

## REVITALIZING UNION DEMOCRACY: LABOR LAW, BUREAUCRACY, AND WORKPLACE ASSOCIATION

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*Do core doctrines of labor-relations law obstruct the internal democratic governance of labor unions in the United States? Union democracy is likely an essential precondition for the broader strategic and organizational changes unions must undertake in order to recruit new union members—the labor movement’s cardinal priority. Yet according to widely accepted wisdom, the weakness of democracy within labor unions is the unavoidable outcome of an “iron law of oligarchy” that operates in all such membership-based organizations. This Article challenges this conventional thinking and argues that the triumph of oligarchy over democracy in U.S. labor unions is not inevitable, but conditioned on the nature of American labor law. The main message is that labor law will directly or indirectly undermine what I call “workplace association,” a decisive strategic component in the florescence of union democracy, when, as in the U.S., it: (1) provides for exclusive representation; (2) establishes institutions and procedures for collective bargaining; and (3) inhibits the use of economic “self help” as alternatives to such procedures. To reach this conclusion, the Article develops a game-theoretic model of union democratization, formalized in the Appendix, that highlights the role of union bureaucracy and workplace association in the success or failure of union democracy. The Article then uses the model to analyze the impact of U.S. labor law on this game of union democracy, and makes comparison to Great Britain, where labor law has contrasted dramatically, with equally divergent results for union democracy.*

### INTRODUCTION

In January of 2009, the Service Employees International Union (SEIU) placed its United Healthcare Workers-West (UHW) affiliate into trusteeship, removing all of its elected leaders.<sup>1</sup> Prominent friends of the

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1. Michelle Amber & Joyce E. Cutler, *Former Leaders of UHW Local Quit SEIU, Plan to Form New Health Care Workers Union*, 17 Daily Lab. Rep. (BNA) A-17 (Jan. 29, 2009).

labor movement met the news with dismay.<sup>2</sup> By all accounts, the large, 150,000-member UHW was a “model” and “democratic” local union.<sup>3</sup> The trusteeship ended a long internal feud between SEIU and UHW over a plan to sever 65,000 members from UHW and merge them with workers from two other affiliates.<sup>4</sup> As the conflict reached its apogee, the UHW leadership said they would only accept the reorganization plan if members of the local were allowed to vote on it.<sup>5</sup> The trusteeship was imposed the next day.<sup>6</sup> At the heart of the conflict, according to one service clerk and former elected leader of the UHW, is union democracy: whether UHW members will “be part of a union that they control democratically” or “one that is led by a handful of outsiders from Washington, D.C.”<sup>7</sup> Received opinion would regard this outcome as just another example of a general and inherent organizational dynamic toward oligarchy in labor unions—unfortunate but characteristic, and perhaps even inevitable. This Article contests that wisdom and argues that labor law critically conditions this organizational tendency toward oligarchy.

What makes the dissolution of UHW particularly tragic is that not only was it a model, democratic union, but that it was also enormously successful in organizing new members. Recruiting new workers into unions is the labor movement’s cardinal priority.<sup>8</sup> However, success in organizing new members is not easy to achieve. To do so, labor unions must make far-reaching strategic and organizational transformations—a process scholars call union “revitalization.”<sup>9</sup> The first requirement is high levels of membership participation and commitment in the comprehen-

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2. *Id.* (describing the reactions of labor historian Nelson Lichtenstein and labor researcher Kate Bronfenbrenner).

3. *Id.*; see also Paul Pringle, *Breakaway Union Could Prompt War of Attrition with SEIU*, L.A. TIMES, Feb. 2, 2009, <http://www.latimes.com/news/local/la-me-union2-2009feb02.0,6911054.story> (“[T]he UHW had been widely viewed as one of the most vibrant and successful locals in the SEIU . . .”).

4. Amber & Cutler, *supra* note 1.

5. *Id.*

6. *Id.* The ousted leaders of the UHW responded the day after the trusteeship by forming a new union, the National Union of Healthcare Workers (NUHW). *Id.* The NUHW has had notable success in winning over former UHW members in contested NLRB elections with the SEIU. See Michelle Amber, *Employees at Two Facilities Vote for NUHW After NLRB Finds Elections Should Be Held*, 196 Daily Lab. Rep. (BNA) A-2 (Oct. 14, 2009).

7. Amber & Cutler, *supra* note 1 (quoting Angela Glasper, a former UHW elected leader).

8. This has been the official stance of the AFL-CIO since 1995; the slow change of pace was the pivotal reason several major unions left the AFL-CIO to form the Change To Win Federation in 2005. See Joseph A. McCartin, *Reframing US Labour’s Crisis: Reconsidering Structure, Strategy, and Vision*, 59 LABOUR/LE TRAVAIL 133, 133 (2007), available at <http://www.historycooperative.org/journals/lt/59/mccartin.html> (describing how the Change to Win Federation left the AFL-CIO due its failure to devote more resources to recruitment). As it is well known, union density, the proportion of the workforce that are union members, has declined dramatically over the past several decades. See Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members Summary (Jan. 22, 2010), available at <http://www.bls.gov/news.release/union2.nr0.htm> (showing that in 2009 the number of workers belonging to unions was 15.3 million and that union members accounted for 12.3 of employed wage and salary workers, down from 20.1 percent in 1983; also reporting that union density is 7.2 percent in the private sector and 37.4 percent in the public sector).

9. Kim Voss & Rachel Sherman, *Breaking the Iron Law of Oligarchy: Union Revitalization in the American Labor Movement*, 106 AM. J. SOC. 303, 304 (2000).

sive use of “rank-and-file intensive” tactics.<sup>10</sup> In their widely-cited study of 14 organizing unions, Kim Voss and Rachel Sherman showed that this kind of strategic orientation demands dramatic organizational changes as well: shifting resources into organizing requires reducing the size of the union’s traditional, bureaucratic-professional staff and increasing the amount of voluntary self-representation of members within the workplace.<sup>11</sup> Coincidentally (or not), the UHW was almost certainly one of a handful of “fully” revitalized labor unions highlighted as exemplars in Voss and Sherman’s study.<sup>12</sup>

The UHW’s combination of robust union democracy with an aggressive organizing posture seems to have been far from accidental. Eliciting high levels of membership participation requires that members have a voice in the decisions that make such heavy demands on their time and attention.<sup>13</sup> Downsizing the union’s traditional professional staff can catalyze resistance from those on whom oligarchic leaders most depend.<sup>14</sup> Most important, a mobilized rank-and-file can not only better organize new members, it can also organize the opposition that removes the old guard from office.<sup>15</sup> Entrenched union officials with parochial prerogatives and interests, fortified in relatively undemocratic unions, will therefore assiduously avoid adopting an organizing posture, even as this strategic choice sacrifices the larger interests of the labor movement. Consequently, lack of union democracy may be thwarting union revitalization.<sup>16</sup>

What is more, the successful case of UHW is very rare. Actual commitment to organizing still does not match the rhetoric in the vast

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10. Kate Bronfenbrenner, *The Role of Union Strategies in NLRB Certification Elections*, 50 INDUS. & LAB. REL. REV. 195, 198 (1997). See also Kate Bronfenbrenner & Robert Hickey, *Changing to Organize: A National Assessment of Union Strategies*, in REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 17, 19 (Ruth Milkman & Kim Voss eds., 2004); Steven H. Lopez, *Overcoming Legacies of Business Unionism: Why Grassroots Organizing Tactics Succeed*, in REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 114, 115 (Ruth Milkman & Kim Voss eds., 2004).

11. Voss & Sherman, *supra* note 9, at 313, 315.

12. *Id.* at 315. In accordance with their research protocol, Voss and Sherman did not reveal the identities of the local unions they studied. Nevertheless, they conducted their research on “almost all the major Northern California locals affiliated with SEIU.” *Id.* Given the UHW’s reputation and the fact that it was based in Oakland, California, the conclusion that the UHW was one of Voss and Sherman’s model “revitalized” locals seems inescapable.

13. Teresa Sharpe, *Union Democracy and Successful Campaigns: The Dynamics of Staff Authority and Worker Participation in an Organizing Union*, in REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 62, 63 (Ruth Milkman & Kim Voss eds., 2004) (explaining that workers “are more likely to stay involved if they feel a sense [of] ownership over the direction and outcome of the organizing drive”).

14. Voss & Sherman, *supra* note 9, at 321–22.

15. See *id.* at 322.

16. The necessity of internal organizational change also implies that current reform efforts, such as the Employee Free Choice Act, may be insufficient to spark the kind of organizing revival needed to restore the prospects of the labor movement. See William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 299–300 (2008) (arguing that the Employee Free Choice Act is not the best answer to labor law reform).

majority of unions.<sup>17</sup> And for the most part, labor unions in the US remain at best nominally democratic, governed like “one-party states.”<sup>18</sup> And even more dismaying, prevailing opinion says that the absence of union democracy is the normal, even inexorable, organizational outcome for labor unions.<sup>19</sup> Many scholars believe the struggle to preserve and enhance union democracy is futile and ineffectual.<sup>20</sup> These scholars rest their claims on a long tradition of empirical and theoretical scholarship that credits these outcomes to an “iron law of oligarchy.”<sup>21</sup> This research argues that large-scale, membership-based organizations, such as labor unions, require the installation of bureaucracies in order to efficiently function.<sup>22</sup> But bureaucracy enhances the capacities of the officialdom while it simultaneously promotes membership powerlessness and inactivity.<sup>23</sup> As the balance of power changes, so does the governance of the organization, as the leaders seek to erode the democratic constraints that inhibit their personal interests from prevailing over the interests of the members and larger movement. According to the iron law of oligarchy, the prospect for union revitalization is grim.<sup>24</sup>

This Article will contend that the permanence of oligarchy in labor unions is far less assured than widely supposed. More precisely, it will argue not only that union democracy is possible,<sup>25</sup> but also that labor law

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17. See Bronfenbrenner & Hickey, *supra* note 10, at 55 (explaining that “[e]ven the country’s most successful unions” must organize on an unprecedented scale “if they are going to make any significant gains in union density”); DAN CLAWSON, *THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS* 45 (2003) (“Unions talk about committing 30 percent of their resources to organizing . . . but almost no unions in fact do so.”); Voss & Sherman, *supra* note 9, at 324 (stating that “[the amount of resources devoted to organizing] is so low it’s almost embarrassing. . . . We’re lucky if we’re doing three [percent]”) (alterations in original).

18. Samuel Estreicher, *Deregulating Union Democracy*, 21 J. LAB. RES. 247, 247 (2000). See also Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 368–70 (1992); Clyde W. Summers, *Democracy in a One-Party State: Perspectives From Landrum-Griffin*, 43 MD. L. REV. 93, 93–95 (1984).

19. Schwab, *supra* note 18, at 371.

20. Estreicher, *supra* note 18, at 247–48 (“The pursuit of union democracy is counterproductive . . .”).

21. ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 377–92 (Eden Paul & Cedar Paul trans., Dover Publications 1959) (1915).

22. See *id.* at 25–27.

23. See *id.* at 50–51, 60–61, 69–72, 80–82, 130; see also Summers, *supra* note 18, at 93–95 (summarizing the iron law of oligarchy).

24. Voss & Sherman, *supra* note 9, at 304.

25. Sustained union democracy has been shown to be possible in several other studies. See, e.g., Margaret Levi, *Inducing Preferences Within Organizations: The Case of Unions, in PREFERENCES AND SITUATIONS: POINTS OF INTERSECTION BETWEEN HISTORICAL AND RATIONAL CHOICE INSTITUTIONALISM* 219, 228–36 (Ira Katznelson & Barry R. Weingast eds., 2005) [hereinafter Levi, *Inducing Preferences*]; SEYMOUR MARTIN LIPSET ET AL., *UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* 15 (1956); JUDITH STEPAN-NORRIS & MAURICE ZEITLIN, *LEFT OUT: REDS AND AMERICA’S INDUSTRIAL UNIONS* 12, 161 (2003); Margaret Levi et al., *Union Democracy Reexamined* 37 POL. & SOC’Y 203, 208 (2009). In most of these studies, the factors sustaining union democracy are acknowledged to be unique to the particular cases.

plays a pivotal role in *conditioning* the possibility of union democracy.<sup>26</sup> By comparing the labor laws of the United States and Great Britain, where labor unions are significantly more democratic than their American counterparts, this Article concludes that foundational doctrines of ostensibly pro-union U.S. labor law forcefully inhibit the realization of union democracy within American labor unions. In particular, democracy in labor unions is less likely to survive or thrive where labor law, as in the U.S.: (1) grants to labor unions the exclusive right to represent a given group of workers, (2) establishes or provides support for professional and institutionalized procedures to resolve disputes in collective bargaining, and (3) prohibits or discourages the use of strikes or other forms of economic “self help” as alternative ways to address those disputes.

To reach this conclusion, the Article develops a game-theoretic model that explains how union democracy and labor law are related through two key mediating variables: the size of the union’s bureaucracy and the extent of membership self-organization in the workplace—what I will call “workplace association.”<sup>27</sup> Union leaders prefer oligarchy while the membership would rather prefer that the union be run democratically. Nevertheless, leaders may concede to union democracy when members can threaten to disrupt the normal functioning of the union. Union democracy then solves a commitment problem for union leaders, and thereby avoids disruptions that are costly to both sides. Critically, members’ capacity to threaten disruption depends on the strength of their own autonomous forms of self-organization: workplace association. Workplace associations are groups of union member-workers who are organized in their workplaces to improve conditions of work, as distinguished from the union’s full-time officers and employees—the union’s bureaucracy—who typically perform the same tasks.<sup>28</sup>

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26. Previous research on law and union democracy has either focused on the direct regulatory impact of the Labor-Management Reporting and Disclosure Act, *see, e.g.*, Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 833–34 (1984); Edgar N. James, *Union Democracy and LMRDA: Autocracy and Insurgency in National Union Elections*, 13 HARV. C.R.-C.L. L. REV. 247, 248–49 (1978), or on the law governing elections for certification by the National Labor Relations Board, *see, e.g.*, Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 497–98 (1993); Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 3–5 (2008); Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 656–57 (2006); Schwab, *supra* note 18, at 367. Research has left unexplored the impact of major principles and doctrines of the National Labor Relations Act on union democracy.

27. While the combination of game theory with a case-study comparison of the U.S. and U.K. may strike the reader as odd, these two methodologies share an underlying concern with the specification of causal mechanisms in social-science explanations, as distinct from the more typical general, covering-law approach. For an introduction to this “analytic narrative” methodology, see generally Robert H. Bates et al., *Introduction*, in ANALYTIC NARRATIVES 3, 10–12 (1998). For the contrast between causal mechanisms and general laws, see Peter Hedström & Richard Swedberg, *Social Mechanisms: An Introductory Essay*, in SOCIAL MECHANISMS: AN ANALYTICAL APPROACH TO SOCIAL THEORY 1, 1–26 (Peter Hedström & Richard Swedberg eds., 1998).

28. The definition is refined below. *See infra* Part I.A.3.

However, workplace association and union bureaucracy are “substitutes” in production of the collective goods that unions and workers strive for, such as increases in wages and benefits, or improvements in conditions of work. As such, the strength of workplace association depends inversely on the size of the union’s bureaucracy. In addition, a large bureaucracy is an important source of bargaining power with which the union leadership can deflect democratizing threats from rank-and-file insurgents. In sum, union democracy is more likely when workplace association is stronger, but a strong workplace association is only possible with a smaller union bureaucracy.

Labor law affects the relative strengths of union bureaucracy and workplace association and through them influences the outcome for union democracy. Exclusive representation blocks the ability of workplace associations to reach bargains with employers independent of the formally-recognized union. Exclusive representation also underpins powerful incentives to invest in bureaucracy by removing a free-rider between unions that would arise should they attempt to jointly represent employees in a given workplace. In addition, law that facilitates legally-supported, institutionalized procedures for resolving disputes with employers lowers the costs of union bureaucracy and therefore encourages its growth. Finally, excluded as legitimate and recognized bargaining agents and unable to make use of the technical and arcane procedures of institutionalized collective bargaining, workplace associations must turn to economic self help to address their grievances; but legal restrictions on the ability to strike or take other economic action foreclose precisely those alternatives.

Part I.A of the Article introduces the two cases and describes how unions in the U.S. and Britain vary across the three organizational dimensions we have introduced: democracy, bureaucracy, and workplace association. Part I.B considers and rejects several reasons why U.S. and U.K. unions might differ significantly across these variables. Part II of the Article explores in more detail the intuition for the game-theoretic explanation of union democracy and oligarchy I have just introduced. Part III then uses this model as an analytical framework for exploring the effects of the three areas of labor law highlighted above: exclusive representation, legally-institutionalized collective-bargaining procedures, and restrictions on economic-action alternatives to those procedures. This Part will demonstrate how labor law in the U.S. and Britain has differed dramatically in these three areas and how these legal differences help sustain distinct organizational configurations in American and British unions. The Conclusion offers a brief review of issues necessary for a future normative and policy debate in light of the theory’s arguments.

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The Appendix provides the formal version of the game-theoretic model upon which the analyses in Parts II and III are derived.

The primary goal of this Article is to develop an explanatory, or “positive,” theory of the possibility of union democracy and show how particular configurations of central labor-law doctrines may frustrate this possibility. Consequently, this Article treats labor law as an “independent variable” and asks how it affects the relationship between union leaders and members, rather than asking how union leaders, members, employers, or other interested actors may have played a role in creating or preserving the U.S. or U.K. systems of labor law. In addition, while union democracy may be critically important for union organizing success, that proposition is still hotly debated. By centering on the questions of whether and how labor law conditions the possibility for union democracy, this Article does not directly engage that debate. Nevertheless, the importance of the question is not diminished: if it is impossible to sustain union democracy, what use is there in debating its implications for union organizing? Furthermore, although the Conclusion will address some of the normative issues that arise from the explanation, the focus of the Article remains on the positive analysis because establishing the link between labor law and union democracy is a necessary first step to the important normative questions that follow.

#### I. U.S. AND U.K. LABOR-UNION DIFFERENCES

Although the claims made by the iron law of oligarchy are still considered to be significant,<sup>29</sup> enough instances of union democracy have been observed to question its unexceptional universality.<sup>30</sup> The persistence of union democracy in British labor unions is one such instance. This Part describes the democratic differences between U.S. and British unions, as well as their distinctions in two other organizational characteristics: the size of their bureaucracies and the strength of their workplace associations. Apart from these illuminating contrasts, additional reasons make the U.S. and U.K. a good case comparison. Although their labor laws and the organization of their labor unions have differed greatly, they are otherwise similar in other factors which one would like to control. They share more broadly a common law legal heritage, as well as a similar tradition in labor movement organization and philosophy, based on craft unionism and voluntarism.<sup>31</sup> Thinking ahead about the consequences of union democracy, it is also worth mentioning at the outset that British unions have performed better on what are considered key

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29. See Paul Osterman, *Overcoming Oligarchy: Culture and Agency in Social Movement Organizations*, 51 ADMIN. SCI. Q. 622, 623 (2006) (“A great deal of literature suggests that the iron law is a common outcome . . .”).

30. See LIPSET ET AL., *supra* note 25, at 404–05; Levi et al., *supra* note 25, at 222.

31. See William E. Forbath, *Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law*, 16 LAW & SOC. INQUIRY 1, 23 n.79, 24 n.80 (1991).

measures of union success. Chiefly, over the course of the post-World War II period, Britain has had both higher union density and greater coverage of employees working under a collective bargaining agreement.<sup>32</sup>

### A. Comparing Labor Unions in the U.S. and U.K.

#### 1. Union Democracy

The most important difference between U.S. and British unions lies in how democratic they are.<sup>33</sup> In a path-breaking comparative study of U.S. and British unions, David Edelstein and Malcolm Warner found significant differences in the level of democracy between British and American labor unions.<sup>34</sup> Their measure of democracy was the closeness of elections to fill vacancies in the union's top and next-to-top posts (typically the offices of president and secretary respectively).<sup>35</sup> An election was judged closer when the runner-up received a higher percentage of the victor's votes.<sup>36</sup> For Britain, Edelstein and Warner found that during the years 1949–1966 the mean closeness of elections was 53.9 percent for top vacant-post elections and 69.5 percent for next-to-top vacant-post elections.<sup>37</sup> For the same years in the United States, the results were 10.3 and 14.8 percent respectively.<sup>38</sup> Elections in British unions were therefore more competitive than those in U.S. unions.

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32. See Michael Wallerstein & Bruce Western, *Unions In Decline? What Has Changed and Why*, 3 ANN. REV. POLI. SCI. 355, 358 tbl.1 (2000) (categorizing the U.K. as a "middle-density" country, with densities between 45.1 (1950), 56.3 (1980), and 41.3 percent (1992), and the U.S. as a "low-density" country, with densities between 28.4 (1950), 24.9 (1980), and 15.3 percent (1992); in 1990, contract coverage was 47 in the U.K. and 18 percent in the U.S.).

33. For methodological reasons, the definition of democracy used in this Article is a relatively formal one. If, as I hope to demonstrate, workplace associations help explain the likelihood of union democracy, one needs a definition of democracy that keeps those two concepts distinct. Nevertheless, if union democracy requires extensive member participation in workplace associations our overall notion of democracy is obviously more robust than the formal definition. By the same token, this idea of union democracy is not overly demanding: although it requires significant levels of member participation, it falls short of requiring direct democracy and recognizes that effective membership direction of the union may be indirect, e.g., via competitive elections for union office.

34. See J. DAVID EDELSTEIN & MALCOLM WARNER, *COMPARATIVE UNION DEMOCRACY: ORGANISATION AND OPPOSITION IN BRITISH AND AMERICAN UNIONS 4* (Transaction Books 1979) (1975).

35. *Id.* at 95. One may question whether electoral opposition is a necessary element of democracy. For example, consider a unanimous faculty vote in favor of a single candidate for new department chair. Genuine consensus decisions such as these are democratic, perhaps even more democratic than a majority decision. However, the possibility of consensus and unanimity in large, heterogeneous organizations, such as labor unions seems remote.

36. The closeness of *vacant*-post elections is arguably a better measure of democracy than either turnover in posts or the closeness of elections involving incumbents. For instance, one could have frequent turnover without any opposition, such as a quick succession of union presidents who appoint their successors. In elections with incumbents, an incumbent who is repeatedly reelected does not necessarily indicate a frustration of majority will. The leader may be a genuinely effective and favored officer. The focus on vacant-post contests avoids the problems of either of these measures of democracy.

37. EDELSTEIN & WARNER, *supra* note 34, at 95.

38. *Id.*

Edelstein and Warner also compared the constitutions of British and American unions and found that those of British unions were more favorable to democracy than those of U.S. unions.<sup>39</sup> For instance, consider the rules governing a union's convention—the union's "legislature" and highest policy-making body. In British unions, conventions were held more frequently<sup>40</sup> and had fewer delegates, which facilitated their ability to act more as functioning decision-making bodies and less like large pep rallies for rubber-stamping predetermined back-room agreements.<sup>41</sup> British union constitutions also shielded conventions from the dominance of executive officers by restricting or prohibiting them from participating or acting as delegates.<sup>42</sup> In the U.S., field staff appointed by national officers are frequent participants and often delegates in union conventions.<sup>43</sup>

Similarly, constitutional rules governing the union's highest executive body were more democratic in Britain than in the U.S. In Britain, members of the union's executive council were much more likely to be elected by a subdivision of the union.<sup>44</sup> Electing executive councilors in this fashion gives them a reliable base of support from which to launch electoral challenges for higher union office.<sup>45</sup> By contrast, executive councilors in U.S. unions were more likely to be elected by the convention as a whole.<sup>46</sup> Union rules also influenced the power of the union's president.<sup>47</sup> Union presidents in Britain rarely had the power to appoint subordinate officials. By contrast, many in the U.S. had this power.<sup>48</sup>

British and American union constitutions were further distinguished by how they protected the civil liberties of union members and officers. British unions' constitutions were much less likely than U.S. unions' constitutions to have a disciplinary "blanket clause" expressing vague prohibitions against conduct "unbecoming to a union member" or acting "contrary to the interests of the union."<sup>49</sup> In British unions, final-appeals bodies considering matters of internal union discipline tended to exclude the participation of full-time officers, while officer participation was

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39. *See id.* at 99, 101.

40. *Id.* at 105.

41. *Id.* at 104–05. This fact outweighs our more romantic considerations that having a large number of convention delegates better approximates an ideal of direct democracy.

42. *See id.* at 101.

43. *Id.* at 104.

44. *Id.* at 107.

45. Sara Gamm, *The Election Base of National Union Executive Boards*, 32 *INDUS. & LAB. REL. REV.* 295, 295 (1979).

46. EDELSTEIN & WARNER, *supra* note 34, at 107.

47. *See id.* at 99, 101.

48. *Id.* at 101.

49. *Id.* at 109.

more common in US unions.<sup>50</sup> Constitutional rules differed in many other relevant aspects as well.<sup>51</sup>

Perhaps most interestingly, Edelstein and Warner's study sought to show that a union's constitutional rules were in fact related to the competitiveness of elections for top officers.<sup>52</sup> Indeed, even within the sample of U.S. unions, they found that elections were closer when, among other rules, the time between conventions was shorter, the percentage of the union's executive council elected (or appointed) by subdivision was greater, the highest appeal body was independent from national officers, and the union's president was elected by direct vote rather than by the convention.<sup>53</sup> In short, not only do constitutional rules give the appearance of more democracy in British unions, but those rules actually matter for the competitiveness of union elections.<sup>54</sup>

## 2. Union Bureaucracy

Another striking difference between British and American unions is found in the size of their administrative bureaucracies. In Britain, union bureaucracies are notably smaller than in the U.S. A 1961 study of British trade unions found an average of one full-time union employee for every 1400 union members.<sup>55</sup> In contrast, contemporary estimates put the employee-member ratio in the U.S. between 1 to 273<sup>56</sup> and 1 to 300.<sup>57</sup> Compared with labor unions in other countries, the size of union bu-

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50. *Id.* at 110.

51. For Edelstein and Warner's full discussion of overall British-American union differences, see generally *id.* at 87–114.

52. For their specification of mechanisms linking rules and election outcomes, see generally *id.* at 63–82.

53. *Id.* at 142–47. The claim that rules matter for election competitiveness still holds in Britain, but in a more complicated way because of the part of the heterogeneous British sample on which the comparative U.S. hypothesis was tested. *Id.* at 184–86.

54. The importance of rules, or more broadly institutions, is a significant but underappreciated point. In most discussions, the issue of union democracy is reduced to a simple agency dilemma, with the problem inhering in the difficulty union members have in monitoring their leaders. *See, e.g.*, Estreicher, *supra* note 18, at 248–50; Schwab, *supra* note 18, at 379–81. At the very least, however, the problem of monitoring is insufficient to address the issue of union democracy. Consider the election of executive councilors on an at-large versus regional basis. Electing executive councilors on a regional basis does not improve democracy by giving union members more information, but by exploiting the self-interest of executive officers for the members benefit (since when offices are open to competition candidates will be compelled to cater to members' preferences).

55. H.A. CLEGG, A.J. KILLICK & REX ADAMS, TRADE UNION OFFICERS: A STUDY OF FULL-TIME OFFICERS, BRANCH SECRETARIES AND SHOP STEWARDS IN BRITISH UNIONS 104 tbl.29 (1961). A full-time employee of the union includes full-time officers of the union—typically those who hold elective position in the union—as well as full-time members of the union's professional or administrative staff. *Id.* at 19–20.

56. SAMUEL LUBELL, FUTURE OF AMERICAN POLITICS 193 (Anchor Books 1955) (1952) (dividing the number of union members by the number of union employees).

57. RICHARD A. LESTER, AS UNIONS MATURE: AN ANALYSIS OF THE EVOLUTION OF AMERICAN UNIONISM 116 (1958).

reauracries in Britain ranks low, while in the U.S., the size of union bu-  
reauracries ranks high.<sup>58</sup>

The paucity of administrative resources in British unions relative to U.S. unions correlates with differences in financial strength as well. In Britain, average dues (or subscriptions in British terminology) are approximately 0.4 percent of the average manual earnings of full-time working males.<sup>59</sup> This places the dues rates of British unions below those of unions in most other European countries.<sup>60</sup> Only unions in countries such as France and Italy have had similarly low levels of dues.<sup>61</sup> Dues data are hard to come by in the United States—probably owing to the decentralized nature of dues policy in U.S. labor unions. But an estimate can be made that places dues in U.S. unions at around one percent of the average manual wage.<sup>62</sup> Thus, U.S. unions fair rather well financially compared to European unions, fitting somewhere at the bottom end of the high dues-rate category.<sup>63</sup>

### 3. Workplace Associations

British and American unions are also distinguished by the sophistication and autonomy of their shop-floor organizations, or what I will term more generally as workplace associations. Shop-floor or workplace

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58. Jelle Visser, *In Search of Inclusive Unionism*, 18 BULL. COMP. LABOUR REL. 168, 168–69 tbl.24 (1990) reports data for most European trade union confederations for several years between the 1950s and 1980s. Staff to member ratios for some of the better-staffed confederations, with years (in parentheses) chosen closest to the U.S. and U.K. figures, are as follows: Netherlands, 1:485 (1952) and 1:478 (1970); Germany, 1:855 (1950) and 1:800 (1970); Sweden, 1:690 (1980). *Id.* These figures include only officers and employees of the national and confederal unions, and therefore exclude regional and local officers and employees. *Id.* Including the latter would undoubtedly make the actual densities higher. To give some sense of the possible discrepancy, compare the more inclusive figure we reported for Britain (1:1400, in 1961) to the more exclusive ones reported by Visser: 1:5000 (1950) and 1:2857 (1970). *Id.* If that discrepancy carries over, some of European labor union bureaucracies would be comparable and probably larger than those of the U.S. On the other hand, the highly decentralized structure of labor union organization in the U.S. raises union staff densities relative to European unions.

59. Paul Willman, *The Logic of “Market-Share” Trade Unionism: Is Membership Decline Inevitable?*, 20 INDUS. REL. J. 260, 268 (1989). The estimate is based on unions’ per-capita income from subscriptions. *Id.*

60. Visser, *supra* note 58, at 166–67 tbl.23 (dividing European dues rates into three categories: “low” if less than 0.5% of gross wages, “medium” if greater than 0.5% but less than 1.0%, and “high” if greater than 1.0%).

61. *Id.*

62. Using monthly dues data from Charles W. Hickman, *Labor Organizations’ Fees and Dues*, MONTHLY LAB. REV., May 1977, at 19, and average weekly earnings for all production workers from the Bureau of Labor Statistics’ Current Employment Statistics, I estimate that dues were approximately 0.9% of the average manual wage in 1974. This estimation is very approximate. On the one hand, since only *ranges* for *minimum* dues were reported, the calculation was based on the low end of the range and did not account for the fact that dues are usually set higher than the minimum at the local level. On the other hand, the estimation does not account for the fact that union workers normally enjoy a wage premium over nonunion workers.

63. *Cf.* Visser, *supra* note 58, at 166–67 tbl.23 (placing high dues rate at one percent or greater of the gross wages). On the paradox of U.S. unions’ strong financial and staff resources but weak organizing capacity, see Margaret Levi, *Organizing Power: The Prospects for an American Labor Movement*, 1 PERSP. ON POL. 45, 47 (2003).

associations are exemplified in Britain by its industrial relations tradition of shop-steward committees. Committees of shop stewards began to appear in particular British industries at the beginning of the twentieth century, and by the 1960s were a prominent feature across virtually all industries.<sup>64</sup>

Through such committees, stewards and union members in Britain play a much larger and more independent role in collective bargaining than they do in the U.S. In a 1994 study, 48.9 percent of full-time officers responded that the most common method of decision making about annual pay claims was for stewards and members to decide *alone*.<sup>65</sup> Another 23.3 percent of officers said that the most common method was for stewards and members to decide after consulting with a union officer, and only 1.1 percent of respondents said that the most common method was for a union officer to decide pay claims alone.<sup>66</sup> In the U.S., on the other hand, agreements with employers are negotiated by local union officials or committees of at least one or more full-time union representatives.<sup>67</sup> Typically, shop stewards in the U.S. are at most involved in low-level grievance handling, are carefully monitored by full-time officials, and more often act to relay communications downward from the union hierarchy to the membership rather than the opposite.<sup>68</sup>

The initiative for taking strike action also attests to the power and autonomy of British shop stewards. Between 1960 and 1964, strikes undertaken by members and shop stewards without authorization from union officials “accounted for nearly 95 per cent of all strikes in Great Britain, and 60 per cent of days lost from work because of strikes.”<sup>69</sup> In the United States, thirty percent of all strikes in the U.S. were unauthorized and five percent of working time lost to strikes was a result of unauthorized strikes.<sup>70</sup> The terms “unauthorized” or “wildcat” strike carry the sting of opprobrium in the United States. Given the prominent role of

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64. Michael Terry, *Shop Steward Development and Managerial Strategies*, in *INDUSTRIAL RELATIONS IN GREAT BRITAIN* 67, 67–68 (G.S. Bain ed., 1983).

65. JOHN KELLY & EDMUND HEERY, *WORKING FOR THE UNION: BRITISH TRADE UNION OFFICERS* 129 tbl.7.1 (1994).

66. *Id.* The other 26.7 percent of officers responded that the most common method of decision-making about annual pay claims was for stewards and officers to make a joint decision. *Id.*

67. Jack Steiber, *Unauthorized Strikes Under the American and British Industrial Relations System*, 6 *BRIT. J. INDUS. REL.* 232, 235 (1968); see also H.M. Douty, *Post-War Wage Bargaining in the United States*, 23 *ECONOMICA* 315, 318 n.3 (1956) (noting that in the British case multi-unionism generates shop-steward bargaining “divorced from the local union.” In contrast, “[the shop steward in the U.S.] secures his representation at the plant level directly through his local union. This means in turn that the local union [rather than the shop steward] in the United States tends to be immediately and directly concerned with all aspects of the collective agreement . . .”).

68. Voss & Sherman, *supra* note 9, at 324 (quoting one participant in a partially revitalized local union as saying that the job of a steward “is pretty much to disseminate information and maybe observe if there’s [*sic*] contract violations”). Shop stewards take a much more active role in fully revitalized locals. *Id.* at 313.

69. Steiber, *supra* note 67, at 232.

70. *Id.* at 234–35.

shop stewards in Britain, however, the occurrence of an unauthorized strike probably does not connote the same degree of dysfunction.

### *B. Possible Explanations for U.S.-U.K. Union Differences*

What explains these stark differences in British and American labor unions, particularly in their levels of democracy? Are they related in a way that can explain why British unions are more democratic? Before presenting the Article's answer to these questions, it will be instructive to first consider a few alternative hypotheses.

The alternative explanation that no doubt leaps quickest to the reader's mind is some form of an American "exceptionalism" argument.<sup>71</sup> According to this view, one should not be surprised that British unions are more democratic than U.S. unions. After all, the American labor movement—with its conservative, bread-and-butter, "business-unionism" ideology—has lacked the kind of far-reaching socialist philosophy found in Europe that one might think would seek to truly empower workers democratically.<sup>72</sup> While intuitive, there is not much to support this American exceptionalism argument.<sup>73</sup> Without question, European labor movements sought to achieve *political* democracy by, among other things, extending the franchise.<sup>74</sup> Whether they maintained democracy within their own political parties and trade unions is a much more doubtful question. Indeed, Robert Michels formulated his "iron law of oligarchy" theory based on his analysis of the European labor movement and of the German Social Democratic Party in particular.<sup>75</sup> Moreover, this disjuncture between democratic goals and internal oligarchy may not have been as contradictory as it seems. Even early socialists were quick to defend the need for authority against the more democratic elements within their movement, lest internal infighting, as the argument went, became an obstacle in the struggle against employers and the state.<sup>76</sup>

A comparison of British and other European trade unions bears this reasoning out. European trade unions share many of the same democratic

71. The *locus classicus* of the American exceptionalism argument is WERNER SOMBART, *WHY IS THERE NO SOCIALISM IN THE UNITED STATES?* (Patricia M. Hocking & C.T. Husbands trans., Macmillan 1976) (1906).

72. For an argument that explains the conservative orientation of the American labor movement as historically contingent on the structure of law and legal institutions, see generally Forbath, *supra* note 31, and WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 2–3 (1991).

73. For reconsiderations of the idea of American exceptionalism generally, see Sean Wilentz, *Against Exceptionalism: Class Consciousness and the American Labor Movement, 1790–1920*, 26 *INT'L LAB. & WORKING CLASS HIST.* 1, 3 (1984), and Aristide R. Zolberg, *How Many Exceptionalisms?*, in *WORKING-CLASS FORMATION: NINETEENTH-CENTURY PATTERNS IN WESTERN EUROPE AND THE UNITED STATES* 397, 398–99 (Ira Katznelson & Aristide R. Zolberg eds., 1986).

74. See Zolberg, *supra* note 73, at 414–15.

75. See generally MICHELS, *supra* note 21.

76. See, e.g., Friedrich Engels, *On Authority*, in *THE MARX-ENGELS READER* 730, 731–32 (Robert C. Tucker ed., 2nd ed. 1978).

limitations that are evident in U.S. trade unions: absence of open and contested elections, conventions that meet too infrequently and are dominated by officials, and executive committees that lack independence.<sup>77</sup> The same holds true for the other aspects of labor organization as well. As mentioned, British union bureaucracies are remarkably small by European standards;<sup>78</sup> only French unions are in contention for similarly paltry amounts of administrative muscle.<sup>79</sup> While some “exceptional” factor may account for the relatively high bureaucratic density of U.S. unions (for instance, U.S. labor unions bargain for and administer health and pension benefits that are provided to Europeans through their governments),<sup>80</sup> this does not appear to make bureaucracies any larger in U.S. unions than in continental European unions. Moreover, this factor cannot account for the conspicuous bureaucratic gap found between British and other European labor unions. Finally, no other European country has the form of workplace associations found in Britain.<sup>81</sup> While Germany is famous for its works councils, these labor-organization counterparts are severely curtailed in their bargaining agendas and lack the autonomy and power possessed by British shop-stewards committees.<sup>82</sup> In terms of union democracy, union bureaucracy, and workplace association it is British unions, not American unions, that appear “exceptional” when measured against the rest of Europe. One is almost tempted to endorse a British version of the “exceptionalism” thesis.

Other alternative explanations can likewise be dismissed. First, scholars have criticized weaknesses in the Labor-Management Reporting and Disclosure Act (LMRDA), which seeks to guarantee certain democratic minima in labor unions, for being responsible for the dearth of democracy in U.S. labor unions.<sup>83</sup> But this cannot explain the union-democracy difference between the two countries because, whatever the LMRDA’s shortcomings, there is *no* equivalent regulatory approach in

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77. ANTHONY CAREW, *DEMOCRACY AND GOVERNMENT IN EUROPEAN TRADE UNIONS* 195–96 (1976) (concluding that “it seems fair to characterise the continental unions studied as being more dominated by officialdom than is usually the case in Britain”).

78. See Visser, *supra* note 58, at 168–69 tbl.24, 170; see also KELLY & HEERY, *supra* note 65, at 37 (finding the ratio of full-time officers—as distinct from all full-time employees—to members in British unions is below the Western European average).

79. See Visser, *supra* note 58, at 170–71.

80. NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 142–44 (2002). By failing to distinguish union officers from all full-time union staff, Lichtenstein may overstate the degree to which the bureaucratic densities of U.S. unions exceed those of European unions. See Willman, *supra* note 59, at 268.

81. See CAREW, *supra* note 77, at 196–97.

82. *Id.* at 197 (describing works councils as “essentially non-union, even anti-union, bodies based on an assumed community of interests between employers and workers, and providing little scope for the pursuit of workers’ sectional interests”).

83. See generally Hyde, *supra* note 26, at 807 (“[The LMRDA] . . . said nothing by its terms about collective bargaining, but this very silence was cause for concern to some leading figures of the period who wanted to make sure that full democracy for dues increases, election of officers, and internal by-laws did not infect the collective bargaining process.”); James, *supra* note 26, at 248, 251.

Britain. Second, the structure of American unions is staggeringly fragmented relative to European unions, and this has been offered as a reason for the surprisingly large bureaucratic sizes of U.S. unions.<sup>84</sup> However, the degree of centralization in U.S. and British unions is actually a point of similarity when compared to other European unions.<sup>85</sup> Furthermore, given the strong association of localism with democracy in the U.S., one would think that decentralization would enhance democracy in American labor unions. Third, the democratic differences of U.S. and British unions reported by Edelstein and Warner are national in character and consequently abstract away from important differences in industrial or occupational characteristics.<sup>86</sup> We can therefore most likely rule out explanations that attribute democratic variation to such factors.

Finally, might the much larger population size of the U.S. account for any organizational differences? The staff-member densities relied on above account for differences in union membership sizes across countries because bureaucracy is measured as a ratio of the number of full-time union officers and employees to the number of union members. In any case, we should expect bureaucratic densities to be smaller when union memberships are larger because there are administrative economies of scale.<sup>87</sup>

If these explanations cannot account for the difference in union democracy between the U.S. and Britain, what can?

## II. A THEORY OF UNION DEMOCRACY

This Part provides the intuition for the game-theoretic explanation of union democracy presented in the Appendix. This explanation understands union democracy as a resolution to a commitment problem between union leaders and members, both of whom prefer the institutionalized procedures of union democracy to the disruption that members can create when they are sufficiently self-organized and therefore able to express their opposition to leadership policy. However, because union leaders would rather be unencumbered by union democracy, they will

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84. See LICHTENSTEIN, *supra* note 80, at 142.

85. When seventeen countries are ranked by the degree to which wage bargaining is centralized, one finds that Britain and the U.S. are among the least centralized, ranking at 12 and 16, respectively. Lars Calmfors & John Driffill, *Centralization of Wage Bargaining*, 3 *ECON. POL'Y* 16, 18 tbl.1 (1988).

86. The British sample included thirty-one national unions that consisted of 203,000 members from both blue and white-collar occupations, while the U.S. sample included fifty-one national unions that consisted of 268,000 members, also from both blue and white-collar occupations. EDELSTEIN & WARNER, *supra* note 34, at 87–91.

87. See Willman, *supra* note 59, at 268 (reporting evidence that per capita administrative costs are negatively correlated with the size of the union's membership in British labor unions). Nevertheless, the highly decentralized U.S. labor movement often means that membership sizes are smaller than European labor unions. See EDELSTEIN & WARNER, *supra* note 34, at 88–90 tbls.4.1 & 4.2 (comparing roughly similar total union membership sizes for the U.S. and Britain despite a significantly larger number of U.S. unions).

only abide by democratic restraints when the threat of disruption is strong enough. The strength of workplace association matters, therefore, and this factor depends inversely on the size of the union's bureaucracy because they are substitutes in the production of collective goods union members care about. I will explain at some length why workplace association is a particularly important form of member self-organization. The causal relationships between union democracy, bureaucracy, and workplace association are summarized in Figure 1. We first address the positive relationship between the strength of workplace association and the likelihood of union democracy: What are workplace associations and what is their role in the democratization of labor unions?

#### *A. Union Democracy and Workplace Associations*

##### 1. Secondary and Workplace Associations: Two Examples

To begin our discussion about the relationship between workplace association and union democracy, consider the following two historical examples. Beginning in the early 1960s, serious conflict emerged within the United Mine Workers of America (UMWA) between union leaders and members.<sup>88</sup> Democracy within the UMWA was moribund as the union's administration and collective-bargaining were centralized under the authority of its president.<sup>89</sup> After the contract settlement of 1964 between the UMWA and the mine operators, eighteen thousand miners struck for eighteen days to protest the agreement.<sup>90</sup> According to Paul Clark's account, "This demonstration took place not in protest of the basic wage increase of two dollars a day negotiated by the UMW[A] leadership, but rather in opposition to the lack of fringe benefits, pension increases, and improvement in health and safety provisions in the final settlement."<sup>91</sup> Incipient protests such as these contributed to the emergence of a rank-and-file movement—the Miners for Democracy—that succeeded in electing a reform slate of union officers.<sup>92</sup> Significant, pro-democratic changes were made to the UMWA constitution in 1973 and 1976.<sup>93</sup> Unfortunately, this movement for democracy was unable to sustain itself. In 1979, a new administration amended the constitution in ways that undermined the earlier democratic reforms.<sup>94</sup> Dismayed by the decline of the democratic reform movement in the UMWA, reform-

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88. PAUL F. CLARK, *THE MINERS' FIGHT FOR DEMOCRACY: ARNOLD MILLER AND THE REFORM OF THE UNITED MINE WORKERS* 22–23 (1981).

89. *Id.* at 15–22.

90. *Id.* at 22–23.

91. *Id.* at 23.

92. *Id.* at 26–31.

93. *Id.* at 42–43, 85–89.

94. *Id.* at 143–45.

minded former officers concluded that, despite their efforts, “it’s all right back where we started.”<sup>95</sup>

Contrast this chronology of the UMWA with that of the British Amalgamated Society of Engineers (ASE).<sup>96</sup> Significant turmoil emerged within the ASE in the early decades of the twentieth century as the process of collective bargaining began to change.<sup>97</sup> Previously, wages and working conditions were set—often unilaterally—at the local level by union members within their respective shops or by district committees of the labor union.<sup>98</sup> As markets expanded and technology changed, employers sought to bargain with the union over terms of employment at a national, rather than local, level.<sup>99</sup> While national union officers sought an accommodation with these changes, this transformation provoked significant opposition from local union districts.<sup>100</sup> In one of the most significant examples, workers in Glasgow, Scotland, launched a strike in defiance of the ASE Executive Council’s agreement with the employers on a demand for a wage reduction in the midst of an economic recession.<sup>101</sup> These events accumulated into “an amount of dissatisfaction and unrest unprecedented in the Society’s history.”<sup>102</sup>

At the same time that local-central conflict was growing within the ASE, committees of shop stewards began to appear throughout the union, often as more formalized expressions of the ASE’s ancient craft tradition of shop-floor representation.<sup>103</sup> The sophistication of these shop-steward organizations was impressive: in 1919 they achieved formal recognition from employers, independent from the recognition earlier granted to the ASE.<sup>104</sup> These shop-steward organizations were also closely linked to democratic reform committees within the ASE that culminated in a number of thorough-going constitutional changes, including the creation of an annual National Committee, whose membership was limited to rank-and-file members and which was responsible for setting policy for the union’s executive officers.<sup>105</sup> Such reforms helped ensure rank-and-file control over union policy and administration and reduced conflict between local and central organizations of the union. However, whereas

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95. *Id.* at 155.

96. JAMES B. JEFFERYS, *THE STORY OF THE ENGINEERS: 1800-1945* (1946).

97. *Id.* at 167–69.

98. *Id.* at 12, 98–100, 167; Jonathan Zeitlin, *The Triumph of Adversarial Bargaining: Industrial Relations in British Engineering, 1880-1939*, 18 *POL. & SOC’Y* 405, 412–13 (1990)

99. JEFFERYS, *supra* note 96, at 167; Zeitlin, *supra* note 98, at 410, 413.

100. JEFFERYS, *supra* note 96, at 167–69.

101. *Id.* at 167.

102. *Id.*; *see also id.* at 169–71.

103. *Id.* at 165–66, 181–86.

104. *Id.* at 185–86.

105. *Id.* at 169, 193.

reform in the UMWA faltered, democratic change in the ASE proved durable.<sup>106</sup>

What led to attempts at democratic reform in each union, despite the different outcomes? In each case, organizations that were autonomous from the official union provided a critical counterbalance to the authority of incumbent union officials. In the UMWA this was the Miners for Democracy. In the ASE, it was the shop-steward committees. In democratic theory such organizations are called “secondary associations.” Secondary associations are best defined in the pioneering study of union democracy by Seymour Lipset and his colleagues as “organized or structured subgroups which while maintaining a basic loyalty to the larger organization constitute relatively independent and autonomous centers of power within the organization.”<sup>107</sup> The definition, of course, is analogous to that used in theories of civil society and civic associations; the acknowledgement to Tocqueville is explicit.<sup>108</sup> The existence of secondary associations within an organization enhances the potential for democracy in several ways: they serve as arenas in which new ideas are generated, as alternative networks of communications, as training grounds for new leaders, as a means of encouraging participation in the larger union arena, and as bases of opposition to the central union authority.<sup>109</sup>

Not only must secondary associations be independent of the central union organization, but they must also be able to exercise some considerable form of power against it as well.<sup>110</sup> In both the UMWA and the ASE, the ability to carry out independent strike action without the authorization of union officials was an important example and demonstration of such power. Indeed, such “wildcat” or “unauthorized” strikes—while often protests against conditions of employment—are frequently demonstrations against the union’s leadership as well.<sup>111</sup> Such actions can be highly disruptive, even catastrophic, to the union, and are therefore a potent means of sanctioning the union leadership.<sup>112</sup> Not only may they pose the loss of dues revenues, but they also disrupt established bargaining relationships, cause employers to question union leaders’

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106. See, e.g., EDELSTEIN & WARNER, *supra* note 34, at 263–318 (describing persistence of democracy within the ASE, later the AUEW).

107. LIPSET ET AL., *supra* note 25, at 15.

108. *Id.* at 73–76. Tocqueville’s study remains the *locus classicus* of the discussion of civil society and civic associations. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., The Legal Classics Library 1988) (1835).

109. LIPSET ET AL., *supra* note 25, at 80.

110. *Id.*

111. See *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 403 (1981) (acknowledging that union-member respondents “commenced a wildcat strike, because they believed that ‘the union was not properly representing them’”).

112. William B. Gould, *The Status of Unauthorized and “Wildcat” Strikes Under the National Labor Relations Act*, 52 CORNELL L. REV. 672, 672 (1967) (quoting Secretary of Labor, W. Willard Wirtz, as describing the threat of wildcat strikes as “very, very dangerous for collective bargaining”).

ability to keep their promises, and threaten the leadership's legitimacy. Under certain conditions, secessions of smaller union organizations from the larger body are another example of a similar disruptive mechanism.<sup>113</sup>

Nevertheless, while the democratic reforms in the ASE proved enduring, those in the UMWA did not. What explains the differing outcomes? The divergence can be attributed to the faltering of secondary association in the UMWA and to its tenacity in the ASE. In the UMWA, secondary association took the form of a single-issue organization based explicitly around the goal of union democracy. Tragically, once its purpose was thought to have been served, the rationale for its continued existence came into question. Indeed, even successful reform candidates at all levels of the UMWA united in calling an end to the Miners for Democracy once they took office: "The need for MFD has ceased to exist and we now must devote our time to rejuvenating the union that we all want to serve and must improve."<sup>114</sup> However, without a secondary association to *sustain* union democracy, the reform struggle eventually failed. By contrast, secondary associations in the ASE were rooted in the workplace organizations of shop-steward committees. Based in the struggle with employers for gains in the workplace, the rationale for shop-steward committees survived the movement for democratic reforms as did the system of shop stewards itself.

The more general conclusion one draws from the different outcomes in the UMWA and the ASE is that secondary associations are more likely to form and persist when they address employees' primary workplace interests, such as improvements in wages and working conditions. As has been frequently recognized, union democracy and matters of internal union governance are often much less salient to them than these first-order goods that unionization delivers.<sup>115</sup> Indeed, even the partial success of the Miners for Democracy is a notable exception in an American labor movement that could be characterized by its high number of largely marginal and failed democratic-reform organizations.<sup>116</sup> However, workplace associations do not face this "salience" obstacle, since they form precisely to improve and defend conditions of employment in the workplace.<sup>117</sup> Their role as democracy-supportive secondary associations is

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113. STEPAN-NORRIS & ZEITLIN, *supra* note 25, at 68–69, 71–72 (showing that among unions founded in the New Deal era under the Congress of Industrial Organizations, "many more of the . . . unions born in a workers' insurgency than [those unions] led into the CIO by their top officers had organized factions and were highly democratic").

114. CLARK, *supra* note 88, at 34–35.

115. Estreicher, *supra* note 18, at 251.

116. See EDELSTEIN & WARNER, *supra* note 34, at 197, for a long list of such reform groups. Other cases of partial success, such as the Teamsters for a Democratic Union, owe their victories to significant government support. See Estreicher, *supra* note 18, at 251.

117. In addition, workplace associations are more likely to form than associations that fulfill workers primary non-work goals. This is because workplace gains present a more likely basis of shared interests. For instance, while workers may have many alternative outlets for satisfying their

incidental and unintended. Thus while secondary associations can take a number of forms within labor unions, *workplace* associations are more likely to form and succeed as a particular case of secondary associations. We reach the paradoxical conclusion—inferred from the civic-associations literature as well—that successful secondary associations are more likely *not* to have democracy as their primary *raison d'être*.<sup>118</sup>

I have tended to use the term “workplace associations” to refer to this particular kind of secondary association rather than the more straightforward “shop-steward committees” because, as we have seen in the U.S. case, shop stewards do not always have the responsibilities and autonomy required to act as genuine secondary associations.<sup>119</sup> Furthermore, we can think of autonomous forms of workplace association other than shop-steward committees. For instance, sociologists and organizational theorists have long been fascinated with the nature and functioning of “informal work groups.”<sup>120</sup> And in analyzing the legal standing of “employee caucuses” in nonunion work settings, Alan Hyde provides examples of some other forms of workplace associations: “(1) unorganized networking and griping; (2) internal pressure groups that form in protest of *ad hoc* [management] decisions; and (3) ‘identity’ groups like women’s, Black, Latino, Asian, or gay and lesbian caucuses.”<sup>121</sup>

## 2. Union Democracy and Credible Commitments

We have highlighted the capacity of wildcat strikes and union successions to create disruptions. But disruption by itself does not induce union democracy.<sup>122</sup> So how does the power of workplace associations actually contribute to democratic change within a union? Moreover, how did protests over health and safety in the UMWA and over wage reductions in the ASE lead to struggles for democratic reform? More generally, how were disputes over *policy* transformed into changes in constitutional *principle*?

To answer these questions, I propose we understand union democratization as a resolution to a commitment problem between union leaders and union members.<sup>123</sup> When the policy preferences of union leaders and

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social needs, they have only each other when searching for ways to improve conditions on the shop floor. See Estreicher, *supra* note 18, at 252.

118. On the civic-associations inference, see ROBERT D. PUTNAM ET AL., MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 91–92 (1993).

119. See *supra* text accompanying notes 64–70.

120. See, e.g., Fred E. Katz, *Explaining Informal Work Groups in Complex Organizations: The Case for Autonomy in Structure*, 10 ADMIN. SCI. Q. 204, 220 (1965).

121. Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 150 n.3 (1993).

122. For the capacity to create disruption as a general form of power distinct from institutions such as democracy, see FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE’S MOVEMENT: WHY THEY SUCCEED, HOW THEY FAIL 27 (Vinatage Books 1979) (1977).

123. For a similar analysis, see generally DARON ACEMOGLU & JAMES A. ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY (2006). See also Douglass C. North &

members diverge,<sup>124</sup> the threat of a wildcat strike or secession gives a self-organized membership a weapon with which to contest leadership decision-making in a relatively undemocratic labor union. Wanting to avoid such a costly and disruptive confrontation, leaders will want to make concessions in policy. But promises from a leadership who calls all of the shots are simply that: promises without any binding force. Union members will also prefer to have their policy preferences implemented without having to carry through on their strike or secession threat, which may entail lost wages and other costs for them as well. When an oligarchic leadership's promises are not credible, however, a wildcat strike or secession might be the only possible outcome.<sup>125</sup>

Democracy is a solution to this credibility problem. Democracy entails rules and procedures that make leadership promises more binding and policy-making more favorable to the preferences of union members.<sup>126</sup> To recapitulate our previous discussion, competitive elections present leaders with the possibility of being voted out of office; executive-council members that are elected by and accountable to specific subdivisions of the union are freer to oppose presidential authority; limitations on a parent union's power of trusteeship restricts its ability to remove leaders elected by the local's members; and so forth. Democratization is therefore a process of institutionalization that transforms the de facto power of workplace associations into the de jure power of union rules that more effectively transmits member preferences into policy.<sup>127</sup> Both leaders and members prefer this arrangement to the alternative: costly wildcat strikes, successions, or other forms of disruption.

However, the key point is that union leaders will submit to democratic procedures, which restrict their policy preferences, only when workplace association is sufficiently strong to pose a potent enough threat. If workplace associations are too weak to mount any real opposition, then oligarchy prevails and the union leadership implements its most preferred policy choice (in which case, the leadership's credibility is irrelevant). A third, intermediate outcome is also possible. If workplace association is at a middling level of strength and if the union leadership's promises are sufficiently credible, then the insurgent union members might be willing to forgo their strike threat and accept the leadership's concessions. This may indeed be a common outcome in U.S.

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Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 804 (1989).

124. As in the "iron law of oligarchy" and agency theory, a misalignment of preferences between leaders and members is presumed. See Summers, *supra* note 18, at 93–95 (summarizing the iron law of oligarchy). There would hardly be a democratic dilemma without such a misalignment.

125. For a discussion of commitment problems in political democratization, see ACEMOGLU & ROBINSON, *supra* note 123, at 133–42.

126. Of course, union democracy would not fully eliminate agency costs. All that is necessary for the argument is that agency costs are lower under union democracy than under oligarchy.

127. ACEMOGLU & ROBINSON, *supra* note 123, at 173–81.

labor unions. For instance, labor law practitioners are familiar with the way that the threat of wildcat strikes can serve as an informal goad to encourage the union to process workers' grievances.<sup>128</sup> The lack of perfect credibility diminishes the value of the leaderships' concessions, but this is the best a weaker workplace association may be able to achieve. These three distinct union-governance outcomes—oligarchy, democracy, and oligarchy with concessions—and the conditions of workplace-associational strength and union-leadership credibility likely to satisfy them, are displayed in Table 1.<sup>129</sup>

### *B. The Role of Union Bureaucracy*

The democratic outcome of the labor union therefore depends critically on the strength of workplace associations. But likelihood of union democracy and the strength of workplace associations both depend on the size of the union's bureaucracy (among other factors that shall be discussed). In our comparison of union bureaucracy and workplace association in the U.S. and Britain, we saw that while union bureaucracies were large in the U.S. and small in Britain, the opposite was the case for the strength of workplace association.<sup>130</sup> In Britain, shop-steward organizations are far more sophisticated, autonomous, and central to its industrial-relations system than they are in the U.S. These correlations raise the questions of whether bureaucracy and workplace association are "substitutes" and by extension whether the size of bureaucracy is inversely related to the likelihood of democracy. This section will argue that this is exactly the case.

In union democracy and revitalization studies, some negative relationship between union bureaucracy and union democracy or workplace association is often presumed, but the links articulating them are often unspecified.<sup>131</sup> The game-theoretic model helps identify two mechanisms linking a larger bureaucracy with a reduced likelihood of union democracy.<sup>132</sup> Returning attention to Figure 1, these relationships are visually summarized as the two arrows leading from union bureaucracy to workplace association and union democracy, respectively.<sup>133</sup> The first mechanism has a negative, indirect effect on union democracy: a larger union

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128. See David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 751 (1973) ("[T]he grievance and arbitration machinery [must] operate with reasonable speed. . . . If it does not, and grievances accumulate, the system becomes unacceptable [to workers]. This, in turn, may lead to wildcat strikes or work-slowdowns.").

129. One can regard this Table as a simplified version of the equilibrium characterization of the union-democracy game found in the Appendix. See *infra* Appendix B.2.

130. See discussion *supra* Part I.A.2–3.

131. See, e.g., STEPAN-NORRIS & ZEITLIN, *supra* note 25, at 161 (taking "union democracy" and "monolithic, bureaucratic unions" as mutually exclusive alternatives).

132. Another possible mechanism, recognized elsewhere, is patronage: a larger bureaucracy can buy off the opposition or incorporate those talented workers most able to lead workplace associations. See MICHELS, *supra* note 21, at 185–87.

133. See *infra* Figure 1.

bureaucracy “crowds out” the possible strength of workplace association.<sup>134</sup> The second mechanism has a negative direct effect on the likelihood that union democracy will emerge: a larger bureaucracy gives the union leadership greater “capacity” to make more attractive policy concessions and bargain its way out of a full, de jure democratization of the union.<sup>135</sup>

Before investigating these mechanisms in detail, we should provide a microfoundation for why union leaders seek to establish bureaucracies in the first place.<sup>136</sup> Bureaucracies represent significant and costly investments in professional and administrative staff. The union’s staff performs work that benefits the union members: the bargaining and enforcement of contracts, the resolution of grievances, and the production of other collective goods. The question becomes, why would unaccountable union leaders ever make such costly investments to produce collective goods that benefit union members? One answer to this question is that union leaders care greatly about revenues.<sup>137</sup> The source of union revenues, however, is primarily dues—the monetary contributions that members make to the union. Dues in turn depend on the level of wages of union members. If union leaders care about revenue, they will therefore have substantial incentives to bargain wage increases and therefore to provide the administrative means to achieve them. Union leaders may have other motives for building bureaucracies, ranging from empire building to a genuine commitment to the union movement. Nevertheless, the assumption of revenue maximization is a useful and reasonable first approximation of union leader behavior.

Given these incentives, how does union bureaucracy affect workplace associations? The first, “crowding-out” mechanism works in the following way. Since workplace association is another way of producing the collective goods that unions deliver, bureaucracy and workplace association are *substitutes*. Indeed, the high number and relative sophistication of shop stewards in Britain are seen as necessary to replace the dearth of full-time professional staff.<sup>138</sup> Consequently, the more of the collective good the union produces, then the more likely that workplace association will run into decreasing returns. Wages, for instance, can only be raised so high before they threaten to put the employer out of

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134. *Id.*

135. *Id.*

136. There is a large literature on labor union behavior, the engagement with which is beyond the scope of this Article. For an overview of that literature, see generally Henry S. Farber, *The Analysis of Union Behavior*, in HANDBOOK OF LABOR ECONOMICS, 1039–89 (Orley Ashenfelter & Richard Layard eds., 1986); Bruce E. Kaufman & Jorge Martinez-Vazquez, *Monopoly, Efficient Contract, and Median Voter Models of Union Wage Determination: A Critical Comparison*, 11 J. LAB. RES. 401 (1990).

137. Union revenues may be a source of personal perquisites for union leaders, or they may be used to pursue other goals.

138. KELLY & HEERY, *supra* note 65, at 119 (explaining that with “limited resources, British unions require lay activists to shoulder much of the burden of day-to-day representation”).

business. In a large-bureaucracy environment that delivers high wages, workers will find that the costs of workplace association outweigh the potential gains for further wage increases.

A large bureaucracy that “delivers the goods” does not, unfortunately, mean that member preferences will be fully satisfied—even while it will still effectively obstruct the formation of workplace associations. Better union contracts may increase the scope for certain kinds of leadership rent seeking. For instance, higher wages can support higher dues payments, *higher* than necessary to pay for the larger bureaucratic effort. In this case, members could be made better off by lowering dues while holding the level of wages and bureaucracy constant. Large pension funds can generate personal income for union leaders, in different ways and in sometimes more or less legal forms.<sup>139</sup> The history of the Teamsters union is a prime example of the compatibility of favorable contracts with high costs in corruption.<sup>140</sup> In these examples, there would still be little point trying to form workplace associations in order to extract greater gains in the workplace, and yet members are not receiving all of the gains the union wins from the employer.

In addition, the mix of collective goods the union negotiates may not be the one that union members prefer. Since union leaders have an interest in maximizing revenue, they may favor wage increases over other collective goods from which it may be more difficult to measure and extract monetary rents<sup>141</sup>—for example, recall the members’ health-and-safety concerns in the case of the UMWA.<sup>142</sup> If wages are at least partial substitutes for other union goods, wage increases will tend to crowd out workplace associations even though the final contract is not the one union members would have chosen.

Finally, a strong collective-bargaining agreement that delivers gains in the workplace will crowd out workplace association, but leave unsatisfied issues that concern union members *outside* the direct employment relationship. The best example of this is the organization of new members, discussed in the introduction.<sup>143</sup> The union’s bureaucratic effort may be allocated toward improving conditions of employment in a single plant or firm, edging out workplace associations, when members’ inter-

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139. Benefit funds generate income for trustees but can also serve as a source of money for all manner of nefarious schemes, from simple embezzlement to the use of funds in questionable ventures. ROBERT FITCH, *SOLIDARITY FOR SALE: HOW CORRUPTION DESTROYED THE LABOR MOVEMENT AND UNDERMINED AMERICA’S PROMISE* 25–28 (2006) (describing benefits and corruption associated with union benefit funds).

140. See LEVI, *Inducing Preferences*, *supra* note 25, at 231–32.

141. Edward E. Lawler, III & Edward Levin, *Union Officers’ Perceptions of Members’ Pay Preferences*, 21 *INDUS. & LAB. REL. REV.* 509, 515 (1968) (finding that “officers tend to greatly overestimate the members’ desire for additional cash” relative to economic security benefits), *cited in* Schwab, *supra* note 18, at 383 n.73.

142. See *supra* text accompanying note 91.

143. See *supra* pp. 1–7.

ests might be better served by organizing the wider industry.<sup>144</sup> Members may also care about the union's legislative agenda or its role in politics more generally, about its relationship to other unions and the larger labor movement, or about strategy and tactics leading up to the negotiation of agreements. We could add to this a long list of noninstrumental or intrinsic benefits that union democracy could bring to union members.<sup>145</sup> A large bureaucracy that "delivers the goods" may therefore crowd out workplace associations even while still failing to fully satisfy union members' interests.

The second mechanism that links union bureaucracy with the reduced chance of union democracy is called the "capacity" effect.<sup>146</sup> As we saw previously, union leaders will want to avoid democratization by offering policy concessions to insurgent workers.<sup>147</sup> In sum, the capacity effect says that those policy concessions will be more attractive to union members when the union's bureaucracy is larger. If bureaucracy can produce a unit of the collective good for members at a lower cost than workplace association, then greater gains from efficiency will be associated with a larger bureaucracy.<sup>148</sup> An efficient bureaucracy may help union leaders more effectively pursue their own goals, distinct from those of the membership. But, by the same token, a more efficient bureaucracy's greater "capacity" can also more effectively achieve members' interests, should the threat of disruption provoke the leadership to make concessions. Thus, when bureaucracy is more efficient, the union leadership can more easily "compensate" union members for the privilege of retaining an oligarchy when a rank-and-file insurgency is threatened.<sup>149</sup> For example, a more efficient bureaucracy could bargain better health-and-safety rules in place of high wages. On the other hand, with an inefficient bureaucracy, the union's capacity for only modest wage gains can only be traded off for limited health-and-safety improvements. The success of these promised changes in policy of course depends on the credibility of the leaders; but the point is that a more efficient bu-

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144. On union members' interests in organizing, see *supra* text pp. 5–6.

145. As "schools of democracy," democratic labor unions give union members the training and experience in a broader role of citizenship.

146. See *infra* Appendix B.2.

147. See *supra* Part II.A.2.

148. Will union bureaucracy be more efficient than workplace association? Certainly bureaucracy presents its own information problems and agency dilemmas. And when bureaucracy is used for patronage, nepotism, or empire building, a larger bureaucracy may indeed be associated with greater inefficiency. But abstracting from these latter effects, bureaucracy is probably at least relatively more efficient than workplace association. Whereas bureaucracy entails full-time specialization and hierarchical monitoring, workplace associations, whose members voluntarily contribute effort on a part-time basis, tend to lack those efficiency-promoting attributes. There is also a heuristic reason to assume efficient bureaucracy. One of the foundational assumptions of Michels' "iron law of oligarchy" was the bureaucracy was more efficient than other forms of organization. If it can therefore be demonstrated that union democracy is possible even when union bureaucracy is more efficient than workplace organization, so much the stronger for the theory. MICHELS, *supra* note 21, at 187.

149. See *id.* at 389.

reaucracy increases the value of concessions at any *given* level of credibility.

The capacity effect has an important implication that is relevant for a normative and policy discussion of union democracy. If union democracy is more likely when bureaucracy is less efficient, then there will be some welfare loss associated with the conditions necessary for union democracy. Indeed, British unions are sometimes portrayed this way: poor in staff and finances and with informal and imprecise collective agreements negotiated by lay shop stewards.<sup>150</sup> The question is then raised: would concessions produce a better outcome for workers than union democracy? After all, concessions are easier to sustain than democracy as the efficiency of bureaucracy increases. And concessions go some distance toward satisfying members' policy preferences, while at the same time allowing them to benefit from the efficiency gains of union bureaucracy. Offsetting the attractiveness of this alternative is the problem of ensuring the credibility of union leaders without union democracy, since this credibility is crucial to the effectiveness of the concessionary strategy. In addition, union leaders have no incentive to concede more than necessary to avoid a *de jure* democratization of the union. For these reasons, union members may indeed be willing to trade away some of the efficiency of bureaucracy for a reduction of agency costs under union democracy.

While bureaucracy threatens to undermine democracy and crowd out workplace association, there may indeed be limits to these effects. Dues and benefit funds may increase the opportunities for economic rents, but "shirking," or not working as hard as leaders could because of the difficulty in monitoring their efforts, is a real problem in some unions as well.<sup>151</sup> For instance, even if leaders were solely concerned with economic rents, the non-profit nature of unions restricts those incentives since leaders are unable to capture the full value of their efforts.<sup>152</sup> Furthermore, high wages may partially substitute for other collective goods that members care about, but by the same token, if they are only partial substitutes, members will still have some incentive to form associations to make further improvements in the workplace. However, the strength of workplace associations does not depend solely on the size of the un-

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150. OTTO KAHN-FREUND, *LABOUR AND THE LAW* 199–200 (1972) (writing that the language of many collective agreements in Britain "is so vague that a court may have to hold them to be 'void for uncertainty'"); Steven Tolliday & Jonathan Zeitlin, *Shop-Floor Bargaining, Contract Unionism and Job Control: An Anglo-American Comparison*, in *THE AUTOMOBILE INDUSTRY AND ITS WORKERS: BETWEEN FORDISM AND FLEXIBILITY* 99, 106–07 (Steven Tolliday & Jonathan Zeitlin eds., 1987) (arguing that the frequent job actions and extreme decentralization of shop-steward organizations' in Britain dissipates collective power and exacerbates sectionalism, ultimately curtailing their abilities to challenge wage inequities and employment insecurities).

151. Schwab, *supra* note 18, at 395. This informational rent is the primary agency problem discussed by Schwab. It is perfectly possible for both economic and informational rent seeking to occur simultaneously.

152. *Id.* at 396.

ion's bureaucracy, but on other costs as well, as depicted in Figure 1.<sup>153</sup> For example, as collective entities, workplace associations depend on the resolution of a collective-action problem. More central to this Article's focus are the costs of workplace association that are erected by legal statutes and rulings. These legally-imposed costs of workplace association will now be discussed in Part III.

### III. LABOR LAW AND UNION DEMOCRACY

This Part examines how labor law influences union bureaucracy and workplace association, and hence the prospects for union democracy. As mentioned in the Introduction, we will examine three different areas: (1) the rights of labor unions to exclusively represent a given group of workers, (2) legal establishment or support for professional and institutionalized procedures to resolve disputes in collective bargaining, and (3) legal prohibitions on the use of strike action—economic “self help”—as alternative means of addressing those disputes. As each area of labor law is discussed, the U.S. version of the law will be compared to its British counterpart. Because the data used to compare the different elements of British and American union organization are available only from the 1960s and 1970s, the legal analysis will largely be confined to a similar period. The significant changes in British labor law—which have taken place since the late 1970s—therefore remain outside the scope of the analysis.

These three areas are critically important components of labor law. But they may not be the only important components, and one should not presume the list to be exhaustive. Further, whether the presence or absence of one area depends on the presence or absence of another is a question that is not addressed, although it will be possible to infer such an interdependency from the subsequent analysis. Whether or not this is the case, the three areas nevertheless have distinct causal implications. Figure 2 expands upon Figure 1 to display schematically the causal relationships between labor law and union bureaucracy and workplace association, and thence union democracy.<sup>154</sup> Each mechanism will be elaborated in more detail as each area of labor law is discussed.

#### A. Exclusive Representation

Clyde Summers has called the principle of exclusive representation the “fundamental ordering principle which shapes American labor law and collective bargaining.”<sup>155</sup> I would add that the principle of exclusive representation is also the fundamental ordering legal principle that influ-

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153. See *infra* Figure 1.

154. See *infra* Figures 1 & 2.

155. Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle*, 20 COMP. LAB. L. & POL'Y J. 47, 47 (1998).

ences the fate of union democracy in American labor unions. As shown in Figure 2, exclusive representation has two momentous consequences for union democracy. First, exclusive representation powerfully influences the union leadership's incentives to invest in building a bureaucracy. Second, exclusive representation determines which agency of the workers—the union leaders and its bureaucracy or workplace association—is granted privileged access to the institutionalized procedures both under the National Labor Relations Act (NLRA) and arising from collective agreements.

### 1. Exclusive Representation and Union Bureaucracy

The principle of exclusive representation is articulated in section 9(a) of the NLRA:

Representatives designated or selected for purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .<sup>156</sup>

When a labor union is certified by the National Labor Relations Board (NLRB) under Section 9(a) as the exclusive representative, “the presence of a majority union precludes the employer from bargaining collectively with a minority union.”<sup>157</sup> The Supreme Court has acknowledged in numerous instances that an employer must “treat with no other”<sup>158</sup> than the exclusive bargaining representative and that a minority union may only bargain with an employer in the absence of an exclusive bargaining representative.<sup>159</sup> In the well-known case of *J.I. Case Co. v. NLRB*,<sup>160</sup> the Supreme Court recognized that employers commit unfair labor practices, specifically by refusing to bargain collectively with chosen representatives (Section 8(a)(5))<sup>161</sup> and by interfering with protected

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156. National Labor Relations Act (NLRA) § 9(a), 29 U.S.C. § 159(a) (2006).

157. Summers, *supra* note 155, at 47.

158. *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 547–48 (1937) (exploring the ramifications of the Railway Labor Act). For the NLRA specifically, see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44 (1937).

159. See, e.g., *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 741 n.1 (1961) (Douglas, J., dissenting in part) (“[A]bsent an exclusive agency for bargaining created by a majority of workers, a minority union has standing to bargain for its members.”); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 237 (1938) (“[T]here is nothing to show that the [noncertified union] has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the [noncertified union], even if they were a minority, clearly had the right to make their own choice.”).

160. 321 U.S. 332 (1944).

161. National Labor Relations Act (NLRA) § 8(a)(5) (“It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .”).

employee rights (Section 8(a)(1)),<sup>162</sup> when they attempt to bargain in circumvention of a certified and exclusive bargaining representative.<sup>163</sup>

The effect of exclusive representation on incentives to invest in union bureaucracy works in the following way. When unions lack exclusive representation, unions are free to recruit members on an individual basis. Two or more unions may seek to recruit members in the same workplace. This scenario presents several dilemmas to unions. First, because of the collective nature of the union good, workers will join the union which offers the lowest dues, *ceteris paribus*, since they get the good regardless of their union affiliation. This competition for members places downward pressure on the level of dues. Second, because the union-provided good is a collective good, each union has an incentive to *reduce* the amount of effort it provides (the size of its bureaucracy)—the opposite outcome in the market for a private good. In contrast, when a union has exclusive representation, workers have no incentive to join an outside, competing union. The result is both smaller bureaucracies and lower levels of dues in the absence of exclusive representation.

These mechanisms go a long way toward explaining the administrative and financial differences between U.S. and British unions. The lack of exclusive representation has made an enormous impact on Britain's system of industrial relations. First, what is called multi-unionism, the presence of multiple unions within a given workplace or firm, often competing to represent similar categories of workers, is a prominent feature of British labor relations.<sup>164</sup> In the U.S., by contrast, similarly situated workers belong to the same bargaining unit represented by a single, exclusive union.<sup>165</sup> Second, rival unionism has a depressing effect on union dues in Britain. Even within Britain, unions have lower per capita dues income where competition for members is fiercer.<sup>166</sup> One sees this phenomenon in other European labor movements when competitive un-

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162. National Labor Relations Act (NLRA) § 8(a)(1) ("It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . ."); see also § 7 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .").

163. See *J.I. Case Co.*, 321 U.S. at 334, 339; see also *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 679–80 (1944). Both *J.I. Case Co.* and *Medo Photo Supply Corp.* involved the question whether the employer could bargain directly with employees in circumvention of the exclusive representative. The principle is virtually unquestioned where the employer attempts to bargain with a minority union.

164. See Robert Kilroy-Silk, *Royal Commission on Trade Unions and Employer Associations*, 22 INDUS. & LAB. REL. REV. 544, 551 (1969) (discussing a report of the Royal Commission on Trade Unions and Employer Associations which recommended a reduction in multi-unionism, which is present when two or more unions exist); KAHN-FREUND, *supra* note 150, at 85 (interunion disputes are "of considerable importance in British industry").

165. EDELSTEIN & WARNER, *supra* note 34, at 17–18 (contrasting the US with Britain and stating that "[i]n the United States, virtually all the manual workers in a given workplace belong to the same union, which is the sole bargaining agent for such employees").

166. Willman, *supra* note 59, at 268.

ionism prevails. Both France and Italy have had multiple union confederations that compete to recruit members in the same industries and occupations. Like Britain, they have also had smaller bureaucracies and lower dues rates than European labor movements without such competition.<sup>167</sup>

The effects of exclusive representation can therefore be quite substantial. As will shortly be examined, the legally-supported institutionalization of collective bargaining can lower the costs of bureaucracy, and thereby influence its growth. But whereas the costs of union bureaucracy affect its size at the margin, the absence of exclusive representation and the accompanying collective-action problem between unions undermines incentives to invest in bureaucracy regardless of its costs.

## 2. Exclusive Representation and Workplace Association

Exclusive representation not only affects the size of the union's bureaucracy, but the strength and potential effectiveness of workplace association as well. This is because the principle of exclusive representation not only precludes an employer from bargaining with a minority union, but it also prohibits an employer from bargaining directly with its employees. In addition, the courts have concluded that the NLRA does not protect employees' use of economic action to pressure the employer into bargaining with them in circumvention of the recognized union representative because direct bargaining would violate the exclusivity principle. In sum, this raises the costs of workplace association, making them less likely emerge or become a meaningful and vibrant alternative to achieving workplace gains.

In an early case, *Medo Photo Supply Corp. v. NLRB*,<sup>168</sup> the Supreme Court concluded that an employer may not bargain directly with the employees, in circumvention of the exclusive agent, even when the employees initiate the bargaining.<sup>169</sup> In that case, a labor union was recognized as the bargaining representative for a designated unit of workers.<sup>170</sup> Prior to negotiations, however, a majority of employees in the unit sought to negotiate wage increases without the union's intervention.<sup>171</sup> The Court held that the employer's bargaining violated Sections 8(a)(1) and 8(a)(5) of the NLRA, stating: "Bargaining carried on by the employer directly with the employees, whether a minority or majority . . . would be subver-

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167. See Visser, *supra* note 58, at 166–67 tbl.23, 170–71. Italy is particularly revealing of the causal relationship between competition for members and union dues, since dues went up after contending confederations established more a cooperative relationship.

168. 321 U.S. 678 (1944).

169. *Id.* at 685.

170. *Id.* at 681.

171. *Id.*

sive of the mode of collective bargaining which the statute has ordained .

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Not only will an employer who bargains directly with employees be subject to unfair labor practice sanctions, but he or she is also free to terminate employees who seek to press the employer into negotiations without the participation of the exclusive bargaining agent through the use of economic sanctions. This conclusion was most famously stated in *Emporium Capwell Co. v. Western Addition Community Organization*.<sup>173</sup> In that case, employees who filed grievances with the union against the employer that alleged racial discrimination became dissatisfied at the pace of progress.<sup>174</sup> As a result, they sought to engage the employer directly and commenced picketing their place of employment; after a warning, the employer discharged them.<sup>175</sup>

The Court in *Emporium Capwell* first addressed the question whether the employees were merely attempting to present a grievance to, rather than bargain with, their employer.<sup>176</sup> If it is clear that the NLRA bars employers from bargaining with unions rival to the exclusive representative, the direct relationship between employer and employees raises more of a question. The remainder of Section 9(a), following the part quoted above, contains a proviso stating:

*Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.<sup>177</sup>

However, despite this proviso, the Court affirmed the Board’s finding that the employees’ conduct was “no mere presentation of a grievance but nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees.”<sup>178</sup>

172. *Id.* at 684.

173. 420 U.S. 50 (1975). The ramifications of *Emporium Capwell* reach far beyond exclusive representation. For a contextual history of the case exploring the relationship between racial discrimination in employment, labor law, and the fate of New Deal liberalism, see generally Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-War Liberalism*, 25 BERKELEY J. EMP. & LAB. L. 129 (2004).

174. *Emporium Capwell*, 420 U.S. at 53–54.

175. *Id.* at 55–56.

176. *Id.* at 60–61.

177. National Labor Relations Act (NLRA) § 9(a), 29 U.S.C. § 159(a) (2006).

178. *Emporium Capwell*, 420 U.S. at 57 (quoting the Board’s adoption of the Trial Examiners’ findings and conclusions); see also *id.* at 60–61 (affirming the finding of Board).

It also noted that the intention of the proviso was to allow employees to present grievances to the employer without exposing the employer to liability for bargaining in circumvention of the exclusive bargaining representative.<sup>179</sup>

The second question raised in *Emporium Capwell* was whether the termination of the picketing employees violated their rights under the NLRA.<sup>180</sup> Section 7 of the NLRA grants employees rights “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” and section 8(a)(1) makes it an unfair labor practice for an employer to interfere with the exercise of those rights.<sup>181</sup> However, the Court concluded that the terminations of the workers did not violate the Act because their attempt to circumvent the union and bargain directly with the employer was inconsistent with section 9(a)’s exclusivity principle.<sup>182</sup> The Court conjectured at length on the “fragmentation” that would happen with “separate” bargaining, and the diminution of the union’s bargaining power that would accompany it.<sup>183</sup>

These decisions place workplace associations in an insuperable position. If workers are dissatisfied with their rights established under the collective-bargaining agreement or the procedural means for securing them, they may seek to engage the employer directly—using “unofficial” means such as economic sanctions—to bring the employer to negotiations. However, the use of such self-help alternatives does not receive the same level of protection that other concerted activities are given under the NLRA. Moreover, even if the use of economic action is effective and induces the employer to make concessions, the law ties the employer’s hands. If the employer does bargain a separate agreement with the workplace association, the union can charge the employer with violating its duty to bargain. Both of these outcomes significantly obstruct the ability of workplace associations to achieve gains independent of the official union. For workplace association to be successful it must overcome not only the absence of statutory protection, but also the employer’s fears of liability.

### 3. The Closed Shop as Alternative in Britain?

The British counterpart to the American rule of exclusive representation was very simple: no principle of exclusive representation ever existed during the relevant time period. Nevertheless, union-security agreements—such as the closed shop, which make membership in the

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179. *Id.* at 61 n.12.

180. *Id.* at 71.

181. National Labor Relations Act (NLRA) §§ 7, 8(a)(1). For the text of these provisions, see *supra* note 162.

182. *Emporium Capwell*, 420 U.S. at 65–70.

183. *See id.*

union a condition of employment—were legal.<sup>184</sup> And if a closed-shop agreement requires that employees join only a single union, then the union has exclusive bargaining rights.<sup>185</sup> Furthermore, there are cases illustrating the use of the closed shop to inhibit workplace associations from directly bargaining with an employer.<sup>186</sup> Was the closed shop in Britain therefore an effective counterpart to exclusive representation in the U.S.? The answer is no, for the simple reason that only about two-fifths of union members were covered by closed-shop agreements in the 1960s.<sup>187</sup> By itself, this is not a trivial proportion. But it approaches nowhere near the degree of pervasiveness that exclusive representation operates compared to the United States, where virtually the only way unions achieved recognition was through an NLRB certified election that conferred exclusive-representation status where the union prevailed.<sup>188</sup>

### *B. Legally-Institutionalized Collective Bargaining*

Inscribed in the very purposes of the Wagner Act is the goal of “removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes.”<sup>189</sup> In accordance with these objectives, the NLRA, greatly facilitated by subsequent judicial support and elaboration, establishes opportunities to substitute legal, administrative, or arbitral process for economic self help at virtually every stage of the collective-bargaining process. These stages include: the organization of workers, recognition of the union, the employer’s duty to bargain with the union, and interpretation and enforcement of the collective-bargaining agreement.<sup>190</sup> The contrast with British labor law in the post-war period could not be greater. Whereas the Wagner Act system of collective bargaining endowed un-

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184. KAHN-FREUND, *supra* note 150, at 199–200. Union-security agreements come in a variety of forms. Broadly speaking, in American usage, a closed shop requires the employer to hire and keep in employment only members of the particular union. A union shop allows the employer to hire anyone, but requires the new hire to become a member of the union within a specified time period, such as thirty days. An agency shop requires employees to pay a “fair share” of representation fees to the union as a condition of employment without requiring or conferring full, formal membership rights. A maintenance-of-membership agreement requires those employees who were union members at a given date to maintain union membership as a condition of employment. In British usage, the closed shop can be used to refer to either a closed- or union-shop agreement, with the distinction sometimes made between the “pre-entry” closed shop and the “post-entry” closed shop. *Id.* at 198–99.

185. Union-security agreements need not be exclusive. For example, a closed-shop agreement could require that all employees simply become a member of one of several possible unions. Kahn-Freund mentions this kind of agreement in Britain, but does not say how common such agreements are. *Id.* at 199.

186. *See, e.g.,* Morgan v. Fry, (1968) 2 Q.B. 710, 721–23 (involving employer dismissing member of a breakaway union in order to avoid strike trouble from the union with which the employer had an informal exclusive bargaining agreement), cited in KAHN-FREUND, *supra* note 150, at 203.

187. W. E. J. MCCARTHY, *THE CLOSED SHOP IN BRITAIN* 28 (1964).

188. CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 88 (2005).

189. National Labor Relations Act (NLRA) § 1, 29 U.S.C. § 151 (2006).

190. *See id.* §§ 7, 8(a), 8(d), 9(a).

ions and workers with a set of “positive” rights, British labor law left trade unions and workers merely with “negative” liberties. British labor law famously became characterized as a system of “collective *laissez faire*.”<sup>191</sup>

The main consequence of the substitution of legal and orderly procedure for economic strife is to lower the costs of collective bargaining. At any one of these points in the collective-bargaining process a dispute with the employer is possible. Without a binding procedure to address that dispute, unions have only the threat of strike or other economic action to enforce their claims. Yet strikes are enormously costly. An opportunity to resolve disputes through an institutionalized procedure therefore presents unions and workers with a lower-cost alternative to economic action.<sup>191</sup>

However, the union leadership is in a better position to benefit from the substitution of process for self help than is workplace association. This is for two reasons. First, as the exclusive representative, the union has privileged access to these institutionalized alternatives. In addition the costs of learning and accommodating collective-bargaining procedures are lower for the union bureaucracy—with its comparative advantage in skill, knowledge, and specialization—than for associated union members on the shop floor. Thus, institutionalized collective-bargaining procedures are expected to lower the costs of union bureaucracy rather than those of workplace association. And lowering the costs of bureaucracy gives union leaders further incentive to expand these administrative apparatuses, with all the consequences for union democracy that were discussed in the previous Part.

### 1. Organization, Recognition, and Bargaining

The NLRA provides legal support to labor unions attempting to organize workers. Before a union has been recognized, employees have rights under Section 7 to “form, join, or assist labor organizations.”<sup>192</sup> Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with an employee’s Section 7 rights.<sup>193</sup> And Section 8(a)(3) makes it an unfair labor practice for an employer to discourage membership in a labor organization by discrimination in hiring, tenure, or conditions of employment.<sup>194</sup> A voluminous amount of law has developed under these provisions in the context of labor union organizing. In Section 9, the NLRA establishes procedures for determining an appropriate bargaining unit and certifying an exclusive representative of that unit through a

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191. For a fuller discussion of these “two logics” of union behavior, see generally Claus Offe & Helmut Wisenthal, *Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form*, 1 POL. POWER & SOC. THEORY 67 (1980).

192. National Labor Relations Act (NLRA) § 7. For text, see *supra* note 162.

193. *Id.* § 8(a)(1).

194. *Id.* § 8(a)(3).

Board-directed representation election.<sup>195</sup> Once recognized, an employer has a duty to bargain with the union under Section 8(a)(5).<sup>196</sup>

Thus, in each of these collective-bargaining stages—organization, recognition, and bargaining—the law provides a procedural substitute for the need to mobilize a large number of workers for strike action. Labor unions and their supporters justly complain about the inadequacy of the available remedies to redress employer violations of unions’ and employees’ rights under Section 8. Nevertheless, unions’ consistent recourse to the protections of the NLRA indicates that they are the preferred method of addressing disputes, whatever their shortcomings.<sup>197</sup>

In contrast to the United States, during the relevant period in British labor law there were no legally meaningful rights to organize or rights to labor union recognition. Although under the British conception of collective laissez faire labor unions were free to engage in a broad range of economic actions, this nevertheless left “a glaring contrast between the wide scope of this freedom and the absence of any legislation seeking to guarantee its exercise.”<sup>198</sup> Thus, there was no legal protection against anti-union discrimination or the interference by employers in the establishment or functioning of labor unions.<sup>199</sup> There was no obligation for an employer to bargain with a union.<sup>200</sup> Ultimately, the only sanction trade unions could bring to bear on employers in order to enforce a claim to recognition or against acts of discrimination or interference was the one of economic action.<sup>201</sup> British labor law therefore failed to provide its unions with the same kind of cost-reducing procedural alternatives that the Wagner Act presented to unions in the U.S.

## 2. Interpretation and Enforcement of Collective Bargaining Agreements

Once a union has successfully organized, been recognized, and has concluded an agreement with the employer, U.S. labor law also lends its support to disputes arising from the interpretation and enforcement of these agreements. First, Section 301(a) of the Labor Management Rela-

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195. *Id.* § 9.

196. *Id.* § 8(a)(5). The duty to bargain is subject to a good-faith standard as established in the NLRA section 8(d). Section 8(d) also requires that, where a collective-bargaining agreement is in effect, a party desiring a termination or modification of the agreement give written notice to the other party, offer to meet and confer, and continue the existing agreement for sixty days after giving such notice (or until the expiration of the contract if that occurs later) before resorting to economic action. *Id.* § 8(d)(1)–(4).

197. See MORRIS, *supra* note 188, at 83–86 (discussing how rapidly labor unions came to embrace Board procedures in the case of representation elections). The law’s failure to fully protect the right to organize, thus making the ability to organize more costly, could explain why unions tend to allocate bureaucratic resources to servicing existing members rather than organizing new ones.

198. KAHN-FREUND, *supra* note 150, at 172.

199. *Id.*

200. *Id.* at 78.

201. *Id.* at 249.

tions Act (LMRA) makes collective-bargaining agreements enforceable in federal courts.<sup>202</sup> In the important decision of *Textile Workers Union v. Lincoln Mills*,<sup>203</sup> the Supreme Court upheld the constitutionality of section 301.<sup>204</sup> However, the Court also went further and declared that section 301 gave the federal courts the mandate to create a federal substantive law of collective bargaining.<sup>205</sup> The policy of substituting institutionalized procedures for economic strife could not have been stated more clearly:

Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.<sup>206</sup>

Such legal support gives unions the assurance that disputes can be effectively addressed through procedural means, without the need to mobilize and resort to economic compulsion and self-help. Further, this policy was forcefully elaborated in a series of subsequent decisions, known collectively as the *Steelworkers Trilogy*. In those decisions, the Supreme Court held that courts should enforce agreements to arbitrate regardless of the underlying merit of the dispute,<sup>207</sup> that the agreement should be interpreted to cover the dispute even where the scope of the agreement was ambiguous,<sup>208</sup> and that arbitration awards would be enforced as long as they drew their essence from the collective agreement.<sup>209</sup>

The contrast with British labor law is again instructive. For the most part, collective agreements were legally unenforceable because they lacked contractual intent.<sup>210</sup> This was as the parties desired, and is the

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202. 29 U.S.C. § 185(a) (2006) (“Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”). Prior to the passage of the LMRA, some state courts had enforced collective agreements under various legal theories. See, e.g., *Goldman v. Cohen*, 227 N.Y.S. 311, 312–14 (N.Y. App. Div. 1928), cited in Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1520 (1981); see also *Schlesinger v. Quinto*, 194 N.Y.S. 401, 409–10 (N.Y. App. Div. 1922).

203. 353 U.S. 448 (1957).

204. *Id.* at 457–58.

205. *Id.* at 455–57.

206. *Id.* at 455.

207. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960).

208. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580–81 (1960).

209. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

210. See KAHN-FREUND, *supra* note 150, at 132 (citing *Ford Motor Co. v. Amalgamated Union of Eng'g & Foundry Workers*, (1969) 2 Q.B. 303, 330–31 (holding that an agreement between Ford and a number of other unions could not be enforced because of the factual finding that the agreement lacked contractual intent)).

consequence of long tradition in British industrial relations.<sup>211</sup> There was an exception to this rule, which was that certain provisions of collective agreements could be incorporated into the terms of individual contracts of employment through a theory of prevailing custom and usage.<sup>212</sup> However, this theory only applied to the terms of the collective agreement that could and were intended to be terms of contracts of employment and that gave rise to rights and duties that could be enforced through law-of-contract remedies.<sup>213</sup> Hence, parts of collective agreements covering the making of employment contracts themselves were not applied, for example, agreements over job allocation or the promise to return to work after a strike. The theory also did not cover jointly created institutions, such as committees for whatever purpose or pension funds. Nor did it apply either to established collective bargaining rules or “peace obligations,” known in the United States as no-strike agreements.<sup>214</sup>

More generally, British law establishes no rules promoting the use of legal or quasi-legal procedure to resolve disputes under the collective agreement. In the 1970s, British labor-law scholar Otto Kahn-Freund even felt justified in concluding that although British trade unions had achieved de facto recognition over a broad swath of industries, “[t]he law . . . had no share in the advancement of collective bargaining.”<sup>215</sup> Collective-bargaining parties did establish their own dispute-settlement procedures, but as just shown, such procedures lacked any legal status: the *ultima ratio* for any dispute regarding the dispute procedures themselves always remained the resort to economic self-help.<sup>216</sup> Further, British law did provide for state-initiated conciliation of disputes, but in practice this service tended to reinforce rather than undermine the dominant British model of collective *laissez faire*. That is, state intervention could not dictate, but only facilitate, a settlement and the procedure was only triggered after the parties’ own negotiation machinery had failed.<sup>217</sup> Finally, just as in the U.S., the British state did provide employers and unions with voluntary, nonbinding arbitration services. Significantly, however, the law establishing the arbitration service never created a permanent board that could develop an expertise or a set of principles to apply in the

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211. KAHN-FREUND, *supra* note 150, at 132.

212. *Id.* at 146 (“[T]he elementary rule of contractual construction . . . that the parties are, in the absence of an express term to the contrary, deemed to have implicitly incorporated the substance of the prevailing usages or customs, remains the principal link between collective agreements and contracts of employment.”).

213. *Id.* at 149.

214. *Id.*

215. *Id.* at 77.

216. *See supra* text accompanying note 198–201.

217. *Id.* at 98–100.

settlement of workplace disputes.<sup>218</sup> In sum, the exceptions in British labor law tended to prove the rule.

### C. Restrictions on Economic-Action Alternatives

Key to the Wagner Act's voluntarist system of labor law is the use of "economic weapons," such as strikes and other economic actions. Since U.S. labor law does not dictate any of the terms to which unions and management agree, the resulting bargaining must be one determined by the relative economic power of the parties. The Wagner Act's commitment to "industrial peace and stability" also dictates that economic actions will be an important object of regulation.<sup>219</sup> The governance of these economic weapons is therefore a main concern of U.S. labor law.

The regulation of economic action also critically affects the fortunes of workplace associations.<sup>220</sup> We have previously examined two reasons why workplace associations will tend to resort to strategies of economic self help. First, they lack access to formal proceedings either before the Board or made available under the collective-bargaining agreement because in the presence of a union they do not have exclusive-representation status.<sup>221</sup> Second, union-member workers do not have the same opportunities to acquire knowledge or specialize in the arcane and formal procedures under the NLRA or the collective agreement.<sup>222</sup> If workplace associations wish to achieve their aims, they will therefore need to resort to the use of strikes or other economic actions. This was exactly the conundrum faced by the workers in the *Emporium Capwell* case.<sup>223</sup> Yet U.S. labor law places restrictions on the ability to strike and take other economic action and therefore increases the costs of precisely those alternatives to which workplace associations must resort to advance their demands. This further reduces the strength and possibility of

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218. *Id.* at 100. Britain also experimented with a system of compulsory arbitration arising out of wartime industrial-relations experience and which nevertheless proved unending. Regarding Britain's final experiment with compulsory arbitration, which lasted from 1951 to 1959, Kahn-Freund remarked, "If this system had been more important in practice than it was it would have been inconceivable for the employers to put up with it for more than seven years." *Id.* at 117. The British government also experimented during the two world wars with government-sponsored efforts to establish industry-wide procedure agreements for collective bargaining by instituting Joint Industrial Councils (JICs) where unions had not been established. Though notable as an exception to the British system of collective laissez faire, the JICs remained peripheral to the established trade union sections and did not contribute to the formal institutionalization of collective bargaining. See PAUL DAVIES & MARK FREEDLAND, *LABOUR LEGISLATION AND PUBLIC POLICY: A CONTEMPORARY HISTORY* 39–43 (1993). But see K.D. Ewing, *The State and Industrial Relations: "Collective Laissez-Faire" Revisited*, 5 HIST. STUD. INDUS. REL. 1, 17–20 (1998); CHRIS HOWELL, *TRADE UNIONS AND THE STATE: THE CONSTRUCTION OF INDUSTRIAL RELATIONS INSTITUTIONS IN BRITAIN, 1890-2000*, at 72–73 (2005) (portraying a more positive impact of the JICs).

219. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 454–55 (1957); *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 476 (1953) (stating the declared purpose of the Wagner Act is to promote "industrial peace and stability").

220. See *infra* Figure 2.

221. See *supra* text accompanying notes 168–83.

222. See *supra* Part III.B.

223. See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 53–56 (1975).

workplace associations. In Britain by contrast, legal restrictions on economic action are unknown.

### 1. The Law of Economic Action in the United States

Although Sections 7 and 13 of the NLRA purported to give employees a broad right to strike,<sup>224</sup> this right has been vastly restricted in a number of ways. Important for our story are three main changes: (1) the statutory restrictions on organizational and recognition strikes and secondary boycotts added to the NLRA by the Taft-Hartley Act of 1947; (2) judicial deprivation of protection for what I will call “shop-floor tactics”; and (3) the effect of unions’ no-strike agreements on workplace associations.

#### a. Statutory Restrictions on Economic Action

The possibilities for workplace association can be quite favorable at the organization and recognition stages of collective bargaining, when the position of the labor union is less established.<sup>225</sup> In this respect, the most salient restrictions on economic action are the Taft-Hartley Act’s limitations on organizational and recognition strikes. Among these provisions is Section 8(b)(4)(C), which bans the use of economic action to compel an employer to recognize or bargain with a particular labor organization in the case where another labor organization had already been certified as the employees’ representative.<sup>226</sup> A violation of any of 8(b)(4)’s prohibitions may be redressed under Section 303 of the LMRA with an action for damages in federal court, a remedy not available for any employer unfair labor practice.<sup>227</sup> Thus when employees seek to bargain directly with an employer in circumvention of the exclusive union representative, not only does an employer face an unfair labor practice sanction and not only is employees’ economic action unprotected,<sup>228</sup> as we have already seen, but economic action with such an object may be patently illegal as well. This further raises the costs of workplace associations.

A possible distinction is the restriction of the 8(b)(4)(C) prohibition to “labor organizations,” which conceivably could be interpreted not to

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224. See National Labor Relations Act (NLRA) § 7, 29 U.S.C. § 157 (2006); *id.* § 13 (“Nothing in this [Act] . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”).

225. See Gould, *supra* note 112, at 680.

226. National Labor Relations Act (NLRA) § 8(b)(4)(C) (making it an unfair labor practice for a labor organization to engage in economic action when the object is “forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159”).

227. Labor Management Relations (Taft-Hartley) Act § 303, 29 U.S.C. § 187 (2006) (making unlawful “any activity or conduct defined as an unfair labor practice in Section 158(b)(4)” and creating a right of action for damages in US district courts).

228. See *supra* text accompanying notes 168–83.

cover employees or their associations. However, the Act defines labor organization quite broadly, as including “any organization of any kind, or any agency or employee representation committee or plan” that at least in part deals with employers over terms and conditions of employment.<sup>229</sup>

A case from the First Circuit demonstrates both the negative impact of Section 8(b)(4)(C) on workplace associations as well as the breadth of the Act’s definition of “labor organization.” In *Simmons, Inc. v. NLRB*<sup>230</sup> the circuit court vacated the Board’s order dismissing an employer’s complaint that a committee of workers had violated Section 8(b)(4)(C) by initiating a strike demanding that the employer bargain with the committee, although a labor union had already been elected and certified.<sup>231</sup> At issue was whether the committee of workers was a “labor organization.”<sup>232</sup> The court concluded that it was, reasoning that if the committee “sought to have itself recognized or bargained with, then it acted as a labor organization.”<sup>233</sup> Thus, the same conduct of the committee that made its action prohibited under the NLRA also defined it as a labor organization.

In addition, the Taft-Hartley Act also prohibits the use of secondary tactics by labor unions.<sup>234</sup> Secondary actions are the use of economic or other pressure on an employer who is not the primary party to a labor dispute.<sup>235</sup> Such restrictions are potent, for as is recognized, secondary actions are “one of the most effective weapons in labor’s economic arse-

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229. National Labor Relations Act (NLRA) § 2(5); *see also* *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210–14 (1959) (holding that although employee committees did not bargain with employers in “the usual concept of collective bargaining,” they were nevertheless labor organizations because they existed in part for the purpose of dealing with employers concerning grievances).

230. 287 F.2d 628 (1st Cir. 1961).

231. *Id.* at 631.

232. *Id.* at 628.

233. *Id.* at 629, 631.

234. National Labor Relations Act (NLRA) § 8(b)(4)(B) (making it an unfair labor practice for a labor organization to engage in economic action when the object is “forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing”).

235. Section 8(b)(4)(B)’s proviso to preserve the primary right to strike or picket has led the Board to develop a labyrinthine set of rules governing the secondary-activity ban that, if anything, increases uncertainty and confusion for workers. For instance, under certain conditions, unions can target worksites that the primary employer shares with another employer (a “common situs”). Economic action can target “allies” (interpreted narrowly by the Board as those employers so integrated with the struck employer that they form a “common enterprise” and entities that perform struck work of the primary employer). And under the *Moore Dry Dock* rules, striking workers can follow and picket supervisors, nonstrikers, and replacements that work at the location of a secondary employer. *See Sailor’s Union of the Pac. v. Moore Dry Dock Co.*, 92 N.L.R.B. 547, 549 (1950). There is also some permissiveness for what are broadly called “sympathy strikers”; Section 8(b)(4) does not prohibit strikers at a primary employer’s location from asking delivery drivers, vendors, or outside contractors from honoring their picket line. *See Chauffeurs, Teamsters & Helpers Local Union No. 175 v. NLRB*, 294 F.2d 261, 262 (D.C. Cir 1961) (per curiam).

nal.”<sup>236</sup> Although one may question whether workplace-based employee associations would be able to coordinate multi-firm economic actions, it is clear that where developed such associations can achieve a remarkable degree of interplant organization, which would allow them to exploit these potent tactics.<sup>237</sup>

b. No Protection for “Shop Floor” Economic Actions

In addition to these legislative prohibitions, the courts have also deprived from the protection of the NLRA certain forms of economic action in which workplace associations may have a comparative advantage over union bureaucracy. As we shall shortly see, *unprotected* economic actions leave workers in the U.S. no worse off from a strictly legal perspective than their counterparts in Britain, where labor law has provided no “positive” right to strike. Nevertheless, the very distinction in U.S. labor law between protected and unprotected activities may create a normative (as contrasted with legally coercive) disincentive to strike. The lack of illegitimacy is absent under British labor law, where the absence of a right to strike is the “normal” status of a strike.

Among the set of unprotected activities most likely to affect workplace associations are what might be called shop-floor tactics: work stoppages that entail not just quitting work, but that also obstruct the ability of employers to restart production with replacement workers because striking workers remain in the workplace. Workplace associations have an advantage in such tactics because they typically require a high degree of workplace communication and coordination. And because they make it more difficult for the employer to restart production, they are highly effective. The most important decision in this category of cases is *NLRB v. Fansteel Metallurgical Corp.*<sup>238</sup> In that case, the Court held that sit-down strikes were not protected under the act and striking sit-down workers may be terminated without redress.<sup>239</sup> The decision in *Fansteel* could have been read to deprive strike activity of legal protection in the case when workers trespass on the employer's property.<sup>240</sup> However, later courts drew on *Fansteel* to examine a variety of different work-stoppage

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236. 2 COMM. ON THE DEV. OF THE LAW UNDER THE NAT'L LABOR RELATIONS ACT, AM. BAR ASS'N, *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 1621 (Patrick Hardin et al. eds., 4th ed. 2001) [hereinafter *DEVELOPING LABOR LAW*].

237. See EDELSTEIN & WARNER, *supra* note 34, at 18 (commenting on “combine” committees of shop stewards linking workplace organizations across multiple plants in the British automobile industry); Terry, *supra* note 64, at 69 (noting the “considerable sophistication” of inter-plant coordination of workplace organizations in the British engineering industry).

238. 306 U.S. 240 (1939).

239. *Id.* at 256–58.

240. Craig Becker, “Better Than a Strike”: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act, 61 U. CHI. L. REV. 351, 367–68 (1994); see also James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 520–26 (2004).

tactics.<sup>241</sup> Decisions following *Fansteel* therefore found that intermittent work stoppages, slowdowns, and partial strikes were also unprotected concerted activities.<sup>242</sup>

### c. No-Strike Agreements and Workplace Associations

Another important source of restrictions on economic action has been promises unions make not to strike during the term of a collective-bargaining agreement. Both scholars and activists have frequently highlighted no-strike agreements as a prime example of the way insular labor leaders undermine the prospects for more vigorous workplace associations in the U.S.<sup>243</sup> Yet, the relationship between no-strike agreements and workplace associations is more complicated than it would otherwise appear. First, individual union members are not liable for damages when they engage in unauthorized work stoppages in violation of a no-strike agreement.<sup>244</sup> Second, absent express contractual assumptions of responsibility, unions face reduced standards of liability for damages in cases of wildcat strikes that violate a no-strike promise.<sup>245</sup> To the extent that liability of the union encourages it to be more vigilant in policing the union's ranks for dissenters, these reduced standards weaken those disciplinary incentives.<sup>246</sup> Thus, no-strike agreements may actually have a fairly weak effect on workplace associations, in terms of the prospects of damages liability.

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241. Becker, *supra* note 240, at 368–71.

242. See DEVELOPING LABOR LAW, *supra* note 236, at 1488–90.

243. See DAVID BRODY, WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE 185–195 (2d ed. 1993) (arguing that the “contractual logic” and no-strike promises of collective bargaining agreements “evolved into a pervasive method for containing shop-floor activism”).

244. Labor Management Relations (Taft-Hartley) Act § 301(b), 29 U.S.C. § 185(b) (2006) (“Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.”); see also *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 407 (1981) (holding individual union members not liable for damages in the express case of an unauthorized strike in violation of a no-strike obligation); *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 247–48 (1962) (holding that section 301(a) of the LMRA does not authorize a damages action against individual union officers and members when their union is liable for violating a no-strike clause in a collective-bargaining agreement).

245. See Labor Management Relations (Taft-Hartley) Act § 301(b) (stating that labor unions “shall be bound by the acts of its agents”). *But see* § 301(e) (stating that in determining union responsibility for acts of its agents, the question of actual authorization or subsequent ratification shall not be controlling). The federal courts nevertheless differed on what was the union’s standard of liability. *Cf. Eazor Express, Inc. v. Int’l Bhd. of Teamsters*, 520 F.2d 951, 962 (3d Cir. 1975) (holding the union liable for violation of a no-strike obligation for failure to use best efforts to end unauthorized strikes); *United Constr. Workers v. Haislip Baking Co.*, 223 F.2d 872, 877–78 (4th Cir. 1955) (holding the union not liable for damages from an unauthorized strike when there was no evidence that the union “adopted the strike, that they encouraged it or that they prolonged it”). This tension was not resolved until the Supreme Court’s decision in *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 216–18 (1979) (holding that LMRA § 301(e) established that the common-law test of agency should be used to determine union liability for the acts of its agents). *Carbon* also held that absent an express agreement in the contract, there was no implied duty of the union to “use all reasonable means to prevent and end” unauthorized strikes. *Id.* at 216.

246. The subject of union discipline has received much attention.

Nevertheless, while the Supreme Court held in *Complete Auto Transit, Inc. v. Reis*<sup>247</sup> that individual union members were not liable for damages for an unauthorized strike that violated a no-strike agreement, the Court expressly declined to address the issue of whether an employer could obtain injunctive relief in such a situation.<sup>248</sup> Because of its immediacy, a temporary restraining order could more effectively hamper incipient workplace associations than would the more remote prospect of damage liability. Commentary suggests that an injunction is indeed the typical and accepted response to a wildcat strike.<sup>249</sup> Moreover, courts have long held that wildcat strikes are unprotected,<sup>250</sup> and again this distinction from protected activities may give such actions the cast of illegitimacy and induce a normative, if not coercive, constraint on economic action. Indeed, the fact that labor law practitioners refer to the terminations of wildcat strikers as the industrial-relations equivalent of “capital punishment” speaks in favor of this conclusion.<sup>251</sup> Therefore, despite the distant impacts of damages liability to wildcat strikers, injunctions and the normative-legitimacy constraints on authorized job actions undoubtedly inhibit workplace associations.

## 2. The Law of Economic Action in Britain

Unlike the Taft-Hartley prohibitions on organizational, recognition, and secondary strikes in U.S. labor law, no legal restrictions on strikes existed under British law. Also unlike U.S. law, the idea of legally-protected concerted activities was unknown. Rather, British workers and union members have had for much of the twentieth century only privileges and immunities: for a broad range of activities, economic action was neither legally prohibited nor legally protected. This system was the

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247. 451 U.S. 401 (1981).

248. *Id.* at 417 & n.18. It is clear in the case of union-authorized strikes that employers can obtain an injunction. *See Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 252–54 (1970) (upholding an injunction for a strike in violation of a no-strike clause that was precipitated over a dispute subject to arbitration in the collective-bargaining agreement), *overruling* *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 199–201 (1962) (holding that the Taft-Hartley Act provision authorizing suits against unions did not impliedly repeal the Norris-LaGuardia Act prohibition against labor injunctions in federal courts); *see also Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 406–09 (1976) (refusing to expand *Boys Markets* to strikes in violation of a no-strike obligation over disputes not subject to grievance arbitration in the collective-bargaining agreement).

249. M. Jay Whitman, *Wildcat Strikes: The Unions' Narrowing Path to Rectitude?*, 50 *IND. L.J.* 472, 473 (1975) (explaining that in a wildcat strike, the “employer is typically content with a *Boys Market* injunction and a speedy resumption of production”).

250. *NLRB v. Draper Corp.*, 145 F.2d 199, 205 (4th Cir. 1944). Wildcat strikes need not violate a no-strike agreement to be unprotected. In *Draper*, the court concluded that the employees' actions were unprotected because wildcat strikes undermine the principle of exclusive representation, not because the strike violated a no-strike agreement. *Id.* at 202–04. However, for a strike to be “unauthorized,” a duly recognized labor union must be present, so an unannounced walkout in an unorganized workplace is generally protected under section 7 of the NLRA. *See NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14–16 (1962).

251. *See Feller, supra* note 128, at 780.

product of two statutes that the British labor movement achieved in the culmination of a long legislative battle.<sup>252</sup>

First, economic action was immunized from criminal liability in 1875. The Conspiracy and Protection of Property Act (CPPA) immunized any act done “in contemplation or furtherance of a trade dispute” from the common-law doctrine of criminal conspiracy;<sup>253</sup> abolished certain individual crimes associated with strikes, such as “molestation” and “obstruction”;<sup>254</sup> and sanctioned certain forms of picketing.<sup>255</sup> In 1890, British courts began entertaining actions alleging that trade unions were civilly liable for activity that had been decriminalized in the CPPA.<sup>256</sup> In response, British Parliament passed the Trade Disputes Act (TDA) in 1906 which immunized peaceful picketing from civil liability,<sup>257</sup> eliminated the tort of inducement to breach of contract in the context of a trade dispute,<sup>258</sup> and protected trade union funds from civil remedies.<sup>259</sup> The famous Section 1 of the TDA, enshrined in British labor law as the “golden formula,”<sup>260</sup> immunized strikes against civil conspiracy: “An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.”<sup>261</sup>

This “extraordinary freedom”<sup>262</sup> conferred by the TDA proved to be broad. The Act’s language granted immunity to actions done “in contemplation or furtherance of a trade dispute” and defined a trade dispute as a dispute between employers and workmen or between workmen “connected with the employment or nonemployment, or the terms of employment, or the conditions of labour of any person.”<sup>263</sup> Importantly, unlike the U.S., this immunity was determined to cover recognition strikes and secondary disputes.<sup>264</sup> The immunities granted by the TDA, along with the CPPA, were also extremely durable: with only minor modification it “remained on the statute book for seventy-five years” and became the “bedrock of the British system of labour law.”<sup>265</sup>

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252. See Forbath, *supra* note 31, at 22–31 (providing a concise account of this story); see also Michael J. Klarman, *The Judges Versus the Unions: The Development of British Labor Law, 1867–1913*, 75 VA. L. REV. 1487, 1487–90 (1989) (providing a more detailed account of this story).

253. Klarman, *supra* note 252, at 1496.

254. *Id.*

255. *Id.*

256. *Id.* at 1505–21.

257. *Id.* at 1521.

258. *Id.*

259. *Id.* at 1535–36.

260. Forbath, *supra* note 31, at 24, 31.

261. Trade Disputes Act, 1906, 6 Edw. 7, c. 47, § 1 (Eng.), available at [http://www.constitution.org/sech/sech\\_136.htm](http://www.constitution.org/sech/sech_136.htm).

262. Forbath, *supra* note 31, at 31.

263. KAHN-FREUND, *supra* note 150, at 248.

264. *Id.* at 249.

265. DAVIES & FREEDLAND, *supra* note 218, at 15.

## CONCLUSION

The goal of this Article has been to argue that the law makes a difference for the possibility of union democracy and that, in the United States, labor law restricts this possibility. The central claim is that labor law can obstruct or promote the amount of workplace association either directly, or indirectly through the law's effect on union bureaucracy; and that the strength of workplace association is critical for the maintenance and florescence of union democracy. Both exclusive representation and legally-supported procedures of collective bargaining promote the bureaucratization of unions, which negatively impacts the amount of workplace association. And both exclusive representation and restrictions on the use of economic action, which workplace associations often resort to in order to voice their grievances, further hinder the growth of worker self organization. Whereas such a constellation of rules accurately characterizes labor law in the U.S., the labor law contrasts in each respect in Britain. And these different legal configurations can explain contrasting patterns in labor organization between the two countries. British unions have small bureaucracies, strong workplace associations, and enjoy a greater measure of democracy. American unions have large bureaucracies, weak workplace associations, and suffer a democracy deficit.

The main thrust of this article has been to *explain* why U.S. labor law presents affirmative obstacles to the emergence of union democracy. However, before we embrace the *normative* conclusion that features of the British collective laissez faire system ought to be adopted if union democracy is the goal, a much fuller normative and policy discussion ought to be considered. While such a discussion is beyond the scope of this Article, some of the relevant points will at least be raised here.

The overriding consideration is the one that began the Article in the Introduction: the paramount need for the labor movement to organize new members. There is a contentious debate about whether union democracy hinders or helps unions generally and more specifically in the case of organizing.<sup>266</sup> Certainly, the claim that union democracy is ineffective is unpersuasive, as the example of the United Healthcare Workers, as well as many others, demonstrates so powerfully. In fact, if anything, the story of the UHW suggests that union democracy and successful organizing are essential for one another. Some would also point out that union members themselves can be an obstacle to union revitalization.<sup>267</sup> But in this case, there are strong indications that such behavior is a highly cultural and learned response to conditions of bureaucratic and

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266. Estreicher, *supra* note 18, at 247 (claiming that the "pursuit of union democracy is . . . counterproductive because it . . . weakens (or complicates) [unions'] ability to wage economic struggle with employers").

267. Voss & Sherman, *supra* note 9, at 320–21.

undemocratic unions.<sup>268</sup> How members act in an undemocratic union is a poor guide to how they would respond in a democratic one.

The more troublesome objection is not that union democracy would induce poor union performance, but that aspects of the British collective *laissez faire* model would hinder unions in other ways. For example, the absence of exclusive representation negatively affects not only the size of union servicing bureaucracies in Britain but also their resources. And as the research on union organizing we introduced earlier has also shown, union organizing is a highly staff and resource intensive endeavor. While it requires a reduction in the union's traditional bureaucracy, and therefore an increase in workplace association, it also requires new organizing and research staff.<sup>269</sup> Smaller bureaucracy has a salutary effect on workplace associations, but abolishing exclusive representation may do too much, diminishing the union's resources and weakening bureaucracy across the board, including the organizing and research departments that might work more like *complements* rather than substitutes in the specific case of union organizing.

How and whether this conundrum can be resolved is a matter that will have to occupy further reflection and research. Can exclusive representation be amended to unburden workplace associations while preventing inter-union competition, in a way similar to that sought by the plaintiffs in *Emporium Capwell*? Should the logic of contractualism in the workplace be weakened? Will this undermine the traditional *servicing* bureaucracy sufficiently while avoiding the drastic effects of abolishing exclusive representation? Whatever the conclusion, the burden of this Article has been to demonstrate that the present configuration of labor law is likely one that is extremely unfavorable to revitalization and transformations unions must undertake to organize on a serious scale, and that certain changes are likely necessary if the labor movement wishes to once again become a vibrant and important part of our economic and political landscape.

#### APPENDIX

The formal analysis of union democratization is presented in two games: the union-bureaucracy game and the union-democracy game. The first game, the union-bureaucracy game, generates predictions of the sizes of union bureaucracy and workplace association given an initial, nondemocratic union. The other main goals of this game are to show the inverse relationship between union bureaucracy and workplace association and the effect of exclusive representation on union bureaucracy. Given the levels of union bureaucracy and workplace association determined in the union-bureaucracy game, the union-democracy game then

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268. *Id.* at 321–23.

269. *Id.* at 313; *see also* Bronfenbrenner & Hickey, *supra* note 10, at 54.

makes predictions about the likelihood of democracy when the union leadership's credibility is at issue. Presenting the analysis in two games, rather than one, effectively means workers do not take into account the impact of workplace association in the second game, when they determine its level in the first game. This is necessary given our (more realistic) assumption that workplace association has only an unintended effect on the likelihood of union democracy.

### A. The Union-Bureaucracy Game

#### 1. Players, Actions, Order of Play, and Payoffs

Consider a game with two players, the leadership of a union,  $L$ , and a group of workers,  $W$ , of size  $n$ , who we treat as a unitary actor. In the first step of the game, the union leadership selects the level of monetary contributions, or dues, that workers will contribute to the union,  $d \in [0, \infty)$ , and the size of its bureaucracy,  $b \in [0, \infty)$ . In the second step, workers choose their level of association,  $a \in [0, \infty)$ , and whether or not to accept the union's offer. If workers reject the union's offer, leaders and workers each receive a reservation payoff normalized to 0.

Each worker receives a single, collective good, which is a function of the levels of bureaucracy and workplace association,  $w(a, b)$ . The key assumption is that  $a$  and  $b$  are perfect substitutes. Production of the collective good is assumed to take on the natural logarithmic form. Thus,  $w(a, b) \equiv \ln(a + b)$ . Although  $\ln(0)$  is undefined, at least  $a$  or  $b$  or both will be strictly positive. The assumption of diminishing returns for the production of the collective union good seems natural, since there are definite limits to efficiency in the size of organizations, bureaucratic or otherwise. The union receives a dues payment from each worker. To capture limitations on the residual claim (e.g., unions' non-profit status), we assume that the leadership captures only a fraction of the dues revenue,  $\sigma \in [0, 1]$ , so the union receives  $\sigma nd$ . Bureaucracy and workplace association are costly; the cost of association is linear and is given by  $\alpha a$ , while the cost of bureaucracy is convex and is given by  $\beta b^2/2$ . Also assuming convex costs for workers would not change the underlying intuition of the results, but the linear cost assumption is maintained to make those results clearer here.

#### 2. Equilibrium

Using subgame-perfect Nash equilibrium to find the solution of this game, we begin with the workers' problem. The workers' utility function is given by:

$$V_W = n \ln(a + b) - nd - \alpha a$$

Workers choose  $a$  to maximize  $V_W$ . More precisely, assuming that their participation constraint is satisfied, workers set:

$$a^* = \begin{cases} n/\alpha - b, & \text{if } b < n/\alpha \\ 0, & \text{if } b \geq n/\alpha \end{cases}$$

where  $n/\alpha - b$  is obtained by differentiating the workers' objective function with respect to  $a$  and setting it equal to zero. As is clearly seen, workers' associational effort is decreasing in its cost as well as in the size of the union's bureaucracy.

Since the reservation payoff is zero if workers do not accept the union's offer, workers' optimal choice of association can be substituted into their objective function, and their participation constraint can be written as  $d \leq \ln(a^* + b) - \alpha a^*/n$ . Since union leaders will want to set the level of dues as high as possible, we can define a maximum level of dues:

$$\bar{d} \equiv d = \ln(a^* + b) - \alpha a^*/n \quad (1)$$

Some further analysis would show that  $\bar{d}$  will still be positive even if the amount of bureaucracy is zero. This captures the idea that the leadership in a nondemocratic union is able to transfer to itself "unearned" rents. We will see how the union members can remedy this situation in the union-democracy game.

Having solved the workers' problem, we can now back up and address the union leadership's problem. The union maximizes:

$$V_L = \sigma n d - \beta b^2 / 2$$

with respect to  $d$  and  $b$ . Given the workers' optimal solution, and assuming that dues are set as high as possible, the union's objective function can be rewritten as:

$$V_L = \sigma [n \ln(a^* + b) - \alpha a^*] - \beta b^2 / 2$$

Plugging in the workers' optimal solutions yields:

$$V_L = \begin{cases} \sigma [n \ln(n/\alpha) - (n - \alpha b)] - \beta b^2 / 2, & \text{if } b < n/\alpha \\ \sigma n \ln(b) - \beta b^2 / 2, & \text{if } b \geq n/\alpha \end{cases}$$

Differentiating each equation with respect to  $b$  and setting each equal to zero gives the union's optimal choice of bureaucracy:

$$b^* = \begin{cases} \sigma \alpha / \beta, & \text{if } b < n/\alpha \\ (\sigma n / \beta)^{1/2}, & \text{if } b \geq n/\alpha \end{cases}$$

As is clearly seen, the optimal level of bureaucracy is increasing in  $\sigma$ , the share of the surplus which the union can appropriate, increasing in  $\alpha$  (for  $b < n/\alpha$ ), the cost of workers' association, and decreasing in  $\beta$ , the cost of bureaucracy. Finally, note also, that if workers could influ-

ence the dues level, they would prefer that the union choose  $\alpha/\beta$  (when  $b < n/\alpha$ ).

### 3. Extension: Rival Unions

Now consider a version of the above game, but where there are two union leaderships,  $L = \{1,2\}$ . We can think of this situation as equivalent to the absence of exclusive representation and the previous problem with one union as equivalent to the presence of exclusive representation. Each union chooses its level of dues and bureaucratic effort and the workplace association can allocate any proportion of workers between the two unions or decide to reject both unions' offers. Since the workplace good is a collective one, workers receive the good regardless of which union they join. The collective good function is given by  $w(a, b_1, b_2) \equiv \ln(a + b_1 + b_2)$ . The union leadership receives a dues payment from each worker who joins its union, with  $n_1 + n_2 = n$ .

The workers' utility function is now given by:

$$V_W = n \ln(a + b_1 + b_2) - n_1 d_1 - n_2 d_2 - \alpha a$$

And the optimal choices of association are:

$$\alpha^* = \begin{cases} n/\alpha - b_1 - b_2, & \text{if } b_1 + b_2 < n/\alpha \\ 0, & \text{if } b_1 + b_2 \geq n/\alpha \end{cases}$$

While the workers' optimal solution is similar to the previous game, the problem facing the unions is much different. Since workers obtain the collective good regardless of which union they are allocated to, they will join a union based only on its choice of dues. At any dues level that union 1 sets lower than union 2,  $d_1 < d_2$ , (or vice versa), the number of workers joining union 2 is zero,  $n_2 = 0$ , and union 2's payoff becomes  $-\beta b_i^2/2$ , which is inconsistent with its participation constraint. Each union will therefore set dues as low as possible.

How low will each union set dues? Answering this question will also help us understand each union's choice of  $b$ . When  $d_1 = d_2$ , the lowest dues that will just satisfy each union's participation constraint is such that  $\sigma n_i d_i - \beta b_i^2/2 = 0$ . Solving this for  $d_i$  gives a minimum level of dues:

$$\underline{d} \equiv d_i = \beta b_i^2 / 2 \sigma n_i \quad (2)$$

This minimum dues level is clearly increasing in the level of bureaucracy. Therefore, even when each union's dues are equal and positive, each will have an incentive to lower bureaucratic effort by a fraction, which from the above equation will allow the union to lower its minimum dues by a fraction. But then all workers will join that union and the union's revenues will increase dramatically. My intuition is that

this process will continue until both the level of effort and dues are equal to zero. In reality we observe positive dues and effort between competing unions, as in Britain. But this reasoning yields the correct qualitative insight that competition between unions will both lower dues *and* bureaucratic effort.

### B. The Union-Democracy Game

#### 1. Players, Actions, Order of Play, and Payoffs

The union-democracy game is once again a game between two players, the union leadership ( $L$ ) and the union members ( $W$ ). In the first stage of the game, the union leadership decides whether to concede to the installation of democracy ( $D$ ) or to maintain an oligarchy ( $O$ ). In the second step, the level of union dues is set:  $d_O$  denotes the dues rate set by the leadership in a nondemocratic union and  $d_D$  denotes the dues rate set in a democracy by the union members. The set of possible dues levels is the interval  $[\underline{d}, \bar{d}]$ , where  $\underline{d}$  and  $\bar{d}$  are as defined in equations (1) and (2) at the optimal level of bureaucracy,  $b^*$ , as determined in the previous game. (Thus, in the union-democracy game  $b^*$  becomes a parameter of the model.) If the leadership chooses  $D$  at the first stage, union members determine the level of dues, but if it chooses  $O$ , then the leadership determines dues. Following the dues decision, the union members choose whether to stage a revolt. In a revolt, union members cease paying dues. A revolt always succeeds if attempted, but a tradeoff is faced since members depend solely on their own associational capacity,  $\alpha$ , which is determined by members' optimal choice of effort,  $a^*$ , in the union-bureaucracy game. Without loss of generality, I assume that  $a^*$  always takes on its nonnegative value,  $n/\alpha - b^*$ , where  $b^*$  is again determined by the union's optimal choice of bureaucracy in the union-bureaucracy game. Since  $b^*$  can take any value in  $[0, \infty)$ , we can capture the full range of outcomes in the union-democracy game.

Therefore, if workers undertake a revolt, their payoffs are:

$$V_W(R) = n \ln(n/\alpha - b^*) - (n - ab^*)$$

Since the union is deprived of revenue, the payoff to the union is  $V_L(R) = -\beta(b^*)^2/2$ . Without loss of generality, we say that the revolution constraint is binding if the workers obtain more in a revolt than when the leadership chooses its ideal dues level,  $\bar{d}$ . Therefore the revolution constraint is binding if  $V_W(R) > V_W(O, \bar{d})$ . Note that since the union sets dues as high as possible consistent with workers' participation constraint, then  $V_W(O, \bar{d}) = 0$ . The revolution constraint then simply reduces to the condition that the collective good that workers can produce with their own effort is greater than the costs of doing so, or:

$$n \ln(n/\alpha - b^*) > n - ab^*$$

Because of the logarithmic collective-good function we have chosen,<sup>270</sup> this constraint may or may not bind. For instance, as  $b^* \rightarrow n/\alpha$ , and in particular as  $(n/\alpha - b^*) \rightarrow 1$ , then the condition tends toward  $0 > \alpha$ , which will fail to hold for any positive  $\alpha$ . On the other hand, when  $b^* \rightarrow 0$ , then the condition goes to  $\ln(n/\alpha) > 1$ , which will hold for  $n$  large enough and  $\alpha$  small enough. In other words, the revolution constraint is more likely to bind when both the size of union bureaucracy and the cost of workplace association are smaller. This is one way of seeing the crowding-out effect in operation. If workers undertake a revolt, the game ends with payoffs  $(V_W(R), V_L(R))$ .

If democracy has been created and there is no revolt, then the game ends with dues set at the level preferred by the membership. Members want the lowest dues possible,  $d_D = \underline{d}$ . Therefore, in the case of democracy, payoffs are:

$$V_W(D) = n \ln(n/\alpha) - n\underline{d} - (n - ab^*)$$

$$V_L(D) = 0$$

Rather than democracy, the leadership can choose a nondemocratic form of union governance and set the level of dues themselves. In this case, in an attempt to stave off a revolt, the leadership will choose  $d_N = \hat{d}$ ,  $\underline{d} \leq \hat{d} \leq \bar{d}$ . Following this decision, we are again at the stage where workers choose to revolt, with payoffs the same as before if workers in fact revolt. In a nondemocracy, however, whether the dues level that the union sets becomes the effective dues level depends on whether the leadership can credibly commit to maintain its promised level. Therefore, if workers choose not to revolt, nature then moves and determines  $p \in [0,1]$ , where, with probability  $p$ , the promise that the union gave with respect to dues stands, but with probability  $1 - p$ , the union reneges and resets the dues level. If the leadership's promise is credible, then payoffs are:

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270. It would possible to find collective good functions such that the revolution constraint would bind for any positive level of association. This would not change the main results.

$$V_W(O, d_O = \hat{d}) = n \ln(n/\alpha) - n\hat{d} - (n - \alpha b^*)$$

$$V_L(O, d_O = \hat{d}) = \sigma n \hat{d} - \beta(b^*)^2/2$$

However, if the leadership's promises aren't credible, then after the workers have decided not to revolt, the leadership can do no better than to set dues at their most preferred level. When nature lets the leadership reset the dues level, then payoffs are:

$$V_W(O, d_O = \bar{d}) = n \ln(n/\alpha) - n\bar{d} - (n - \alpha b^*)$$

$$V_L(O, d_O = \bar{d}) = \sigma n \bar{d} - \beta(b^*)^2/2$$

A game-tree depiction of the order of play and payoffs of the union-democracy game is found in Figure 3.

## 2. Equilibrium

Since workers are unsure whether the leadership is credible or not, the expected payoff to workers not revolting in an oligarchy is  $pV_W(O, d_O = \hat{d}) + (1 - p)V_W(O, d_O = \bar{d})$ , which we can also write as  $V_W(O, d_O) = n \ln(n/\alpha) - n[p\hat{d} + (1 - p)\bar{d}] - (n - \alpha b^*)$ . If the leadership can choose a dues level such that  $V_W(O, d_O = \hat{d}) \geq V_W(R)$ , then such a concession will be sufficient to stop a revolt. This condition may or may not hold. To see this, let  $\hat{d} = \underline{d}$ , which is the best concession the union can make to the workers (i.e., if the condition fails at  $\underline{d}$ , it fails at any  $\hat{d}$ ). Substituting payoffs into the condition and simplifying a bit, we get:

$$\ln(n/\alpha) - [p\underline{d} + (1 - p)\bar{d}] \geq \ln(n/\alpha - b^*)$$

Recall that the left-hand side is the payoff from concessions and the right-hand side the payoff from revolt; the only difference is that workers' costs of association,  $(n - \alpha b^*)$ , on both sides cancel each other out.

Consider first the case where the leadership's promises are perfectly credible, that is  $p = 1$ . Then the condition reduces to  $\ln(n/\alpha) - \underline{d} \geq \ln(n/\alpha - b^*)$ . As  $b^* \rightarrow 0$ , then  $\underline{d} \rightarrow 0$ , and the condition becomes  $\ln(n/\alpha) \geq \ln(n/\alpha)$ . Therefore, workers are indifferent between concessions and revolt when the size of union bureaucracy is zero and leadership promises are perfectly credible. However, as  $(n/\alpha - b^*) \rightarrow 1$ , the condition becomes  $\ln(n/\alpha) - \underline{d} \geq 0$ , and we know that the left hand side is positive, since the concession payoff must still satisfy workers' participation constraint, the costs of workplace association costs are absent, and  $\underline{d} < \bar{d}$ . In this case, it is again easy to observe the crowding out effect. As bureaucracy increases, the payoff to

revolt (the right-hand side) decreases: bureaucracy crowds out workplace association and reduces the threat of revolt.

On the other hand, when the leadership's promises are imperfectly credible, the condition for concessions may fail to hold. Consider the case where the leadership's promises are perfectly incredible, that is,  $p = 0$ . Then the condition becomes identical to the revolution constraint previously examined, which we know will bind with a sufficiently small bureaucracy. Similarly, as we let the leadership's credibility vary, concessions will not be sufficient to stop a revolution for a sufficiently smaller bureaucracy. Note in particular that as  $b^* \rightarrow 0$ , the condition tends toward  $\ln(n/\alpha) - \bar{d} \geq \ln(n/\alpha)$ , where the union's maximum dues is  $\bar{d} > 0$ . In this case, the condition must fail to hold.

We can also use the condition for concessions to illustrate the capacity effect, which is more difficult to observe. It is easiest to see if we rewrite the condition for concessions and hold the crowding-out effect constant, at workers' best revolt payoff, i.e., with bureaucracy at zero. When leaders' promises are perfectly credible and leaders make the best possible concession, the condition is:  $n \ln(n/\alpha) - n\bar{d} - (n - ab^*) \geq n \ln(n/\alpha) - n$ . After some simplification and rearranging, the condition becomes  $ab^* \geq n\bar{d}$ . The term on the left-hand side is the effect of bureaucracy on workers' costs of association while the term on the right is the minimum dues level, which is equivalent to the costs of bureaucracy. Substituting in the values for  $\bar{d}$  (evaluated at  $b^*$ ) and  $b^*$ , the condition then becomes:

$$\sigma\alpha^2/\beta \geq \sigma\alpha^2/2\beta$$

which must always hold with inequality or at equality when the level of bureaucracy is at zero (e.g., when the share of dues revenue the leadership takes is zero). In other words, as bureaucracy increases the reduction in the costs of workplace association is greater than the increase in costs of bureaucracy. Intuitively, because union bureaucracy is more efficient than workplace association, the leadership can produce the collective good with a decreasing cost as bureaucracy increases. The union's offer to pass on this efficiency to workers in the form of concessions makes those concessions more attractive and the threat of revolt less appealing. Because we have assumed that leaders are perfectly credible, this capacity effect is by itself sufficient to thwart a revolt; however, with imperfect credibility this will not be the case in general.

Since the condition for concessions may or may not hold, we can define a critical value of bureaucracy,  $b^{**}$ , such that workers are indifferent between revolt and concessions:  $V_w(R, b^{**}) = V_w(O, d_o = \bar{d})$ . This can be written more fully as:

$$\ln(n/\alpha - b^*) = \ln(n/\alpha) - [pd + (1-p)\bar{d}] \quad (3)$$

If  $b^* < b^{**}$ , then even at the best possible dues level, the promises of the leadership are not sufficient to forestall a revolt; that is,  $V_W(R) > V_W(O, d_O = \underline{d})$ . In order to stop a revolt, the leadership will therefore have to democratize. Democratization is a feasible strategy if democracy leaves workers at least as well off as revolt. This is the case when  $V_W(D) \geq V_W(R)$ , which is equivalent to:

$$\ln(n/\alpha) - \underline{d} \geq \ln(n/\alpha - b^*)$$

This condition is identical to the condition where the union leadership offers workers concessions with perfectly credibility. We therefore know that this condition will always hold.

On the other hand, when  $b^* \geq b^{**}$ , then a revolt is sufficiently unrewarding that the leadership can prevent democratization by making dues concessions. In this case, the leadership will set the dues level at the amount which makes workers indifferent between revolting or not; in this case,  $V_W(R) = V_W(O, d_O = \hat{d})$ .

We can now state succinctly the union-democracy game's equilibrium structure in terms of  $b$ :

1. If  $n \ln(n/\alpha - b^*) \leq (n - \alpha b^*)$ , then the revolution constraint does not bind and the leadership can stay in power without democratizing or changing the dues level.
2. If  $n \ln(n/\alpha - b^*) > (n - \alpha b^*)$ , the revolution constraint binds. In addition, letting  $b^*$  be defined as in (3), then:
  - a. If  $b^* \geq b^{**}$ , the leadership does not democratize and sets the dues level to concede enough to avoid a revolt.
  - b. If  $b^* < b^{**}$ , dues concessions are insufficient to avoid a revolution and the union is democratized.

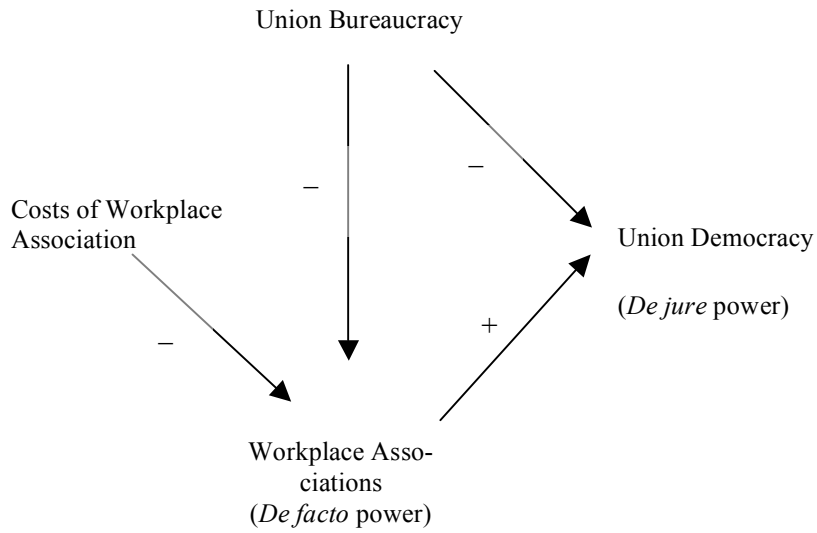


Figure 1. Relationships Among Union Bureaucracy, Workplace Associations, and Union Democracy

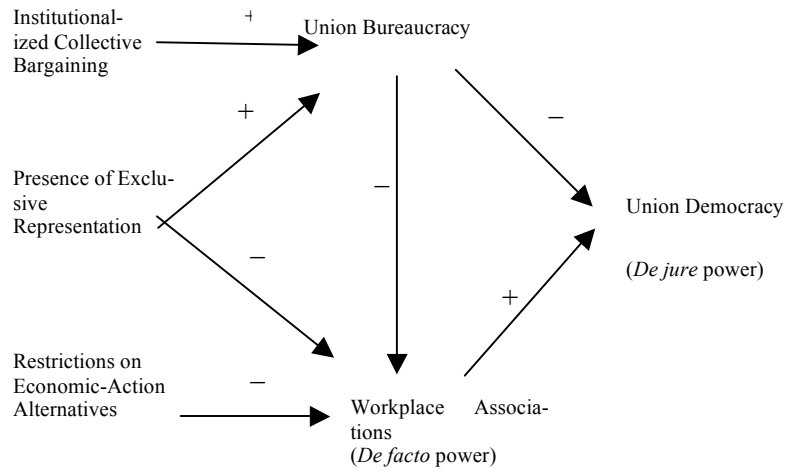


Figure 2. Effects of Legal Rules on Union Democracy

STRENGTH OF WORKPLACE ASSOCIATION	CREDIBILITY OF LEADERSHIP	UNION GOVERNANCE OUTCOME
Low	N/A	Oligarchy
Medium	High	Oligarchy with concessions
High	Low	Democracy

Table 1. Union Governance Outcomes for Given Credibility and Associational Conditions

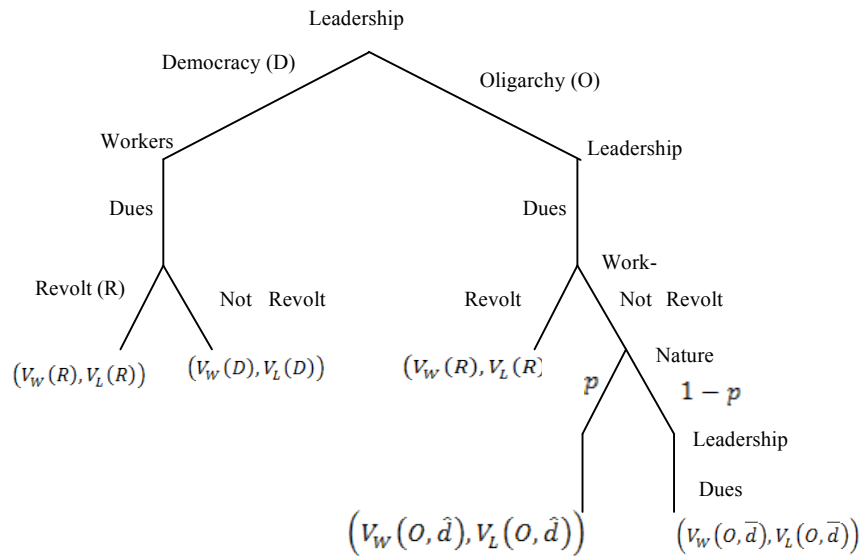


Figure 3. The Union-Democracy Game