directed. . . . [T]here must be a division not only of the profits, but a division of responsibilities; and the men must have the opportunity of deciding, in part, what shall be their condition and how the business shall be run.}\]

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129. \textit{Id.} at 25.
134. \textit{Id.}
The Commission summarized this idea of industrial democracy: "The struggle of labor for organization is not merely an attempt to secure an increased measure of the material comforts of life, but is a part of the age-long struggle for liberty . . . even if men were well fed they would still struggle to be free." 135

During the 1920's, however, society continued to manifest a "fundamental uncertainty over the place of labor in the business system," according to Bernstein.

Employers did not know whether to clutch workers to their breasts as partners in a great cooperative adventure in production or to keep them at arm's length as potential, if not present, enemies. . . . This ambivalence manifested itself most dramatically in the extraordinary shift in the labor policy of employers that occurred during the decade. 136

Many business leaders, endorsing the "American Plan," launched a direct and hostile attack on the union movement. Others, seeking an alternative to independent, "outside" unions, opted for various forms of "welfare capitalism": company unions, industrial relations departments, and various types of nonunion employee representation plans. 137

Though premised on cooperation and mutuality of interest, while motivated to avoid "outside" unions, and though essentially paternalistic, these plans can be seen now as a rudimentary movement in the direction of industrial democracy. More fundamentally, they reflected an enduring shift in social attitude. The individual in a complex industrial society is helpless and the group interest must, accordingly, be recognized. The extensive publicity regarding these plans served to reinforce this view among workers, employers, and society-at-large. 138 Labor unions had not yet become heir to this changing social attitude, but, in Bernstein's words, "[e]mployers who might later seek to turn the clock back would meet resistance not just from the labor movement but also from an enlightened public opinion." 139

135. Id. at 62. See also 2 J. Commons & Associates, supra note 63, at 520. For a discussion of Commons's view of the democratic function of collective bargaining and an excellent history of the development of industrial democracy during the early twentieth century, see Derber, The Idea of Industrial Democracy in America: 1898-1915, 7 LAB. HIST. 259 (1966).


138. See I. Bernstein, supra note 122, at 173, 186-89.

139. Id. at 186.
The "welfare capitalism" movement died with the Great Depression. As previously established job standards began to erode, the basic flaw of "welfare capitalism" became more evident: It did not create a shop government giving workers the means to protect their group interest at a time of serious social and economic dislocation.

The short-lived National Industrial Recovery Act\textsuperscript{140} was the government's initial response. While its section 7(a) gave employees the right to organize and bargain collectively, employers interpreted this as permitting bargaining with either a labor union or an internal employee representation unit. As a result, company unionism grew extensively.\textsuperscript{141} The Roosevelt administration, endorsing this view, seemingly endorsed bargaining with dominated company unions. Moreover, it accepted proportional, rather than exclusive, representation, thereby threatening the bargaining power of independent "outside" unions.\textsuperscript{142} Although still ambivalent, the American political community was struggling for a vision of the social order and the appropriate role for unions within it.

By the spring of 1934, it had become clear that additional legislation was needed, since company unions and other nonunion forms of representation had failed to provide workers an effective voice.\textsuperscript{143} The Wagner Act was introduced and a great debate over it occurred in the spring of 1935 before the Senate Labor Committee. A review of proponents' arguments, the statement of purpose in the Act itself, and subsequent judicial statements concerning the purpose of the Act shows that four arguments prevailed in moving social policy.\textsuperscript{144} These four arguments were not novel. They were the twentieth century acceptance of the nineteenth century arguments advanced by union proponents during the criminal conspiracy trials.\textsuperscript{145}

\textit{Fractionalization of power}—Proponents argued that the Depression had been caused, in part, by an unbalanced economy and that economic stability required a more equitable income distribution. Private ordering through collective bargaining was chosen as the preferred equalizing mechanism. Proponents maintained that it produced a better national wage policy than did centralized wage determination by government, it

\begin{itemize}
\item \textsuperscript{140} Pub. L. No. 73-67, 48 Stat. 195 (1933). For a discussion of government attempts to regulate labor-management relations during World War I and in the railroad industry, see C. Summers & H. Wellington, \textit{supra} note 106, at 16-17.
\item \textsuperscript{141} I. Bernstein, \textit{Turbulent Years} 39 (1971).
\item \textsuperscript{142} Id. at 184-85; Derber, \textit{supra} note 137, at 9.
\item \textsuperscript{143} I. Bernstein, \textit{supra} note 141, at 333; Summers, \textit{supra} note 64, at 33.
\item \textsuperscript{144} See J. Rosenfarb, \textit{supra} note 141, at 330; Summers, \textit{supra} note 4, at 26-28, 40-42. See also F. Dulles, \textit{supra} note 78, at 287.
\item \textsuperscript{145} See \textit{supra} notes 62-66 and accompanying text.
\end{itemize}
shortened the reach of government, and was needed as a balance in the economy against the "integration of wealth and power." 146

*Industrial Democracy*—Senator Wagner believed that workers’ dignity is secured only when they can express their group interest through freely chosen representatives. In 1932 he echoed Brandeis’s 1915 testimony before the Commission on Industrial Relations by stating:

We can raise a race of men who are commercially as well as politically free. . . . To me the organization of labor holds forth far greater possibilities than shorter hours and better wages. Organization plants in the heart of every worker a sense of power and individuality, a feeling of freedom and security, which are the characteristics of the kind of men Divine Providence intended us to be. 147

Subsequently, urging the adoption of the Wagner Act, he stated, “[D]emocracy in industry must be based on the same principles as democracy in government. Majority rule, with all its imperfections is the best guarantee of workers’ rights, just as it is the surest guarantee of political liberty that mankind has yet discovered.” 148 Wagner and others, seeing the increase of company unions as a threat to genuine industrial democracy, argued that only through majority rule, exclusive representation, and government supervised elections could the promise of industrial democracy be fulfilled. 149

*Impotence of Individual Bargaining Power*—By the 1930’s, the impotence of individual bargaining power had begun to be recognized more fully. 150 Testimony before the Senate Labor Committee in 1935 noted that this impotence was exacerbated by the rule in this country that a worker’s "‘contract’ might be changed without notice at the will of the employer.” 151

Accordingly, in its Statement of Findings and Policies, the Wagner Act

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147. 75 Cong. Rec. 4918 (1932).
149. I. Bernstein, *supra* note 141, at 333. Wagner’s vision of industrial democracy is ambiguous regarding whether it is contemplated to be participatory or representational. Compare *quote supra* at text accompanying note 147 with *quote supra* at text accompanying note 148. See also Klare, *supra* note 21, at 285 n.61, 289 & n.77. This issue is fundamental to a determination of an appropriate model of union democracy. See infra text accompanying notes 458-63.
150. See *supra* text accompanying notes 136-39. The Supreme Court, in American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921), had recognized explicitly that unions “were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer.” *Id.* at 209.
151. I. Bernstein, *supra* note 141, at 331. See *supra* text accompanying notes 95-104.
explicitly recognized the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate and other forms of ownership association. . . .”\textsuperscript{152} As the Supreme Court subsequently made plain, the Wagner Act was intended “to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.”\textsuperscript{153}

\textbf{Stabilizing Function of Unions—}Societal acceptance of collective bargaining and labor unionism was, finally, seen as promoting both industrial and political stability. The Wagner Act’s Statement of Findings and Policies stated that the denial of the right of employees to organize and the refusal by employers to accept the practice and procedure of collective bargaining were leading causes of strikes and other forms of industrial strife or unrest.\textsuperscript{154} Accepting this view, the Supreme Court in \textit{NLRB v. Jones and Laughlin Steel Corp.} took judicial notice that the refusal to negotiate “has been one of the most prolific causes of strife” and, therefore, the right to self-organization is an “essential condition of industrial peace.”\textsuperscript{155} Moreover, testimony before the Senate Labor Committee advanced the view that unions promote political stability because “organized labor in this country [is] our chief bulwark against Communism and other revolutionary movements.”\textsuperscript{156} When workers can express and redress their grievances, they have no inducement to overthrow the social order.

\section*{C. Contemporary Societal Functions of Unions}

The burden of the argument so far is that (1) American unions operate in a society that has been ambivalent concerning their assigned social

\begin{itemize}
\item \textsuperscript{152} Wagner Act, § 1.
\item \textsuperscript{154} Wagner Act, § 1.
\item \textsuperscript{155} 301 U.S. 1, 42 (1937).
\item \textsuperscript{156} I. Bernstein, \textit{supra} note 141, at 332. American communists recognized this goal of the Wagner Act. They saw it as a cynical conspiracy of the capitalist-New Dealer nexus inevitably serving the interests of employers at the expense of a militant working class. For this reason, they joined conservative business interests in opposing the Wagner bill. Many noncommunist leftists also opposed it, arguing that it threatened to lull militant labor organizations into a false sense of security and reliance on government, and because it would be accompanied inevitably by other government actions detrimental to the union movement. \textit{See} C. Daniel, \textit{The ACLU and the Wagner Act: An Inquiry Into the Depression-Era Crisis of American Liberalism} (1980). \textit{See also} I. Bernstein, \textit{supra} note 141, at 820 n.4.
\end{itemize}
functions; (2) two sets of competing values reflect that ambivalence; (3) informal group control over the individual is a value deeply rooted in the social structure of the workplace, demanding legitimacy; (4) while business unionism and collective bargaining emerged as the primary, formal means for workers to assert their group interest against individuals, other groups, and society, political action and reform within the existing order remain essential attributes of labor unionism; and finally (5) societal acceptance during the 1930's that worker groups are legitimate and privileged to assert group interests evolved from a gradual recognition that in a complex and highly integrated industrial society unions are a necessary countervailing force performing for workers and society both an economic and democratic function.

These variables define unions' presently assigned social role. This understanding can be broadened and deepened by tracing subsequent developments refining national labor policy and by canvassing contemporary attitudes of unions' societal role.

I. Subsequent Developments Refining National Labor Policy

Encouraged by the legal right to self-organization and the government's support and encouragement of collective bargaining, labor unionism prospered following the Wagner Act. Labor union membership (exclusive of Canadian membership) tripled between 1933 and 1941.\textsuperscript{157} Company unions and nonunion employee representation plans faded in the face of statutory prohibitions and a revitalized labor union movement.\textsuperscript{158} By 1940, the sectors of the economy having the heaviest concentration of blue-collar workers—mining, construction, transportation, and manufacturing—became highly unionized as both the AFL and the Congress of Industrial Organization (CIO) organized industrial workers.\textsuperscript{159} "Business unionism" continued as the dominant model, but political action and reform efforts by labor intensified "to bring about those conditions in our economic and social life that would enable the system of free enterprise to operate successfully with the largest possible degree of social justice."\textsuperscript{160}

Strong resistance also continued. The 1937 report of the La Follette

\textsuperscript{157} I. Bernstein, supra note 141, at 769, 787-88. Between 1935 and 1945, the NLRB conducted 24,000 representation elections involving six million workers. In all but 16.1\% of the elections, employees chose union representation. F. Dulles, supra note 78, at 280.

\textsuperscript{158} Between 1935 and 1945, the NLRB disestablished approximately 2,000 company unions. F. Dulles, supra note 78, at 280. See also Derber, supra note 137, at 4.

\textsuperscript{159} I. Bernstein, supra note 141, at 770, 772-74.

\textsuperscript{160} F. Dulles, supra note 78, at 312. See generally I. Bernstein, supra note 141, at 776-83.
Civil Liberties Committee documented an undeniable pattern of employer financed "labor espionage," violence, and campaigns to organize community opposition to unions. The American Liberty League organized an extraordinary campaign to marshall legal opinion that the Wagner Act was unconstitutional, and many employers justified noncompliance by reliance on its asserted unconstitutionality. After the Supreme Court's 1937 decision holding the Wagner Act constitutional, employer groups continued a strategy of opposition. Discrimination against employees for engaging in union activities was rampant; the NLRB was denounced as "public enemy number one"; pressure was mounted to restrict the Board's jurisdiction; and a litigation strategy seeking to contain both unions and the scope of protections afforded by the Wagner Act was initiated. Moreover, proposals to amend the Wagner Act were soon introduced. In particular, arguments were mounted that legislation was required to regulate certain aspects of union government. Phillip Taft reports:

It was charged that labor organizations were guilty of improper handling of their finances, that their dues and initiation fees were excessive . . . that many workers belonging to labor unions were held captive by union security agreements [and that] unions through closed shop provisions in their contracts with employers were excluding workers from particular labor markets . . . . Complaints were made of serious Communist influences within some unions and fears [sic] that others might use their financial resources for political purposes.

Labor unrest following World War II galvanized political opposition to union power. Accordingly, in 1947, Congress overrode a presidential veto to enact the Taft-Hartley Act.

Taft-Hartley is significant both for what it did and did not do. On the one hand, it can be seen as a reaffirmation of the national commitment to

161. F. Dulles, supra note 78, at 276-79.
162. I. Bernstein, supra note 141, at 515, 639, 646.
164. Between 1935 and 1945 in cases involving employer discrimination, the NLRB ordered three hundred thousand employees reinstated with back pay totalling nine million dollars. F. Dulles, supra note 78, at 280.
165. I. Bernstein, supra note 141, at 663-64, 666-71.
166. Taft, supra note 20, at 352.
167. During 1946, a pattern of strikes seriously disrupted the national economy. During late November, 1945, a total of 500,000 workers were on strike and by January, 1946 almost two million workers were simultaneously on strike. During the 12 months following V-J day the nation experienced 4,630 work stoppages and over 5 million workers had struck, causing a total of 120 million worker-days of lost production. F. Dulles, supra note 78, at 358-67.
the practice and procedure of collective bargaining. There was no turning back from the view that the individual had a right to a voice at the workplace, and the best hope to secure that voice remained with the organized group. Yet the emphasis changed from protecting the group, to placing controls on it in the interest of dissenting individuals, other groups, and society-at-large.

Accordingly, the federal government, for the first time through legislation, assumed responsibility for protecting individuals and small groups of workers from the larger group by regulating union government at the workplace and within unions. The right to refrain from participating in concerted activities was declared a statutory right and unions were prohibited from restraining or coercing individuals choosing to exercise this new right.\textsuperscript{168} The legislation supported the appropriateness of small bargaining units to protect groups of workers who believe their interests conflict with the interests of those in a larger bargaining unit.\textsuperscript{169} Agreements requiring union membership as a condition of hiring (the closed shop) were made unlawful. Agreements requiring union "membership" as a condition of continued employment (the union shop) were permitted but subjected to complex restrictions. Among these were the right of states to prohibit such agreements,\textsuperscript{170} the requirement that none could be initiated without majority vote of the affected employees, and the right of employees to revoke such agreements by majority vote.\textsuperscript{171} Provisions permitting employees to rescind a union's bargaining authority through an NLRB conducted election were added.\textsuperscript{172} Excessive or discriminatory union initiation fees were prohibited under certain circumstances.\textsuperscript{173} Provisions for filing union financial and other reports with the Secretary of Labor were added in an attempt to foster greater democratic procedures within unions.\textsuperscript{174} Union political contributions and expenditures were regulated.\textsuperscript{175} Contracts be-

\textsuperscript{168. Taft-Hartley Act, §§ 7, 8(b)(1)(A).}
\textsuperscript{169. Taft-Hartley Act, §§ 9(b)(1) & (2), 9(c)(5). \textit{See also} Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 64 (1975) (shaping appropriate bargaining units combines employees with a sufficient commonality of interest "to ensure against the submergence of a minority with distinctively different interests in the terms and conditions of their employment.".).}
\textsuperscript{170. Taft-Hartley Act, §§ 8(a)(3), 8(b)(2), 14(b).}
\textsuperscript{171. Taft-Hartley Act, § 9(e)(1). The requirement of union shop authorization elections was repealed October 22, 1951, for in 97.1\% of the 46,146 union authorization elections held, the union shop was approved. 85.7\% of the over 5.5 million workers who cast ballots voted such approval. Taft, \textit{supra} note 20, at 354-55.}
\textsuperscript{172. Taft-Hartley Act, § 9(e)(1)(A)(ii).}
\textsuperscript{173. Taft-Hartley Act, § 8(b)(5).}
\textsuperscript{174. Taft-Hartley Act, §§ 9(f), 9(g). \textit{See} Taft, \textit{supra} note 20, at 355-59.}
\textsuperscript{175. Taft-Hartley Act, § 304.}
tween labor organizations were made enforceable in federal court. Finally, a union desiring access to the NLRB’s processes was required to have its officers file non-Communist affidavits. Other provisions seeking to regulate union government more extensively were urged but rejected by Congress due to the fear of creating “complete and unlimited control by the Federal Government of the internal affairs of labor organizations.”

Whether these restrictions were appropriate or effective is an independent and important issue. Their enactment is, perhaps, most significant as an expression of unions’ assigned societal role. The society granting worker groups the legal right to assert group interests through self-organization and collective bargaining held worker groups to a concomitant duty of restraint. Moreover, protecting the assertion of group interests through legislation also entailed a commitment to mediate, through legislation, certain social conflicts thereby created. Few in 1947 saw Taft-Hartley as the first installment of the prediction advanced thirty years earlier by the dissenters on the Commission of Industrial Relations of 1916 that “if the State recognized any particular union by requiring the employer to recognize it, the State must necessarily guarantee the union to the extent that it must strip it of any abuses that it may practice.” The federal law regulating union government had now been launched, but without serious consideration of the complexities of the mediation task or the dangers to union independence.

Organized labor soon began a mostly unsuccessful effort to repeal or amend Taft-Hartley, but by 1954 concentrated on preventing enactment of bills greatly expanding the Taft-Hartley controls. In 1957, the Senate created a special committee, the McClellan committee, to study improper practices among unions and employer groups. The McClellan committee hearings, Wellington states, “revealed extensive corruption in a small number of unions, but the hearings also resulted in a renewal of interest in unions and their appropriate role in society.”

Following these hearings, Congress enacted the Labor Management Reporting and Disclosure Act (Landrum-Griffin Act) in 1959. While the Mc-

176. Taft-Hartley Act, § 301(a).
178. H.R. REP. No. 245, 80th Cong., 1st Sess. 77 (1947) (minority report); see Finkin, supra note 4, at 202.
181. H. WELLINGTON, supra note 4, at 198.
Clellan committee testimony and initial legislative proposals focused on certain corrupt practices of union officers, mostly involving financial abuse, the central thrust of the statute, as enacted, is protection of democratic procedures in union government. The arguments successfully advanced to the Congress urging enactment of these protections demonstrate that, as in 1935, unions were understood to serve the dual economic and democratic functions that had been articulated over one-hundred and fifty years earlier during the criminal conspiracy trials. As Senator McClellan stated to the Senate, strong unions serve a vital economic function, for "the individual worker in an industrial economy has little or no power, when he stands alone, to deal effectively with his corporate employer." 182 Moreover, unions add self-government to industry because only through the group and collective bargaining does the worker have an effective voice. The Report of the Senate Committee on Labor and Public Welfare also recognized that national labor policy had assigned unions a "vast responsibility" for the economic welfare of the workers they represent. This function fractionalizes power by countering other private and public power. Accordingly, the report cautioned against excessive governmental interference that would "undermine union self-government...weaken unions in their role as collective bargaining agents [or] cross over into the area of trade union licensing and destroy union independence." 183

Still, in 1959, the ambivalence continued concerning worker groups' assigned role with regard to their relationship to individuals and to the larger society. The McClellan committee investigation had raised the issue, and the Landrum-Griffin Act sought to address it. Like Taft-Hartley, Landrum-Griffin was a statement that unions' role includes a duty to exercise restraint as it acts to advance group interests: specifically to abstain from depriving the individual a voice within the group or permitting group control to reside with a few.

This duty was seen to attach for two reasons. One view, expressed by the Senate committee, reasoned that by urging the adoption and enjoying the benefits of an affirmatively favorable national labor policy, worker groups had accepted, as part of their role, the responsibility to "permit the individual to share in the formulation of union policy." 184

Senator McClellan advanced this view but also urged a second. He understood that national labor policy justifies protecting the assertion of group interests, because the group serves not only an economic but also a

democratic function. Without the group, the individual would have no effective voice at the workplace, and would be subject to the tyranny of superiors. Accordingly, he argued, unless the group's assigned societal role includes permitting individuals to share in the formation of union policy, the "other provisions of law may be of little benefit and meaningless." For if a union member were to become as voiceless within the group as he is as an individual at the workplace, national labor policy will then have failed. Substituting the tyranny of the group, or a few within it, for the tyranny of an employer effects no net gain for the individual.

National labor policy had taken a giant step in a remarkably short time. The Wagner Act recognized and protected the right of the group to assert its interests because the economic and democratic function claims of union proponents had gradually been accepted. Taft-Hartley and Landrum-Griffin had reaffirmed the commitment. The unions' role was seen also, however, to include an obligation to exercise restraint with regard to individual interests both at the workplace and within the union. Perhaps most significantly, the federal government had assumed a substantial statutory obligation to "guarantee" unions to the extent of accommodating individual rights and union authority. Finally, the risk that paternalistic regulation could destroy union independence was now openly discussed.

Although still ambivalent, Congress had finally settled on a somewhat abstract view of unions' assigned societal functions. Not surprisingly, this did not end the debate. Canvassing the functions unions presently perform, and how others—the general public, union members, union and business leaders, and the academic community—view union's societal role will sharpen the contours of the continuing controversy and expose the accommodation tasks law has assumed.

2. Contemporary Attitudes

a. Economic Function

Today, it is widely accepted that collective bargaining is a union's primary function. Yet its scope is so vague as to obscure many issues confronting national labor policy and the law regulating union government.

Certainly, collective bargaining includes attempting to advance the economic welfare of bargaining unit members. The perception of the general

public and most workers is that unions are necessary to improve wages and benefits, and that workers' economic gains have been due primarily to labor unions. Kochan's 1978 study of data obtained from a nationally representative sample of 1500 workers found that over 85% agreed unions improve wages, and in response to open-ended questions, "[t]he most common positive thing mentioned was that unions improve the wages and benefits of their members." Others question these conclusions. Many in the business community assert that unions' contribution to economic advancement is illusory since real income increases only as productivity increases. Indeed, many argue unions have restrained the growth of real income by restricting productivity gains. Lipset, for instance, reports "economists are tending to agree that unions have little enduring or major effect on the distribution of industrial income, or on the real wages of workers." Some economists add that unions adversely affect the equality of income distribution among workers. Others, however, disagree. The only consensus is that under certain conditions unions have been able to raise wages for their members and, again under certain conditions, this can be done without raising prices or adversely affecting other workers.

Bok and Dunlop, confronting this evidence, raise the obvious question: What, if any, clear economic purpose does collective bargaining serve? They conclude: "If unions have not greatly influenced the amount of compensation, they certainly have altered the form in which it has been given" by increasingly channeling the total wage bill into such fringe benefits as

187. See D. BOK & J. DUNLOP, supra note 45, at 13-14, 19 (summarizing poll data up to 1966); Labor Outlook, Opinion Outlook, February 23, 1981, at 3-4 (summarizing poll data up to 1976).
190. Lipset, supra note 42, at 8 & n.12 (1961); Lipset, Trade Unions and Social Structure: I, 1 Indus. Rel. 75, 84 & n.21 (1961) (collecting authority).
pensions, health, and welfare benefits.\(^{194}\)

As the demand for these and other benefits increases, collective bargaining will become increasingly complex, taxing not only the technical skills of union leaders but also their ability to share decisionmaking with the membership group. Moreover, workers’ disparate interests due to differences in age, skill, gender, race, occupational group, and education may increasingly raise conflicts regarding the allocation of the wage bill to specific groups and for specific types of fringe benefits. Thus, the law regulating union government can be expected to become increasingly involved.

The union collective bargaining function also includes efforts to enhance job security. Barbash concludes that the “dominant theme of union collective bargaining demands in recent years has been defense against job insecurity,” and that many union leaders believe job security is even more important to workers than wage increases.\(^{195}\) Job security issues are fundamentally issues of job allocation: obtaining employment and maintaining it. Job allocation strategies are premised on the concept that a present job is a property interest that ought to be protected. Reder argues that respect for this interest “is rooted in what . . . may be term[ed] the ‘ethics of the queue’. . . . [N]ewcomers shall not usurp the ‘places’ of those already having them [and] scarce and desired things shall be rationed ‘first come, first served.’”\(^ {196}\) Anyone who has waited in a line knows the “ethics of the queue” are not universally recognized. In labor relations the closed shop, for instance, is certainly controversial. In addition, how are two waiting lines, or seniority rosters, to be merged? These and many other job security conflicts will arise as unions perform their collective bargaining function.

Employee economic security also includes protection against capriciousness, error, or arbitrariness in the application of personnel policy. Accordingly, collective bargaining entails negotiation of contract provisions defining rights and duties, and participation in the administration of these provisions through the grievance-arbitration procedures now in most con-


\(^{195}\) Barbash, Union Response to the “Hard Line”, 1 INDUS. REL. 25, 27 (1962).

\(^{196}\) Reder, Job Scarcity and the Nature of Union Power, 13 INDUS. & LAB. REL. REV. 349, 353 (1960). See also Barbash, supra note 195, at 29 & n.5; Cox, supra note 41, at 609-10. For a discussion of John R. Commons’s view of the present job as a property interest, see Perlman, supra note 193, at 341-42. But cf. Steelworkers Local 1330 v. United States Steel Corp., 492 F. Supp. 1 (N.D. Ohio), aff'd in part, vacated and remanded in part, 631 F.2d 1264 (6th Cir. 1980).
tracts. Thereby, unions, as one observer has noted, "aid in extending the rule of law to industrial establishments." Here again, individual rights and group authority can collide, raising questions such as the scope of an employee's right to participate, as an individual, in the negotiation and administration of these industrial rules of law as well as the nature of the group's duty to represent the individual.

Finally, the collective bargaining function has begun to include efforts to modify the work environment to make work psychologically more healthy. As higher educational levels have increased expectations, and as "a hierarchical, nonparticipatory and stifling workplace environment" has increased frustrations, collective bargaining agreements have begun to include job satisfaction reforms: worker participation in modifying job design, internal distribution of tasks, and production methods. Yet, paradoxically, both business and union leaders tend to oppose such plans, fearing they will be successful. Many management officials fear a loss of authority and indispensability. Many union leaders suspect labor-management participation initiatives are intended to weaken the union or will have that effect as the traditional adversarial relationship with management is replaced by cooperation. Job enrichment and satisfaction issues, thus, raise a potential conflict between individuals performing daily tasks at the workplace and union leaders responsible to the group for the long-run vitality of the union.

The above modest catalog hardly exhausts the scope of contemporary unions' economic function. Instead, it shows the limited utility of the

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197. Almost all collective bargaining agreements contain grievance-arbitration provisions to resolve contract disputes. See 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) §§ 51:1, 51:5 (1982). Implicitly or explicitly, the vast majority of collective bargaining agreements limit the employer's power to discharge. Id. at § 40:1. See Summers, supra note 95, at 499 & n.104.


200. Id. at 43-45 & nn. 12-23. See address by Thomas R. Donahue, secretary-treasurer of the AFL-CIO, University of Massachusetts' Labor Relations Research Center (Jan. 1982) reported at 109 LAB. REL. REP. 94, 95 (1982) (BNA) (quality of work programs often becomes a "carefully orchestrated organizational and communications link with the employees that can bypass or attempt to supplant the union."). See generally D. BOK & J. DUNLOP, supra note 45, at 354-60.

201. Responding to their cooperative heritage, unions also provide members noncollectively bargained benefits in the form of union sponsored services. "A few labor organizations have provided low-cost housing for members and their families; others offer credit unions, recreation facilities, free legal services, family counseling, or old-age homes. Many provide trained community counselors who advise members on their eligibility and rights under social legislation . . . ." D. BOK & J. DUNLOP, supra note 45, at 82. See also W.
general agreement that unions are assigned such a function. For behind the general agreement lay many conflicts that may demand accommodation through the law regulating union government.

b. Democratic Function

(1) Industrial Self-Government

Unions purport to strive for "industrial democracy." One union leader's perception of this concept is to provide workers a means to participate in "the creation of industrial constitutions." A union publication has stated the concept connotes the means for employees to realize aspirations for "intellectual equality" at the workplace. Phillip Murray, in 1940, succinctly summarized this aspiration as bringing "into play the heads as well as the hands of the workers." It also has been summarized as "the re-creation of the individual as a person who is respected for what he does, who feels that he is being consulted in the determination of policy, and who is kept constantly informed of what is in fact policy." However specifically described, the rationalizing principle is widely accepted: Unions should be a means for workers to achieve through participation the psychological benefits of increased status and dignity.

There is a dissenting view. Bok and Dunlop report that "in contrast to many labor spokesmen and social scientists, employers do not normally regard the union as a valuable means for providing greater 'democracy in the workplace' or for achieving the psychological benefits of a more active participation by workers in decisions affecting their jobs and their welfare." Nor has this dissenting view remained outside the labor movement. As Bok and Dunlop also report, according "[t]o Dave Beck, former president of the Teamsters, members . . . 'join our union for only one purpose; to sell their labor for the highest price they can get. . . . [The union]

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Moore, supra note 74, at 313 (cooperative buying, banking, credit unions, cooperative housing).

202. W. Leiserson, supra note 72, at 53.


204. See N. Chamberlain, supra note 60, at 75.

205. I. Bernstein, supra note 141, at 446.


207. L. Sayles & G. Strauss, The Local Unions 7 (1967); W. Moore, supra note 74, at 312; Kasper, The Size of the Bargaining Unit and the Locus of Union Power, 6 Q. Rev. Econ. & Bus. 59, 59 (1966); Summers, supra note 130, at 275. See also discussion at supra note 149.

208. D. Bok & J. Dunlop, supra note 45, at 25.
is the machinery of our people to sell that labor.' ”

Some members of the academic community share these views. Allen asserts: “[T]he end of trade union activity is to protect and improve the general living standards of its members and not to provide workers with an exercise in self-government.” Hays has similarly suggested that “[w]hat the employee looks to his union for is essentially job security, higher wages, [and] better working conditions!” Moreover, he continues, viewing “the bargaining agreement [as] a kind of legislative enactment which provides the laws under which the employees work . . . exaggerate[s] the importance of the decisions which are made in the course of collective bargaining, [for after the first agreement,] [a]ll that is really left . . . are the details.” Finally, Magrath states that “the measure of success for . . . all unions has been the extent to which they obtain tangible economic benefits for their members.” He posits that “most union members regard their union as a service organization . . . which aids them in attaining economic benefits, [and] [l]ike the passive corporation stockholder, the passive union member think[s] . . . [that] so long as [the union] delivers the goods with reasonable competence he remains uninterested in its affairs.”

Somewhat surprisingly, these basic questions regarding the motives behind union membership have not, until recently, been subjected to empirical analysis. Moreover, much of the early work had been fragmentary. Kochan's extensive 1978 empirical study offers several valuable insights. Using data contained in the 1977 Quality of Employment Survey, Kochan analyzed 800 responses to questions concerning union member expectations of their union and evaluation of union performance. The data shows that union members expect their union to give highest priority to increasing the responsiveness of the union's internal administration: handling member grievances, increasing feedback to members, and providing members with increased influence in the internal government of the union. The second highest priority is increasing tangible benefits—wages, fringe benefits, job security, and working conditions. The third priority concerns job quality—providing more interesting jobs, and increasing the amount of

209. Id. at 362.
211. Hays, supra note 186, at 40-41.
worker say at the workplace. These results reveal the danger in overestimating the relative importance of industrial democracy to workers, for the traditional issues of wages, benefits, and job security have a greater priority. Yet, workers do not view themselves merely as corporate shareholders, as has been suggested. Nor do they view the union, as has also been suggested, as a public utility that merely provides a tangible commodity.

For the data make plain that workers' highest priority is the quality of the union's grievance representation and internal governance. Moreover, Kochan found, "between 60 and 75 percent of all respondents want their unions to exert some or a lot of effort in improving the quality of the work aspects of their job." A regression analysis of the data showed age was the only statistically significant demographic characteristic explaining responses to the quality of work questions: "Younger workers were significantly more interested in having their unions pursue the quality of work issues than their older counterparts."

Precise conclusions must await cross-sectional studies, such as industry and occupational surveys, and longitudinal studies, testing results over time. Present evidence, however, supports the conclusion that workers expect their union to perform both an economic function and a democratic function of providing them a meaningful voice both within their unions and at the workplace. Moreover, if the greater priority now given to quality of work by younger workers continues as they become older, the importance of the democratic function at the workplace may well increase both absolutely and relatively.

(2) Fractionalization of Power Within the Society

Beyond the workplace, unions' democratic function is to fractionalize power within the society. This dimension of a union's societal role has two components. Unions participate in setting wage policy, and thereby, help avoid the necessity of centralized governmental regulation. Additionally, acting as a power center, unions assert group interests against other groups and the government.

(a) Decentralization of Economic Decisions

Unions' contribution, through collective bargaining, to decentralized, private ordering of economic decisions continues to be valued. The

214. Kochan, supra note 188, at 23-27, 33-34. For a summary of these findings, see Kochan, How American Workers View Their Union, 102 MONTHLY LAB. REV. 23, 29 (1979).
216. Kochan, supra note 188, at 25.
217. Id. at 28.
Supreme Court's 1970 decision in *H.K. Porter Co. v. NLRB* is instructive. The NLRB asserted that its statutory power included ordering an employer to adopt a substantive contract term as a remedy for its refusal to bargain in good faith. No section of the LMRA speaks specifically to the question, yet the Court had little difficulty rejecting the Board's position. Relying on the legislative history of both the Wagner and Taft-Hartley Acts the Court stated:

The object of [the LMRA] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. . . . [I]t was never intended that the Government would . . . step in, become a party to the negotiations and impose its own views of a desirable settlement.

The political theory underlying this commitment to private decision-making through collective bargaining has been well-documented elsewhere. Summers explains that "[a]llocation of power and control to the union . . . creates centres of power and instruments of control apart from the State, which then does not become unmanageable or dangerously large. Collective bargaining shortens the reach of central legal control by establishing a separate structure of industrial government as an alternative to suffocating statism." Relying on what might be termed political pragmatism, Bok and Dunlop also see a value in unions' maintaining a viable separation between the government and units of economic power. They reason that

...[e]ven if unions do not have a strong, direct impact upon the real income of their members, their presence helps to gain general acceptance for the rates of pay and . . . help[s] to persuade the worker that the conditions under which he labors are tolerably fair. [Otherwise,] workers might easily demand government regulation as the only practical alternative to protect their interests.

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219. Id. at 103-04. Accord First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 678 (1981) (collective bargaining, "is premised on the belief that collective decisions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole.").
221. Summers, Internal Relations Between Trade Unions and Their Members, 91 INT'L LAB. REV. 175, 177 (1965).
Others have viewed this decentralization of economic decisions as an "axiom" around which our political system is based and an "essential of democracy." It undeniably is widely regarded today as an essential union function.

(b) Fractionalization of Political Power

Contemporary unions are also generally understood to serve what may broadly be termed a political representation function by seeking to stabilize workers' political power. Unions operate as a counter-lobby to that of business and as a countervailing force to protect workers from the "tremendous state power inherent in a collectivist society."

The strategies are varied, including participation in community and local governmental affairs. Leiserson reports that unions get "nominees seated in the governments' inner councils and administrative agencies. When representatives of labor are needed to serve on public boards or on government advisory agencies, organized labor designates them. Organized labor thus regulates group conduct of working people outside the ranks of union organizations as well as those within." Unions also directly and indirectly influence the election of state and local political candidates and lobby to influence legislation.

A profound change has taken place during the last forty years in unions' interest in national politics. Today, unions routinely endorse candidates and contribute large amounts of time and money to influence national elections. They operate as a pressure group within a political party seeking to influence the party's policies, and through extensive lobbying, unions act as a pressure group for a broad range of legislation. An important reason for this political activity is increased awareness among union leaders that collective bargaining cannot end at the plant gate; its arena must extend into both domestic and international public policy, for

224. Hays, supra note 186, at 44.
225. S. Lipset, M. Trow, & J. Coleman, Union Democracy 411-12 (1956) [hereinafter cited as S. Lipset]. See also Reder, supra note 196, at 361.
226. W. Leiserson, supra note 72, at 315.
227. W. Moore, supra note 74, at 315.
228. D. Bok & J. Dunlop, supra note 45, at 82; Barbash, supra note 195, at 31.
229. For an excellent short review of labor's increasingly important role in Presidential election campaigns, see Galenson & Smith, United States, in Labor In the Twentieth Century 50-57 (J. Dunlop & W. Galenson ed. 1978).
230. For a summary of these and other methods of union political action and education, see D. Bok & J. Dunlop, supra note 45, at 384-427, 465; N. Chamberlain, supra note 60, at 117-25.
union and management leaders alone cannot solve the economic problems affecting workers. Steady employment, for example, is a function of the state of the economy, and economy-wide legislation can affect vitally the ability to maintain high levels of employment. In addition, only through public policies encouraging high levels of production and employment can the economy absorb workers displaced by automation. Tax policy, interest rate levels, and international trade policy are but a few additional examples of national concerns vitally affecting workers' economic lives. Barbash has explained the new awareness in economic terms. "[C]ollective bargaining efforts can have only a micro effect. The vexing problems of insecurity can be dealt with only through 'macro' techniques." Mr. Justice Rutledge's classic conclusion seems increasingly to be appreciated. To say unions have no legitimate role in politics, he stated, is to "ignore the obvious facts of political and economic life and of their increasing interrelationship in a modern society."

Unions' political representation function is more complex and controversial when the focus shifts to the question of whose interests unions should represent. The poles on the spectrum of possibilities are easily identified. Clearly a union asserts the interests of those it represents as the exclusive statutory bargaining agent. These interests often conflict in a variety of ways, as noted above, but the unions' function is clearly to accommodate and represent them. Conversely, since at least the beginning of this century, the mainstream of union leaders, and most members of the society, have understood that the unions' function should not be to represent those desiring escape from the wage system through creation of a new social and economic order. Between these poles, however, lay questions of whether, and to what extent, unions' societal role includes representing the interests of workers and others by seeking reform within the existing order.

Unions are viewed by some as "[i]deologically conservative and narrowly self-interested... oriented toward the economic advancement of those in their particular union or trade rather than toward changes in the

231. See, e.g., Reuther, supra note 186, at 78.
232. Barbash, supra note 195, at 31. See also N. Chamberlain, supra note 60, at 74-75; Moore, Notes for a General Theory of Labor Organization, 13 INDUS. & LAB. REL. REV. 387, 395 (1960). For a thoughtful discussion of the proposition that unions are drawn inexorably to an economy-wide role of helping sever the connections between the inflation dynamic and such things as crises in energy and the environment, full or high employment, and high levels of consumer spending brought on by an affluent society, see Barbash, Labor Movement Theory and the Institutional Setting, 104 MONTHLY LAB. REV. 34 (1981).
social system for the benefit of the wider society . . . ." This posture has been justified pragmatically: "[U]nions are conditioned . . . by the amoral practices attendant upon survival in the great American jungle" and members expect the union to maximize their interests and not sacrifice them "to social purpose." This posture is also justified on economic theory. Unlike businesses, "[t]rade unions have found no latter-day Adam Smith to show that when they do the best for themselves, they are doing the best they can for society . . . . [Yet,] unions exist to serve their own interests, not someone else's." Finally, political theory has been raised to argue that "the union does not legitimately claim to speak for the totality of the interests of society." Accordingly, society may accept that unions speak for a limited group interest and regulate the assertion of that interest lest individuals, other groups, or society be unduly harmed.

Others view the unions' constituency, and therefore its function, more broadly. Some, despairing, call for a revitalization of a "union movement" to replace the present attitude of autonomous national and international unions that seek to advance the separate interests of their own members. Others confidently assert that unions, concerned with such things as eliminating slum conditions, providing medical care for the poor and the aged, improving education, and securing civil liberties and civil rights, are an important part of a social reform movement. Indeed, it has been estimated that "three-quarters of the issues that have occupied labor's legislative energies have had no special benefit for unions or union members; they are simply general social-welfare issues." This is applauded on the theory that unless unions "perform the expanded stewardship service of improving the life the worker leads after 5 o'clock," unions will be criticized justifiably for failing to address the concerns most frustrating to workers, thereby leaving these concerns unvoiced and unknown.

Public opinion surveys dating from 1950 consistently have demonstrated strong support among union members and the public at large for unions' efforts to obtain general social welfare legislation. A 1977 survey found

235. Tyler, supra note 203, at 287.
236. Munson, supra note 22, at 501.
237. Blumrosen, supra note 67, at 432.
238. See Roth, supra note 186.
239. D. Bell, The End of Ideology 208-21 (1960); Reuther, supra note 186, at 78.
240. Kemble, Rediscovering American Labor, Commentary, April 1971, at 45, 49.
242. See D. Bok & J. Dunlop, supra note 45, at 24.
76% of almost 1500 adults surveyed believed most unions had served a positive social role by working for such things as "national health insurance, higher unemployment compensation, better Social Security, minimum wage laws and other desirable social needs"; only 10% disagreed and 14% were unsure.

Unions, thus, perceive themselves and are perceived by many others to be a significant force for social reform. What seems controversial is whether this is an assigned social function or a gratuitous contribution. As law elects to regulate union expenditures for political activities, this uncertainty can create conflict and contribute to doctrinal fragmentation.

D. Summary of Unions' Assigned Role

In sum, the contemporary societal attitude is that unions are assigned both economic and democratic functions. Generalizations are hazardous, however. For instance, the generalization that unions serve a collective bargaining function is overly simplistic and vague because it masks many conflicts demanding accommodation. Generalizations such as unions' role is to effect a redistribution of income, may be overinclusive since unions can do this only under certain circumstances. Conversely, the conclusion that unions are fighting institutions engaged in industrial conflict is underinclusive. They are also social institutions providing workers status at the shop and in the wider community. Finally, a generalization may be true on an absolute scale but fail to reflect the relative importance of the function. Such seems to be the generalization that unions perform a democratic function at the workplace. It is an assigned function that is highly valued by workers, yet it remains relatively less important to members than the union's function of securing better wages, job security, and working conditions. Yet neither of these functions is as important to union members as providing them feedback and a voice in the internal governance of their unions.

Perhaps, only two generalizations may safely be advanced. First, American society has accepted business unionism, with its history of group control, political action, and social reform, and has assigned unions, in general terms, the role of advancing the democratic and economic values asserted during the criminal conspiracy trials. Yet, still ambivalent, society seeks to accommodate the conflicting values expressed by the judges during those trials, one strategy being the law regulating union government. Second, unions are assigned many different functions but their relative importance

will vary depending on one’s emphasis of the values each function advances. Accordingly, as long as these values are left unarticulated or confused, unions’ assigned societal role will continue to be variously understood, thereby frustrating law’s attempt to develop a coherent role in preserving and promoting union democracy.

IV. Union Structure and Government

The conventional wisdom, unrelentingly pessimistic, holds that union structure and government at best impede, and at worst preclude, the possibility of union democracy. Other, more recent evidence, suggests minority control of unions may be a tendency though not an inevitability. These contesting views raise questions regarding what model of union democracy is possible, and what degree of public regulation is necessary to attain it. Union structure and government are, therefore, considered next to help clarify further the goals for law and the legal institutions regulating union government.

A. The “Iron Law of Oligarchy” and National Union Structure and Government

Much of our thinking concerning democracy in union government results from organizational theory developed over 70 years ago by Michels, and others, and by the more recent work of Lipset and his associates. This work suggests that the structure and government of all mass organizations such as unions, corporations, and governmental agencies predispose them to control by a few hierarchically organized leaders. Such control is termed oligarchy and its inevitability the “iron law of oligarchy.” Today, Michel’s theory, as reformulated by Lipset, has become standard principle supporting the widely held view that while, nominally, unions are controlled by their members, “the real and often permanent power rests

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247. For an excellent discussion of the nature of oligarchy distinguishing several forms of oligarchical power structures, see J. Edelstein & M. Warner, Comparative Union Democracy 28-53 (1975) [hereinafter cited as Union Democracy].
with men who hold the highest positions."\textsuperscript{248} Several interrelated factors are seen to produce this result.

1. Psychological Imperatives

Incumbent union leadership is seen to share a unique and intense psychological motivation to remain in office and resist the formation of political opposition. First, most union leaders rise from the trades or industries of the workers they lead.\textsuperscript{249} Though major differences exist among national unions, many compensate principal officers on a par with leaders in industry. Almost all provide them salaries, allowances, and retirement benefits substantially greater than they earned from their previous work.\textsuperscript{250} Naturally, such financial security could motivate many leaders to resist vigorously electoral challenges.

Beyond increased affluence, the increased influence, prestige, and power associated with union office can also act as important psychological imperatives. Persons achieving high union office share many of the traits and skills of other national leaders: ambition, aggressiveness, desire for power, and overall leadership ability. Indeed, the motivation to endure the hard work required to attain high office is seen largely resulting from the "opportunity that unions provide for otherwise suppressed leadership talents among industrial workers . . . ."\textsuperscript{251} Thus, the status derived from leadership within the organization is highly valued and not willingly relinquished. Moreover, these leaders are responsible for the operation of powerful institutions, many oversee multimillion dollar administrative budgets; they engage business and political leaders in economic and intellectual combat; and they associate generally with the nation's most powerful leaders. Many are themselves among the nation's most important

\textsuperscript{248} S. Lipset, \textit{supra} note 225, at 5.
\textsuperscript{249} D. Bok \& J. Dunlop, \textit{supra} note 45, at 54-55; \textit{Union Democracy}, \textit{supra} note 247, at 15.
\textsuperscript{251} W. Leiserson, \textit{supra} note 72, at 247. \textit{See generally id.} at 245-51.
decisionmakers, consulted for their advice and cultivated for their assistance. Accordingly, they achieve status beyond their union.

Finally, because in pay and status national union officers often resemble other national leaders more than the union members they lead, they tend to develop values and aspirations that differ from those of the members.\textsuperscript{252} A raging debate continues among sociologists regarding whether union leaders and industrial managers share a basic similarity in attitudes, perceptions, and beliefs.\textsuperscript{253} That debate can be left to others, for there is little disagreement that as national union leaders rise to higher union office, their values diverge from the membership.\textsuperscript{254}

As these differences in pay, status, and values develop, return to previous work may become a bleak prospect many union leaders are unwilling to face.\textsuperscript{255} Yet, that is often the prospect following defeat. For, unlike a corporate executive able to transfer skills to an executive position with another company, union leaders who fail to be reelected seldom can transfer to a staff position with another union. Union officials, moreover, do not have alternative, high status professions to fall back on as do many governmental officials failing to gain reelection. Chamberlain, thus, concludes: "There are few positions of authority in our society which so expose the ex-incumbent to insecurity."\textsuperscript{256} When leaders are ousted, moreover, most fail to return to their prior work, thereby relinquishing both their union membership and their potential as leaders of an opposition within the union.\textsuperscript{257}

The existence and strength of the psychological motivation to remain in office varies, of course, as a function of the leader and the pay and status differentials existing between the union office and the leader's previous

\begin{itemize}
\item \textsuperscript{252} See H. Wellington, \textit{supra} note 4, at 161; Lester, \textit{The Changing Nature of the Union}, 13 N.Y.U. ANN. CONF. ON LAB. 19, 23 (1960); Lipset, \textit{supra} note 42, at 12.
\item \textsuperscript{254} England, Agarwal, & Trerise, \textit{supra} note 253, at 226; Magrath, \textit{supra} note 42, at 508; Strauss, \textit{Union Financial Data}, 14 Indus. Rel. 131 (1975). \textit{See also} Barbash, \textit{supra} note 232, at 37 ("[T]rade unionism sinks its roots in the nooks and crannies of the society and becomes a powerful institution . . . with interests that are, at various points and at various times, distinguishable from the interests of its individual constituents.").
\item \textsuperscript{255} See H. Wellington, \textit{supra} note 4, at 161; Lipset, \textit{supra} note 42, at 12; Magrath, \textit{supra} note 42, at 511, 524.
\item \textsuperscript{256} N. Chamberlain, \textit{supra} note 60, at 70 (emphasis in the original); see D. Bok & J. Dunlop, \textit{supra} note 45, at 174; W. Leiserson, \textit{supra} note 72, at 246.
\item \textsuperscript{257} H. Wellington, \textit{supra} note 4, at 161; Seidman, \textit{supra} note 42, at 40. For a description of how this process deprives members of able opposition leadership, see P. Clark, \textit{The Miners' Fight for Democracy} 115 (1981).
\end{itemize}
Supplementing this motivation, however, are structural forms, inherent in most unions, that facilitate retention of power.

2. Organizational Imperatives

National unions increasingly centralize power around expert leaders and a professional bureaucracy. This tendency has two primary causes. First, being fighting organizations, unions struggle often with powerful employers and to prevail must develop efficient, technically competent organizations. Moreover, most represented employees in the United States are included in large, structurally complex negotiation units. This, and the growing number of complicated bargaining subjects requiring highly rationalized solutions, compel centralized control. Business has responded to these realities by developing bureaucratic managerial structures. Many unions have adapted by instituting the rationalized systems of administration of the employers with whom they deal.

These administrative systems increasingly develop into a complex infrastructure of organizational units staffed by technicians responsible for organizing, auditing, data processing, insurance, education, public relations, legislative affairs, research, legal counsel, community service, and field representation. Even as this organizational trend develops, unions are criticized for having primitive management practices "lagging behind the standards achieved not only in large businesses, but in many of the better-run foundations, hospitals, and government departments." Accordingly, they are pressed to become "more professionalized" and develop more effi-

259. See W. Leiserson, supra note 72, at 238; Lester, supra note 252, at 23; Moore, supra note 232, at 392 n.8.
260. See Lipset, supra note 42, at 11; Magrath, supra note 42, at 508.
262. Barbash, supra note 9, at 47, 52-54; Lester, supra note 252, at 23; Kasper, supra note 207, at 61-63.
263. H. Roth, supra note 186, at 15; H. Wellington, supra note 4, at 160; Lipset, supra note 42, at 45; Magrath, supra note 42, at 514, 524; Segal, Some Efforts at Democratic Union Participation, 48 Amer. Econ. Rev. 53, 62 (1958).
264. D. Bok & J. Dunlop, supra note 45, at 148, 151; W. Leiserson, supra note 72, at 99, 238; Barbash, supra note 45, at 149.
265. D. Bok & J. Dunlop, supra note 45, at 149.
cient and highly rationalized organizations. Yet, the imperatives of such organization—centralized control, expert leaders, and a professional bureaucracy—can, in combination, facilitate control by a dominant minority.

a. Monopolization of Technical and Political Expertise

The imperatives of organization encourage the monopolization of technical expertise by incumbents as the leaders make the important decisions due to their superior knowledge and expertise. As bargaining, for example, becomes increasingly centralized and complex, it is considered a leadership function since the expert leadership is in a better position to make wise decisions than is the membership. This view becomes a self-fulfilling prophecy as ordinary members have little opportunity to gain technical skills required to lead.

Centralized control by expert leaders and a professional bureaucracy can also result in a monopoly of political skills. Wellington observes: “Those in power sharpen their manipulative and rhetorical skills [and] the worker with a latent political flair has little opportunity in the organization to develop his talent except as part of the establishment.” When talented and ambitious leaders who could organize opposition do develop, they are often brought into the leadership group and are thereby co-opted. Predictably, it has been argued, training programs have not been encouraged within many labor organizations. In part, this has been explained by union leaders’ fears that education of subordinates will lead to their increased political and technical competence and self-assurance, resulting in their questioning union policies, as well as the incumbent leadership. Thus, the perception that the incumbents are most fit to lead again

266. Id. at 160-88, 470; Kochan, supra note 188, at 32-33 (behavioral science specialists); Troy, American Unions and Their Wealth, 14 INDUS. REL. 134, 138 (1975) (financial management); Dunlop, What’s Ahead in Union Government, TRADE UNION GOVERNMENT AND COLLECTIVE BARGAINING 198-202 (Seidman ed. 1970) (information system and personnel specialists). For a recent survey concluding the trend is to increase the number of national union staff specialists, see Gray, Unions Implementing Managerial Techniques, 104 MONTHLY LAB. REV. 3, 6 (1981).

267. Magrath, supra note 42, at 508; Moore, supra note 232, at 392-93; Strauss, supra note 254, at 133.

268. See D. Bok & J. Dunlop, supra note 45, at 85; Magrath, supra note 42, at 508.

269. H. Wellington, supra note 4, at 161. See Magrath, supra note 42, at 511.

270. James, supra note 245, at 328 n.272; Magrath, supra note 42, at 507-08.

271. D. Bok & J. Dunlop, supra note 45, at 181-86; Blaine & Zeller, Union Attitudes Toward University Participation in Labor Education: An Examination and Assessment, 16 LAB. L.J. 237, 241 & n.12 (1965); Manson, Internal Union Affairs and the Need for Training Leaders, 11 N.Y.U. ANN. CONF. ON LAB. 1, 3-4 & n.10 (1958); Segal, supra note 263, at 59-60. This trend recently has begun to change. See Gray, supra note 266, at 5-12.
becomes self-fulfilling.

b. Monopolization of the Effective Means of Power

Additionally, the imperatives of organization facilitate minority control because the incumbents' strategic position within the bureaucratic structure allows a few to control many of the effective means of power.

(1) Power to Discipline Members, Officers, and Subordinate Governing Units

Every union must provide disciplinary authority if it is to protect its internal political and fiscal integrity and fulfill its collective bargaining obligations. Typically the disciplinary authority within national unions is shared by the union president and the general executive board exercising legislative, executive, and judicial powers. They are empowered to interpret the constitution, remove or suspend officers and appoint replacements, appoint trustees to administer subordinate union governing units, initiate and adjudicate disciplinary charges against members, and hear appeals of disciplinary charges originating at the local level.272 Appeals from these decisions usually can be taken to the union convention, but seldom with any success.273

This disciplinary power can be used to the incumbents' political advantage. First, union constitutions often grant national officers extensive discretion to discipline based on their opinion or judgment regarding the best interests of the union. This discretion has been exercised to impose trusteeships, to curb dissent, and to influence the outcome of national union elections.274 Second, union constitutions almost always include at least one general or "catchall" prohibition not explicitly defining the behavior outlawed, such as "conduct unbecoming a member" or "bringing the union into disrepute." These provisions also can be used to quiet critics.275


273. See infra discussion at text accompanying notes 310-18.

274. See J. BARBASH, supra note 76, at 135; D. BOK & J. DUNLOP, supra note 45, at 65; UNION DEMOCRACY, supra note 247, at 109-10; W. LEISERSON, supra note 72, at 60-61; Seidman, supra note 42, at 41 & n.10; Summers, supra note 130, at 274.

Third, most unions lack an independent judiciary for, as noted, the legislative, executive, and judicial functions are merged in the national officers. 276 This structure can be a fundamental weakness when the substance of a disciplinary charge involves a policy of the national union, as often is the case when discipline arises in an intra-union political context, or when national officers are asked to review discipline of a political opponent. 277

Given these potentials for abuse, what is, perhaps, most notable about union disciplinary machinery may be that abuse has not been widespread. 278 Yet, as Seidman has concluded, the above defects make union disciplinary procedures faulty "precisely at the point where the political process within the union is involved." 279

(2) Control of the Political Process

Union constitutional theory responds to the power and authority of the national union president through three structural and governmental forms: the general executive board, the national convention, and the periodic election of officers. The executive board is conceived as a check on the president, and the convention and periodic election of officers as a check on both.

(a) The General Executive Board

Executive boards take many forms. Typically, they are composed of the national union's principal executive officers, such as the president and secretary-treasurer, and board members usually holding no other elected national union office, who are typically designated vice presidents or district representatives. 278 Though their powers vary, executive boards usually

under such provisions). But see Union Democracy, supra note 247, at 128 (catchall prohibitions in union constitutions not highly correlated to absence of electoral opposition).


277. See W. Leiserson, supra note 72, at 253-59; Seidman, supra note 42, at 40; Note, supra note 19, at 396.


279. Seidman, supra note 42, at 40.

280. For a discussion of the variations in the composition of national union executive boards, see W. Leiserson, supra note 72, at 222, 224-26; L. Ulman, supra note 84, at 270-301; Marcus, supra note 246, at 68.
share, with the national officers, control over finances, issuance of charters to local unions, assignment of jurisdiction among local unions, calling strikes and authorizing strike benefits, negotiating collective bargaining agreements, determining the union’s legislative and political program, and, as noted above, serving as a trial board or appellate tribunal in disciplinary matters.\footnote{281} In theory, the board acts as a check on the powers of the national officers but, in practice, it seldom has sufficient independence to serve that function.\footnote{282}

First, in many unions the constitutional relationship between the union president and the board virtually guarantees the president’s dominance. In most unions the president has authority to assign board members duties and work territories, exercise general supervision over their activities, and discipline them for failure to perform duties or comply with instructions.\footnote{283} Moreover, as Seidman and Melcher have reported, in more than 25% of the unions studied (reporting a combined membership of almost five million) the national president “has the authority to assign board members to jobs that carry additional pay, sometimes very high indeed.”\footnote{284} Gamm’s more recent study found that in one-third of the unions studied (reporting a combined membership of over seven million) full-time employment for board members is subject to the president’s discretion, though sometimes consent of the other board members is required.\footnote{285}

Board independence is additionally truncated when, as in most American unions, board members are elected at large.\footnote{286} Gamm states:

The election base is of utmost importance in establishing the presence or absence of genuine political life inside the national union . . . . If board members are elected at large, either by referendum or by convention delegates, it is nearly certain there will be little opposition to national officers from within the union.\footnote{287}


284. \textit{Id.} at 80. This 1962 study included 93 national unions reporting a total membership of more than 17 million. \textit{Id.}

285. Gamm, \textit{supra} note 281, at 300. This 1979 study included 81 national unions reporting a total membership of more than 20 million. \textit{Id.} at 301.

286. Seidman & Melcher found that 67 of the 93 unions studied (reporting over 11 million members) elected board members at large. Seidman & Melcher, \textit{supra} note 281, at 73-74. Gamm, similarly, found that 55 of the 81 unions studied (reporting over 12 million members) elected board members at large. Gamm, \textit{supra} note 281, at 301. Accord \textit{Union Democracy, \textit{supra} note 247, at 107.}

When the board is elected regionally, either by a caucus of district delegates at the national convention, by district elections, or by district conventions, each board member can develop a power base within the district independent of control by the national president. A regionally elected board member can, thus, oppose the president's policies or mount an election challenge confident that, should the challenge fail, the board seat will not be lost as long as the power base within the district is secure. Conversely, at-large election systems weaken the board member's regional ties, giving greater power to that individual or group able to control the at-large vote. Each board member, then, is dependent on the others for reelection, because local union leaders look to the executive board member they know for information about other executive board candidates. All at-large elected board members are, in turn, dependent on the president, who enjoys national support and can help secure election of a mutually supportive slate. Accordingly, the governing group values unanimity on major policy issues and can answer dissent or an unsuccessful electoral challenge by a board member by withdrawing support.

A substantial minority of unions safeguards the board's independence by providing a regional election base. In those unions political life is more vibrant. This is not simply a theoretical prediction, for Edelstein and Warner have verified statistically that "the availability of . . . highly placed full-time officials with independent power is one of the most important structural characteristics which facilitates successful opposition [to top-level union officers]."

(b) The Union Convention

Since the rise of the national union as the dominant union governing structure, direct government by a large and widely dispersed membership

288. Id. at 295-96.
289. Id. at 300-06; Seidman & Melcher, supra note 281, at 74-75. The adverse effect of at-large executive board elections is compounded by the normal union convention practice that the presidential election is usually followed immediately by the election of other national officers. An executive board member unsuccessfully challenging a union president would then be required to seek immediate reelection by the convention delegates having just rejected his or her presidential candidacy. Edelstein and Warner conclude: "Opposition of this type would not be taken lightly, and . . . the circulation of 'slates' of administration candidates would make any representation for an opposition unlikely in an election by the convention as a whole . . . ." UNION DEMOCRACY, supra note 247, at 107.
290. See Gamm, supra note 281, at 301-02 (26 of 81 unions studied reporting a membership of almost eight million); Seidman & Melcher, supra note 281, at 73-74 (25 of 93 unions studied reporting a membership of six million).
291. UNION DEMOCRACY, supra note 247, at 319. See id. at 93, 328, 333. See also Marcus, supra note 246, at 67-70.
has been impossible. Therefore, in practically all unions the convention has emerged as an alternative mechanism for member control. Composed of elected delegates from each local union who cast a number of votes in some proportion to the local's membership, the convention is now the national union's ultimate governing body, having final authority over union policy and government. The assembled delegates are a constitutional assembly, a legislature, a court of appeals, a nominating convention, and, in most unions, the electors of the union's chief executive officers. Ideally, the convention acts as a counterweight to incumbent national officers and the executive board by holding them to account for their stewardship; by facilitating informal communication among local leaders and, thereby, enabling them to form coalitions that can influence union policy and elections; and by serving as a training ground for union leaders. It is, in theory, "one of the most direct forms of expression available to the rank and file." Yet, conventions vary widely in fulfilling these theoretical functions. Leiserson concludes:

Some are models of self-government, others mirror the powers of a dominating executive. There are conventions in which the delegate body is not much more than an audience registering approval of programs presented by the officers while it is being entertained. Others are truly deliberative bodies with wide participation by delegates in formulating, discussing, and adopting laws and policies.

Several structural forms explain these dissimilarities.

i. Frequency and Size of Conventions

When conventions are more frequent, the union can be expected to have a more active political life: The incumbent administration has less opportu-

292. For a discussion of the development of the convention as a substitute for direct government by the members, see J. Barbash, supra note 76, at 74-76; L. Uzman, supra note 84, at 243-70.

293. S. Chamberlain, supra note 60, at 62-63; W. Leiserson, supra note 72, at 103-04. For a discussion of several methods of proportional representation of the membership by convention delegates, see id. at 128, 130-32; Segal, supra note 263, at 59.

294. Very few union constitutions provide for amendment by direct vote of the membership. J. Barbash, supra note 76, at 72, 78; W. Leiserson, supra note 72, at 103. Normally a majority vote of the convention delegates is sufficient to amend. Id. at 105, 203.

295. See J. Barbash, supra note 76, at 76-77; W. Leiserson, supra note 72, at 105, 122-23; Union Democracy, supra note 247, at 102-03.

296. See J. Barbash, supra note 76, at 77; Union Democracy, supra note 247, at 103.

297. Marcus, supra note 246, at 65.

298. W. Leiserson, supra note 72, at 126.
nity to solidify its position. Less business accumulates since the last convention, leaving less undone at the next convention and, accordingly, left to the discretion of national officers. Potential dissenters have more meaningful opportunities for horizontal communication, to form voting coalitions, and to express opposition. In unions electing officers at the convention, elections are held more frequently, creating more opportunities for electoral challenge and officer turnover.\footnote{299. See \textit{Union Democracy}, supra note 247, at 105-06; Edelstein \& Ruppel, \textit{Convention Frequency and Oligarchic Degeneration in British and American Unions}, 15 \textit{Ad. Sci. Q.} 47, 48 (1970); Marcus, \textit{supra} note 246, at 65.}

In American unions, the mean interval between conventions is three years and the trend has been toward less frequent conventions.\footnote{300. See J. \textit{Barbash}, \textit{supra} note 76, at 77; \textit{Union Democracy}, \textit{supra} note 247, at 105; H. \textit{Roth}, \textit{supra} note 186, at 97-98; Edelstein \& Ruppel, \textit{supra} note 299, at 49; Marcus, \textit{supra} note 246, at 65-66; Snowbarger \& Pintz, \textit{Landrum-Griffin and Union President Turnover}, 9 \textit{Indus. Rel.} 475, 475-76 (1970).} This is partly understandable since large conventions are very expensive, preparation for them requires considerable work by both officers and staff, and they are unsettling since the incumbent administration must divert attention from the union’s work to the mending of political fences.\footnote{301. See \textit{N. Chamberlain}, \textit{supra} note 60, at 64; W. \textit{Leiserson}, \textit{supra} note 72, at 140, 143-44; Snowbarger \& Pintz, \textit{supra} note 300, at 476.} Increased delay between conventions has also been interpreted, however, as evidence of centralization and loss of membership control.\footnote{302. Edelstein \& Ruppel, \textit{supra} note 299, at 47.} The empirical work of Edelstein and Warner substantiates that more frequent conventions are associated with more election opposition and defeat of top and next to top national officers.\footnote{303. Edelstein \& Ruppel, \textit{supra} note 299, at 47.} In short, good and sufficient reasons could explain the diminished frequency of national union conventions. Yet the benefits of such delays are at least partly offset by the convention becoming less of a check on the incumbent administration.

The size of the convention, moreover, can thwart the convention’s performing its intended functions. Some are as small as fifty delegates while many others attract between 1,000 and 2,000. Some have been as large as 3,000 and 4,000. The mean in a representative sample of fifty-one national unions was nearly 900 delegates.\footnote{304. Id. at 104-05.} With such large assemblies, coordination and communication are difficult. It is impractical, or impossible, to yield time to all who would wish to speak. Important matters must often be decided without the benefit of a roll call vote. These deficiencies have long been recognized, yet the tendency has been to increase the number of
democracy in union government

Delegates. Some unions have, therefore, attempted to ameliorate the problems associated with large size by conducting educational institutes on convention procedures and installing telephone and microphone systems that facilitate debate.\textsuperscript{305} Perhaps the most common response, however, has been the increased use of the committee system. It, perhaps, more than any other development has frustrated the union convention's checking function.

\textit{ii. The Committee System}

Transferring the deliberative work of the convention to committees clearly expedites conducting the convention's business. Nevertheless, the transfer displaces decisionmaking from the elected delegates to the incumbent officers, especially to the national union president.\textsuperscript{306} Convention delegates rarely elect committee members. Customarily, the president alone appoints the members of all committees, though sometimes this power is shared with the union's executive board. The president normally designates the person to chair each committee. Sometimes these appointments are subject to approval by the delegate body but most of the important committees begin their work weeks or months before the convention. Accordingly, this ratification is only a formality in most cases.\textsuperscript{307} The informal political process does restrain the committee appointment power, for district leaders are consulted and effort is made to appoint committees that are representative of the union's various interest groups.\textsuperscript{308} Control is maintained, however, as Leiserson has described:

When opposition groups are well organized and act in the open, they are commonly given representation, though they may be kept off key committees. But in unions with a closely knit officedom . . . the same persons head the main committees in successive conventions to make sure that nothing untoward happens. These are generally officers or paid staff representatives, and care is taken to name committee members who are 'safe.' On all important matters, the committees report what has been previously approved by the officials, and the convention rarely changes or rejects the recommendations.\textsuperscript{309}

\textsuperscript{305} See Segal, \textit{supra} note 263, at 58.
\textsuperscript{307} See J. Barbash, \textit{supra} note 76, at 79; Craypo, \textit{supra} note 306, at 493 n.11, 495.
\textsuperscript{308} See W. Leiserson, \textit{supra} note 72, at 143-44, 187.
\textsuperscript{309} Id. at 187. See also J. Barbash, \textit{supra} note 76, at 79; N. Chamberlain, \textit{supra} note 60, at 69; Craypo, \textit{supra} note 306, at 493-94; Marcus, \textit{supra} note 246, at 70 & n.28.
The work of the convention is done through many committees. One is
the appeals committee. Craypo's analysis of the national convention ap-
peals system confirms Leiserson's above-noted conclusion. Almost all na-
tional constitutions designate the convention as the final appellate body for
disciplinary and administrative decisions.\footnote{Craypo, supra note 306, at 487 n.1. For a summary of the literature evaluating the
efficacy of the convention as a final appeal body, see id. at 487-88 nn.2-3. For a discussion of the
functioning of the normal appeal procedure in national unions, see id. at 489-90; W. Leiserson, supra note 72, at 194, 211-12, 252-79; P. Taft, supra note 212, at 117-80; U.S. Bureau of Labor Statistics, Dept of Labor, supra note 272.}

—Craypo's study analyzing nearly 2000 appeals reported in the convention proceedings of 100 na-
tional unions between 1945 and 1964, produced the following conclusions:

—In almost every union, the president or the executive board appoints the
members of the appeals committee.\footnote{Id. at 493 n.11.}

—The person chosen to chair the committee is most often a member of
the incumbent national administration or an officer of an intermediate
union governing unit, usually a district or regional officer. The remainder
are mostly local union officers or staff representatives.\footnote{Id.}

—Service on the appeals committee is a traditional step toward national office “afford[ing] ambitious local leaders an excellent opportunity to
demonstrate qualities of loyalty and leadership.”\footnote{Id. at 494 & nn.14-15. See also J. Barbash, supra note 76, at 79 (“Committee assignments are allocated to reliable and influential delegates . . . .”).}

—“[M]ost present-day union-related disciplinary appeals are against na-
tional union actions, frequently taken in opposition to local sympathizers,
as are many significant nondisciplinary steps including national supervi-
sion of local unions, forced mergers of subordinate bodies, and jurisdic-
tional awards among competing locals.”\footnote{Craypo, supra note 306, at 492 & table 2.}

—Most reports of appeals committees contain only the appellant’s name,
local union, nature of the offense, type of punishment, and the committee’s
recommendation. They seldom contain the facts, evidence, and related
materials, and delegates rarely receive other, supplemental information.
Indeed, 80% of the appeals are upheld without discussion and only 10% are
debated.\footnote{Id. at 495-96, 505. Only 1% of the appellants appeared before the convention to
state their case. These were mostly union officers and staff employees. Id. at 495.}

—Through agenda control and chairing the convention, the incumbent
officers can control “when the report is made and under what conditions it
is discussed; they decide when debate is stopped and the vote taken; and
they judge the vote.”

In only 28 of nearly 2,000 cases did the convention delegates reverse a committee decision recommending denial of an appeal.

In only fifteen of nearly 2,000 cases did the convention delegates rule contrary to the position taken by the national officers.

Some conventions have guarded their independence by giving important committees special status: electing the members, devoting sufficient time to review, discuss, and debate their reports thoroughly, and even requiring membership ratification of the convention’s action. Even where such structural reforms in the committee system have not been adopted, political activity is not dormant. Committee meetings, if not floor proceedings, sometimes become centers for debate and compromise. The question, then, is not whether dissent survives, for it does, or even whether incumbents have the advantage, for they usually do. Rather, the question is whether the convention’s checking function fails because the committee system strengthens control of the convention by incumbents to the extent that dissent too seldom prevails. The answer normally, though not inevitably, seems to be yes.

(c) The Electoral Process

Union constitutions seldom limit the number of terms an officer may serve and, with rare exceptions, national unions continually reelect the same officers, most often in uncontested elections. Taft’s early survey of union elections in 34 national unions between 1900 and 1948 found that of 202 elections for president only 18.8% had been contested. Of 2,105 elections for other national union offices, secretaries, treasurers, and vice presidents, only 23.7% had been contested. Even when an electoral challenge

316. Id. at 505. Craypo’s findings regarding agenda control are consistent with the earlier conclusions of Leiserson and the later conclusions of Bok and Dunlop. See D. Bok & J. Dunlop, supra note 45, at 75; W. Leiserson, supra note 72, at 144, 198-99.


318. Id. at 503. Eighty percent of all appeals were denied. Most decisions in favor of appellants represent the exoneration of previously disciplined members who disclaimed their past conduct and demonstrated loyalty to the union. Craypo concludes most appeal sustainments serve “to ratify pardons granted by the union’s president, to justify his political expediencies, and to confirm the dominance of the national union in most matters.” Id. at 506. See also id. at 497-99. Seeking to extricate the appeals process from the political process, a few unions have established independent public review boards to hear appeals. See supra note 276.

319. W. Leiserson, supra note 72, at 199-202; Segal, supra note 263, at 58.

320. See D. Bok & J. Dunlop, supra note 45, at 74-75; W. Leiserson, supra note 72, at 193; L. Sayles & G. Strauss, supra note 207, at 167.
was mounted, incumbents were seldom removed. Sandver's review of the literature and more recent empirical analysis of elections in national unions, accounting for 90% of all union members, concluded that the vast majority of officer turnover is caused by death or retirement, not electoral opposition. Incumbents normally are reelected as long as they are willing to serve.

The undeniable overall lack of electoral opposition has resulted in pessimism in many quarters. Taft argues, however, that emphasizing the failure of open opposition obscures the real political process in unions: pre-election compromises before elections often avoid contests; weak candidates withdraw prior to the election; rivals wait until a vacancy develops; union leaders avoid election contests fearing they will show division within the union; and the opposition can force an incumbent into retirement. In Taft's view, "diffused power in unions is at least as significant as the number of candidates running for an election."

### i. Organizational Structure and Election Outcome

Others take a middle course between cynicism and optimism. Perhaps the most extensive empirical work yet conducted examining the self-perpetuation of national union leaders is Edelstein and Warner's study of thirty-one British and fifty-one American unions. Less confident of the diffused power in unions, they argue that "the absence of regular use of [electoral] machinery . . . is a sign of control . . . by the few, with perhaps a disproportionate weight given to a single individual among them." Yet, rather than focusing on the absence of electoral opposition in most unions, they explored the presence of opposition in some, seeking to isolate statistically the factors explaining it. They posited that "consistently effective opposition results from competition between equally powerful potential competitors and their supporters . . . ." To test this hypothesis they conducted correlation and multiple regression analyses examining the re-

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322. Sandver, supra note 250, at 7. See James, supra note 245, at 248 n.5; U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 2079, Directory of National Unions and Employee Associations, 1979, at 52 & table 1 (1980) ("Since the Bureau began collecting data on the turnover of union presidents in 1969, the predominant reasons for leaving the presidency have been retirement, resignation or not seeking another term of office.").
323. P. Taft, supra note 212, at 36, 64. Accord J. Barbash, supra note 76, at 131-35. See also supra note 320.
324. Each of the American unions had a membership in excess of 50,000. Union Democracy, supra note 247, at 87-90.
325. Id. at 33.
326. Id. at 339-40. See also id. at 319.
relationship between certain structural forms within national unions' internal government and the presence and effectiveness of opposition in union elections. They also conducted case studies of several unions. Edelstein and Warner conclude that the "unrelieved pessimism" of the past is unwarranted, for between 1949 and 1966 nearly 20% of the American unions studied had a defeat of a top or next to top officer. Effective electoral opposition in national unions is possible, but requires favorable union governmental structures. Among the most important are: (1) full-time executive boards elected regionally; (2) a relatively large number of full-time elected national officers; (3) smaller and more frequent conventions; (4) referendum election of officers and relative ease of nomination, as opposed to election by delegates at a national convention; and (5) an appeals system that removes the effective power of decision from the national officers, thereby securing basic civil liberties for members and autonomy for local unions, especially with regard to finances and collective bargaining authority.

Edelstein and Warner conclude that "in the long run the outcome of . . . struggles [for control of national unions] is largely predetermined by the organisation of the union . . . ." In their view, "[o]rganisational specifics . . . are the actual operative variables." But opposition candidates face several functional obstacles in addition to union organizational structure.

ii. Functional Disabilities and Election Outcome

Overt abuse by incumbents of a union's election machinery can disable formation of opposition candidacy. If elections are never or infrequently held, if eligibility for office is limited to a few, if the right to vote is denied to many, if the formation of opposition groups is prohibited or their right to communicate denied, if election day fraud prevails—all these things will poison the institution's political life and create insurmountable disadvantages to opposition candidates. No doubt, such abuses have occurred. Yet,
close studies of union election procedures and election day conduct generally conclude that formal election procedures are normally adequate and the incidence of abuse is negligible.\(^3\)

Recently, inquiry increasingly has begun to focus on many functional disabilities confronting national insurgency campaigns. Even when adequate election day procedures are followed faithfully, the incumbent’s control over information and institutional resources can create insurmountable barriers to opposition.

**(a) Control Over Information**

The realities of national union election campaigning make access to certain information critical. James has argued that any candidate must have constituent information—lists of local officers, local members, and work sites—in order to develop support, target mailings to selected groups of members, and reach members directly at their places of employment. In addition, a candidate’s nomination for national union office generally requires securing the support of a specified number of local unions. This requires access to the time, date, and place of local union nominating meetings sufficiently in advance of the meeting to develop local support and turn out enough members to carry the vote. Finally, in unions holding at-large referendum elections, knowledge of polling place locations is also critical, for a candidate will want to place an observer at each poll to detect fraud or other abuse of election regulations.\(^3\) Based on research of several recent national elections, James concludes challengers find this information to be formally unavailable, difficult and time-consuming to obtain, or available in unusable forms. Conversely, the incumbent is often the creator of this information, usually is its custodian, and can always obtain it.\(^3\)

**(b) Control Over Institutional Resources**

**(i) Control Over the Channels of Communication**

In the national union, the leadership enjoys important advantages over rivals by controlling channels of communication. Seidman notes:

> The publicity that an important national head receives in the daily press, the union journal that functions as a press organ for him, the flow of communications in his name to all the local un-

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\(^{336}\) See James, *supra* note 245, at 273-76, 285-86.

\(^{337}\) Id. at 272.
ions, the spotlight that plays on him at the national convention, the expense account that permits him to visit locals throughout the country—all these are political advantages of the first order, impossible of matching by a rival candidate. Best of all, these activities, so vital to a re-election campaign, are carried on throughout his term of office and at the union’s expense.338

This advantage is heightened as the union grows and layers of officials separate the membership and the elected leadership within a large, bureaucratically stratified organization. Members then have less access to one another and to their leadership. The principal lines of communication disseminating information and opinion concerning political and economic issues increasingly run from the national union officers and staff to the intermediate and local union governing units.339 Control of these lines of communication defines real power. Bok and Dunlop conclude, “there will normally be no one with necessary information, resources or means of communication who has an interest in informing the electorate or suggesting alternative policies for the union to follow.”340 Opposition, then, seldom develops. When it does, rivals often lack the resources and organization to communicate effectively their views among the union electorate and bring their name to the attention of the membership.341 This disadvantage is exacerbated in unions having constitutional provisions hampering opposition candidates’ ability to raise the large sums of money needed to publicize their campaigns.342

(ii) Patronage and Other Rewards

Supplementing control over the channels of communication is the network of rewards increasingly available to incumbents. The leadership of the national union can often induce loyalty among local leaders by offer-

338. Seidman, supra note 42, at 38. For other examples of the communications advantage of the incumbent, see W. Leiserson, supra note 72, at 12-24, 179-80, 196; P. Taft, supra note 212, at 36.  
339. See Gamm, supra note 281, at 302.  
340. D. Bok & J. Dunlop, supra note 45, at 85.  
341. Id. at 73. For examples of the high cost of a single mailing to the membership of a large union, see J. Barbash, supra note 76, at 99; James, supra note 245, at 279 n.104. Some unions, recognizing the incumbent’s substantial communications advantage, provide opposition candidates space in the union’s newspaper. See, e.g., Segal, supra note 263, at 59.  
ing cooperation and financial assistance to those confronted by factional disputes or disputes with employer groups. Moreover, the chief executive officer of a national union typically has effective authority to appoint, suspend, and discharge national union representatives, organizers, deputies, staff assistants, and other employees, and fix their salaries, prescribe their duties, and control promotions.

This is a great advantage to incumbents for several reasons. It can be used to “reward supporters or to placate ambitious [persons] heading large locals who might otherwise seek high elective office.” Ambitious local leaders aspiring to a national staff position are under pressure to maintain amicable relations with national officers and staff and not oppose their policies or candidacies. In addition, the technical staff at the union headquarters, as well as the field staff, work for the incumbents’ reelection in order to preserve their jobs. This work includes public relations, legal advice, providing incumbents with important local election event information, and through their contact with members, providing vertical communication to and from national union headquarters.

(iii) Legal Counsel

Separating political from institutional involvement of union counsel can be difficult. The institution must have counsel to advise the leadership, guide its decisionmaking, and defend its legitimate policies. This resource, however, often is available to aid incumbents and can be used to cripple a national insurgent’s campaign. Conversely, “[f]or the insurgent, counsel is always an outside resource.” Yet, when an opposition candidate seeks outside assistance, for legal or financial support, “it reinforces the image of the insurgent as representative of extra-institutional interests and not part of a legitimate opposition movement.”

James summarizes the numerous disabilities national insurgents face as follows:

[The challenger] is opposed by the incumbent candidate plus the institution itself. The key to [the challenger’s] disabilities is that

343. See D. Bok & J. Dunlop, supra note 45, at 178.
344. See id. at 179; Union Democracy, supra note 247, at 101; W. Leiserson, supra note 72, at 63, 99, 237-39; Gamm, supra note 281, at 296-97.
345. Seeid, supra note 42, at 39.
346. See James, supra note 245, at 277-79, 287-88.
347. Id. at 280. James reports that in the combined 10 years of litigation surrounding elections in two large national unions “there is not one instance of the union’s inhouse or retained counsel ever taking a position different from the incumbents whose unions they represented.” Id. at 281 & n.110.
348. Id. at 281-82.
the powers and resources of the institution are thrown into the balance against him. . . . \[A\]n insurgent typically confronts not only the incumbent but also the union as an organized entity. . . . In short, the national insurgent's difficulties are structurally rooted in the fact that the institution is not neutral, but is a powerful force against him.\(^{349}\)

3. National Union Structure and Government: Summary

The conventional view is that achieving any meaningful model of member control of unions is a myth, and aspirations for it, therefore, are doomed to failure. First, the incumbent leaders are strongly motivated psychologically to resist political opposition. Second, the imperatives of organization—centralized control by expert leaders and a professional bureaucracy—predetermine that incumbents will retain power for a variety of reasons:

1) Leaders monopolize technical and political expertise depriving potential opponents of the skills to lead;
2) Incumbents control the legislative, executive, and disciplinary machinery to such a degree that dissent can be quieted;
3) The general executive board fails as a checking institution because it lacks independence, at least when the union's executive officers have constitutional control over the board members' duties and income or when the members are elected at large rather than regionally;
4) Union conventions fail as a checking institution for many reasons, the most significant being their infrequency, large size, and the resulting use of the committee system; and
5) The electoral process malfunctions as a check because incumbents control access to information and the institution's resources such as the channels of communication, patronage and other rewards, and legal counsel.

Others eschew despair, believing informal processes sustain political life in unions. They call attention to the general lack of abuse of both the disciplinary and electoral processes in unions. Informal controls, prevailing custom and practice, and unions' rich democratic tradition are offered as supplements that compel compromise, diffuse power, and check abuse. These careful students of unions offer primarily their years of close association with national unions and their reputations as detached observers to support their conclusions. Their encouragement can hardly be dismissed.

\(^{349}\) Id. at 270 (emphasis in the original). Accord J. Barbash, supra note 76, at 98-99; Lipset, supra note 32, at 11-12.
Yet the glaring disparity between their optimism and the concentration of power residing in self-perpetuating incumbents running unopposed until death or retirement concerns many.

Most recently, inquiry has taken a middle course. Unwilling to join either the literature of pessimism, or subjective optimism, some social scientists and lawyers have begun to uncover the pressure points in union structure and government that explain the presence of active political life in some unions. The “iron law of oligarchy” has been pierced empirically with the aid of modern statistical analysis, unearthing the structural factors most significantly contributing to electoral opposition. Additionally, new and renewed understanding is emerging regarding the realities of national union elections, and the ways national insurgency campaigns are disabled by having to confront not only the incumbent but also the powers and resources of the institution. Based on studies of opposition campaigns, some successful and some not, this work supplements statistical analysis and, again, dispels the iron law of oligarchy phantom by showing how structure can make a difference.

The burden of the argument need not be that national union political life is both alive and well. If, as the available evidence suggests, it is alive and possible in some national unions, if top-down control by a dominant minority is not inevitable, if there are structural pressure points that can be pressed to promote a more active political process within national unions, then law and its effecting institutions have meaningful targets and public regulation has a chance of success. Decisionmakers are then justified proceeding to the difficult questions of what, if any, regulation of national unions' internal affairs is desirable and necessary. Otherwise, serious questions would be raised whether the social cost of such regulation is worth the gain.350

Before proceeding to questions of desirability and necessity, a brief evaluation of local union structure and government is warranted both to determine if democracy is possible in local union government, and to ascertain the relationship between the political processes of local and national unions.

B. The Political Process at the Local Union

1. Local Union Internal Political Processes

Typically, the national organization charters local and various intermediate bodies such as joint boards or district councils. The subordinate un-

350. H. WELLINGTON, supra note 4, at 186.
ions are governed by elected officials, usually a president, vice-president, secretary-treasurer, and an executive board. In craft unions, an elected business agent normally handles grievances, enforces the union's rules and collective bargaining agreements, and generally oversees the union's business affairs. There may also be trustees, a finance and negotiating committee, and other elected or appointed offices. Generalizations concerning the nature of local union internal government are hazardous because of the wide variations found. Yet, certain tendencies and trends can be isolated.

Most local unions do not fit the organizational paradigm tilting mass organizations toward control by a dominant minority. The psychological imperatives that may motivate some national union officers to remain in office and resist opposition have generally not strongly influenced local union leaders' conduct in the past. Traditionally, most have been part-time and paid only a token salary. Even in larger unions employing full-time officers, and craft unions employing business agents, the salaries were usually equivalent to the members' earnings. Nor, in the past, have local union officers often enjoyed great influence, prestige, or the power to dispense patronage or other rewards.

351. N. Chamberlain, supra note 60, at 62-63. The duties of these various officials have been well discussed elsewhere. See L. Sayles & G. Strauss, supra note 207, at 56-75; Ehrenberg & Goldberg, Officer Performance and Compensation in Local Building Trades Unions, 30 Indus. & Lab. Rel. Rev. 188, 189 & n.8 (1977) (business agents).

352. See supra notes 249-58 and accompanying text.

353. N. Chamberlain, supra note 60, at 623; W. Leiserson, supra note 72, at 293. Compensation should not, however, be measured solely by salary. "One of the highly desired compensations for union activity, is the chance to go to state and national union conventions, company-wide bargaining meetings, and the like. The delegates enjoy all-expense-paid trips to great metropolitan centers that they might otherwise never have visited." Many unions traditionally have also offered leaders job security in the form of super-seniority. L. Sayles & G. Strauss, supra note 207, at 68. In recent years, however, the NLRB has eroded substantially a union's ability to compensate through super-seniority. See, e.g., Dairylea Co-op., 219 N.L.R.B. 656, enforced 531 F.2d 1162 (2d Cir. 1976); Note, Super-seniority: Post-Dairylea Developments, 29 Case W. Res. 499 (1979); Memorandum of the N.L.R.B. General Counsel, Cases Arising Under Dairylea Cooperative, Inc., (Sept. 19, 1978), reported at 99 Lab. Rel. Rep. 124 (1978) (BNA). For the impact of the Dairylea doctrine on labor arbitration, see Perma-Line Corp. v. Painters Local 230, 106 L.R.R.M. 2483 (2d Cir. Jan. 23, 1981).

These tendencies are now changing, however, as local unions become increasingly larger, wealthier, and more bureaucratically structured. As early as 1962, nearly half of all union assets were held by local unions. Sandver more recently found that 100 local unions account for 8% of all union members in the United States and the smallest of these is larger than 40% of all national unions. Today, volunteer leaders increasingly are being replaced by paid, full-time local union officers, and all but the smallest local unions retain some professional staff. Gradually, local officers' salaries are outpacing the members' earnings. Indeed, in larger local unions, some officers receive salaries comparable to, or even higher than, the national union president. Thus, psychological imperatives caused by power, status, and affluence differentials between members and local union leaders are now emerging.

These imperatives are beginning to affect local union political life. Several decades ago, turnover of elected officers was common. More recent evidence suggests a new trend. Applebaum and Blaine, analyzing the pay and turnover rates of the major offices in over 2,000 local unions during a five year period, found a significant inverse relationship between amount

355. Larger local unions are one result of the drift toward industrial unionism and away from traditional craft-type structures. See Barbash, supra note 354, at 492-96. Another cause is the merging of small locals to achieve economies of scale and "make possible full-time, better paid union posts that may be attractive to more members." See D. Bok & J. Dunlop, supra note 45, at 145-46, 154-55, 175. See also Allison, Financial Analysis of the Local Union, 14 Ind. Rel. 145, 152 (1975). Some national union constitutions require that locals be large enough to support a paid full-time officer. L. Sayles & G. Strauss, supra note 207, at 153.
356. Troy, supra note 266, at 135.
358. See D. McLauughlin & A. Schoomaker, The Landrum-Griiffin Act and Union Democracy 178 (1979); L. Sayles & G. Strauss, supra note 207, at 159; Barbash, supra note 354, at 493. The ratio of full time paid officers to members in the United States has been reported at 1:300. Typically a local union having several hundred members is financially able to support at least one full-time officer. D. Bok & J. Dunlop, supra note 45, at 54, 150.
359. Troy, supra note 266, at 142; Sandver, supra note 357, at 110; Labor Management Services Administration, Department of Labor, Financial and Administrative Characteristics of Large Local Unions, 59-63 (February 1969) (unpublished study in the U.S. Dept' of Labor Library, Wash., D.C.) [hereinafter cited as Local Unions].
360. For discussion of the relationship between these structural changes and value changes of union leaders, see W. Leiserson, supra note 72, at 289; England, Agarwal & Trerise, supra note 253, at 226; Lipset, supra note 189, at 90, 92-94; Seidman, supra note 42, at 37.
361. See J. Barbash, supra note 76, at 133; N. Chamberlain, supra note 60, at 71-72; L. Sayles & G. Strauss, supra note 207, at 60; Barbash, supra note 9, at 56; Blaine & Zeller, supra note 271, at 240 & n.7.
of compensation and officer turnover. Moreover, they concluded that "[a]lthough turnover in individual office may be considerable . . . most turnover is replacement or exchange from within a clearly defined group."362 Thus, even where members of the group are replaced through death or retirement, the group survives and thereby maintains its control of the organization.

These findings only begin to describe the level of meaningful political life within local unions. For although local incumbents or members of the leadership group increasingly win most elections, unlike national unions, local union elections are increasingly contested, often resulting in narrow victories.363 Thus, local union political life is very much alive, albeit somewhat paradoxically. As local unions grow larger, wealthier, and more bureaucratically structured, and as they offer high salaries, power, and prestige to top officials, the iron law of oligarchy begins to penetrate their political processes. Yet these same changes encourage competition for what have become increasingly attractive union offices.364

Local union opposition candidates, moreover, confront far fewer obstacles than do national union insurgents, and the advantages of incumbency vary considerably depending on the work environment and the locus of power in the local union. In industrial-type unions whose membership is concentrated in one plant, workplace government tends to be intricate, with power diffused among many leaders having face-to-face contact with bargaining unit employees. These are the shop stewards, department chairpersons, the chief steward, members of the negotiating committee, and locally elected officers. Incumbents enjoy little communication advantage over opposition candidates, because members work in relatively close proximity to one another, and the lines of communication spread throughout the shop government. In such unions political life tends to be vibrant.365

As these unions become large, and especially where union members

362. Applebaum & Blaine, The "Iron Law" Revisited: Oligarchy in Trade Union Locals, 26 LAB. L.J. 597, 599, 600 (1975). Accord Koziara, Bradley, & Pierson, supra note 354, at 45 ("[W]hen there are election challenges to [local] incumbent leaders, they do not come from members outside the leadership hierarchy but from people already in the established network."). See Applebaum & Blaine, Compensation and Turnover of Union Officers, 14 INDUS. REL. 156, 156 (1975). See also Seidman, supra note 42, at 37.
363. D. McLaughlin & A. Schoomaker, supra note 358, at 8-10.
364. See generally D. Bok & J. Dunlop, supra note 45, at 45; Union Democracy, supra note 247, at 75; Faunce, Size of Locals and Union Democracy, 68 AM. J. SOC. 291 (1962).
365. See L. Sayles & G. Strauss, supra note 207, at 145-47. See also D. Bok & J. Dunlop, supra note 45, at 77; Union Democracy, supra note 247, at 18.
work at numerous sites over a wide geographic area, such as in building construction and the service industries, members have much greater difficulty communicating with one another and with their leaders. Opposition candidates are then less able to organize an effective opposition. Moreover, employment and market factors often require structural adaptations, shifting power from worksite leaders to full-time business agents granted broad powers to resolve many of the union's most important issues. This structure mitigates against an effective shop steward system of representation that diffuses power.\textsuperscript{366} In short, the work environment conditions the local union's structure and, thereby, the diffusion of power and the advantages of incumbency.

The locus of collective bargaining authority also affects the local union's political life. Where members' elected local leaders negotiate and administer the agreement and are required to submit it to the membership for ratification, participation in union affairs greatly increases, local leaders are held more directly accountable, and member sentiments are more strongly considered. Sayles and Strauss report that member disapproval of local union incumbents' bargaining performance is the greatest cause of local union election contest and defeat.\textsuperscript{367} When, however, the locus of collective bargaining authority shifts to higher units of union government, the members' opportunity to participate declines, their sense of involvement decreases, opportunities for communication dwindle, and a separation between officers and members results, causing political life to atrophy.\textsuperscript{368}

Member apathy has been raised by critics "as sensational proof that [unions] are not controlled by their membership."\textsuperscript{369} While estimates and empirical findings vary, the consensus is that less than 10% of the union

\textsuperscript{366} See D. Bok & J. Dunlop, supra note 45, at 84; Barbash, supra note 354, at 495-96; Seidman, supra note 42, at 38. But see Strauss, Control by the Membership in Building Trades Unions, 41 Am. J. Soc. 527 (1956) (due to small size and cohesiveness, building trades are very democratic). These full-time local leaders become almost unassailable if they control jobs or choice of jobs through the hiring hall or the shape up. Lipset, supra note 42, at 12. See L. Sayles & G. Strauss, supra note 207, at 156 & n.9.

\textsuperscript{367} See L. Sayles & G. Strauss, supra note 207, at 77. See also D. Bok & J. Dunlop, supra note 45, at 77, 113-14; N. Chamberlain, supra note 60, at 71.

\textsuperscript{368} See Union Democracy, supra note 247, at 341; L. Sayles & G. Strauss, supra note 207, at 151-52, 155-57; Lipset, supra note 42, at 45; Perline & Lorenz, Factors Influencing Member Participation in Trade Union Activities, 29 Am. J. Econ. & Soc. 425, 436 (1970). Within the local union itself, centralization of contract administration and dues collection through the checkoff seriously weakens the steward system causing an additional erosion of power diffusion. See W. Leiserson, supra note 72, at 289; L. Sayles & G. Strauss, supra note 207, at 22-23.

\textsuperscript{369} This criticism is reported in L. Sayles & G. Strauss, supra note 207, at 93.
Democracy in Union Government

membership typically attends local union meetings. Moreover, those normally attending are not a cross-sectional representation of the membership. 370

A substantial body of research has evaluated the causes of low participation. 371 Member apathy is seen by some as a manifestation of the members' view of the union as an "administrative agency" delivering a technical service. As long as the service is delivered satisfactorily the member has no greater interest in governing the union than would a customer have in governing the local utility. 372 Member apathy is also seen as a circular problem. Unions must compete with other loyalties of members and other demands on their time. When individual members perceive their participation as relatively unimportant, they have little incentive to participate. Concomitantly, union leaders have little incentive "to encourage participation beyond particular purposes...since active political participation in union affairs breeds 'factionalism' or at least instructions and queries to officers otherwise left to their own devices": Minority control and member apathy then feed one another "emptying democratic forms of real content." 373 Finally, member apathy increasingly is understood as a manifestation of certain individual characteristics: demographic, psychological, and attitudinal. 374

There are several cures for this apathy and the great concern it has generated. First, many local unions successfully encourage greater meeting attendance by providing incentives. Some "provide fines for members who fail to attend a specified minimum number of meetings per year.

370. See, e.g., D. Bok & J. Dunlop, supra note 45, at 74 (less than 10%-15%); N. Chamberlain, supra note 60, at 73 (2%-10%); W. Leiserson, supra note 72, at 285 (less than 10%); L. Sayles & G. Strauss, supra note 207, at 107 (less than 5%); Seidman, supra note 42, at 36-37 & n.5 (2%-5%).

371. For an excellent review of the literature and evaluation of determinants, see Anderson, supra note 40, at 279 nn.4-5; See generally Perline & Lorenz, supra note 368. See also Nicholson, Ursell & Lubbock, Membership Participation in a White-Collar Union, 20 INDUS. REL. 162 (1981) (British unions).

372. See Magrath, supra note 42, at 511. But see supra notes 213-17 and accompanying text.

373. Moore, supra note 232, at 393. See also H. Wellington, supra note 4, at 161; Roomkin, Union Structure, Internal Control, and Strike Activity, 29 INDUS. & LAB. REL. Rev. 198, 205 & n.22 (1976). But cf. Rogow, Membership Participation and Centralized Control, 7 INDUS. REL. 132, 138 n.11 (1968) ("In environments with powerful centrifugal forces at work, centralization of power and initiative may not be the Michel-type oligarchic monster that the literature usually describes, but rather the only viable solution open to responsible leadership.").

When this is enforced, attendance increases, phenomenally.\textsuperscript{375} Moreover, an informal representative process often protects against uncontrolled exercise of authority by union officials. Both formal and informal shop leaders often attend union meetings and act as lines of communication to and from the union's elected leadership. Chamberlain concludes: "The town meeting which is what the union ostensibly remains, has actually been converted into an informal, representative 'town council.'"\textsuperscript{376} Thus, there are two memberships that participate in local union government: the small percentage that regularly attends to the union's business and reports to the larger membership informally, and those who are so informed and comprise a larger "crisis membership" and are ready to interject their voice and vote to resolve particularly important issues.\textsuperscript{377}

In sum, evidence suggests that member control of the decisions made within local union government is possible, but local unions are at a critical stage of development. They are evolving bureaucratic structures centered around paid expert leaders. They are exhibiting officer turnover patterns suggesting concentration of power in a single leadership group. Yet, electoral opposition remains high and insurgent disadvantages are not usually debilitating. Even pessimists recognize "it would be misleading to allow generalizations about internationals to obscure the often very different picture existing at the local union level."\textsuperscript{378} Pessimism reemerges, however, due to the migration of power to the national union.\textsuperscript{379} If local union government is essentially irrelevant, it then matters little that members can influence its decisions.

2. Power Distribution: Local, Intermediate, and National Governing Units

Three union governing units interact with the members and with one another: the local union, intermediate bodies such as a joint board, conference board, or district council, and the national union. These interactions

\textsuperscript{375} L. Sayles \& G. Strauss, supra note 207, at 96. Accord Rogow, supra note 373, at 135. For an analysis of the NLRB's view of permissible incentives, enforceable through union security provisions available to a union to encourage meeting attendance, see supra note 38.

\textsuperscript{376} N. Chamberlain, supra note 60, at 73. Accord W. Leiserson, supra note 72, at 299-301.

\textsuperscript{377} The presence of this larger "crisis membership" has long been recognized. See, e.g., D. Bok \& J. Dunlop, supra note 45, at 74; N. Chamberlain, supra note 60, at 73; Segal, supra note 263, at 54.

\textsuperscript{378} Magrath, supra note 42, at 519. See also James, supra note 245, at 265-66.

\textsuperscript{379} See, e.g., Gamm, supra note 281, at 304; Lipset, supra note 42, at 11; Magrath, supra note 42, at 520.
are defined by the formal procedures of the union constitution or the collective bargaining agreement, and also by informal practices and procedures. In theory, the national union is the decisive governing unit. In practice, however, that unit controlling the collective bargaining function often can effectively assert authority. Where the locus of collective bargaining authority is centralized, effective power tends to be “unitary,” flowing from the top to subordinate governing units. Conversely, where a subordinate body dominates the collective bargaining function, “it necessarily acts with an independence more consistent with a federal than a unitary relationship.”

Most represented employees in the United States are part of large, inclusive negotiation units where bargaining increasingly addresses many complex, varied, and detailed issues of wage structure, fringe benefits, seniority, work rules, and job security. These issues demand highly rationalized solutions and, as noted earlier, national unions respond by centralizing power in expert bureaucracies. Yet, these same forces also have had a decentralizing effect. As bargaining units grow larger, competing interests within a single negotiation unit develop among diverse special-interest groups. Conflict is magnified as the collective bargaining issues become more complex. Kasper notes, “there is an apparent paradox of union power: the larger the bargaining unit, the greater the union bargaining power; but the larger the bargaining unit, the less able the union is to secure the demands of any single group within the unit.”

380. For a discussion of the formal relationship between national unions and subordinate governing units see D. Bok & J. Dunlop, supra note 45, at 150-51; N. Chamberlain, supra note 60, at 63-64; W. Leiserzon, supra note 72, at 86-87, 108-09, 280-82. Babash has identified five parent and union-affiliate relationship models but concludes that most unions develop unique relationships incorporating some of each. J. Babash, supra note 76, at 89-93.

381. See J. Babash, supra note 76, at 140-141, 148; Rogow, supra note 373, at 137 (“A tendency for power and authority to follow the boundaries of collective bargaining structure has been frequently noted in the literature.”).

382. See authorities cited supra at notes 261-62.

383. See supra notes 259, 263-64 and accompanying text.

384. Kasper, supra note 207, at 62. See also Union Democracy, supra note 247, at 53-54.

Over the last several decades, the dominant trend has been increased concentration of union power both through consolidation of national unions and the presence of proportionately more members in larger unions. These structural changes precipitated by changes in technology, growth in conglomerate businesses, the rising costs of operation, and economic adversities, have altered the locus of power within unions at the expense of locals. The structural changes result in membership diversification and decreased cohesiveness requiring unions “to develop appropriate administrative and decisionmaking structures to cope with the classic problems of bigness: loss of contact with the membership, bureaucratic tendencies, internal conflicts of interest among constituencies, and other sources of tension.”
ions, therefore, have created increasingly complex integrated systems of negotiation units with varied special interest groups more or less separately represented. Thus, some issues may be negotiated at a centralized multi-plant, multiemployer, or industry-wide level while others are negotiated at a less centralized, local level. This provides local union leaders greater influence and can provide varied special-interest groups greater representation.\(^385\)

Moreover, even when a local union’s negotiation function is displaced, the shift of bargaining authority is more often to an intermediate governing unit than to the national union.\(^386\) Depending on the market structure of the industry, this intermediate unit may be a geographic or cross-geographic group, such as white-collar, professional, or skilled trades employees.\(^387\) Barbash observes that these “intermediate bodies . . . can become contending power centers in their own right in relation to the national union and in relation to specific local unions. The national union is, therefore . . . a complex system of potentially (and, frequently, actual) contending forms of union government.”\(^388\)

Other forces also operate to diffuse power among a union’s governing units. Even if the local union is displaced substantially from the negotiation process, it continues, in most industries, to play an important role in the administration and enforcement of the collective bargaining agreement.\(^389\) Additionally, while many union constitutions and collective bargaining agreements seem to limit local union collective bargaining autonomy, they seldom reflect fully the relationship between local and intermediate or national governing units. Informal “common law” relationships often locate the real locus of power.\(^390\)


385. See J. Barbash, supra note 76, at 20; Livernash, supra note 261, at 242, 251-53. See also Windmuller, supra note 384, at 53-56.

386. W. Leiserson, supra note 72, at 287-88.

387. See Barbash, supra note 9, at 49-50.


389. See D. Bok & J. Dunlop, supra note 45, at 51; L. Sayles & G. Strauss, supra note 207, at 152; Barbash, supra note 45, at 632.

A national union's supervisory authority can become so extreme that little power remains with the local union and it soon is little more than a service agency. One example is control over finances. A local union's primary sources of income are dues, initiation fees, and special assessments. From this they make per capita payments to the national union and, often, to intermediate union bodies.\textsuperscript{391} In a few highly centralized unions, dues are paid directly to the national union or intermediate governing body, often through checkoff, and remitted to the locals after per capita payments have been deducted.\textsuperscript{392} This power of the purse seriously limits local autonomy, as do high per capita payments that leave little revenues for local union activities. Also, "bargaining tends to be centralized in those few unions where local funds are subject to headquarters' control . . . ."\textsuperscript{393} Conversely, maintaining local autonomy over finances helps keep the local political process a vital part of the members' lives.\textsuperscript{394} Likewise, the extent to which national and subordinate bodies share control over strike funds and organizing, also gauges local autonomy and the vitality of local union political life.\textsuperscript{395} Finally, a national union's ability and proclivity to abuse its trusteeship power or even its power to require that local bylaws conform with the national constitution can strangle that political life.

Some local unions are able to resist attempts to control their activities by higher union governing units. They may have sufficient resources or political power within the organization to obtain greater local control over bargaining or, at least, adoption of contract terms responsive to local conditions.\textsuperscript{396} Local leaders simply may resist passively directives from the

\textsuperscript{391} Leo Troy calculates that in 1970, union members paid approximately 1\% of their annual earnings to unions in dues and fees. Troy, supra note 266, at 141. Accord N. Chamblerlain, supra note 60, at 65 & n.2.

\textsuperscript{392} See D. Bok & J. Dunlop, supra note 45 at 153; Local Unions, supra note 359, at 4-5; W. Leiserson, supra note 72, at 288.

\textsuperscript{393} See Troy, supra note 266, at 136. Per capita payments vary between 3\% and 58\% of local unions' total receipts. The highest payments are by industrial union locals and the lowest are by building trades and longshoremen's locals. See Allison, supra note 355, at 152-53, table 3.

\textsuperscript{394} See D. Bok & J. Dunlop, supra note 45, at 80-81 (dues increase votes allow members to review the union's overall performance and express dissatisfaction); Hickman, Labor Organizations' Fees and Dues, 100 MONTHLY LAB. REV. 19, 19 (1977) ("Efforts to gain rank-and-file approval of dues increases . . . have in some instances become referenda on the overall performance of national leaders.").

\textsuperscript{395} Strike Funds: Roomkin, supra note 373, at 201. Organizing: D. Bok & J. Dunlop, supra note 45, at 143-45, 153; W. Leiserson, supra note 72, at 288, 290.

\textsuperscript{396} See Marcus, supra note 246, at 69; Troy, supra note 266, at 135-36. One study of 100 large local unions found that the assets of each were larger than the assets of almost 50\% of all national unions. One-half of these locals had over 12,000 members. In several national
national union, confident that their own local constituency will not turn them out of office and that the national union's negative sanctions such as trusteeship, fines and compulsory mergers cannot be used often without causing political repercussions and overtaxing the time or resources of the national union.397

The available evidence thus suggests the limited utility of generalizations that the locus of union power has drifted dangerously from the local union to impersonal higher units of union government. There has been a drift toward excessively centralized control making local union political life largely irrelevant. Yet, forces can and often do operate to preserve the relative power of local governing units and maintain the importance of their political processes. Among the most important pressure points are control over collective bargaining, strike funds, and organizing; the power to discipline local unions; and control over local finances.

C. Summary and Conclusion

The above evaluation of union structure and government strongly suggests that preliminary goals for law and the institutions regulating union government are to shun the literature of pessimism, and grasp the realities of union political process. Within each governing unit complex relationships among the leadership, the bureaucracy, and the membership determine the possibility of member participation, communication, influence, and control. Power is distributed through formal and informal interactions that, together, comprise the union's operative political process. This process, organized around democratic forms, can and often does, provide the soil for members to achieve personal and group goals, but it can also veil oppressive rule, abuse of power, and domination by a few hierarchically organized leaders. The above analysis has sought to isolate the pressure points that make a difference and can, therefore, be targets for public regulation. It does not follow, however, that all such targeting is either necessary or desirable. Various models of union democracy must be evaluated within the framework now identified to ascertain which are possible, which will not frustrate unions fulfilling assigned societal functions, and which will require some form of external regulation for their advancement. That inquiry follows. An appropriate role for public regulation can then be posited.

unions, membership, and therefore political power, is concentrated in a small number of these large locals. Local Unions, supra note 359, at 8, 30, 65.

397. See J. Bok & J. Dunlop, supra note 45, at 152, 178.
V. DESIRABILITY OF UNION DEMOCRACY AND GOVERNMENT INTERVENTION

A. Introduction

The nettle of the debate over the desirability of union democracy and governmental intervention has been its compatibility with unions' performing assigned societal functions. As the discussion at Part III shows, the dominant principle underlying unions' role is that worker power groups are inevitable and essential in any modern industrial society insisting that neither combined capital nor government monopolize power. Accordingly, unions are granted rights and immunities to represent group interests. In return, unions are expected to perform economic and democratic functions. Specifically, unions enlarge and balance liberty at the workplace by asserting collective power to offset that of the employer. Workers thereby maximize opportunities for material gain and enhance standing, dignity, and self-esteem through contractual protections against arbitrariness and through participation in their industrial government. Beyond the workplace, unions perform these dual economic and democratic functions by fractionalizing power within the larger society. Unions act as a power center to stabilize workers' political power and to avoid the necessity of centralized wage determination.

The controversy over the desirability of union democracy and external regulation to attain it has centered implicitly on which component of this assigned role should be paramount, and in particular, the emphasis among the different and sometimes conflicting goals and values implicated by each component.

B. Objections to Union Democracy and Government Intervention

The many objections to democracy in unions and governmental regulations to achieve it converge on two arguments: union autonomy and union responsibility.

1. Union Autonomy

To some, proper emphasis requires recognition that bargaining effectiveness gives a union its essential meaning. Accordingly, it is argued, unions must remain able to command support from the members and respect from employers, the latter being gained by a credible strike threat and an

398. See supra notes 46-245 and accompanying text.
399. See J. Seidman, supra note 245, at 10.
ability to control the work force. From this premise flow several conclusions: 1) unions must be able to discipline the work force, in a military sense, both to maintain the ability and willingness to sustain conflict through the strike and to prevent job actions, wildcat strikes, or other unauthorized interference with a union's contractual obligations; 2) union victory requires unity and, therefore, as with a nation at war, "political democracy should be curtailed, for criticism of the war itself, of the objectives for which it is fought, and even of the leaders and their tactics, becomes high treason;" and, 3) like a military organization, unions must be able to act and react quickly and decisively in times of crisis without the constraint that decisions be argued and voted upon in town meeting fashion.

In short, the autonomy argument begins by emphasizing a union's role as a fighting organization, and therefore, places primary reliance on efficiency, strong leadership, unity, and discipline. Taking the argument to its extreme, Magrath concludes that successful conflict with modern industry "demands businesslike, i.e., nondemocratic, organization. However unpleasant the reality, democracy is as inappropriate within the international headquarters of the UAW as it is in the front office of General Motors." One answer to the above has been to reject its premise: that modern unions are locked in persistent antagonism with powerful opposition groups. Such a rejoinder, however, ignores strong evidence that a virulent conflict between unions and employers is a heritage that persists in many industries. Even if reality is a series of labor wars and armed

400. See Barbash, supra note 232, at 37.
401. See L. Sayles & G. Strauss, supra note 207, at 9, 55, 156; Seidman, supra note 245, at 6.
402. L. Sayles & G. Strauss, supra note 207, at 155. See also P. Taft, supra note 212, at 239 (presence of factionalism not necessarily a sign of strength; its absence not an intrinsic weakness); Magrath, supra note 42, at 511 (organized for political or industrial conflict, unions require unity "not unlike that of the state in its foreign policy").
403. See St. Antoine, supra note 44, at 37.
404. Magrath, supra note 42, at 525. See also Seidman, supra note 42, at 36 (Some share a psychology "much like that of a nation at war, fearful lest internal division give an advantage to the enemy").
405. See, e.g., Lester, supra note 252, at 20-24; Lipset, supra note 42, at 41-42.
406. See Bilk, Corrupt, Crusty, or Neither? The Poll-ish View of American Unions, 30 Lab. L.J. 323, 327-28 (1979); Bok, supra note 2, at 1409-11, 1450; Marshall, The Future of the American Labor Movement: The Role of Federal Law, 57 Chi.-Kent L. Rev. 521, 528 (1981) ("[R]elations between labor and management in the private sector have become more polarized in recent years."). Accord id. at 534 (Management lawyer: "I would agree that there has been increased polarization between labor and management in recent years."). Following the 1980 presidential election, the president of the National Right-to-Work Committee is reported to have stated in a letter to members the following: "Everyone knows the
truces, unions must keep in "fighting trim." 407

Still, while unions are often locked in critical tests of strength with employers, such things as protecting dissent, protecting against unfair discipline, requiring fair representation, encouraging leadership responsiveness to rank and file desires, and enforcing fiduciary obligations of officers are not impediments to unions in crisis situations. 408 On the contrary, democratic guarantees advance unions' long-term stability. Lipset and others have found that when discontent is channeled through an internal political process, it is deflected away from the institution itself and onto those in power, resulting in a high degree of loyalty to the union. Otherwise, discontent with the leadership is projected and becomes an attack on the institution. 409 Indeed, unions themselves are often most responsive to the members, and often emphasize democratic procedures, such as membership votes and rallies, at times of crisis, precisely because that is when genuine support is most vital. 410 Decreasing dissatisfaction and increasing member influence have also been shown to strengthen the union by increasing participation. 411 This is hardly surprising, for Kochan's extensive analysis of worker attitudes toward unions found that "the greatest concern of the union members is for increasing the responsiveness of the union's internal administration." 412

Effectiveness in industrial conflict, then, is not immaterial; it simply is not determinative. Unrestrained democracy borders on anarchy and is destructive, Seidman counsels, just as unrestrained power results in dictatorship. 413 Society gains from neither so the question is, as always, one of

union bosses took a real bath in the past election. We've finally got their backs up against the wall." Id. at 523-24.


408. See D. BOK & J. DUNLOP, supra note 45, at 88 n.* ("Democratic procedures are seldom an impediment in crisis situations."); H. ROTH, supra note 186, at 94 (democratic procedures seldom used to harass unions); Seidman, supra note 42, at 36 (perceived conflict between democracy and discipline "more often apparent than real").

409. See Lipset, supra note 42, at 41-42 & authority cited at 41 n.122.

410. See D. BOK & J. DUNLOP, supra note 45, at 88 n.*; L. SAYLES & G. STRAUSS, supra note 207, at 155-56; James, supra note 4, at 251 n.13 ("There is a subtle, but important, difference between weakening an officer's position and weakening the union's bargaining strength.").

411. See D. BOK & J. DUNLOP, supra note 45, at 159-60; Givens, Federal Protection of Employee Rights within Trade Unions, 29 FORDHAM L. REV. 259, 308 & n.258. See also infra note 446 and accompanying text.

412. Kochan, supra note 188, at 23. See generally supra notes 213-17 and accompanying text.

413. Seidman, supra note 42, at 36. In his July 4, 1861 address to Congress, Lincoln formulated the dilemma: "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" quoted in Konvitz, Labor Movement,
Union independence from the state, a related autonomy argument, must similarly be evaluated. Unlike country clubs and private fraternal organizations, unions are neither private nor voluntary in any realistic sense. Rather, they are important economic institutions that convert an individual worker's illusory individual liberty to withhold labor into meaningful collective liberty for all members of the group. Individual liberty is made real when industrial and political conflict are adjusted among "competing units of social and economic aggregation." No country club can claim such importance to an individual's or society's economic well-being. Since economic well-being is one of government's central concerns, there is good reason for its exercising some external control over unions.

Moreover, public policy explicitly encourages the practice and procedure of collective bargaining and enjoins each party to exert every reasonable effort to make and maintain agreements. Government will, if requested, conduct representation elections. If a majority of the bargaining unit employees chooses to have its interests asserted collectively, then, in conjunction with the employer, the union establishes the conditions of employment, controls the grievance procedure, disciplines the work force, and affects almost every other aspect of the workers' industrial life. There is little here that is private. Moreover, there is little that is voluntary, for once collective authority is brought into being by majority vote, the individual is controlled by it as to any relations with the employer. For those desiring to maintain present employment there is, thus, no individual power to contract out of the group.

Tension comes, then, not because unions are private voluntary associations in a traditional sense, but because they are not. It is precisely because unions are among the important "competing units of social and economic aggregation."
aggregation” that their independence from state control is so vital. Yet, increased collective power also creates an increased threat to individual liberty and societal interests. Thus the dilemma.

It is helpful to recognize, as Brousseau argues, that the tension is “between different kinds of liberties and the means to their attainment.” Enjoyment of private independence for momentary individual gain cannot be allowed to impede, and ultimately undermine, the union and the collective liberty it promises. Nor can the exercise of collective liberty be permitted to subjugate completely the individual. An accommodation is required between protection of individual rights and enjoyments, and the group’s collective liberty to determine its own rules without outside interference. Stressing these broader aspects of unions’ claim for autonomy from governmental control may not provide an exact accommodation formula, but will help clarify the issue and the competing values involved.

The final component of the autonomy debate raises the ageless conflict between efficiency and democracy: that unions often suffer from inefficient administration and external efforts to strengthen democratic processes tend to worsen the problem. Bok and Dunlop are among the leading advocates of this argument. They begin with the reasonable premise that the desirability of any democratic procedure in unions should be measured by “whether it will serve the ends of the modern union—to respond to the interests of the membership, to promote them effectively, to deal fairly with individuals and minorities within its ranks, and to exhibit a due regard for legitimate interests of those beyond its walls.”

Democratic process within unions, they urge, can impede these goals in a variety of ways. First, the union’s decisionmaking is skewed by the political process. Policies and programs are too often adopted to curry membership favor rather than because they will serve the long-range interests of the institution. Beneficial programs and policies are abandoned or not supported because, unlike business organizations that are able to hire and fire subordinates, national unions must rely on local union leaders who are elected and have an independent constituency over which the national union has little control. Finally, the political process diverts energies

419. Brousseau, supra note 414, at 24-25 & n.106.
420. Id. at 21-25.
421. See D. Bok & J. Dunlop, supra note 45, at 88-91.
422. Id. at 91.
423. Id. at 88-89. They argue that “[u]nions can . . . suffer because the rank and file make demands without appreciating their long-run effects upon the organization.” The two examples offered are demands for wage increases that threaten union jobs and insistence on strikes that promise to cost more in lost pay than the benefits likely to be achieved.
424. Id. See also id. at 145, 148-49, 151-52, 157-58, 185.
that could otherwise be used to clarify goals and to plan, budget, and de-
velop innovative programs beneficial to the union.425

In addition to these concerns, democratic processes are also seen as ad-
versely affecting the union’s ability to attract, select, and develop the most
able leaders. Those selected by members at the local level may not be the
best qualified, and, therefore, the “election of top local officers is not neces-
sarily . . . the best way, of combining representative government and effi-
cient administration.”426 Appointments to the national union’s staff are
seldom based solely on merit but, rather, are usually influenced substan-
tially by political considerations. This means appointees usually must be
drawn from a pool of elected local union leaders, the composition of which
is beyond the national union’s control.427 The demands of democracy can
also dissuade able potential leaders from pursuing careers in union admin-
istration in favor of careers with business.428

Finally, some have argued that external imposition of democratic
processes is financially costly due to such requirements as bonding and
mailing notices of election.429 To this list might be added the litigation
expense incurred in defending suits brought by members.

These concerns for efficiency potentially implicate many different val-
ues. To the extent the argument proceeds from the unarticulated assump-
tion that union members are fundamentally less able to govern wisely than
are their expert leaders because they are short-sighted, emotional, or irra-
tional, the argument lacks evidentiary support.430 As a commentary on
democracy’s inherent inefficiency it begs the issue, for the question is
whether unions can long perform their societal role without the “ineffi-
ciency” of democracy.431 If, however, these concerns merely put the ques-

425. Id. at 89-90, 163-65, 186-87. Bok and Dunlop argue that innovation comes not from
members’ initiative but from the initiative of the leaders, id. at 82, 148, for union business
“will never compete with television for the attention of the average member.” Id. at 90.
426. Id. at 176.
427. Id. at 88, 146, 174-77, 187.
428. Bok and Dunlop see union officers’ low prestige as the reason “that few college
graduates seek careers in union administration.” Id. at 187. Others, however, see in union
democracy the risk that able persons “may be deterred from aiming for careers as union
leaders.” St. Antoine, supra note 44, at 37-38. Accord Wyle, Landrum-Griffin: A Wrong Step
430. See Wellington, supra note 220, at 1330 & nn.18-20. This underlying assumption
has not always remained unarticulated but is advanced without evidentiary support. See,
e.g., Hays, supra note 186, at 42 (“[I]n some situations . . . the shorter view of the members
triumphed over the longer view of the national leaders, and in many of the shops where that
happened there is today . . . much cause for remorse.”).
431. Taft, discussing the absence of electoral opposition in most national unions, argues
that union democracy promotes efficiency. He concludes that “its absence . . . makes re-
tion of how shall the legitimate collective interest to seek efficiency be accommodated with the members’ competing and legitimate interest to control their unions and be protected from the tyranny of the majority, then efficiency becomes an important part of the calculus.432

2. Union Responsibility

Beyond autonomy, some see democracy in unions as undesirable because undemocratic unions are more responsible, both to the community and as collective bargaining partners. Unions’ right to assert group interests is at least partly based on what James calls “a systemic approach to unionism by equating the good of any component of the system, in this case the union, with the good of the whole.”433 Accordingly, unions must exercise collective power responsibly. Difficulty arises not from this abstraction but from its application.1

Some who emphasize unions’ duty to foster industrial stability, for example, question the compatibility of union democracy. They fear union leaders, seeking to justify their incumbency, and viewing “each new contract as [a] platform for the next election,” will intransigently advance irresponsible and unrealistic bargaining demands thereby causing unnecessary strikes or inflationary wage settlements.434 Given the opportunity, members may also refuse to ratify contracts negotiated by their leaders. In addition, “[c]andidates for union office are usually under pressure . . . to prosecute every grievance and demand, however farfetched, in the hope of winning support for their candidacy.”435 Finally, “[where] active opposition exists, . . . officers will refuse to compel obedience to contractual obligations, if compulsion is opposed by large locals of many members. . . . [W]here reelection is uncertain, general officers may not be as eager to

election inevitable, regardless of merit or performance. It, thus may remove a natural deterrent to . . . ineffective administration, since the conduct and policies of the office holder are not critically examined in a free election campaign.” P. TAFT, supra note 212, at 37. See infra text accompanying notes 449-52.

432. This seems to be the underlying view of Bok and Dunlop, who argue that “democratic procedures have a valuable place in union government, [but] a real problem arises in determining how much—and what form of—democracy is appropriate . . . .” D. Bok & J. DUNLOP, supra note 45, at 72. See also St. Antoine, supra note 44, at 55 (“[U]nion democracy is a worthy value and entitled to much weight. But . . . a single-minded pursuit of that objective [should not be] blind . . . to the competing right of a union to regulate its own affairs . . . .”).

433. James, supra note 245, at 252.


enforce discipline or protect the individual member . . . ."\(^{436}\) Efforts to strengthen member influence within unions has even been seen as the villain that “bolster[s] the forces that lead the union to favor positions opposed to the interests of the society at large.”\(^{437}\)

These causal assertions are serious indictments. Wellington argues, however, that “these theories are usually—and quite properly—advanced tentatively. As reflections of empirical data, they lack evidentiary support; as naked assertions, persuasiveness.”\(^{438}\) Others identify the same defects, and add that both “responsible” and “irresponsible” unions are found among those that are most and least democratic, suggesting the lack of a causal relationship.\(^{439}\)

There is evidence, however, that some union leaders are more sympathetic to social reform than the members, and that centralized control of collective bargaining by more insulated national union leaders, rather than local leaders, may result in fewer strikes.\(^{440}\) Accordingly, it may be partially valid that requiring greater leader responsiveness to the members may lead to unionism that is deemed less “responsible,” from a public point of view.

This raises an inescapable conflict. It is, however, not one created by unions or democracy in unions, for as the earlier discussion of pre-union shop society confirms,\(^{441}\) and as Wellington concludes, there exists a conflict “between public responsibility and membership desire [that] is a ma-

\(^{436}\) P. TAFT, supra note 212, at 37.

\(^{437}\) D. BOK & J. DUNLOP, supra note 45, at 87-88. Specifically, union democracy is seen as a threat hampering union programs for social reform because members are less progressive than the leaders. Id. at 87-88, 458-61. Insecurity resulting from electoral opposition in local unions is posited as the incentive for union leaders to suppress dissent and act corruptly. Bok, supra note 2, at 1447-48. Finally, union democracy allegedly helps communist factions in unions by impeding unions’ ability to “clean its house of communists.” See Perry, The Legal Position of Communists in Labor Unions, 9 I.L.R. RESEARCH 8, 12 & n.36 (1963) (summarizing the position advanced by Taft).

\(^{438}\) Wellington, supra note 220, at 1330 & n.20. Coleman warns that irresponsibility arguments raised by industrial leaders must be read cautiously for “employer interest in democratic decision-making may often be expected to ebb and flow with the changing assessments of the ways in which greater member participation in the formulation of union policy would affect the result.” Coleman, The Compulsive Pressures of Democracy in Unionism, 61 AM. J. SOC. 519, 521 (1956).

\(^{439}\) See Lipset, supra note 42, at 6, 34-35 & 6-7 n.8; Yale Note, supra note 4, at 416 & n.27 (collecting authority). See also Lipset, supra note 190, at 81 (“[R]acketeering may be seen as a natural by-product of American culture.” (reporting the observations of Daniel Bell)). For a summary of authority expressing the fear that Landrum-Griffin would cause irresponsibility and evaluating whether it has, see James, supra note 245, at 248 n.4.

\(^{440}\) See D. BOK & J. DUNLOP, supra note 45, at 460-61 (progressive social programs); Roomkin, supra note 373, at 213-14 (strikes).

\(^{441}\) See supra text accompanying notes 72-76.
major problem in every modern capitalistic state . . . ."442 Unions help lead the industrial system away from both despotism and anarchy by contributing to an exquisite tension intended to permit the system of free enterprise to operate successfully and provide workers the largest degree of material comforts and dignity, through their effective voice at the workplace and within the larger society. That the members' voice is not always deemed "responsible" from a public point of view merely restates the inescapable tension that exists. If this voice in industrial government is silenced in favor of more "responsible" leadership, the standing and dignity promised by unionism is sacrificed.443 When that voice is expressed through other means, it will be heard through "[w]ildcat strikes and various other breakdowns in the scheme of stable production [as] are often the membership's response to a leadership unconcerned with their needs."444

Conversely, opening constructive channels for workers to express that voice promotes industrial stability. Dubin, applying to union militancy Lewin's pioneering theories relating participation and commitment, found that worker participation in ongoing work decisions provides a sense of "payoff." Commitment to the productive enterprise increases; the propensity to threaten it diminishes.445 Unions as institutions also benefit from increased member loyalty and participation as members are integrated into the union's decisionmaking processes and perceive a "payoff" from the union and their participation in it.446

In sum, the objections to union democracy and governmental intervention fail to establish its undesirability. They do demonstrate, however, that desirability is a question of degree. By shifting focus to the affirmative case for union democracy and governmental intervention, this question of degree can be clarified more fully.

442. H. WELLINGTON, supra note 4, at 188.
443. See Lipset, supra note 42, at 7 and n.9.
444. James, supra note 245, at 252. See Givens, supra note 411, at 310 n.267 (member participation in the formation of bargaining policy reduces the threat of wildcat strikes); Lipset, supra note 42, at 34-35 (member rebelliousness is caused by a felt sense of powerlessness within the union and a "consequent readiness to 'latch on to causes in order to use [the] power which they have.' . . . [I]t is the decline in democracy . . . that has resulted in a decrease in union responsibility.").
C. The Desirability of Union Democracy

1. The Sufficient Reasons for Union Democracy

The affirmative case for union democracy can be summarized simply: It is integral to unions' performing properly their assigned societal role, irrespective of which aspect of that role one considers paramount.

Only a democratic union can perform a democratic function at the workplace. This is true, a priori, if the goal is to provide workers the dignity gained from participating in the industrial government. It is also true if the goal is more narrowly defined as providing workers liberty by democratizing industrial management, in the sense that the rules and procedures of the collective agreement substitute for arbitrary power. Cox concludes, “[a]n individual worker gains no human rights by substituting an autocratic union officialdom for the tyranny of the boss.”

Focusing on the union’s economic function at the workplace does not require a contrary result. As bargaining representative, the union speaks for the employees; the individual has no effective voice except the collective voice of the union. Also, since the collective agreement governs every important aspect of the worker’s work life there is no practical way to contract out of this governance. “[U]nions will bring to the bargaining table matters that the leadership believes important to the welfare of employees. This is their function as representatives, and it is what the [LMRA] envisions.”

Unlike business, however, unions do not have the “universal quantifier” of profit to check the efficiency of their goals and the means chosen to attain them. An active internal union political process, therefore substitutes for the business marketplace. It, and protections against arbitrary treatment of minority interests within the union, also act as the countervailing checks ensuring that the benefits and burdens of the collective agreement are distributed not only efficiently, but also fairly.

447. Summers states the argument most succinctly. “[T]he worker gains no voice in the decisions of his industrial life if he has no voice in the decisions of the union which speaks for him.” Summers, supra note 20, at 275.

448. Cox, supra note 41, at 610. Accord W. Leiserson, supra note 72, at 54 (“If labor organizations also exercise autocratic powers over their members, then workers may merely be substituting dictatorial rule of union officials for the arbitrary authority of the employer or his managers.”).

449. See supra text accompanying notes 416-18.

450. H. Wellington, supra note 4, at 85.

451. See Munson, supra note 22, at 500 (“The goal of profit, and the fact that it is measured in money, gives to profit organizations a means by which degrees of success or failure can be measured in all ventures. The trade union is less fortunately circumscribed . . . .”). See also P. Taft, supra note 212, at 37.

452. See Givens, supra note 411, at 311-12; Lipset, supra note 42, at 21 & n.53 (union
For these reasons, democratic procedures are desirable even if a union were viewed primarily as a “service organization” providing material benefits to workers.

Emphasizing the unions’ economic and democratic functions beyond the workplace further clarifies the desirability of union democracy. Since workers rely on union representation in the political arena to stabilize their political power, they must be able to control the institutions on which they depend. An effective internal political process provides such control and checks the misrepresentation of members’ views. In this sense societal democracy depends on union democracy.453

The sufficient reasons for union democratic procedures, then, derive directly from the role unions are assigned and have assumed. The essential nexus between these procedures and the unions’ role has long been recognized by unions, at least formally, through their democratic structures, constitutional expressions, and leaders’ representations.454 This tradition, therefore, further validates union democracy’s desirability but does not answer the question of what model of democracy is desirable.

2. An Appropriate Model of Union Democracy

At a high level of abstraction, democracy in the American political mind has been conceived as a process of decisionmaking that, paradoxically, keeps leaders responsive to majority will and limits this will by guaranteeing basic rights to the minority.455 This coexistence of will and limit has

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453. See Lipset, supra note 42, at 8. This contribution of union democracy to societal democracy should not be confused with arguments that union democracy is desirable because 1) a society can only be democratic if all of its constituent parts are or 2) societal democracy depends on union democracy in the sense that it provides members experience in democratic procedures. The first argument fails upon examination. See Magrath, supra note 42, at 521-22. The second assumes a teaching role for unions that has neither been assigned nor assumed. A union’s societal role does include representing group interests beyond the workplace of at least those workers for whom it is the exclusive bargaining representative. See supra notes 225-44 and accompanying text. Union democratic procedures simply reinforce workers’ reasonable claim of control over the union on which they depend.


been explained as follows:

[This system] is not completely democratic if by "democratic" we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason than that they are majorities. [The] model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. [These] are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.\footnote{Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 \textit{Ind. L.J.} 1, 2 (1971).}

That this concept of democracy has been adopted for unions as national labor policy is self-evident,\footnote{Compare, e.g., the majority will values underlying Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) and J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) with the limits explicit in Steele v. Louisville & N. R.R. Co., 323 U.S. 192 (1944) and LMRDA and LMRA §§ 8(b)(1)(A), 8(b)(2), 8(b)(5).} but not very helpful. A simplistic definition of democracy as majority will with minority rights leaves many important questions unanswered. Is this concept of democracy desirable in union government? What is the scope of the majority's right to control decisions, and how shall this right be made effective? Finally, how shall minority rights and majority will be accommodated; or stated differently, at what point does the existence of minority rights, in the face of majority will, become minority tyranny because it prevents the majority from governing where its power is legitimate?

\textit{a. Majority Rule}

\textit{1. Form of Control}

Most would agree that majority rule is a system of decisionmaking affording a majority of active members an effective opportunity to control the formation and implementation of policy.\footnote{See generally R. Dahl, \textit{A Preface to Democratic Theory} 145 (1956).} The threshold point of friction concerns the form of control—direct rule or control through representative government.

One model would provide members no active participation in the formation or implementation of policy, but simply provide a formal process to select leaders responsible for performing this function. Under this passive model, the sole question is whether members support leaders' policies because they like what they get; whether they get what they want is irrelevant "since the majority ha[s] no opportunity to consider major policy decisions." \footnote{political mind simultaneously holds two contradictory ideas: popular sovereignty that suggests \textit{will} and fundamental law that suggests \textit{limit}.}
Sayles and Strauss term this the "safety valve" model. "[U]nions are democratic because, if things get too bad and the members become aroused enough, they have the power to change things."

At the other extreme, substantial direct rule is considered mandatory. One proposal, for example, would require that each small group of union members having common economic concerns be permitted to form interest groups, that the union leadership must deal directly with each interest group when forming bargaining policy, and that each group would retain "a limited right to veto decisions of the majority, to assure that union leadership will heed their concerns."

Neither view adequately balances the competing interests at issue. A town meeting view of democracy seems as inappropriate in modern unions as in modern industrial states. Membership meetings are ill-suited for policy formulation, especially among large conflict resolution groups such as unions, that can fairly claim needs for efficiency and flexibility. It need not follow, however, that majority rule should be limited to officer selection, excluding all other zones of direct membership control. Active participation is central to union democracy because unions provide workers the dignity, status, and self-esteem resulting from participation. Moreover, active participation advances union institutional stability as well as industrial stability.

Accordingly, an appropriate model of majority rule would attempt a middle ground between "safety valve" democracy and direct policy formulation by members. It would provide meaningful opportunities for direct, active participation in policy formation and implementation consonant with competing demands for efficiency and flexibility.

459. J. Seidman, supra note 245, at 8-9.
460. L. Sayles & G. Strauss, supra note 207, at 167 (emphasis in the original).
463. Traditionally, many unions have provided members meaningful opportunities for direct rule through local union membership meetings and votes on such matters as dues increases, strikes, contract ratification, mergers, and decisions to proceed to arbitration. See D. Bok & J. Dunlop, supra note 45, at 77-79, 218-19, 244-45; Grodin, Legal Regulation of Internal Union Affairs, in Public Policy and Collective Bargaining 196 (I. Shister, B. Aaron & C. Summers eds. 1962). Most observers agree that an appropriate model of union democracy must balance direct rule with control through representative government. See, e.g., J. Barbash, supra note 76, at 142; L. Sayles & G. Strauss, supra note 207, at 167-68; J. Seidman, supra note 245, at 9-10. The issue then is not whether to balance, but how to balance. Some, focusing on practical difficulties, begin with a stated presumption against direct rule. See Grodin, supra note 463, at 196 ("direct democracy is . . . impracticable for the modern union"). With others, a negative presumption appears throughout their work, but an unstated premise exists based on preferences for rule by a leadership elite. See, e.g.,
(2) Effectiveness of Control

A second point of friction concerns requirements making majority rule effective. A skeleton democratic system providing a formal participatory process is essential. The minimum requirements of such a process would include the normal civil liberties: 1) The right of citizenship (union membership) to every worker represented by the union; 2) regular elections honestly conducted; 3) reasonable, nondiscriminatorily applied qualifications for nominating, voting, and holding office; 4) the right to attend, speak freely at, and vote at union meetings; 5) the right to express views, arguments, and opinions critical of union leadership and policies; and, 6) adequate protections against discriminatory discipline including fair hearing and appeal procedures. These protections constitute prerequisites of the bare “safety valve.”

Yet, these protections alone are insufficient, for they fail to address many important realities of union structure and government that can make this “safety valve” stick.

The previous discussion of union structure and government has demonstrated that incumbents often can monopolize technical and political expertise and the effective means of power. They can, therefore, manipulate members' satisfaction with current programs and policies by controlling the information provided and withheld. They often can mobilize the financial and personnel resources of the institution for their own political advantage. The disciplinary machinery can be manipulated to discourage dissent. Rewards can be traded for political support. Consequently, union executive boards, conventions, and elections often are unable to serve their checking functions. In short, without more, majority rule through a bare “safety valve” system can be emptied of real content.

Effective countervailing power centers within the union are the essential check allowing majority representative rule to operate effectively as an active, participatory mechanism. Responding to this reality, some have traveled to a far end of the spectrum, demanding a democratic model that includes permanent, institutionalized opposition—a two-party system. Applying notions of collective liberty to unions’ internal life, Lipset argues

D. Bok & J. Dunlop, supra note 45, at 79; supra notes 42-28. Balance requires consideration of all the competing values, but too often the values advanced by member direct control—individual dignity, status, and self-esteem as well as union institutional strength and industrial stability—are eclipsed by short-sighted concerns for efficiency and practicability. An appropriate model of union democracy would assign importance to both but priority to neither.

464. Except for the right to membership, these basic civil liberties are all guaranteed by the LMRDA. See LMRDA, tits. I & IV. See also Lipset, supra note 42, at 21 & n.53 (discussing the importance of the right to membership in the union).

465. See supra notes 267-349 and accompanying text.
that "the most important factor" in achieving leadership responsiveness to members is the existence of formal internal opposition.466 Others have elevated this central importance to an inescapable condition.467 More recent empirical work and case studies piercing the "iron law of oligarchy" have demonstrated, however, that permanent institutionalized opposition is not a necessary condition for effective majority control.468

A democratic model concerned with protecting not only individual members' participatory rights but also the rights and effectiveness of potential opposition groups is essential. The working requirements of such a model fall into three categories: structure, protection of individual and group participatory rights, and neutralization of incumbent advantage.

(a) Structure

Edelstein and Warner's pioneering research demonstrates the central relationship of national union structure, power diffusion, and control.469 Local union structure and the distribution of power among units of union government also contribute to the possibility of local union democracy.470 Accordingly, absent a demonstration that one or more of the following structural forms seriously impedes a union's performing its assigned societal functions, an appropriate model of majority rule would include the following structural characteristics.

At the national level—1) full-time executive boards elected regionally; 2) a relatively large number of full-time elected national offices; 3) smaller and more frequent conventions than are presently the norm; 4) referendum election of officers and relative ease of nomination rather than election by convention delegates; and 5) an appeals system that removes effective control from national officers, thereby securing basic civil liberties and greater autonomy for local unions, especially with regard to finances and collective bargaining authority. These structures have been shown to encourage the development of countervailing power groups capable of mounting an effective electoral opposition.471

At the local level, democratic models should focus primarily on the structural relationship of the local union to other units of union government, rather than on local union internal structure, for two reasons. First, local union internal structure is largely predetermined by the work envi-

466. Lipset, supra note 42, at 36-40.
467. Magrath, supra note 42, at 505, 521.
468. See supra notes 324-49 and accompanying text.
469. See supra notes 324-34 and accompanying text.
470. See supra notes 355-97 and accompanying text.
471. See supra notes 328-33 and accompanying text.
Second, local union insurgent disabilities resulting from local union internal structure are not usually debilitating. Far more significant and debilitating is the overall lack of vitality of political life in the local union that can result from overly centralized control by higher union governing units. Because the distribution of collective bargaining authority among units of union government is largely conditioned by the labor and product market in which a union asserts its jurisdiction, it seems inappropriate that any model of union democracy should set strict norms locating the locus of that authority. Yet, except where inconsistent with the normal operation of these market forces or a union’s bargaining effectiveness, an appropriate model of local union democracy might properly include the following structural relationships between local unions and higher governing units: 1) decentralized local negotiation of bargaining issues vitally affecting local concerns; 2) active bargaining participation by intermediate governing units regarding other important issues, to allow these bodies to function as important power centers in relation to the national union; 3) an important local union role in contract administration and enforcement; 4) local control over its finances, rather than higher union governing units collecting dues and remitting a portion back to local unions; 5) local control over increases in dues rates; 6) decentralized control over strike funds; 7) decentralized contract ratification votes; and 8) limitations to guard against the coercive use of trusteeship, compulsory mergers of local unions, bylaw review, and discipline of local unions or their officers.

The above structural forms should not be considered exhaustive. Nevertheless, these are important pressure points that can make a difference and, therefore, are appropriate components of an effective system of union majority rule except where any are shown seriously to impede a union’s ability to perform its functions.

(b) Protection of Individual and Group Participatory Rights

Active participation with others to form a legitimate group that can make itself heard effectively at a crucial stage in a decision is inconceivable without minority rights. The right of an individual, the ultimate minority, to oppose without reprisal through formal and informal channels must be protected. Otherwise, the marketplace of ideas will be closed and political persuasion rendered impossible. But equally important is the right to or-

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472. See supra text accompanying note 366.
473. See supra text accompanying note 365.
474. See Kasper, supra note 207, at 61-62; Livernash, supra note 261, at 243-45.
475. See supra text accompanying notes 380-97.
ganize effective opposition, for without the group, individual dissent is easily atomized. The group provides moral support and financial backing. It provides opportunities to develop leadership and political skills. Within its own ranks it provides a forum for policy debate thereby tending to increase member interest, knowledge, and participation. It provides the larger membership community alternative candidates and programs. Even when its electoral candidates are unsuccessful, its presence exerts pressure on incumbents to be more responsive to the membership. In short, only a group can be organizationally effective.\textsuperscript{476}

Organized opposition within the union polity may bring associated costs of disruption, absorption of leadership time and energy, and decreased flexibility.\textsuperscript{477} Although these costs do not justify suppressing group opposition or otherwise making it ineffective, they cannot be ignored. The right of effective, organized opposition must be balanced by the present majority's right to control and act. Accordingly, except as limited by the majority's right to protect its decisionmaking processes from paralysis, or limited by some other clear demonstration of overriding institutional interest, an appropriate model of majority representational rule would provide the following participatory rights and protections in addition to the minimum requirements of a bare participatory process already discussed:\textsuperscript{478} 1) the right to organize an opposition group; 2) the right of that group to hold meetings, raise funds, and distribute literature; 3) access to information required to make opposition effective such as union constitutions, collective bargaining agreements, financial disclosure statements, constituent information and the time, date, and location of membership meetings and polling places; and 4) meaningful access to the membership through the union's channels of communication, including its regular publications.\textsuperscript{479}

\textsuperscript{476} See J. Seidman, \textit{supra} note 245, at 37-40; Lipset, \textit{supra} note 42, at 36-40; Magrath, \textit{supra} note 42, at 511-12.

\textsuperscript{477} See \textit{supra} notes 400-46 and accompanying text.

\textsuperscript{478} See \textit{supra} notes 335-49 and accompanying text.

\textsuperscript{479} The relationship between effective group participatory rights by union members and their access to the union's publications is being recognized increasingly by perceptive members of the judiciary, by the academic community, and by union leaders themselves. Jacobs & Spring, \textit{Fair Coverage in Internal Union Periodicals}, \textit{4 Ind. Rel. L.J.} 204, 204 & nn.4-5 (1981). Moreover, structural forms promoting autonomy of local and intermediate governing units also help promote these group participation goals.

The local newspaper may provide a counterbalance to the national publication; the local may have funds and facilities to make protests known throughout the union; it can provide independent leaders and an independent bureaucracy. The same values may be served by district, regional, or departmental structures to the extent they are independent of central control.

Summers, \textit{supra} note 41, at 46.
(c) Neutralization of Incumbent Advantage

A democratic model incorporating the governing structure and the protection of individual and group participatory rights discussed above will foster formation of contending power centers within a union and will begin to neutralize incumbent advantage. These advantages are quite substantial, however, and for many years they were believed to preclude the possibility of democracy in unions. It is appropriate, therefore, to consider if a valid model of union democracy would also include restrictions on incumbent use of the power and resources of the institution.

This question is extremely difficult, for national union incumbent advantage often obtains simply from the fact of incumbency and the exercise of substantial constitutional powers. In many instances it is impossible, or in any event undesirable, to attempt to separate political from institutional motivations regarding such things as the exercise of the appointment power, granting of patronage and other rewards, use of the union's various channels of communication, and even the use of union staff and union counsel. Notwithstanding these limitations, some restrictions are possible and, absent a clear demonstration that they would impede the unions' functions, desirable.

Accordingly, an appropriate model of union democracy would: 1) require the union and its officers to adhere strictly to the institution's constitution and other governing documents; 2) hold the officers to a fiduciary duty with respect to all dealings with the institution, including its various governing units, and with its members; 3) prohibit the expenditure or commitment of the institution's resources, including staff personnel, to promote the candidacy of any single person or group; and 4) prohibit reprisals against elected or appointed officials due to their intra-union political activity.

480. See supra notes 267-320, 335-49 and accompanying text.
481. James argues that the LMRDA's present provisions are adequate to neutralize many of the most important incumbent advantages, but due to restrictive interpretation and the inadequate administration of Title IV by the Secretary of Labor, incumbent advantage has largely remained unchecked. James, supra note 245. Accord Yale Note, supra note 4. Compare Finnegan v. Leu, 102 S. Ct. 1867, 1873 & nn.11-12 (May 17, 1982) (LMRDA protects the "long-standing practice of union patronage" by preserving the "freedom of an elected union leader to choose a [policymaking] staff whose views are compatible with his own" and discharge appointed policymaking officers for having supported the unsuccessful candidacy of the incumbent union president). For a penetrating analysis of the democratic role dissenting union officers can play, see Note, Finnegan v. Leu: Promoting Union Democracy By Suppressing Internal Dissent, 32 CATH. U.L. REV. 287, 305-07 (1982). While the Court in Leu failed to incorporate in its analysis the realities of union structure and government that make achieving union democracy difficult and make officer dissent an important democratic instrument, see id. at 307-09, Leu has left important questions unanswered.
b. Minority Rights

The previous discussion outlines the minority participatory rights upon which a functioning system of majority rule depends. Beyond these, a concept of majority will and minority rights properly includes the right not to participate as a member of the group, the right to fair treatment by the majority, and the right to participate in civic political activities.

A threshold question is whether an appropriate model of union democracy should recognize and protect any such individual rights. Brousseau argues: "The recognition of [minority rights] is a necessary product of a system of collective rights operating within a larger legal, social and political context which rightfully respects individual expectations." Traditions supporting individual rights have deep roots in the American political mind. These traditions are part of the legal, social, and political context within which unions assert collective authority. Conditioned expectations of individual rights accompany the employee entering the plant gate, and the member entering the union hall. These expectations, moreover, are highly valued as evidenced by societal acceptance of union collective authority to protect individual liberty by offsetting employer power. These same values, therefore, compel a model of union democracy that recognizes and protects justifiable expectations of individual rights. Brousseau concludes,

[t]hat the individual's rights may be subsumed to the collective may be necessary; that those rights, now held by the collective may be bartered away, is permitted; but that . . . rights mirroring justifiable individual expectations . . . should be frivolously abandoned, is collective liberty degraded to a caricature of itself, to unprincipled majoritarianism . . . .

Determining which claimed rights "mirror justifiable individual expectations" involves complex accommodations. For present purposes, the principal claims only can be categorized. Beyond that, it must suffice to state the appropriate democratic model in abstract terms: it would ascer-
tain justifiable individual expectations by reference first to the larger "legal, social and political context," for that context conditions expectations. Then, as always, only those expectations not seriously impeding the union's unique societal role would be protected within the framework of union democracy.

The first category of claimed individual rights are those arising at the workplace. While no list can be complete, most controversies will fall within one or more of four categories: compulsory support of unions, the right of fair representation, union discipline for refusing to engage in concerted activities, and questions concerning the right to participate as an individual in the collective bargaining process.

Within the union's internal government, individual members may also claim justifiable individual expectations. They may claim rights akin to substantive due process—that no burden of membership be imposed without a reasonable basis; or akin to procedural due process—that obligations of membership not be vague, that breach of these obligations be based on sufficient evidence, and that the procedures determining breach be fair and adequate; or akin to equal protection—that classifications distributing the benefits and burdens of union membership not be arbitrary.

Finally, individuals may assert justifiable expectations to engage in civic political activities without restraint because they are arguably beyond the union's appropriate sphere of control. For example, a member may wish to sue the union or otherwise initiate legal proceedings involving its interests or engage in civic political activities such as lobbying or supporting a political candidacy. Or an individual may wish to refrain from certain activities such as certain picketing or striking, claiming they are illegal or unlawful.

The above discussion describes a possible and desirable model of union democracy. What remains is whether there exist sufficient reasons for any public intervention to attain democracy in unions, and if so the appropriate role for law.

**D. The Desirability of Government Intervention**

1. The Sufficient Reasons for Intervention

Like union democracy itself, governmental intervention to attain it has associated costs. These costs, however, do not justify total abstention. Yet, because at least some of these costs are real and not insubstantial, the
question of the sufficient reasons for governmental intervention must be considered.

The affirmative case for public intervention to attain union democracy is found in the public interest that unions perform their role and not abuse their collective authority, and in the essential nexus between democratic procedures and this public interest. Accordingly, even if law had not encouraged the practice and procedure of collective bargaining and had not granted unions important rights and immunities in reliance on unions' promise to perform their representational role, the public could and should insist that unions be democratic, simply because the benefits of unionism are so highly valued, and democratic procedures are so closely related to securing these benefits. Any society has sufficient reason to insist on those things essential to its welfare.

Government intervention is also insisted upon by some, however, because of government's support of unions. Through their leaders and political supporters, many unions committed themselves to industrial democracy and its concomitant, union democracy, and relying on these representations society privileged unions' asserting group interests. This creates what Wellington has termed "the morality of promise keeping and the obligation of government through law to protect the reliance and expectational interests generated by the making of [these] promises." The "shock of betrayal," he concludes, resulting when union leaders fail to pursue promised democratic ideals cannot be tolerated or even risked. Advancing a related argument, Cox urges that since unions are to serve democratic functions, and since law has granted unions statutory rights and immunities to fulfill these functions, the community has a concomitant obligation to provide safeguards "as may be necessary to eliminate the risk that the statutory power will not be abused."

Both arguments proceed from the historical record of governmental sup-

487. See supra notes 448-54 and accompanying text.
488. H. Wellington, supra note 4, at 189. Bok and Dunlop advance a related but distinct argument:
[U]nions have chosen to govern themselves by elections and related democratic procedures. As a result, there is a public interest in maintaining the integrity of these procedures, not only to protect the rights of individual candidates, but also to avoid the risk that dishonest practices will breed cynicism toward governmental methods that are vital to our entire political system.
D. Bok & J. Dunlop, supra note 45, at 72.
489. Cox, supra note 41, at 627. See id. at 610-11; Lipset, supra note 42, at 7 & n.10. While there is some empirical evidence that "the Wagner Act had a significant positive impact on unionization . . . for the most part, . . . time-series analyses have tended to view such legislation as incidental, or as effect rather than cause . . . ." Fiorito & Greer, Determinants of U.S. Unionism: Past Research and Future Needs, 21 IND. REL. 1, 9 (1982).
port of unions. Wellington’s “morality of promise keeping” argument focuses primarily on the promises made, and the reliance generated, and Cox’s status under law argument looks primarily to the powers granted. Both positions have surface appeal, but are troubling, for each has an implicit negative that government would not have sufficient reason to intervene had unions not promised to be democratic and had government not granted them unique statutory powers. Of course, some unions and their supporters did not seek statutory protection, and even urged against it.\footnote{490} Unions representing employees such as those working in the public sector or agriculture still do not enjoy the statutory powers and immunities of the Taft-Hartley Act.\footnote{491} Finally, if legislative protections are eroded, would the case for union democracy and governmental intervention concomitantly erode? The slender reed of governmental support of unions, therefore, proves too much; it also proves too little. The value of union democracy does not depend on the source of union power but “in the fact of union power and the function of collective bargaining.”\footnote{492} This is the

\footnote{490. See I. Bernstein, supra note 141, at 195, 820 n.4; C. Daniel, supra note 156. At best, John L. Lewis was ambivalent for he cautioned that the Wagner Act would lead to governmental regulation of unions. See Hays, supra note 186, at 44. But see, I. Bernstein, supra note 141, at 34 (Lewis compared § 7(a) of the National Recovery Act with the Emancipation Proclamation).}

\footnote{491. See LMRA §§ 2(2) & 2(3). Federal employees are now covered by Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5, 10, 15, 28, 31, 38, 39, 42 U.S.C.) [hereinafter cited as CSRA and section number]. One need only review the statute’s preservation of “Management Rights” (CSRA § 7106), the prohibition against striking (CSRA § 7116(b)(7)), or the limitations on the scope of bargaining (CSRA § 7117) to conclude that the rights and immunities granted federal public employees and their unions are far less than those granted by the LMRA. Yet, CSRA § 7120 requires federal employee unions to be free of “influences opposed to basic democratic principles.” If the sufficient reasons for governmental intervention in union government were limited to either “morality of promise keeping” or “status under law,” federal employee unions reasonably could argue that public intervention in their government is unjustified or, at least, that the standards of union democracy applied to private sector unions cannot be applied fully to them. Only when the justification for intervention is severed from arguments related to promise keeping and powers granted to unions can the more fundamental reasons for intervention be clarified. See infra note 492 and accompanying text.}

\footnote{492. Summers, supra note 130, at 278 (“The legal status of unions provided a catalytic metaphor which speeded the reaction.”). See also Bok, supra note 2, at 1398 (“[T]he theory . . . suggesting that the government only chose to intervene after 1935 because it had previously encouraged the growth of union power . . . seems more of a make-weight than an accurate description of events.”). One must concede that Summers’s justification for union democracy and public intervention to preserve and promote it incorporates the unarticulated assumption that collective bargaining, as conditioned by the law regulating it, strengthens unions’ power to promote workers’ relative position in their industrial struggles. Otherwise, unions cannot fairly be viewed as being assigned the important societal functions that justify union democracy in
gravamen of national labor policy and the sufficient reason for govern-
mental intervention in internal union affairs. Accordingly, some external
regulation is clearly justified unless there exist adequate alternatives to en-
sure union democracy.

If employees' threats to withdraw union support were a meaningful
check on a union's failure to provide democratic processes, the case for
governmental intervention would erode. An individual or a dissident
group certainly has the bare legal right to resign from a union. If, how-
ever, one's job depends on union membership, the right is hollow. If a
union security clause is in effect and is lawfully administered, a bargaining
unit member resigning from a union must still tender financial support as a
condition of employment. Finally, even if no union security clause is in
effect, resignation merely gains an individual or opposition group loss of
industrial citizenship and the right to participate. Most unions, in any
event, could easily sustain the resignation of individual dissenters or small
opposition groups having little present influence. Although a mass resig-
nation would gain the leaders' attention, such a "safety valve" has at least
as many shortcomings as a bare electoral process, and such a majority
revolt would not protect minority rights.

Nor does the option of decertification present an adequate alternative to
democratic procedures. This option is, at best, a crude check should condi-
the first place. See supra discussion at notes 447-54 and accompanying text. An emerging
school of labor jurisprudence advancing a "critical" labor law theory attacks vigorously the
premises of the system, arguing that collective bargaining does not work to enhance workers' relative power, but instead acts as an instrument of repression by seeking to reconcile workers to their own domination at the workplace. See, e.g., Klare, Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law, 4 IND. REL. L.J. 450, 452 (1981) ("[L]iberal collective bargaining law is itself a form of political domination"); Lynd, Government Without Rights: The Labor Law Vision of Archibald Cox, 4 IND. REL. L.J. 483, 487 (1981) (Based on the premise that "subjugation of workers' rights to the interests of labor peace is reasonable and in the interest of national labor policy," "collective bargaining has "sought to institutionalize, and thereby regulate, class conflict"); Stone, The Post-War Paradigm in American Labor Law, 90 YALE L.J. 1509, 1515-17 (1981) (Industrial pluralism, the ideology conditioning current collective bargaining law, "serves as a vehicle for the manipulation of employee discontent and for the legitimation of existing inequalities of power in the workplace"). For a summary of the literature of "critical" labor law jurisprudence, see Klare, supra note 492, at 450 n.1. A critique of this "critical" labor jurisprudence is beyond the scope of this article. But see Dubofsky, Labor Theory and Workers' Rights: A Historian's Critique, 4 IND. REL. L.J. 496 (1981). Yet, to the extent this school of labor jurisprudence is correct, the case for union democracy and public intervention to attain it may well be weakened.

493. LMRA § 8(a)(3), 8(b)(2). See also NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963) ("Membership as a condition of employment is whittled down to its financial core").

494. See supra notes 459-60, 462 and accompanying text.
tions become so unacceptable that a majority is prepared to rebel. Even then, decertification simply allows workers to replace an undemocratic union with no union.

Theoretically, a majority can seek to replace the incumbent union with another, but there are so many obstacles that this is not a reasonable alternative. First, the NLRB's lawful voluntary recognition bar, certification bar, and contract bar rules delay the raising of a question concerning representation. If an existing contract qualifies as a contract bar, for example, an election to replace a bargaining representative can be delayed up to three years.

Second, even when a question concerning representation can be raised, it must be raised in a bargaining unit coextensive with the appropriate unit at the time the election is requested. Accordingly, although the election unit in which the union initially achieved majority status may have been a single plant or single employer unit, the subsequent decertification or representation election will be permitted only in a multiplant or multiemployer unit if, in the interim, the union and employer have, through their history of bargaining, manifested a mutual intent to so modify the bargaining unit. Thus, no election will be held unless a 30% showing of interest is obtained in the expanded unit, which in many industries includes thousands of employees. Even then, a majority of those voting among the large number of employees is required to change union representation.

Finally, even where the above obstacles are surmounted, a union must

495. For reasons why decertification would not protect minority rights, see Silverstein, supra note 461, at 1488 n.14.
498. Deauthorization votes conducted pursuant to LMRA § 9(e)(1) and craft severance elections conducted pursuant to LMRA § 9(c)(1) also will be held only in a bargaining unit coextensive with the contractual unit. Illinois School Bus Co., 231 N.L.R.B. 1 (1977) (deauthorization election); General Motors Corp., 120 N.L.R.B. 1215 (1958) (craft severance election).

Even where the election unit has not been modified subsequently by the parties, small groups of craft workers desiring a craft severance election face substantial obstacles with regard to whether a craft unit is appropriate. See, e.g., La-Z-Boy Chair Co., 235 N.L.R.B. 77 (1978).
be found that is willing to serve as a substitute for the incumbent. Here the AFL-CIO no-raiding program raises another obstacle. Since 1962, the AFL-CIO's Internal Disputes Plan has required, as a condition of AFL-CIO affiliation, that all affiliates must respect established collective bargaining relationships of other affiliates. Alleged violations of this obligation are either mediated or adjudicated by an impartial umpire, and noncompliance subjects an affiliate to internal sanctions. Raiding is, therefore, now minimal among affiliates and even among nonaffiliates not bound to the Internal Dispute Plan.\footnote{499}

One may fairly debate whether the stability gained by the contract bar rules, the coextensive unit doctrine, and the AFL-CIO no-raiding program inappropriately balances free choice and the value of stability. One need not enter that controversy, however, to conclude that given these rules, decertification, including replacement of union representatives, is not an adequate alternative to internal democratic procedures.

Nor is civil disobedience by members within their union or industrial governments an alternative to governmental regulation of internal union affairs. It is often a reality of effective labor relations that bargaining effectiveness depends on union leaders' ability to "deliver" a disciplined work force.\footnote{500} Members can, therefore, obtain a measure of shared power by threatening leaders with such work actions as absenteeism, slowdowns, sit-downs, sabotage, or wildcat strikes. They may also get their leaders' attention by passive resistance to the union's policies or active resistance such as refusing to strike and honor lawful picket lines. These work action alter-


natives subject the employee to employer discipline, however, and violation of union rules subjects union members to union discipline. More fundamentally, these acts of civil disobedience are unacceptable alternatives to democratic process, because their effectiveness is predicated on weakening the union or the labor-management relationship. Perhaps a serious malfunction of the democratic process at the workplace or within unions would justify such worker actions. Still, inherently disruptive and destructive conduct by workers can hardly be viewed as a reasonable alternative to democratic process by any national labor policy committed to stability through the practice and procedure of collective bargaining.\textsuperscript{501}

A role for the law of internal union affairs is, therefore, clearly warranted. It is necessary, however, to clarify its contours.

2. An Appropriate Role for Law

Over fifty years ago, Chafee described in colorful botanical terms three attitudes explaining judicial reluctance to regulate internal affairs of private associations.\textsuperscript{502} First was the "Living Tree" attitude favoring minimal intervention lest the roots of autonomous private groups be damaged by excessive regulation. The "Dismal Swamp" attitude favored cautious intervention due to legal institutions' insufficient familiarity with the complex internal affairs of private groups, such as unions, and the perceived institutional incompetence to evaluate the actual impact of decisions on the parties. Finally, the "Hot Potato" attitude eschewed intervention because regulating powerful private organizations threatens to embroil the judiciary in political controversy. More recently, Grodin, extending Chafee's theme, suggested two additional botanical metaphors: the "Worthless Weed" judicial attitude reflecting the view that most competing interests that arise in union-member controversies are social and not worthy of legal protection; and the "Shrinking Violet" attitude that, in any event, law can do little to promote union democracy.\textsuperscript{503} These attitudes,

\textsuperscript{501} See LMRA § 1.

Nor is self-regulation an adequate alternative to public intervention. Inertia stalls self-reform and unions most needing reform are least likely to engage in it. See Hardman, supra note 500, at 499; Lipset, supra note 41, at 16; St. Antoine, supra note 44, at 38. Even where practiced, self-reform by a membership majority could most likely be relied on to protect minority rights when the value of minority rights is already implanted in a union's traditions. Here again, unions most needing reform will probably not engage in it voluntarily. See also Summers, supra note 20, at 278 (McClellan committee disclosures demonstrate the inadequacy of self-regulation).

\textsuperscript{502} Chaffee, The Internal Affairs of Associations Not For Profit, 43 Harv. L. Rev. 993, 1020-29 (1930).

\textsuperscript{503} Grodin, supra note 463, at 188.
often unarticulated, underlie the controversy concerning the appropriate role for the law of internal union affairs.

"Worthless Weed": Dispelling this attitude may well be the foundation on which a role for the law regulating union government is built. Legal institutions responsible for developing that role must steel themselves, for their task is formidable; society must allocate the necessary enforcement resources to prevent statutory protections from becoming a political fraud, and the parties must exercise moderation or the legal system will be overwhelmed. All this requires a commitment to union democracy, forged from a clear understanding of its worth. As a corollary, a reasonably clear vision of the democratic model sought is required, for if the preferred results remain uncertain, so also will law's role. There are sufficient reasons for union democracy, and for public intervention to preserve and promote it. Moreover, an appropriate model of union democracy can be articulated: one that is both feasible and desirable in the sense of balancing the competing legitimate interests. Raising and clarifying issues concerning the meaning of union democracy and its worth promises reciprocal benefits. Nondecisionmakers can help adjudicatory institutions develop doctrinal coherence. By responding, these institutions not only add coherence to their decisions, but also help clarify the meaning of union democracy and its worth, since their decisions are instructive beyond the specific issues adjudicated and parties directly affected.

"Dismal Swamp": The internal affairs of unions need not be a "Dismal Swamp." The social sciences have explored unions' assigned societal functions, their internal structure and government, and the possibility and desirability of union democracy. To be sure, many of the associated relationships are subtle and complex, but legal institutions, and persons appearing before them, can consult this body of accumulated knowledge to help understand the realities of union organizational life. Informed distinctions can thereby be made among actions that do and do not conform to appropriate norms of union democracy, among laws that do and do not achieve intended results, and among remedies that do and do not balance wisely the competing legitimate interests.

504. See supra notes 447-54 and accompanying text.
505. See supra notes 486-501 and accompanying text.
506. See supra notes 455-85 and accompanying text.
507. See generally McDougal, supra note 1, at 56, 65 (The "emerging conception of law" is that legal decisions "are responses to precipitating events best described as value changes in social processes, are conditioned by many different variables in the particular social processes in which they occur, and have in turn continuing effects upon such processes.") For a related view of the value conditioning function of law, see infra note 549 and accompanying text.
Adjudicatory tribunals play a particularly important role in this regard. The regulatory framework Congress created addresses the individual-collective relationship, not as a precise code, but primarily through broad principles. The enforcement strategy chosen, moreover, is a blend of state, federal, judicial, and administrative processes. Achieving a rational and uniform labor policy requires working into a uniform fabric these various statutes and enforcement structures, and understanding their impact on the parties and on others not before the adjudicative tribunal. This is not solely a legislative function, as Wellington has ably demonstrated. Courts and agencies, through what Mr. Justice Frankfurter termed "litigating elucidation" are assigned the role of understanding and applying the goals of national labor policy and the values embodied in existing law. In this sense, limited always to effectuating legislative goals, adjudicatory institutions "participate in the growth of law" through their role as "elaborators of Congressional policy." 

Courts have long honored this adjudicatory principle. Grasping their role as "elaborators of Congressional policy," they have, for example, found the right of fair representation in the interstices of federal labor statutes. More recently, they have shaped other rights and remedies to balance the guarantees of those statutes with unions' competing institutional interests.

A good example of labor law's use of broad principles to regulate union government may be found in federal enforcement of union constitutions. Section 301(a) creates federal jurisdiction to adjudicate controversies arising out of union constitutions. Plumbers & Pipefitters v. Local 334, 452 U.S. 615 (1981). While the Supreme Court has not yet decided what substantive law shall control these conflicts, id. at 627, the general rule in LMRA § 301(a) cases is the courts shall formulate the federal law to govern § 301(a) suits "by looking to the 'penumbra' of § 301(b) as informed by its legislative history." Complete Auto Transit v. Reis, 451 U.S. 401, 406-07 (1981).

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The NLRB also recognizes its "elaborator" role with respect to the law of internal affairs. For example, it has woven the individual rights values of LMRDA into the Taft-Hartley Act in union fine cases. The Board has sought to accommodate the collective goals of Taft-Hartley with legal traditions respecting justifiable expectations of individual rights, by protecting the right of fair representation and by holding unions to a fiduciary duty in certain union security disputes. Other portions of the Board's work similarly require it to be sensitive to sources of labor policy beyond the Taft-Hartley Act, such as the contract bar, decertification and craft severance rules, and the effect of Taft-Hartley on the exercise of dissent through wildcat strikes. The bargaining unit, for example, affects not only the labor-management relationship but also the locus of bargaining authority and, thereby, the levels of local union autonomy and individual workers' participation in the industrial and union governments. Board decisions regarding which worker rights the union is empowered to waive through the collective bargaining agreement turn on a determination of which are collective and which are held by individuals and, therefore, beyond the reach of the collective. When the issue concerns waiver of an individual member's right to distribute union election campaign literature at the workplace, the Board's work directly implicates the internal union democracy values in labor law. Even the Board's duty to bargain decisions

procedures not required in fair representation suit where they can result in neither complete relief nor reactivation of employee's grievance); IBEW v. Foust, 442 U.S. 42 (1979) (no punitive damages in fair representation suits); Hines v. Anchor Motor Freight, 424 U.S. 554 (1976) (adverse arbitration decision not a bar to employee breach of contract suit against employer where union subverts the arbitration process by failure to fairly represent employee); Hall v. Cole, 412 U.S. 1 (1973) (attorney's fees available as remedy in suits under LMRDA Title I). Many opinions adjudicating LMRDA's protection of union officials from reprisal discharges for exercising free speech rights attempted to balance these interests by looking to the realities of union structure and government. See Note, supra note 481, at 298-302. As courts consider the protection granted elected and nonpolicymaking appointed union officials, they again will be presented opportunities to shape rights by examining the realities of union organizational life. See supra discussion at note 481.


515. See, e.g., Versatile Services, 258 N.L.R.B. 810 (1981) (fiduciary duty to inform employees of duties under union security clause and to provide reasonable opportunity to comply); Kaiser Foundation, 258 N.L.R.B. 29 (1981) (fiduciary duty to furnish employees statement of precise amount of dues owed).

516. See supra notes 496-98 and accompanying text.

517. See supra discussion at note 21.

518. See supra notes 367-68, 381-85 and accompanying text.

519. See Brousseau, supra note 414.

520. See General Motors Corp. v. NLRB, 512 F.2d 447 (6th Cir. 1975).
inevitably confront these values. *Borg-Warner*,\(^{521}\) for example, prohibits employers' demanding to impasse that a union conduct contract ratification votes. Board decisions regarding an employer's duty to honor a collective bargaining agreement not submitted to the membership for ratification can influence union leaders' honoring union constitutional mandates requiring ratification votes.\(^{522}\) The Board can influence a union's structure if it holds that an affiliation of two unions allows an employer to withdraw recognition from the successor union.\(^{523}\) These few illustrative examples are not intended to suggest how the Board should accommodate the policy goals of Taft-Hartley with other labor policies and their underlying values. They do show, however, that while the Board may not have a mandate to regulate directly the internal affairs of unions,

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\(^{522}\) The NLRB's longstanding rule has been that, notwithstanding a union constitutional requirement that a contract ratification vote be held, an employer's refusal to honor a collective bargaining agreement due to the union's failure to conduct such a vote is privileged only when the union and the employer have agreed explicitly that ratification is a condition precedent to final agreement. North Country Motors, 146 N.L.R.B. 671, 674 (1964). *Compare* Sunderland's, Inc., 194 N.L.R.B. 118 (1971) (employer withdrawal of asset privileged because ratification was made a precondition) *with* C&W Lektra Bat Co., 209 N.L.R.B. 1038 (1974) (refusal to execute contract an unfair labor practice because of insufficient proof of agreement to make ratification a condition precedent to a collective bargaining agreement).

Even where ratification has been made a condition precedent to final agreement, the employer has no standing to challenge the fairness of the ratification procedures used or their compliance with union bylaws by refusing to execute the contract. *See* M&M Oldsmobile, 156 N.L.R.B. 903 (1966) (it is for the union and not the employer to construe and apply internal regulations regarding the sufficiency of the ratification procedures). *See also* Roesch Transp. Co., 157 N.L.R.B. 441 (1966) (the union's ratification procedures are no concern of the employer).

\(^{523}\) *See, e.g.*, St. Vincent Hosp. v. N.L.R.B., 621 F.2d 1054 (10th Cir. 1980) (independent union's affiliation with an international union privileges employer's refusal to continue recognition of successor union unless continuity of representation is maintained as manifested by factors such as retention of same officers and governing committees and constitutional provisions preserving the predecessor's autonomy from the successor international union); Retail Clerks Local 428 v. NLRB, 528 F.2d 1225 (9th Cir. 1975) (the important factors for determining continuity of representation are explicit guarantees of unit autonomy, retention of the same officers, and continuation of established procedures). *See* Dannin, Union Mergers and Affiliations: Discontinuing the Continuity of Representation Test, 32 Lab. L.J. 170 (1981); *Note, Union Mergers and the Amendment Certification Procedure*, 28 Cath. U.L. Rev. 587 (1979); *Note Union Affiliations and Collective Bargaining*, 128 U. Pa. L. Rev. 430 (1979).

The NLRB's inquiry into internal union affairs also extends to questions such as whether nonmembers have been excluded from participation in the affiliation vote and whether the voting procedures provided due process protections such as adequate notice, discussion, and time for reflection. *See* State Bank of India, 262 N.L.R.B. No. 143, 111 L.R.R.M. 1015 (July 21, 1982); Amoco Production Co., 262 N.L.R.B. No. 160, 110 L.R.R.M. 1419 (July 23, 1982).
it cannot escape involvement with them. Accordingly, as with other adjudicatory bodies, its role includes weaving the union democracy values of labor statutes with the labor-management relations policy goals of Taft-Hartley.

Many other agencies also participate in this process: antidiscrimination agencies considering alleged union discrimination in employment or in union membership; the labor department through its various policing functions under the LMRDA: the Federal Election Commission regulating union campaign spending; the criminal justice agencies responsible for policing union corruption; and state agencies responsible for effecting state policy. All have roles that are at once different and identical—different since each has a distinct responsibility for effecting the primary policy goals of specific statutes, and identical since each must be sensitive to the national policy goals favoring democracy in union government.

In sum, the realities of union organization life are being increasingly understood, and adjudicatory bodies, therefore, need no longer fear Chafee's "Dismal Swamp." Indeed, by working these realities and the union democracy values imbedded in law into a single fabric, adjudicatory institutions execute their role as elaborators of national labor policy. Therefore, the complex and sometimes overlapping network of laws affecting union government may be kept from becoming a new "Dismal Swamp."

"Living Tree": Since sufficient reasons exist for public regulation of internal union affairs, but also since excessive regulation can damage unions as autonomous and responsible organizations, the role of law question additionally turns on when and how law shall intervene. The precise contours of the answer vary, shaped by the parties, issues, and the decisionmaker's institutional competence, but several guidelines emerge from the previous discussion of unions' societal role, their structure and government, and the risks and benefits of union democracy and public intervention.

When and how law should intervene varies initially on whether the controversy arises in the bilateral workplace government or the unions' internal government. Within the former, controversies primarily are between

524. See Allis-Chalmers Mfg. Co. v. NLRB, 388 U.S. 175 (1967). Indeed, over 40 years ago the Supreme Court admonished the Board that the Taft-Hartley Act is not to be enforced in a vacuum without regard for other congressional objectives. Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942) ("Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another . . . .")
525. See supra notes 486-501 and accompanying text.
526. See supra notes 400-46 and accompanying text.
dissenters claiming justifiable expectations of an individual right to be free from union collective authority, and unions claiming such expectations must be subsumed to advance collective interests. In such classic confrontations, justification for intervention is greatest because the union's internal majoritarian democratic processes cannot fairly be expected to protect minority rights from the majority will. These controversies, however, also present great dangers to collective strength, arising as they do in the crucible of labor-management relations. Accordingly, while law should be least timid in intervening in such controversies, it also must be most cautious lest in the name of individual liberty, it should damage seriously the collective liberty upon which enduring individual liberty at the workplace ultimately depends.

Democracy in union internal government presents a different balance. These controversies, primarily though not exclusively, are between individuals or minority groups claiming justifiable expectations of the right to participate effectively to achieve majority support, and unions claiming the collective right to be free from the inefficiencies and disruptions of excessive democracy. Legal intervention in this situation poses a minimal risk to the collective strength of the union. Indeed, by promoting democracy in unions, it promises to strengthen the union by encouraging members' institutional loyalty and participation. Such public intervention does, however, carry an associated risk of excessive intervention and its concomitant, excessive loss of independence from state control. Accordingly, the role of law should be to encourage effective self-government. The operative concept is "effective." Law need not shrink from intervention calculated to protect legitimate opposition groups seeking to modify union policy through democratic majoritarian processes. Recognizing the realities of union organization life, decisionmakers should minimize the functional disabilities confronting union insurgents such as abuse of discipline and incumbent control over information and institutional resources that can create insurmountable barriers to an insurgency campaign. Paradoxically, by intervening to help make effective the countervailing forces that may arise within the union, law best preserves the central value of union independence from the state; for when the union membership can enforce leaders' basic fiduciary duties and possesses the effective tools for meaningful self-government, the case for external regulation of union structure and substantive policy largely collapses.

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527. See infra note 537 and accompanying text.
528. See supra notes 365, 367-68, 409-12, 446, 479 and accompanying text.
529. See supra notes 272-79, 333, 335-49 and accompanying text.
530. See Cox, supra note 41, at 611; Summers, supra note 20, at 300 ("The law, by pro-
anced view of the role of law as follows: “By protecting and fostering democratic processes within unions, the law can rely on the self-corrective ability of those processes. The necessity for intervention is reduced by insuring that unions speak with the voice of those whom they represent.”

There is no easy or exact calculus here. The principle is that law best serves the union as a “living tree” by protecting justifiable individual expectations, and by strengthening the effectiveness of its democratic majoritarian controls, limited only by competing legitimate claims for efficiency, independence, or collective bargaining effectiveness.

“Hot Potato”: When Chafee reported this judicial attitude, in 1930, the regulation of union internal affairs threatened to entangle the judiciary in political controversy. Courts adjudicated without legislative standards; the myth of unions as voluntary associations akin to a fraternal lodge prevailed; and unions were hostile to the judiciary due to its alignment with property interests, a view that could not abate until law became a more neutral arbiter of industrial conflict.

The present is quite different. Public policy now recognizes that unions are neither private nor voluntary in the same sense as religious, fraternal or social organizations. It is precisely because they are not that law privileges and protects their asserting group interests, has a heightened obligation to ensure their autonomy, and has assumed the duty to resolve certain labor-management controversies and “guarantee” unions’ democratic processes. Unions, moreover, now operate in the mainstream of national political life. The political branches of government—legislative and executive—have determined that regulation of union government is in the public interest and have provided decisionmakers policy standards to guide their decisions. Accordingly, as long as courts and other adjudicatory bodies limit their role to elaborating and enforcing the policy...

Statutory regulation also preserves union autonomy to the extent it avoids the need to confront whether unions are engaged in “governmental action” within the meaning of the constitution. Such a designation would threaten seriously union autonomy from state control for it “would invite more and more regulation with consequent loss of independence.”

Cox, supra note 41, at 620.

531. Summers, supra note 41, at 45.
532. See generally supra notes 95-156 and accompanying text.
533. See supra notes 123-56 and accompanying text.
534. See supra notes 178, 183 and accompanying text.
535. See supra notes 168-79 and accompanying text.
536. See supra notes 225-44 and accompanying text.
goals manifested in labor law, they properly remain insulated from serious political conflict. If the national labor policies themselves constitute "hot potatoes," conflict appropriately should be directed to the political branches of government. It is their role to frame the policies, defend them in the political process, and take the heat.

"Shrinking Violets": If law can do little to promote union democracy, then the appropriate role for law might be to retire from the field. The costs would inevitably outweigh the benefits. This concern soon fades, however, upon inspection.

Properly understood, union democracy connotes two concepts: minority rights and majority will.\footnote{See supra notes 455-85 and accompanying text.} By proscription and injunction, law can protect justifiable expectations of individual and minority group rights to be free from certain exercises of the majority's collective authority. Indeed, perhaps only law can do so for a majority cannot fairly be expected to be the final arbiter of its own limitations.\footnote{See H. Wellington, supra note 4, at 186 ("[G]overnmental regulation . . . providing a climate within the union conducive to full membership control . . . cannot [alone] protect the minority from the majority"). See also R. McCloskey, supra note 455, at 13 (early in our own constitutional history it became clear that the popular branches of government—legislative and executive—could not perform the dual functions of representing the popular will and limiting that will by imposing on it the restraints of fundamental law). While law can protect minority rights, the majority's moderation is also essential. Learned Hand made this point eloquently concerning fundamental rights protected by the Constitution. "[A] society so driven that the spirit of moderation is gone, no court \textit{can} save; \ldots a society where that spirit flourishes, no court \textit{need} save; \ldots in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish." L. Hand, \textit{The Contributions of an Independent Judiciary to Civilization}, in \textit{The Spirit of Liberty} 164 (L. Dilliard ed. 3d ed. 1960) (emphasis in the original).}\footnote{See supra note 464 and accompanying text.}

More complex is the question of whether law can promote an effective majoritarian political process. Law cannot create democracy within a union's internal government for it cannot create the democratic spirit on which an active political process depends. Yet that is hardly the issue, for if law can contribute meaningfully to the nurturing of that spirit, then it can fairly claim a role.

Law can so contribute, and quite directly. First, as it has, law can act as an independent source of affirmative protection by requiring that unions provide a formal participatory process, the minimum requirements of which have been described.\footnote{See supra notes 455-85 and accompanying text.} It can, additionally, play a supportive role by responding to the realities of union organizational life that often eviscerate the formal participatory process. It could, for example, require union structures that provide direct membership control over policy, en-
This, however, seems uniquely inappropriate given the central value of union autonomy from state control. Yet, when a union's structural form, manifested in its constitution or traditions, includes democratic governing structures such as membership ratification votes, the regional election of a full-time executive board, referendum election of officers, relative ease of nomination, or the effective removal of the disciplinary appeals system from national officer control, adjudicatory bodies should assiduously scrutinize deviations by incumbent officers. Such an approach is vital since these structures largely determine the level of membership participation and electoral opposition. Edelstein and Warner conclude that such "[o]rganisational specifics . . . are the actual operative variables." Similarly, when union structure encourages vitality in a local union's political life by minimizing overly centralized control, deviations should, again, be subject to strict judicial scrutiny.

Beyond preserving the organizational structure that nurtures democratic participation, law can play an important supportive role by protecting group participatory rights. Because only a group can be organizationally effective, law could contribute valuably by guaranteeing an opposition group's right to organize, hold meetings, raise funds, distribute literature, gain access to election and constituent information, and use the union's channels of communication to convey its message.

Law can also be supportive by neutralizing at least some of the advantages of incumbency, such as those associated with the incumbent's use of institutional resources for political advantage and disciplinary control over elected and appointed union staff. Adjudicatory bodies will need to be sensitive and imaginative here: sensitive to the functional disabilities confronting electoral challenges and imaginative in framing effective remedies that promote the values of union democracy with as little impairment to the union's independence, strength, and orderly function as possible. The argument is not that the task is easy; only that it is possible and desirable.

Finally, beyond its coercive effect, law's moral force can encourage union democracy in two related ways. First, its mere presence conditions conduct. Lipset argues that one of the law's functions is to set a community

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540. See supra notes 458-63, 469-75 and accompanying text.
541. UNION DEMOCRACY, supra note 247, at 340.
542. See supra notes 472-75 and accompanying text.
543. See supra notes 476-79 and accompanying text.
544. See supra notes 480-81 and accompanying text.
545. See H. WELLINGTON, supra note 4, at 199, 300; Cox, supra note 41, at 627.
standard of proper conduct and the mere fact that an action is unlawful reduces the extent of its occurrence. Second, law’s moral force is “multiplied” when it adopts the standards established by those regulated. There exist “compulsive pressures of democracy in unionism,” deeply rooted in union rhetoric, constitutional form of government, and traditions. By explicitly recognizing democratic values, law reinforces and strengthens those already present in most unions. More specifically, it reinforces the legitimacy of opposition and the legitimacy of resort by the opposition to legal protection of its rights. Law’s role of conditioning values may, in the long run, be one of its greatest contributions in promoting union democracy.

In sum, law has no ultimate power to create union democracy, except when it protects the minority’s justifiable expectation to be free from certain coercive effects of the majority’s collective authority. Law abdicates its responsibility, however, if it acts as a “Shrinking Violet” for in many ways it can nurture the spirit of self-government. Its role is not to be the arbiter of substantive policy conflicts; it is rather to protect union independence from state control, and assist unions in performing their essential societal functions by helping make effective the process of internal opposition and dissent as the preferred method of determining union policy. Legislation only begins this process. The task of elaborating and effecting labor policy favoring union democracy falls to all adjudicative bodies whose work touches union government. Nothing less is demanded.

546. Lipset, supra note 42, at 35. Accord Marcus, supra note 246, at 64. See also Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting) (a law’s presence and the potential of its enforcement affect the conduct of those within its proscriptions); L. Tribe, AMERICAN CONSTITUTIONAL LAW, 713, 720 (1978) (because the mere presence of a law that facially infringes on conduct protected by the first amendment chills protected conduct, a litigant whose own conduct is not protected by the first amendment may be granted standing to challenge the potential unconstitutional applications of such a law to third parties).
547. See Summers, supra note 41, at 49.
549. See H. Wellington, supra note 41, at 50. See also Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 208 (1963) (“The discussion of problems and the declaration of broad principles by the courts is a vital element in the community experience through which American policy is made. The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.”).