

# Workplace Democracy and Democratic Worker Organizations: Notes on Worker Centers

Catherine L. Fisk\*

*Worker organizing outside the traditional union framework in the United States has lately focused on worker centers, which provide the benefits of collective action and participatory workplace democracy without the legal obstacles faced by unions. This Article offers thoughts on legal regulation of worker organizations' internal governance to facilitate collective power with appropriate protection for the rights of individuals within the collective. Federal law extensively regulates the internal governance of unions so as to protect minorities in an organization that is an exclusive representative. It does not apply to worker centers, which disclaim the desire to represent workers for bargaining. Worker centers are regulated only lightly, under state law of nonprofit organizations. But if they become powerful, they will be large and will need to be managed by a leadership that may or may not remain accountable to the membership and respectful of minority rights. This Article offers a reading of the literature on union democracy from the 1950s as notes toward thinking about governance of worker organizations that are not labor unions.*

Democracy was the political moment when the demos recognized that the power of the polis was their power, not an illegal seizure of something that belonged to the rich or well born.

Sheldon Wolin, "Democracy:  
Electoral and Athenian" (1993)

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\* I gratefully acknowledge research assistance from UCI Law students Tilman Heyer and Margaux Poueymirou and from the UCI Law Library Reference staff, especially Christina Tsou. The epigraph is from Sheldon S. Wolin, *Democracy: Electoral and Athenian*, 26 PS: POL. SCI. & POL. 475, 477 (1993). Sheldon Wolin (1922-2015) first got me thinking about participatory democracy long ago when I was his undergraduate student, and I hope the project of which this Article is a tentative first effort will someday be a credit to his inspiration.

## INTRODUCTION

The future of worker organizing and representation in the United States may be one without unions and collective bargaining as it has existed for the last eighty years. Worker organizing abounds and has achieved many successes: particularly in raising state and local minimum wages and in putting issues about low-wage work and the shrinking middle class at the forefront of public debate. Worker centers have been organized across the United States as community-based institutions to organize and educate low-wage, mainly immigrant workers about their rights, to assist workers in making legal claims, to organize direct actions against employers in the form of boycotts, strikes, and public protests, and to push for legislative reform on wage, immigration, safety, and other issues.<sup>1</sup> Organizing campaigns among low-wage workers have driven the enactment of many local wage ordinances.<sup>2</sup> Similarly, organizing among taxi drivers, Uber and Lyft drivers, and truck drivers has initiated new regulatory proposals to address misclassification of workers as independent contractors and other wage, scheduling, and safety issues in the on-demand economy.<sup>3</sup> Organizing among Walmart, fast food, and warehouse employees has led some retail and a smaller number of food service giants to increase

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1 JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 11 (2006); David Rosenfeld, *Worker Centers: Emerging Labor Organizations — Until They Confront the National Labor Relations Act*, 27 *BERKELEY J. EMP. & LAB. L.* 469, 471 (2001).

2 Stephanie Luce, *\$15 per Hour or Bust: An Appraisal of the Higher Wages Movement*, 24 *NEW LAB. F.* 73, 76 (2015) (arguing that the national campaign of fast-food strikes “have had an impact on the resurgence of minimum and living wage activity”); Don Lee, *A New Dawn for the Minimum Wage*, *L.A. TIMES*, June 1, 2015, <http://www.latimes.com/business/la-fi-0601-minimum-wage-20150601-story.html> (reporting that the campaign for a higher minimum wage has led to “Seattle, San Francisco and most recently Los Angeles [adopting] a floor of \$15 an hour to take effect over the next few years. . . . Other cities such as Chicago, Oakland and Washington, D.C., have raised the minimum wage, but not as much.”).

3 Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 *UC IRVINE L. REV.* 939 (2014) (organizing among truck drivers led to local legislation regulating trucking); Brishen Rogers, *The Social Costs of Uber*, 82 *U. CHI. L. REV. DIALOGUE* 85 (2015) (organizing among Uber drivers and other on-demand economy workers); Douglas MacMillan, *Uber Laws: A Primer on Ridesharing Regulations*, *W. ST. J.*, Jan. 29, 2015, <http://blogs.wsj.com/digits/2015/01/29/uber-laws-a-primer-on-ridesharing-regulations/>; Melissa J. Sachs, *On the Road to \$40 Billion, Ridesharing App Uber Hit by Lawsuits, Regulators* Mohamed v. Uber Techs, *WESTLAW J. EMP.*, Jan. 21, 2015, at 10.

their own corporate minimum wage and have brought to light issues about just-in-time shift scheduling and work hours.<sup>4</sup>

Although the achievements of recent worker organizing are considerable, “what these campaigns haven’t done is create more than a small number of new dues-paying union members. Nor, for the foreseeable future, do unions anticipate they will.”<sup>5</sup> Notwithstanding the wave of worker organizing and growing attention to the problems with contingent, low-wage, and unpaid work, prognoses on the future of unions range from pessimism to despair.

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- 4 Many corporations have increased their corporate minimum wage, but retail chains (e.g., Walmart, Target, Gap, TJ Maxx, Ikea and Marshall’s) have done so more readily than food service (only Starbucks and McDonald’s have increased theirs, and the McDonald’s increase applies only to company-owned restaurants, which are less than eleven percent of McDonald’s locations in the United States). See Steven Greenhouse, *Ikea to Increase Minimum Hourly Pay*, N.Y. TIMES, June 26, 2014, <http://www.nytimes.com/2014/06/26/business/ikea-plans-to-increase-minimum-hourly-pay.html> (reporting corporate minimum wage increases by Ikea, Gap, Banana Republic, and Old Navy); Brian Mahoney, *Corporate America Strikes a Liberal Note on Wages*, POLITICO (Apr. 2, 2015, 8:06 PM), <http://www.politico.com/story/2015/04/corporate-america-strikes-liberal-note-on-wages-116644.html> (reporting corporate minimum wage increases by McDonald’s (though only company-owned stores), Walmart, TJ Maxx, Marshall’s and Target); Stephanie Strom, *McDonald’s to Raise Pay at Outlets It Operates*, N.Y. TIMES, Apr. 1, 2015, <http://www.nytimes.com/2015/04/02/business/mcdonalds-raising-pay-for-employees.html>; Rick Wartzman, *Walmart, Starbucks, Aetna’s Pay Hikes: Why Now?*, FORTUNE, Mar. 4, 2015, <http://fortune.com/2015/03/04/walmart-pay-hikes-why-now/> (reporting corporate minimum wage increases by Walmart, Aetna, Starbucks, and Gap). Several reasons for the discrepancy between retail and food service in minimum wage increases include a higher proportion of minimum wage workers in food service, and a higher ratio of payroll costs to revenue in the food service industry. See Claire Zillman, *Wal-Mart, Target Have Raised Their Minimum Wage: Why Not Fast-Food Chains?*, FORTUNE, Mar. 23, 2015, <http://fortune.com/2015/03/23/retail-vs-fast-food-wages/>. Starbucks, though a large nationwide chain, may not be a good bellwether for the food service industry at large. Unlike most restaurants, which concentrate on food and meals, Starbucks primarily serves beverages. Additionally, most organizing has focused on fast-food, specifically McDonald’s, whereas Starbucks is considered more upscale. Though both food service and retail have examples of minimum wage increases, it seems to be an exception in food service compared to a trend in retail.
- 5 Harold Meyerson, *Labor’s New Reality — It’s Easier to Raise Wages for 100,000 Than to Unionize 4,000*, L.A. TIMES, Dec. 7, 2014, <http://calopinion.com/2014/12/harold-meyerson-labors-new-reality-its-easier-to-raise-wages-for-100000-than-to-unionize-4000/>.

One successful union organizer says that the union as we have known it is not coming back and the time has come to think about new organizational models.<sup>6</sup>

Thinking about new organizational models requires thinking about what, if anything, law should say about how they govern themselves. Perhaps it is premature to worry about legal regulation of organizational governance because worker associations are still so small, relatively powerless, and poorly funded that they are in no position to harm their members or anyone else if they are ineptly or undemocratically run. Yet, apart from the hope that one day they'll become large and strong, I believe governance of worker centers matters for at least two reasons. First, at the level of theory, as I explain in Part I below, democratic political theory identifies the crucial importance of associations for civil society and, in a democratic society, it matters that associations are democratic.<sup>7</sup> As discussed below, many worker centers are highly participatory and democratic, but as they grow to national scale one wonders how they can maintain that structure. Should law do anything to require them to govern themselves democratically? Second, as a matter of legal doctrine, worker associations that take the form of unions with the right to represent employees in collective bargaining are regulated more extensively and differently than any other nonprofit organization. Indeed, as noted below, some have already argued that worker centers should be subject to the same federal regulation as labor unions, and it's worth considering whether this is or should be true. For these reasons, this Article aims to contribute in a small way in the ongoing effort of many scholars and activists to think about new organizational models by considering some of the democratic theory about workplace associations and also the law on their internal governance.<sup>8</sup>

This Article also aspires to learn from the criticisms and experiences of unions. Labor unions and the law that empowers them — including the right of exclusive representation and the right to collect dues — are under legal attack in the United States to a greater degree than at any time since unions first gained legal recognition in the 1920s. The basic thrust of all the conservative attacks

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6 Harold Meyerson, *The Seeds of a New Labor Movement*, AM. PROSPECT, Fall 2014, <http://prospect.org/article/labor-crossroads-seeds-new-movement>.

7 See *infra* notes 21-26 and accompanying text.

8 One of the best compilations of articles on law and new forms of worker organization is the Symposium, *Next Wave Organizing*, 50 N.Y. L. SCH. L. REV. 303 (2005-2006). This Article draws on many of the works in that symposium, especially Victor Narro, *Impacting the Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y. L. SCH. L. REV. 465 (2005-2006), and builds in particular on Alan Hyde's important theoretical insights, see Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y. L. SCH. L. REV. 385 (2005-2006).

on unions is to make them less majoritarian; conservatives have long argued that unions should be more responsive to individual rights. The groundwork for that attack was laid in the 1950s when unions were large and strong and, in many cases, oligarchical.<sup>9</sup> Most recently in *Harris v. Quinn*, the Supreme Court held that the First Amendment prohibits a home care workers union to collect fees from nonmembers to subsidize union speech with which they disagreed, and in the pending *Friedrichs v. California Teachers Association* case, the Court may rule that all government employers and their unions are prohibited from requiring nonmembers to pay fees.<sup>10</sup> Relying on *Harris*, conservative lawyers have instituted litigation arguing that empowering a union to bargain on behalf of dissenting workers violates the free speech and freedom of association rights of the dissenters.<sup>11</sup> In another case, they argue that a public sector union that limits voting on internal union governance to members only violates the First Amendment rights of nonmembers by forcing them to choose between getting the full benefits of union membership and subsidizing union speech with which they disagree.<sup>12</sup> While thus far these cases have failed, if the Supreme Court rules for the plaintiffs in *Friedrichs*, one can expect to see many more challenges to the constitutionality of union representation based on the principles of exclusivity and majority rule.

Worker advocates see in litigation like *Harris* and arguments that worker centers should be subject to the extensive federal regulation of internal affairs<sup>13</sup>

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9 The groundwork was actually laid even before the 1950s, as workers of color challenged racially discriminatory practices by employers and unions in courts, administrative agencies, and the workplace, and as employer groups likewise attacked the legitimacy of labor unions on many grounds. See generally SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* (2014); Jefferson Cowie, *Reframing the New Deal: The Past and Future of American Labor and the Law*, 17 *THEORETICAL INQUIRIES L.* 13 (2016).

10 *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Friedrichs v. Cal. Teachers' Ass'n*, 2014 WL 10076847 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2933 (June 30, 2015) (No. 14-915).

11 See *Serna v. Transp. Workers* 2015 WL 5239688 (S.D. Tex. Mar. 30, 2015) (granting summary judgment to union, finding exclusive representation and union security provisions do not violate First Amendment).

12 *Bain v. Cal. Teachers' Ass'n*, No. 2:15-CV-2465 (C.D. Cal. Sept. 28, 2015) (dismissing a suit contending that limiting benefits to members violates First Amendment rights of nonmembers).

13 Stefan J. Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and Its Evolution into Coverage Under the NLRA and LMRDA*, *ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS*, Oct. 2012, at 79 (two lawyers at a management-side firm arguing that worker centers are

no genuine concern for the rights of workers but, rather, a cynical strategy to weaken worker organizations and to make it impossible for them to participate in political activity. But whatever the motivations, attacks on unions and worker centers as being both undemocratic (i.e., unresponsive to the wishes of employees) and too democratic (i.e., too majoritarian without adequate protection for the rights of dissenting employees) invite fresh consideration of both the theoretical and legal principles that should and do govern organizations that seek to represent workers, if for no other reason than that any worker organization that becomes strong likely will face similar legal attacks.

Two significant challenges face worker organizations, and the law governing them, in facilitating collective power with appropriate protection for the rights of individuals within the collective. I call them the democracy challenge and the scale and sustainability challenge. An organization that is large and powerful often struggles to be democratic, and organizations that are governed democratically struggle to scale up and to be sustainable. The democracy challenge and the scale and sustainability challenge raise issues with deep history in both labor history and democratic theory. I offer notes toward thinking about them through a rereading of a classic mid-twentieth century sociological study of union democracy, *Union Democracy: The Internal Politics of the International Typographical Union*, by Seymour Martin Lipset, Martin A. Trow, and James S. Coleman (1956).<sup>14</sup> Lipset et al.'s empirical study of one union, which operated as a representative democracy (of sorts) even before the Labor Management Reporting and Disclosure Act (LMRDA) of 1959<sup>15</sup> required unions to adhere to limited democratic rules, suggests reasons why so few unions and other voluntary associations did so. According to both ends of the political spectrum, as unions gained size and power at the bargaining table and in the legislatures and courts, union leadership became unresponsive to the wishes of some of the membership (and to some union-represented nonmembers as well).<sup>16</sup> The LMRDA was enacted in part to address this alleged — and in many cases

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subject to NLRA and LMRDA regulation); Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law*, 30 BERKELEY J. EMP. & LAB. L. 232 (2009) (union lawyer arguing that worker centers are not subject to NLRA and LMRDA); Rosenfeld, *supra* note 1 (suggesting worker centers may be regulated by NLRA and LMRDA though they should not be).

- 14 SEYMOUR MARTIN LIPSET, MARTIN A. TROW & JAMES S. COLEMAN, *UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* (1956).
- 15 Labor Management Reporting and Disclosure Act (LMRDA) of 1959, 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531.
- 16 See, e.g., PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* (2008); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* (2014).

genuine — lack of democratic accountability. But, as many scholars have pointed out, whatever the LMRDA's success in combating corruption, it did not produce participatory democracy in many labor organizations.<sup>17</sup>

Worker centers and labor unions aspire to bring democracy to the workplace. As a matter of practice though not legal compulsion, many worker centers and unions aspire to operate as democratic organizations, beyond the legal requirements imposed on labor unions.<sup>18</sup> Yet many fall short of the ideal of democratic self-governance. My thesis is that unions present a democracy paradox: they are necessary to promote workplace and political democracy, but as they become powerful (and, therefore, more equal to the huge organizations that employ workers in an advanced industrial or postindustrial economy and more able to promote some degree of political and workplace democracy), they are prone (as is every large organization) to failing in both their intrinsic and instrumental missions of promoting democracy internally. I conclude that the history of the legal regulation of unions suggests caution in thinking law can address the democracy paradox and that legal regulation of the internal

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17 See, e.g., Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903 (describing in detail litigation under RICO and LMRDA to reform labor union governance); George Kennar, *Making the Teamsters Safe for Democracy*, 102 YALE L.J. 1645 (1993) (discussing the difficulty of transforming Teamsters union governance to make it more democratic); Clyde Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93 (1984) (asserting that the LMRDA cannot alone make union governance democratic); Clyde Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J.L. REFORM 689 (1991) (describing failures of court-imposed trusteeships under the LMRDA to democratically reform internal union governance).

18 FINE, *supra* note 1, at 202 (“Many worker centers strive to create a culture of democratic governance and decision-making.”); Chesa Boudin & Rebecca Scholtz, *Strategic Options for Development of a Worker Center*, 13 HARV. LATINO L. REV. 91 (2010) (attempting to provide a broad and comprehensive analysis of the organizational structures that have been used to successfully organize immigrant workers in the low-wage economy, and concluding that establishing a worker center is a prerequisite to success in any of them); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 438 (1995) (noting that an early worker center followed the participatory approach of Paolo Freire); Hyde, *supra* note 8, at 389-90 & n.89 (noting that while not all of what he calls Alternative Worker Organizations are democratic, they generally tend to follow democratic principles, although some do not observe democratic or participatory forms at all).

governance of worker organizations may do as much to thwart democracy as to promote it.

Part I of this Article examines, in light of some of the classic literature on industrial democracy and union democracy, the democracy debate over the governance of labor unions and new forms of worker organization. Part II examines the law governing the governance of worker organizations. It considers the arguments for regulating organizations that lack the right of exclusive representation under the law created to regulate organizations that are exclusive representatives. Part III examines, in light of the law and the literature on organizational democracy, the democracy and scale and sustainability challenges that workers face at the workplace in sharing governance over the conditions of work and within the organizations they form to help them. Given the tension — one faced by all organizations — between democracy and protection for individual rights, Part III also offers cautionary notes about the role law can play in helping membership organizations retain the benefits of participatory democracy and member engagement, and protection for dissent, while growing to national power.

## I. UNIONS, WORKER CENTERS, AND THE DEMOCRACY DEBATE

From early in the industrial era in both Europe and the United States, as well as across the American South, observers of civil society worried about the effect on democratic culture of substantial segments of the population — notably, the industrial working class, slaves, and indentured servants — spending most of their waking hours in a working environment in which they had little opportunity for self-governance. Alexis de Tocqueville found engagement in private associations with the power of self-governance to be an important feature of American democracy.<sup>19</sup> The socially corrosive effect of labor alienation emerged as a crucial topic of attention from Karl Marx's early writings to Pierre-Joseph Proudhon's advocacy of workers' cooperatives.<sup>20</sup> As Beatrice and Sidney Webb remarked in their 1894 study of British trade unions, *Industrial Democracy*,

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19 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 376-86 (New York: Knopf 1945) (1835). On Tocqueville's insights on American democracy, see Sheldon S. Wolin, *Democracy: Electoral and Athenian*, 26 *PS: POL. SCI. & POL.* 475, 475 (1993), and see generally SHELDON S. WOLIN, *TOCQUEVILLE BETWEEN TWO WORLDS: THE MAKING OF A POLITICAL AND THEORETICAL LIFE* (2003).

20 See, e.g., KARL MARX, *ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844* (1927); PIERRE-JOSEPH PROUDHON, *WHAT IS PROPERTY? AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT* (1840).



[i]t is only when . . . the administration of industry, as of every other branch of human affairs, becomes the function of specialised experts, working through deliberately adjusted Common Rules; and when the ultimate decision on policy rests in no other hands than those of the citizens themselves, that the maximum aggregate development of individual intellect and individual character in the community as a whole can be attained.<sup>21</sup>

A common theme in all of this — carried through post-New Deal scholarship on the administrative state, the participatory democratic theories that grew out of the 1960s activism (such as Sheldon Wolin and Carole Pateman), and the 2010s Occupy movement — was the fear that democracy could not thrive if people had no chance to engage in it most of the time.<sup>22</sup> Most recently, in the pages of this journal, Guy Mundlak has surveyed the literature, explored the justifications for workplace democracy, and offered a perceptive analysis of the prospects for and obstacles to implementing greater workplace democracy across a range of labor and employment laws.<sup>23</sup>

Apart from the question whether the capacity for political self-governance would wither if people exercised it rarely — at the ballot box, if at all — there are the instrumental and intrinsic benefits of worker involvement in workplace governance, as Mundlak has explained. Among the instrumental benefits of worker involvement in workplace governance are that laws enacted to ensure minimum labor standards are often not enforced in workplaces in which poorly educated workers have no control over the conditions of work. And if the employing class flouts laws enacted to protect the working class, in what sense is there actually self-government? The American legal regime relies overwhelmingly on employers voluntarily to comply with law or, where that fails, on workers to initiate enforcement, either by filing an administrative charge with the agency or by instituting litigation. Empowered and informed workers are more likely to secure compliance with labor and employment law.<sup>24</sup>

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21 SIDNEY WEBB & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* 848 (1902).

22 See, e.g., CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (2000); PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969); SHELDON WOLIN, *DEMOCRACY INCORPORATED: MANAGED DEMOCRACY AND THE SPECTRE OF INVERTED TOTALITARIANISM* (2010); DANIEL ZWERDLING, *WORKPLACE DEMOCRACY: A GUIDE TO WORKPLACE OWNERSHIP, PARTICIPATION, AND SELF-MANAGEMENT EXPERIMENTS IN THE UNITED STATES AND EUROPE* (2d ed. 1984).

23 Guy Mundlak, *Workplace — Democracy: Reclaiming the Effort to Foster Public and Private Isomorphism*, 15 *THEORETICAL INQUIRIES L.* 159 (2014).

24 Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 *IND. L.J.* 1069 (2014) (noting the significance of

Contemporary sociolegal scholars, including Joel Rogers and his frequent collaborator, the democratic theorist Joshua Cohen, along with social theorist Erik Olin Wright, have been engaged in a decades-long project to study and develop theories and practices of participatory democratic organizations.<sup>25</sup> Their writings emphasize the importance to democratic theory and practice of associations of people acting in participatory democratic projects at the subnational or nonstate level, including workplace democracy, neighborhood associations, and participatory groups focused on schools, environmental protection, and so forth. Each of these case studies and the theories growing from them emphasized the benefits of group deliberation and decision-making over important aspects of life.

These theories identify a number of aspects of institutional design to facilitate democratic participation: (1) the accountability of group leadership to members and power relations between leadership and membership, (2) the extent to which authority is centralized in group decision-making, and (3) the extent to which an association's membership includes a substantial percentage of the population whose interests the association represents.<sup>26</sup> Cohen and Rogers also note that organizational democracy can be facilitated if the organization is also involved in public governance and policymaking and if its public political power is roughly equal to that of other groups active in the public political realm.<sup>27</sup>

In their ideal form, some labor unions and many worker centers aspire to achieve all of the democratic association characteristics noted above, although they vary in the extent to which their aspirations are short-, medium-, or long-term goals. In brief, they aspire to be strong *vis-à-vis* employers and other organizations, to represent all workers with a community of interest (and

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worker-initiated enforcement and using the term “bottom-up workplace law enforcement” to describe it, and documenting through a survey of 4387 low-wage workers in the three largest U.S. cities that workplace laws are not enforced in low-wage workplaces because workers do not know their rights, are afraid to assert them, or lack the resources to initiate legal proceedings).

25 JOSHUA COHEN & JOEL ROGERS, ASSOCIATIONS AND DEMOCRACY (1995); ARCHON FUNG & ERIK OLIN WRIGHT, DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (2003).

26 COHEN & ROGERS, *supra* note 25, at 79.

27 *Id.* at 48-50. Their theory thus suggests that the individual rights attack on union political involvement as reflected in cases like *Harris v. Quinn*, 134 S. Ct. 2618 (2014) is not necessarily likely to enhance the democratic rights of workers. On the contrary, the weakening of unions in the political realm, combined with unrestrained corporate spending on politics, will actually make public governance less responsive to workers rather than more so.

the industrial unions, especially the International Workers of the World (the Wobblies), aspired to one big union of all workers), to operate democratically internally, and to cooperate with groups focused on issues other than labor conditions. Obviously, most never achieved success on all measures (and some never even tried). But many worker centers, at least in their current iteration, prioritize internal democracy and full service to members over other goals; and many unions sacrificed internal democracy and breadth of range of policy concerns in order to concentrate power and be effective in dealing with large employers.<sup>28</sup> Worker centers are thought to provide the benefits of collective action and participatory democracy in the workplace without the legal obstacles faced by unions. If worker centers become powerful, they will be large and will need to be managed by a leadership that may or may not remain accountable to the membership and respectful of minority rights.<sup>29</sup>

Perhaps one reason why legal regulation of the internal governance of worker centers has received so little scholarly attention is that most worker centers have not yet become very large, and they are generally very participatory in their governance. Published accounts suggest they are highly democratic as a matter of philosophic commitment and because they rely on activist member volunteers to mobilize to achieve legal gains.<sup>30</sup> They do not purport to represent workers who are not their members. When they negotiate improved employer policies, nonmembers benefit from the improvements, but the free-rider problem of worker centers has not yet garnered much attention. Worker centers, moreover, rely primarily on philanthropy as a funding model.<sup>31</sup> Although some do require members to pay dues, they have not institutionalized dues collection so that they benefit from automatic payment systems (no payroll deduction). So, absent the power to negotiate contracts on behalf of members

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28 See, e.g., *WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY* (Ruth Milkman, Joshua Bloom & Victor Nardo eds., 2010); FINE, *supra* note 1; JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005); RUTH MILKMAN & ED OTT, *NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT* (2014); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007). And worker centers play a role in almost every one of the organizing campaigns described and analyzed by Scott Cummings. See Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009); Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617 (2011).

29 See Hyde, *supra* note 8.

30 See sources cited *supra* note 22.

31 Janice Fine, *A Marriage Made in Heaven? Mismatches and Misunderstandings Between Worker Centres and Unions*, 45 BRIT. J. INDUS. REL. 335, 341 (2007).

and compulsory dues collection, worker centers remain immune to the law regulating the internal affairs of unions. In addition, there is no reported evidence of worker center corruption or a lack of accountability to members, so lawyers have yet to see a need for legal regulation of their internal affairs.

Thus far, therefore, worker centers have not been subject to the longstanding attacks on unions that they are undemocratic and that they deprive individuals of rights. The democracy criticism has been enshrined in fifty years of Supreme Court jurisprudence giving union-represented workers the right not to join the union, the right in all fifty states to refuse financial support for its political activities, and, most recently for home care workers under *Harris v. Quinn* and in the twenty-five states with right-to-work legislation, the right to refuse even to pay their fair share of the union's costs of negotiating and administering a collective bargaining agreement.<sup>32</sup> Worker centers and unions that do not claim the right of exclusive representation are immune both to the criticism and to the laws arising out of it. In short, they don't have the luxury of behaving like bureaucracies with a stable funding source and they don't have enough money for leader corruption to be an issue.

The few calls that have been made for legal regulation of the internal affairs of worker centers seem to be animated primarily by management lawyers attempting to use increased legal regulation strategically, both to increase hassle for their adversary and, especially, to restrict the ability of worker centers to organize secondary boycotts and to engage in picketing that is prohibited for labor unions.<sup>33</sup> Beyond the strategic, lawyers affiliated with worker centers and those who oppose them, and especially regulators at the National Labor Relations Board (NLRB) and Department of Labor (DoL), should think functionally about what features of a worker organization make it appropriate for the extensive federal regulation of unions. In other words, if unions disappear and are replaced by other forms of worker organization, should the LMRDA restrictions disappear along with unions or simply be

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32 See *Harris*, 134 S. Ct. (union-represented home care workers have a First Amendment right to refuse to pay agency fees); *NLRB v. Gen. Motors*, 373 U.S. 734 (1963) (union-represented workers have a First Amendment right to refuse to join the union). For an explanation of the law in this area, see Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 *LOYOLA L.A. L. REV.* 439 (2015); and Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 *U.C. IRVINE L. REV.* 857 (2014).

33 See Thomas I.M. Gottheil, *Not Part of the Bargain: Worker Centers and Labor Law in Sociohistorical Context*, 89 *N.Y.U. L. REV.* 2228, 2254-57 (2014) (describing efforts to regulate governance of worker centers more extensively).

applied in their current form to the new forms of organization that take the place of unions?

In this context, Lipset's classic 1956 study, *Union Democracy*, offers valuable insights.<sup>34</sup> *Union Democracy* offered a theory about the internal affairs of labor organizations built upon a careful empirical study of a single union with a long history of democracy in its internal operations. It was an effort to respond to a theory — known as the “iron law of oligarchy” — developed by Robert Michels, a German sociologist, in 1911.<sup>35</sup> Michels observed that most voluntary organizations (his examples were labor unions, political parties, business and professional associations, and cooperatives) operated as oligarchies. Power tended to be held by the leadership, regardless of whether members had the right to vote on governance. Lipset, a political scientist, and his coauthors studied the International Typographical Union (ITU) — the union representing typesetters and printers — to explore why it bucked the “iron law of oligarchy” and was vibrantly democratic in its internal affairs.

According to Lipset, the ITU was “the only American trade union in which organized parties regularly oppose each other for election to the chief union posts, and in which a two-party system has been institutionalized.”<sup>36</sup> Lipset and his coauthors identified several aspects of the ITU that tended to enable democracy. First, factors relating to the history and structure of the printing industry mattered. The union was relatively small (about 100,000 members at the time they wrote, of whom 10,000 were in New York), and also locals were more autonomous, which allowed for greater member participation in the activities of the union. The decentralization of printing as an industry enabled the union to be decentralized, too, so that locals exercised real power. And stable union-management relations meant that the union did not perceive itself as an embattled quasi-military organization. Second, there were factors relating to the status of the occupation. The members were well educated and relatively well paid, which gave them the skills and material resources to develop leadership abilities. Their relatively good pay and the pride they took in their jobs also meant that leaders had a good job to fall back on once they were voted out of union office. Third, there were factors relating to member interest and participation in union affairs. Members were devoted to their craft, which inclined them to spend their leisure time on union activities as opposed to family or recreation. Their work hours facilitated communication about union affairs in the workplace. Fourth, there were factors affecting the distribution of political resources in the union, and the commitment to

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34 LIPSET, TROW & COLEMAN, *supra* note 14.

35 ROBERT MICHELS, *POLITICAL PARTIES* (Eder Paul & Cedar Paul trans., 1st ed. 1949).

36 LIPSET, TROW & COLEMAN, *supra* note 14, at 3.

rule-based internal union governance. ITU members had many channels of communication with each other and the norms of the union — its internal code of law — protected democratic internal governance. Finally, Lipset also suggested that a broad range of activities — a broad ideological program as opposed to a narrow economic focus of business unionism — meant that the members were more likely to be engaged in debate rather than deferring to the technical expertise of the leaders in negotiating pay and benefits.<sup>37</sup>

Lipset and his coauthors' research on oligarchy in unions came at a time when the governance of large unions was a major political issue and when conservatives began, as Sophia Lee articulately explained, to use the courts as a vehicle to expand the rights of antiunion employees.<sup>38</sup> In Congress, the McClellan Committee conducted lengthy hearings on the governance of unions and issued reports documenting oligarchy and corruption among a few.<sup>39</sup> As a result of its work, along with politically-motivated and high-profile congressional investigations of corruption in some unions, in 1959 Congress enacted the LMRDA to address the problems that Congress identified, particularly the absence of democratic elections for international and local union leadership and financial corruption of various sorts.<sup>40</sup> The legislation that was ultimately enacted was an amalgam of various proposals floated by different members of Congress and, perhaps not surprisingly for a bill cobbled together on the floor of both houses of Congress and in conference, it represented a number of different points of view on the nature of the problem of union governance and the best approaches to regulating it.<sup>41</sup>

Labor law scholars wrote extensively on the governance of unions, both before and after Congress enacted the LMRDA.<sup>42</sup> They recognized the importance of unions in a society of large industries and the challenges of striking the right balance between legal protection for members and minorities

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37 *Id.* at 414-17.

38 LEE, *supra* note 16 at 56-78.

39 Archibald Cox described the Congressional hearings that led up to the enactment of the LMRDA and how the LMRDA reflected the changes proposed in the hearings. See Archibald Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 821-23 (1960).

40 Labor Management Reporting and Disclosure Act (LMRDA) of 1959, 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531.

41 Cox, *supra* note 39, at 823.

42 *Id.*; see also Archibald Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609 (1959); Harry H. Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961); Harry H. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

within the union and avoiding excessive entanglement of courts and government agencies in their internal affairs. Not surprisingly, their work, not unlike that of Congress, reflected the perceived problems of the era and proposed legislation (or interpretation of legislation) to address those problems. Unions and their leaders should be required to conduct fair elections at regular intervals, to disclose their finances, to avoid conflicts of interest, and to be limited in their ability to put local affiliates into trusteeship as a method of consolidating power over locals. Yet, as Archibald Cox put it, law could only do so much in promoting union democracy:

The law cannot create the spirit of self-government. It cannot compel union members to attend meetings or hold their officers to a strict accounting. It cannot compel members to see in a labor union something more than service organization hired to obtain benefits in return for dues. The most the law can do is to secure the opportunity for workers who wish to take an active part in democratic unions without undue loss of personal freedom.<sup>43</sup>

The legal, sociological, and political science scholarship of the 1950s and 1960s struggled to develop an understanding of power, of democracy in large institutions, and of what role law and legal institutions could play in promoting the democratic participation that mass society seemed to jeopardize.<sup>44</sup>

In sum, both social and political theorists like Lipset and lawyers like Cox and Wellington focused mainly on general norms of fair elections, on some form of two-party system, and on financial probity. They were largely skeptical about, perhaps even inattentive to, participatory democracy in a robust sense.

In 1978, nearly twenty years after the enactment of the LMRDA, a veteran of the struggles to bring democracy to the Teamsters, the Steelworkers, and the United Mine Workers — Edgar James — wrote a pessimistic article about whether the LMRDA had the capacity to democratize even the higher offices of large international unions.<sup>45</sup> James argued that union democracy required, at a minimum, the possibility of successful non-elite challenges to elected union leadership, and that the LMRDA had not made such challenges possible, but he

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43 Cox, *supra* note 39, at 644.

44 An excellent short account of some of the literature and its concerns, and a theory to go along with it, is provided by Steven Lukes, which in a second and expanded edition of his classic work brings the debate up to the early twenty-first century. STEVEN LUKES, *POWER: A RADICAL VIEW* (2d ed. 2005).

45 Edgar N. James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Elections*, 13 HARV. C.R.-C.L. L. REV. 247 (1978).

acknowledged that legal regulation to make non-elite challenges viable would require “a close, practical, and even intrusive look into institutional life.”<sup>46</sup>

Most recently, Matthew Dimick tried again to theorize about the circumstances that led unions toward more or less democracy in their internal governance.<sup>47</sup> Intellectual fashions have changed, so Dimick’s analysis drew more on game theory than on earlier sociological and political approaches to theorizing about governance, but his thoughtful and carefully researched and reasoned conclusions suggested that labor law has done too much to protect unions as institutions. He argued, based on a comparison between British and American law and trade unions, that union democracy is more likely to exist where law does not grant a union the right to be the exclusive representative of a group of workers and where law does not discourage workers’ use of self-help to resolve workplace disputes by encouraging unions to create bureaucratic and professionalized procedures to resolve them.<sup>48</sup> Key to his analysis was workplace association — where law encouraged employees to form associations with one another, union democracy was more likely to exist. In this respect, his analysis is similar to Lipset’s — workers that have the ability and incentive to associate with one another at work are more likely to be empowered *vis-à-vis* their union and *vis-à-vis* their employer. This suggests that law should be cautious in regulating worker centers in a way that would lead to a decline in member engagement. I return to that in Part III.

## II. LEGAL REGULATION OF NONPROFIT AND UNION GOVERNANCE

Federal law regulates the internal affairs of labor organizations far more intensively than the internal affairs of almost any other private organization except a publicly traded corporation. As explained in detail below, the goal of the legal regulation is to force unions to govern themselves so as to protect dissenting employees, and the law does so because unions are the exclusive representatives of employees with the power to affect conditions of employment and also to waive individual employee rights. Unions are prohibited from coercing employees in choosing whether to join or assist them and also from causing an employer to discriminate against an employee who chooses not to join. The law prohibits excessive dues or fees. It prohibits employers from making payments to unions for any purpose other than those listed by statute. And unions owe a duty of fair representation to all workers represented by

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46 *Id.* at 283.

47 Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 DENV. U. L. REV. 1 (2010).

48 *Id.* at 5.



the union, regardless of whether they are union members or fee payers. In this Part of this Article, I survey the law regulating the internal affairs of unions, contrast it with the law regulating the internal affairs of other nonprofit organizations, and examine the limited law on the question of which forms of labor organization are governed by the extensive law regulating the internal affairs of unions.

Title I of the LMRDA requires unions to operate as representative democracies, although the role of the rank-and-file is not required by federal law to be very robust.<sup>49</sup> All members must have equal rights to attend and speak at union meetings and to nominate and elect union leadership. Title I requires member approval by majority vote for dues or fee increases. It grants due process protections in disciplinary matters. Title II requires unions to disclose to their members and to file with the DoL a wide variety of information, including the union's constitution and bylaws. It requires annual reporting to the DoL listing the union's leadership and their compensation, the method of selection of union leadership, and the rules governing union meetings. Title II requires detailed reporting of the union's annual expenditures and how union staff spend their time. In addition, Title IV requires unions to conduct secret ballot elections of officers no less frequently than every five years for national and international unions and every three years for locals. Federal law requires that members be permitted to vote on levying of dues and assessments, but does not require member authorization for bargaining demands, strikes, or ratification of contracts. (Union constitutions and bylaws typically do, however, and the law requires organizations to adhere to their constitutions and bylaws.) Title V of the LMRDA imposes fiduciary duties on union officers regarding union money and property and prohibits conflicts of interest.<sup>50</sup>

The LMRDA regulation of the internal affairs of unions is more stringent than state or federal regulation of other nonprofit membership organizations. The law governing nonprofit organizations has relatively little to say about the rights of members of the organization. Perusing the leading treatises and texts on the law and practice of governance of nonprofit organizations, one finds many chapters on the boards of directors and the requirements for tax exemption and charitable giving, but nothing on the rights of members of the organization to participate in its governance.<sup>51</sup>

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49 Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §§ 501-531. On the LMRDA, see generally *LABOR UNION LAW AND REGULATION* (William W. Osborne, Jr. ed., 2003).

50 29 U.S.C. §§ 501 et seq.

51 See, e.g., BRUCE HOPKINS, *NONPROFIT LAW MADE EASY* (2005) (including chapters on forming an organization, acquiring and maintaining tax-exempt status, reporting

Unlike unions, nonprofit organizations that are organized as membership organizations do not have to give members the right to elect the leadership or to participate in meetings of the organization, except insofar as the organization has adopted bylaws granting such rights.<sup>52</sup> Most of the law on the governance of nonprofit organizations other than labor organizations focuses on the fiduciary responsibilities of the board of directors and the tax exemptions for donations and activities. The law governing other mutual benefit membership organizations (professional and trade associations, sports leagues, neighborhood and condominium associations, and so forth) varies from state to state and has considerably less to say about the rights of members in the organization than do the LMRDA and the National Labor Relations Act (NLRA).<sup>53</sup> While the law of nonprofit organizations regulates expulsion of members, especially when expulsion will restrict an individual's ability to earn a living (as, for example, disbarment makes it illegal to practice law), it does not say much about how the organization must govern itself and who participates in making the policy of the organization. There has been litigation over whether membership organizations (such as the Boy Scouts of America or the Jaycees) may discriminate on the basis of gender, sexual orientation, or

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and disclosure requirements, fundraising and charitable giving, and nothing on involvement of membership); CHERYL SOROKIN ET AL., *NONPROFIT GOVERNANCE AND MANAGEMENT* (2011) (including chapters on the selection and operations of the board of directors, the executive officer, and on the organization's bylaws, mission statement, human resources staff, and fundraising, but nothing on the organization's membership).

- 52 See JAMES. J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 965, ch. 10 (4th ed. 2010) (surveying the special problems of private membership associations and noting that generally membership organizations are required by courts only to adhere to their own procedures in handling expulsion of members but that courts do not generally otherwise interfere, and "unless there are significant property, constitutional or contractual interests involved, or actions in patent bad faith, courts give substantial deference to the rule of the private association"); see also BRUCE HOPKINS & VIRGINIA C. GROSS, *NONPROFIT GOVERNANCE: LAW, PRACTICES, AND TRENDS* 101 (2009) (noting that nonprofit organizations "can be formed as membership organizations, with the member having various rights, including the right to elect the organization's directors, or may be formed with a self-perpetuating governing body, whereby the directors or trustees elect their successors"; the rest of the 250-page book on the governance of nonprofits does not mention the rights of members of the association).
- 53 See generally *Development in the Law — Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 985 (1963). Of particular relevance is the segment on Framework for the Judicial Inquiry. See *id.* at 990-98.

race in admission to membership or in appointing leaders, but that litigation has focused on eligibility for membership or leadership rather than on how the organizations govern themselves.<sup>54</sup>

Whether a worker center or a labor organization that does not claim the right of exclusive representation satisfies the definition of a “labor organization” under the NLRA and LMRDA is, potentially, a fact-specific inquiry that turns on the kinds of activities and relationships these types of organizations have with employers on behalf of workers, i.e., the ways in which they deal with employers over working conditions. This is because both the NLRA and LMRDA define “labor organization” covered by the statutes as entities that “deal with” employers, and courts have interpreted “dealing with” to include more than simply collective bargaining.

The NLRA and LMRDA define “labor organization” in nearly identical terms. Under section 2(5) of the NLRA, a “labor organization” is “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>55</sup> The LMRDA appropriated this definition with slight modifications and one significant expansion. Under section 3(i) of the LMRDA, the definition of “labor organization” is an organization

*engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.*<sup>56</sup>

Both the NLRA and the LMRDA definitions of labor organization are broad. The LMRDA is broader insofar as it encompasses an additional subset of entities (i.e., groups and associations that exist to deal with the employer, and

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54 See generally AMY GUTMANN, *IDENTITY IN DEMOCRACY* (2003) (discussing the law and political theory on the question whether organizations can discriminate on the basis of identity).

55 29 U.S.C. § 152(5).

56 29 U.S.C. § 402(i) (emphasis added) (the emphasized sections highlight the differences between the NLRA and the LMRDA).

conferences, committees, and councils “subordinate” to labor organizations). Section 3(i) also specifies that the organization must be engaged in an industry affecting commerce (which is unnecessary under the NLRA), which the NLRB has interpreted broadly to govern all for-profit entities meeting a gross dollar-volume of business requirement.<sup>57</sup> Given that both definitions state that a labor organization “includes any organization of any kind,” it is unclear what, if anything, the additional groups singled out in the LMRDA add. Additionally, it is unclear how an entity could satisfy the definition of a “labor organization” under the LMRDA but not the NLRA, and vice versa.<sup>58</sup>

Although it is somewhat ambiguous, section 3(i) of the LMRDA should be read in tandem with section 3(j),<sup>59</sup> which defines what it means for a labor organization to be “engaged in an industry affecting commerce.” The statute provides that a labor organization is subject to the NLRA if it is certified by the NLRB or recognized by the employer as the representative of employees, or if it is an affiliate of such an organization, or if it seeks to represent employees under the NLRA, or if “it is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization” covered by the LMRDA.<sup>60</sup>

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57 29 U.S.C. § 152(2). The NLRB explains its rules for determining which employers are covered by the NLRA on its website. See *Jurisdictional Standards*, NAT’L LABOR RELATIONS BD., <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited Nov. 17, 2015).

58 Benjamin Sachs suggests that whether a worker center qualifies as a labor organization under the NLRA as opposed to the LMRDA is a separate issue calling for a separate analysis. See Benjamin Sachs, *Worker Centers and the “Labor Organization” Question*, ON LAB. (Sept. 1, 2013), <http://onlabor.org/2013/09/01/worker-centers-and-the-labor-organization-question/>. But lawyers representing management believe that many worker centers are labor organizations covered by the LMRDA and the NLRA. See Marculewicz & Thomas, *supra* note 13, at 88 (finding that while the Coalition of Immokalee Workers may be exempt from the NLRA due to the agricultural exemption, the Coalition “clearly falls under the definition under the LMRDA where the exemption for ‘agricultural laborers’ is not present”).

59 Naduris-Weissman, *supra* note 13, at 288, suggests there are two ways to read these provisions:

In one reading, section 3(i)’s general definition is paramount, and section 3(j) merely provides illustrative examples of labor organizations that will meet the ‘engaged in an industry affecting commerce’ requirement. A second interpretation is that the two sections must be read together, with section 3(j) specifying the particular types of labor organizations that fall within the Act’s coverage so long as the general definition is also met.

60 29 U.S.C. §§ 402(j)(1)-(5). The DoL regulation characterizes these types of

A worker center might satisfy the LMRDA's definition of a labor organization engaged in an industry affecting commerce even though it has neither been certified by the NLRB nor recognized by an employer to act "as the representative of employees" because it seeks to act as their representative.<sup>61</sup> The question is whether worker centers can be said to deal with employers such that their actions satisfy the NLRA/LMRDA. Arguably, the various approaches that Courts have developed in relation to the NLRA for determining what falls within the "dealing with" category are also relevant to an analysis under the LMRDA.<sup>62</sup>

Furthermore, the term "subordinate" is potentially significant because it contemplates a basis for LMRDA applicability that is contingent upon the existence of a relationship between two entities. In other words, but for this relationship, an organization might not satisfy the criteria of being a "labor organization" under the LMRDA. If a worker center formed an alliance with a traditional labor union, for example, assisting that union in organizing

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organizations as "intermediate bodies." It is unlikely that a worker's center would qualify here because these types of organizations are essentially formed by unions, are locals of the union, or explicitly operate within the union in the form of a committee or conference, for example. *See* 29 C.F.R. §§ 451.4(f)(1)-(4).

61 Rosenfeld, *supra* note 1, at 501 (suggesting that worker centers would fall within the reach of the LMRDA under subsection (j)(2) as well). However, Naduris-Weissman, *supra* note 13, at 290, argues that worker centers do not satisfy the LMRDA's definition of a labor organization affecting commerce. Even if they could be classified as an uncertified "local labor organization,"

the use of the phrase "recognized or acting as the representative of employees," rather than mere "employee participation" as found in NLRA section 2(5), suggests that unlike an NLRA "labor organization," an LMRDA "local labor organization" must represent employees for collective bargaining. Looking at the first part of this phrase, the term "recognized" suggests a specific connection to the representation processes set out in NLRA section 9.

62 *See, e.g.,* NLRB v. Peninsula Gen. Hosp. Med. Ctr., 36 F.3d 1262, 1271-72 (4th Cir. 1994) (explaining that while the term "dealing with" connotes activity which is broader than collective bargaining, an employer does not necessarily "deal with" its employees merely by communicating with them, even if the matters addressed concern working conditions; "dealing" occurs only if there is a "pattern or practice" over time of employee proposals concerning working conditions, coupled with management consideration thereof); Crown Cork & Seal Co., 334 N.L.R.B. 699, 701 (2001) (defining "labor organization" not to include employee committees that perform managerial function without negotiation or review by management); Electromation, Inc., 309 N.L.R.B. 990, 995 (1992) (defining "dealing with" as a bilateral mechanism involving proposals from the employee committee concerning terms of employment).

workers or providing direct services, does that mean that the center would be “subordinate” to the union? At a minimum, alliances between worker centers and labor unions are potentially dangerous for both parties: worker centers could lose their immunity from the LMRDA/NLRA, while unions could face unfair labor practice charges if they joined with worker centers which happened to be engaged in secondary boycotting or other forbidden activity.

Courts have interpreted the definition of “labor organization” under the LMRDA to encompass public-sector labor organizations subordinate to private-sector labor organizations;<sup>63</sup> unions consisting of public- and private-sector employees; and pool arrangements “whereby members of these various chartered locals would become affiliated in one body, temporarily, and could be employed without disputes among the chartered locals regarding contracts with employers, and other matters of representation between employers and employees.”<sup>64</sup> Courts have also found the LMRDA inapplicable to certain kinds of entities clearly engaged in worker issues. For example, “a union which exclusively represents public sector employees is not a ‘labor organization’ within the meaning of the LMRDA,”<sup>65</sup> because the definition of “employer” expressly excludes the “[s]tate or political subdivision thereof.”<sup>66</sup>

One district court found that a Joint Seniority Board comprised of employee representatives and multiemployer bargaining groups who collectively dealt with hiring and firing issues did not fall under the LMRDA.<sup>67</sup> In the *Kanawha Valley Labor Council* case, the Fourth Circuit found that the Kanawha Valley Labor Council did not constitute a “labor organization” despite being “a local central body affiliated with defendant AFL-CIO and composed of local unions and other organizations . . . [and] involved in a broad range of community activities, . . . [including] represent[ing] the interests of its members in dealing with, among others, governmental agencies and legislative bodies.”<sup>68</sup> Likewise, in *Thompson v. McCombe*, the Ninth Circuit rejected plaintiff’s argument that the Amalgamated Transit Union was subject to the LMRDA not only because the union represented public-sector employees,

63 Ala. Educ. Ass’n v. Chao, 455 F.3d 386, 395 (D.C. Cir. 2006).

64 United States v. Dicus, 229 F. Supp. 282, 283 (E.D. Ark. 1964).

65 Thompson v. McCombe, 99 F.3d 352, 354 (9th Cir. 1996); see also Celli v. Shoell, 40 F.3d 324, 327 (10th Cir. 1994); Smith v. Office & Prof’l Emp. Int’l Union, 821 F.2d 355, 356 (6th Cir. 1987); Diven v. Amalgamated Transit Union Int’l & Local 689, 38 F.3d 598, 601 (D.C. Cir. 1994).

66 29 U.S.C. § 402(e); see also 29 C.F.R. § 451.3(a)(4).

67 Mayhew v. ILA Local 1771 (Clerks & Checkers), No. C.A.2-05-01558-PMD, 2005 WL 3055597, at \*5 (D.S.C. Nov. 15, 2005).

68 Kanawha Valley Labor Council, AFL-CIO v. Am. Fed’n of Labor & Cong. of Indus. Org., 667 F.2d 436, 438 (4th Cir. 1981).

but also because “the breadth of [the union’s] goal of bettering employment conditions for ‘working people in general’ [did not] relate specifically to the representation of employees.”<sup>69</sup> If courts and/or the Board adopted the Ninth Circuit’s posture in *Thompson*, worker centers might be able to argue that their aims are too general to constitute employee representation.

The two principal goals of LMRDA regulation are to ensure accountability to the members through mechanisms of democracy and probity in the handling of finances and property, while protecting autonomy from government and avoiding hamstringing the organization so that it can be effective in advancing the interests of its members. I discuss these in the next Part, beginning first with effectiveness in promoting workplace democracy, then how the organizations are accountable to their members through democratic governance and also protect minority interests in the group (what I term the individual rights challenge). Then I discuss whether or how democratic accountability and individual rights can be maintained as the group grows larger (the scale issue) and develops a stable funding mechanism.

### III. WORKER CENTERS AND WORKPLACE DEMOCRACY

Thus far, I have explored the democracy paradox of unions and other worker organizations. They are necessary to promote democracy and, yet, as they become powerful (and, therefore, more equal to the huge organizations that employ workers in an advanced industrial or postindustrial economy), they are prone (as is every large organization) to fail in both their intrinsic and instrumental missions of promoting democracy. Both the Left and the Right over the last fifty years have asserted that many unions tended toward the iron law of oligarchy, as their leadership became, in its quest for power at the bargaining table and in the legislatures and courts, unresponsive and unaccountable to the wishes of the membership. The Supreme Court created the duty of fair representation and the right to opt out of union membership, and Congress enacted the LMRDA, to address the democracy paradox. Nonetheless, the law has been somewhat ineffective in making unions more democratic, but it has provided tools that enable management-funded organizations like National Right to Work to weaken unions as political actors and in some cases in the workplace. It’s not much of a stretch to conclude that legal regulation failed to achieve its intended goal of protecting workers from the power of unions, but did protect management from the power of worker organizing. This is not something we want to replicate in a world without unions.

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69 *Thompson*, 99 F.3d at 354.

Most worker centers, for all their many virtues, have thus far not even aspired to the kind of national power that some unions once claimed. They appear at this stage of their development to be focused on internal democracy, group deliberation and engagement of membership, and on addressing a wide array of the concerns of their members. As noted above, many worker centers are committed to participatory democracy as a matter of philosophy, but many do so for the entirely pragmatic reason that member engagement is essential to effectively regulate working conditions, since otherwise workers will ignore the standards that the center tries to establish in the industry.<sup>70</sup> At this point, therefore, the legal question whether the LMRDA and dues opt-out rules apply to worker centers feels both academic and ideological.

But what if worker organizations achieved the scope and scale that some unions have or had? If worker centers succeed in mobilizing workers to exert real power through any form of collective negotiation, or group litigation, or if they adopt a funding model that looks anything like the dues-checkoff system that has enabled unions for the last century to be a powerful force both in individual bargaining and in the legislative and litigation realms, they should expect the same attacks to be made against them.<sup>71</sup>

Fifty-five years of experience with the LMRDA suggests that the instrumental argument for applying the LMRDA to worker centers is weak. Federal regulation of the internal governance of unions, like state law regulating other nonprofit membership organizations, has done little to create the conditions Lipset et al. found significant to promote democracy.<sup>72</sup> Ironically, although the LMRDA has been a tool to root out union corruption,<sup>73</sup> it may have even contributed to the creation of conditions that promote oligarchy. As Edgar James and Matthew Dimick both noted, the creation of a professionalized union staff — which is necessary to comply with the detailed reporting and disclosure requirements — can undermine member engagement.<sup>74</sup> So does vigorous

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70 Edwin Melendez, Nik Theodore & Abel Valenzuela, Jr., *Day Labor Worker Centers: New Approaches to Protecting Labor Standards in the Informal Economy* (Inst. for Research on Labor and Emp't, Working Paper No. 2009-12, 2008), <https://escholarship.org/uc/item/6tw7575x>.

71 See, e.g., Brian Olney, *Paycheck Protection or Paycheck Deception?: When Government "Subsidies" Silence Political Speech*, 4 U.C. IRVINE L. REV. 881 (2014).

72 LIPSET, TROW & COLEMAN, *supra* note 14.

73 But the literature also notes the significance of civil and criminal prosecutions under the Racketeer Influenced and Corrupt Organizations Act (RICO). See JAMES B. JACOBS & KERRY T. COOPERMAN, *BREAKING THE DEVIL'S PACT: THE BATTLE TO FREE THE TEAMSTERS FROM THE MOB* (2011).

74 Dimick, *supra* note 47; James, *supra* note 45.



enforcement of the duty of fair representation, as it prioritizes bureaucratic regularity in the handling of grievances. Much of what Lipset and the other scholars found important is not required by law and, more importantly, could not be. Absent serious regulation of business and drastic improvements in education and the qualities of jobs, low-wage workers are unlikely to have the time at work, leadership skills, and resources that Lipset found significant in printers being democratic unionists. And studies in the United States and elsewhere have concluded that it is nearly as difficult to make unions and other large voluntary membership associations democratic in a participatory sense as it is to give shareholders any real power over corporate managers.<sup>75</sup>

Without the legal right of exclusive representation, which as Cynthia Estlund has observed, makes unions something of an anomaly,<sup>76</sup> and the legal mandate (however weak) that the employer bargain with the union, the argument for regulation of the internal affairs of a worker organization becomes no stronger than the argument for regulating the internal affairs of any other voluntary association. Neither a worker center nor any union that does not claim to represent a majority has, up to this point, the legal right to force the employer to bargain.

But what about finances? The one thing that unions have done well that worker centers have yet to achieve is to develop a self-regenerating source of funding that is probably necessary to enable worker centers to achieve national scale and long-term sustainability. Unions have for over a century relied on dues paid by members and by nonmembers whom the union represents. In order for worker centers to attain the scale and sustainability that major unions have (or once had), they need to develop a funding mechanism that does not depend on foundation or private philanthropy. But one of the main concerns of the LMRDA was to prevent mismanagement of the money gathered from members in the form of dues.

The dues model has both conceptual and practical advantages over the private philanthropy model. Conceptually, a dues model makes the organization at least in theory accountable to its members rather than to an outside funder. This is important because people tend to believe they should serve the interests

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75 See Roger Spear, *Governance in Democratic Member-Based Organizations*, 75 ANNALS PUB. & COOPERATIVE ECON. 33 (2004) (conducting an empirical and theoretical analysis of why membership-based organizations tend toward oligarchy); ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (first theorists of the problem of making corporate managers truly subject to the control of shareholders).

76 Cynthia L. Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169 (2015).

of those who pay them and because funding restrictions imposed by third parties may explicitly require the recipient to do or refrain from doing certain activities. Thus, foundations will fund some sorts of activity and not others and demand the funding recipient to account for how the money is spent. While I have no evidence that foundations have required worker centers to engage in any activities inimical to the interests of workers, it is theoretically possible.

More importantly, dependence on third-party funding can limit the ability of worker organizations to set their own priorities about what goals to pursue or how to pursue them. If a funder wants to fund leadership training or English instruction more than litigation or protest, the worker center presumably will do what the funder requests, at least with the foundation funding. By analogy, the regulation of lawyers recognizes that the independent judgment of a lawyer can be influenced in ways that do not entirely serve the client's interest when a third party pays for the legal representation. The most extreme example of this that is analogous to the case of worker centers was presented by section 504(a) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, which prevents legal services organizations that receive funding from the Legal Services Corporation from representing qualifying low-income clients in a wide array of matters or using a number of respected and otherwise permissible legal strategies or tools.<sup>77</sup> Thus, legal services lawyers are prevented from, among other things, attempting to persuade legislatures, agencies, or voters to adopt or avoid changes in the law to help their clients. They are also prevented from bringing class action suits, from conducting training programs to help anyone advocate public policy, from engaging in legal work on certain topics including abortion, electoral redistricting, and the military draft, and from representing undocumented immigrants or incarcerated persons.<sup>78</sup> Obviously, lawyers who are not dependent on Legal

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77 Omnibus Consolidated Rescissions and Appropriations Act of 1996 § 504, 110 Stat. 1321-53 (1996); *see* *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 538 (2001).

78 Pub. L. No. 104-134, 110 Stat. 1321 (1996). The American Bar Association issued a Formal Opinion (96-399) critical of the restrictions, though ultimately it concluded that none of the funding restrictions actually violate the lawyer's ethical duty to clients. It is a difficult question whether the restrictions violate, for example, Model Rule 5.4(c), which provides that a "lawyer shall not permit a person who employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such services," or Model Rule 1.8(f), which provides that a "lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship." ABA: STANDING COMMITTEE

Services Corporation funding do not have their judgment about how to represent their clients constrained by these funding restrictions.

Apart from the conceptual importance of worker organizations retaining independence of judgment about their goals and strategies, there is also the question of sustainability. The danger of the philanthropy model of funding is a risk that a vibrant worker organization may wither if the foundation grant expires and no new grant is received. And the danger of relying on individual donations is that they may shrink during hard economic times (when charitable giving tends to fall across the board) or when issues fade from view (organizations like the Red Cross experience spikes of giving in response to natural or other disasters, and organizations like the American Civil Liberties Union experience spikes in giving when certain issues become highly salient). A membership dues model that is tied to continuing in the job leads to a more stable source of funding.

Finally, unions have relied on dues collected by payroll deduction for a very practical reason: it is easy and cheap to administer. Most employers automate their payroll processing. Virtually all employers collect a variety of funds through payroll deduction, including employee benefit plan contributions, taxes, and voluntary gifts to charity. Unions negotiate to include union dues or fees among the payroll deductions because it saves time and money for union staff (who would otherwise have to collect individually from every employee every pay day). It is also more reliable and administrable than asking employees to authorize bank drafts (low-wage employees especially may not have bank accounts) or automated credit card payments (for the same reason), and it avoids the fees banks charge for these payments and the need to reauthorize the deduction when employees switch banks or credit cards.<sup>79</sup>

The principal attack that business is directing at unions now is not surprising: it is an attack on their ability to raise money. As is well known, the attack has proceeded on two related fronts. One has been to enact right-to-work legislation (or, as in *Harris v. Quinn* and *Friedrichs v. California Teachers Association*, to litigate to require it as a matter of constitutional compulsion<sup>80</sup>) preventing

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ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL OPINION 96-399: ETHICAL OBLIGATIONS OF LAWYERS WHOSE EMPLOYERS RECEIVE FUNDS FROM THE LEGAL SERVICES CORPORATION TO THEIR EXISTING AND FUTURE CLIENTS WHEN SUCH FUNDING IS REDUCED AND WHEN REMAINING FUNDING IS SUBJECT TO RESTRICTIVE CONDITIONS (1996), <http://www.americanbar.org/content/dam/aba/publications/YourABA/96-399.authcheckdam.pdf>.

79 The use of payroll deduction and the attacks on it are thoroughly summarized and analyzed in Olney, *supra* note 71, at 888-90.

80 *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Friedrichs v. Cal. Teachers' Ass'n*, 2014 WL 10076847 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2933 (2015) (No. 14-915).

the enforcement of contracts requiring workers to pay dues to the union that represents them. The second has been to enact statutory or constitutional rules prohibiting unions from collecting dues through payroll deduction.

To what extent *should* all worker-led membership organizations be subject to the same restrictions on dues collection and expenditure that American law imposes on unions? The requirement to pay dues or fees as a condition of employment historically has been a product of the union's status as exclusive representative. This model was replicated by state bar associations, all of which limit the practice of law to members and all of which charge dues to administer the licensing system. Compulsory payment of dues is used by homeowners' associations, which require everyone in the neighborhood to pay homeowners' association dues, and which do not allow opting out.<sup>81</sup> But even absent exclusivity or other state or federal law limits, an employer could still require employees to pay fees for a service, just as it requires employees to pay costs associated with health or other insurance plans or pensions.

In principle, therefore, I see no reason why an employer could not contract with a worker center to require all the employees to pay dues or fees to the worker center for services it provides to workers, regardless of whether the workers are members of the worker center and regardless of whether the worker center claims to be the exclusive representative of the workers. But as a matter of encouraging workplace democracy, I think worker organizations are better off eschewing compulsory dues payments and instead engaging members through voluntarism in order to avoid the apathy and corruption that proved so detrimental to unions.<sup>82</sup> As a matter of expedience, unless the worker center provides substantial services to nonmembers, one would think it unwise to attempt to collect money from nonmembers. If an effort is made to collect from nonmembers, for reasons of fairness and to avoid unduly alienating workers, it would seem that the amount of dues should be tied to services the center provides to the workers.

Even if employers and worker centers could agree to use payroll deduction, what limits does or should law place on how the organization spends the money thus raised? Absent exclusivity, there is no greater need to restrict

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81 Evan McKenzie, *Planning Through Residential Clubs: Homeowners' Associations*, *ECON. AFF.*, Dec. 2005, at 28, 29 ("All [home] purchasers become [homeowners' association] members automatically at the time they take delivery of the deed to their unit and may not leave the association except by selling the unit.").

82 Even progressive critics of unions have cited exclusive representation and compulsory dues as a source of corruption and lack of accountability to members. *See, e.g.*, ROBERT FITCH, *SOLIDARITY FOR SALE: HOW CORRUPTION DESTROYED THE LABOR MOVEMENT AND UNDERMINED AMERICA'S PROMISE* 330-31 (2006).

how a worker association spends money than there is for any other nonprofit organization. Some will be highly responsive to stakeholder concerns in setting policy and spending money, for the instrumental reason that it is necessary to be effective. Others may be less so. But they will be no different from other nonprofits.<sup>83</sup>

## CONCLUSION

In the United States, law extensively regulates the governance, fundraising, and financial management of labor unions. It has done so in the name of organizational democracy and to protect the rights of individual employees who are represented by a union but are not members. In contrast, there is relatively little regulation of the governance of other nonprofit membership organizations. The rules governing tax exemptions require that money be spent for legitimate purposes, and the law of corporate governance imposes general fiduciary duties and the obligation to adhere to bylaws. Law has little to say about relations between members and the organization, except to restrict unfair expulsion from membership and invidious discrimination in eligibility for membership.

There are historical reasons for the regulation of the internal affairs of unions — some unions used their position as exclusive bargaining representative and the money they raised in member dues through payroll deduction for corrupt purposes and did not govern themselves democratically, and unions had enough political and economic power to make their governance and finances a matter of public concern. Furthermore, antiunion advocates also astutely used both the image and the reality of union corruption to weaken unions for the purpose of enhancing corporate power and, more recently, for the purpose of enhancing Republican Party power at the expense of the Democratic Party, which receives the vast majority of union financial and logistical support.<sup>84</sup>

The issues that unions struggled with over the past century — democratic internal governance, effective mobilization in the political processes of American democracy, attaining national scale and sustainability — are issues

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83 William A. Brown, *Inclusive Governance Practices in Nonprofit Organizations and Implications for Practice*, 12 *NONPROFIT MGMT. & LEADERSHIP* 369 (2002).

84 See Olney, *supra* note 71, at 888 & n.3 (reporting that in the 2012 election cycle, Democrats received ninety-one percent of the political contributions made by unions, and citing *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups*, *OPENSECRETS.ORG: CTR. FOR RESPONSIVE POLITICS*, <https://www.opensecrets.org/bigpicture/blio.php?cycle=2012> (last visited Nov. 17, 2015).

that any other form of worker organization will face eventually. The experience of unions with the LMRDA and other federal labor law restrictions of their internal governance suggests that law has not been effective in promoting union democracy. Protections for individual or minority rights within the union are justified only because of the principle of exclusive representation, which worker centers do not have and may never claim. And the limited empirical and theoretical research suggests that exclusive representation and the development of a large professional staff may have done as much to undermine union democracy and member engagement as they did to promote worker power. Thus, less legal regulation is probably a good thing for workers.

Worker organizations other than unions recognized or certified as exclusive representatives have the opportunity of a clean legal slate. They are not subject to the detailed requirements of federal labor law and restrictive Supreme Court decisions governing union governance, dues collection, and expenditures. Even if worker organizations of the future achieve the scale of unions of the 1950s and develop a sustainable source of funding, less legal regulation of their internal affairs may, ironically, do more to promote internal democracy than the laws on the books today.