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LABOR RIGHTS IN THE ERA OF GLOBALIZATION

Freedom of Association as a Core Labor Right and the ILO: Toward a Normative Framework

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Abstract

Freedom of association operates as an organizational "meta-norm," appreciated both as an independent value and as a touchstone for the institutional design of the International Labour Organization (ILO). Despite the renewed interest of the ILO in various aspects of the norm, its understanding of freedom of association lacks a comprehensive normative framework. This article presents such a conceptual framework and a critical in-depth analysis of current ILO freedom of association jurisprudence. Freedom of association should be understood in terms of equitable dialogue (ED), a term offered and developed herein, as an understanding that is already partly embedded in ILO jurisprudence.

KEYWORDS: freedom of association, ILO, labor rights, globalization, equitable dialogue

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Introduction

Freedom of association and the right to organize and bargain collectively have long been recognized as fundamental rights, improving both work and living conditions, as well as the "development and progress of economic and social systems."[1] Freedom of association, in particular, operates as an organizational "meta-norm," appreciated both as an independent value and as a touchstone for the International Labour Organization's (ILO) institutional design. Despite the renewed interest of the ILO in various aspects of the norm, it lacks a comprehensive normative framework for freedom of association. This Article presents such a conceptual framework and a critical in-depth analysis of ILO current jurisprudence of freedom of association. The central place freedom of association assumes within the ILO and international labor law at large, contributes an essential building block for the realization of Maupain's statement that the ILO's "golden age of normative action" lies not in its past, but in its future.[2]

Indeed, one of the most celebrated, albeit controversial,[3] normative achievements of the ILO in recent years: the ILO's Declaration on Fundamental Principles and Rights at Work (the 1998 Declaration),[4] reaffirmed freedom of association as one of the four universal rights of workers.[5] Moreover, the right of freedom of association is not only an important value in itself but a precondition to the effectiveness of the ILO; as Creighton aptly puts it:

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[1] ILO, *Freedom of Association in Practice: Lessons Learned*, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, ix, (ILC 97th session, 2008), *available at* www.ilo.org/wcmsp5/groups/public/---dgreports/--dcomm/documents/publication/wcms_096 122.pdf.

[2] Francis Maupain, Le Renouuveau du débat normative á I'OIT de la fin guerre froide á mondialisation, paper presented to ILO, International Labour Standards Department, First Seminar, Geneva, May 2002, at 24, *cited by* Philip Alston, *Labor Rights as Human Rights: The Not So Happy State of the Art, in* Labor Rights as Human Rights 1, 22 (Philip Alston ed., 2005).

[3] *See, e.g.,* the debate between Philip Alston and Brian Langille: Philip Alston, *Core Labour Standards and the Transformation of the International Labour Rights Regime*, 15 Eur. J. Int'l L. 457 (2004); Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work*, 36 NYU J. Int'l L. & Pol. 221 (2004); Brian Langille, *Core Labour Rights—The True Story (Reply to Alston),* 16 Eur. J. Int'l L. 409 (2005).

[4] ILO, *Declaration on Fundamental Principles and Rights at Work and its Follow Up*, *adopted* 18 June 1998, 37 I.L.M. 1233, *available at* www.ilo.org/declaration/ thedeclaration/ textdeclaration/lang--en/index.htm.

[5] The other three rights are: the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.

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> [r]espect for the freedom of association is an essential precondition of the effectiveness of the ILO as a tripartite organization. Meaningful tripartism necessarily depends upon the existence of free and effective organizations of employers and workers. Self-evidently, such organizations can develop and function only in an environment where there is proper respect for the right of employers and workers to associate and to organize their activities.[6]

The decline in union density worldwide in the last few decades has adversely affected the ILO tripartite structure,[7] impairing what has always been considered an invaluable source of strength of the ILO.[8] Reinvigorating organizational efforts worldwide through the articulation and enforcement of freedom of association are therefore central to the ILO's effective operation and to international labor law at large.[9]

Moreover, the ILO increasingly recognizes the norm of freedom of association as a touchstone for its internal governance. Decreasing membership in unions and employers' organizations has exacerbated criticism of the ILO's representativeness and legitimacy,[10] buttressing a process of reform in the ILO representation structure through a revised credentialing process of ILO delegates.[11] Freedom of association (at least its procedural aspects), being closely related to tripartism, has played a crucial role in such reforms as well.[12]

At the moment, however, these endeavors, while they are impressive, are hindered by the lack of a comprehensive normative framework for the

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[6] Breen Creighton, *The ILO and Protection of Freedom of Association in the United Kingdom*, *in* Human Rights and Labour Law: Essays for Paul O'Higgins 1, 1-2 (K.D. Ewing et al. eds., 1994).

[7] The tripartite structure of the ILO departs from the conventional state-centered form of representation in a distinct way—by incorporating two particular functional interests, those of workers and those of employers.

[8] *See* Virginia A. Leary, *Lessons from the Experience of the International Labour Organization*, *in* The United Nations and Human Rights, A Critical Appraisal 580 (Philip Alston ed., 1992) (comparing the ILO system with the UN).

[9] A continuing failure to reverse the decline in the organization of the most essential labor mark institutions result in mounting weakness of the ILO itself, just as a doctor would find it difficult to cure a disease that she herself suffers from as it weakens her ability to work.

[10] For a recent summery of the criticism on the ILO's legitimacy as it relates to it's representativeness, *see* Faina Milman-Sivan, *Representativity, Civil Society, and the EU Social Dialogue: Lessons from the International Labor Organization,* 16 Ind. J. Global Leg. Stud. 311 (2009).

[11] For elaboration on the credentialing process in the ILO and its relation to the representativity of the ILO, *see* Faina Milman-Sivan, *The Virtuous Cycle: A New Paradigm for Democratizing Global Governance through Deliberation,* 30 Comp. Lab. L. & Pol'y J. (forthcoming, 2009).

[12] *Id*.

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understanding of freedom of association. Without such a framework, which would lay down a clear regulatory ideal of freedom of association, related reforms to the ILO institutional design and its representative structure, are bound to remain partial and inadequate.[13] A clear normative understanding of where the ILO is headed and what are the normative assumptions underlining reforms is a pre-condition for success. Moreover, such a framework would ensure that ILO jurisprudence on freedom of association, as elaborated by The Committee on Freedom of Association (CFA, or the Committee) is consistent and will deliver a clear and comprehensible message to ILO members worldwide on the particulars of this norm. It can further serve (as exemplified below) as a foundation for critique of CFA jurisprudence, insuring continuous reevaluation and improvement of the current understanding of the norm.

This Article provides such a comprehensive normative framework, concordant with broad principles that are offered below under the concept termed *equitable dialogue* (ED). The concept of ED is proposed as an all-encompassing framework that can pave the way for an in-depth understanding of freedom of association. ED presents a regulatory ideal, comprised of a mixture of descriptive and normative commitments. The normative commitments include commitments to a particular democratic model (deliberative democracy), and a particular understanding of the self as an embedded self.[14] Furthermore, ED endorses a general commitment to freedom, substantive equality and broad inclusion.[15] The descriptive commitments arise from the doctrinal analysis of ILO jurisprudence of two elements of freedom of association: the right of workers to freely organize and the right to control their organization.[16] This analysis of key doctrines within freedom of association reveals a conceptual dichotomy consisting of competing visions of workers' freedom of association: a *thinner* and a *thicker* approach to

[13] For criticism of the ILO credentials reforms, *see id.*

[14] *See infra* 118-20.

[15] *See infra* 122-23.

[16] The most substantive, significant and detailed standards of freedom of association were elaborated within two ILO Conventions: Freedom of Association and Protection of the Right to Organise Convention, June 17, 1948, ILO. No. 87 (Convention No. 87); and the Right to Organise and Collective Bargaining Convention, June 8, 1949, ILO No. 98 (Convention No. 98). The vast jurisprudence of the Governing Body's Committee on Freedom of Association and the reports of the Committee of Experts on the Application of Conventions and Recommendations supplement the elaboration of these two Conventions. In addition, the ILO has adopted six additional Conventions that are related to this norm: Rights to Associate (Agriculture) Nov. 12, 1921 (No.11); Rights to Associate (Non-Metropolitan Territories), July 11, 1947 (No. 84); Workers' Representatives, June 23, 1971 (No. 135); Rural Workers' Organizations, June 23, 1975 (No. 141); Labour Relations (Public Service), June 27, 1978 (No. 151); Collective Bargaining, June 16, 1981 (No. 154).

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this norm. ED captures, and further develops, the *thicker* approach to freedom of association, latent in the ILO jurisprudence.

My goal in analyzing key ILO doctrines is therefore twofold. First, to illustrate that all of the normative concepts offered in this Article through ED are implicit in the existing jurisprudence and, second, to further examine how the idea of ED illuminates each of the doctrinal issues surveyed. In accordance with the idea of "immanent social critique,"[17] the re-conceptualization of freedom of association presented below draws on implicit and latent internal norms of the ILO rather than on *a priori* theories that promote reform.[18] Avoiding a purely theoretical analysis and argumentation (such as emphasizing the importance of trade unions in a liberal society as a means to secure liberal justice and basic opportunity for individuals)[19] seems to both hold promise for broader legitimacy and insure better prospects of success.

The Article proceeds as follows. Part I opens with the normative commitments and values that constitute ED. This serves as a platform for critiquing existing ILO doctrines in the following section. Part II presents a survey of the jurisprudence of the ILO with respect to five key doctrines of freedom of association. These doctrines are analyzed and critiqued, in an attempt to identify the competing sets of values embodied therein, demonstrating that a thicker understanding of freedom of association (the basis for ED) has firm (albeit partial and latent) roots in the ILO jurisprudence.

ILO Convention No. 87 addresses four basic issues. First, it announces the rights of all workers and employers to establish and join an organization of their own choosing, without prior authorization by the state (Article 2). Second, it outlines the functional and organizational freedoms that workers affiliated with a representative organization are entitled to enjoy. These include the right to draw up their own rules and constitutions, elect their representatives, organize their administration and activities, and formulate their programs (Article 3). Third, it provides for the right of such organizations to establish and join federations and confederations and to affiliate with other international worker and employer organizations (Article 5). Fourth, it provides that an administrative authority shall not weaken these guarantees (Articles 8(2) 11). Convention No. 98 addresses collective bargaining and calls for its promotion in national legislation. It further aims to protect workers and workers' organizations from anti-union discrimination policies, and from interference in their functioning and administration from other organizations and employers. I address here two out of the four aspects of freedom of association elaborated by the ILO. I believe these aspects better embody the concepts of equitable dialogue. This does not mean that the other two aspects do not incorporate such values.

[17] Michael Walzer, interpretation and social criticism (1987).

[18] Iris M. Young, Inclusion And Democracy 10 (2000).

[19] Stuart White, *Trade Unionism in a Liberal State*, *in* Freedom of Association 330 (Amy Gutmann ed., 1998).

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I. Equitable Dialogue—Shifting toward a Comprehensive Framework

This section presents the normative commitments that compose the proposed notion of ED. I suggest that the tensions between the thin and thick approaches to freedom of association, which emerge from the doctrinal analysis, presented further on, should be understood as revolving around different concepts of interest formation and group decision making. These concepts correlate, in turn, with distinct models of democracy, association, and conceptions of the self.

In what follows I present two models of group decision making: the rational choice model and the interest formation model.[20] Next, I link the interest formation model with the thick approach to freedom of association, a linkage that points to the interest formation model as the point of departure for formulating the concept of ED. The following additional normative commitments inherent in the notion of ED are analyzed: the commitment to autonomous interest transformation, the commitment to substantive equality, and the commitment to broad inclusion.

The rational choice model of group decision making seeks to provide optimal conditions for all individuals to make decisions that represent the closest fit between their previously-determined interests and the options they face. Such optimal conditions include a sufficiently robust market of information, similar to the *marketplace of ideas* justification for freedom of speech.[21] The self is perceived as stable and fixed and, accordingly, interests are conceived of as exogenous to the decision making process. Therefore, the employees comprise a group of separate individuals, each with her, or his, own interest and cannot be conceived of as an organic or emergent group that evaluates the best decision for the group as a whole; rather, they function as individuals, each forging a separate and perhaps different view as to which of the options at hand is most beneficial.

An alternative model of collective decision making, the interest formation model, emphasizes the collective and dynamic elements of interest formation during the decision making process. According to this model, the group decision making process itself may serve as a transformative site, changing perceptions of the descriptive reality as well as preferences and interests.[22] This model presumes that

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[20] I concentrate here on merely the two group decision models elaborated below, neglecting two additional models of social choice, namely strategic bargaining and the model of command and control, as they are both too remote from my understanding of normative commitments to equitable dialogue. *See* Archong Fung & Erik O. Wright, *Thinking about Empowered Participatory Governance*, *in* Deepening Democracy 3, 17-20 (Archong Fung & Erik O. Wright eds., 2003) (discussing these four models of social choice).

[21] Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production,* 94 Colum. L. Rev. 753, 796 (1994).

[22] *Id.* at 795.

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interests, preferences, and emotional bonds are not pre-determined, but transformed and altered in the process of collective deliberation.[23] At the normative level, this model encourages members of a group to shape their own collective interests and identity—*as* a group rather than as individuals.[24] It is important to note that the distinction between these models is an analytical one, and in reality, different organizations and processes use one or both of these models in different times, as well as combine elements of both models in one decision making process.[25]

These familiar models of the decision making process also correlate to two, equally well-known models of democracy in contemporary political theory, namely, the aggregative model and the deliberative model.[26] The aggregative model views the political process as accumulating existing interests and preference of citizens. Citizens participate in the political process in proportion to the intensity of their interests, preferences, and feelings about the issue.[27] Democracy, according to this model, is a competitive process in which individuals and interest groups behave strategically in order to influence the process according to their prior, given preferences. At best, this model presents a reliable and fair method of adding such preferences, ensuring that the most intense and numerous preferences prevail: "Assuming that the process of competition, strategizing, coalition building, and responding to pressure is open and fair, the outcome of both elections and

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[23] This means that in a deliberative decision making process, participants "listen to each other's position and generate group choices after due consideration …. This ideal does not require participants to be altruistic or to converge upon a consensus of value, strategy or perspective." *See* Fung & Wright, *supra* note 20, at 17.

[24] Barenberg, *supra* note 21, at 796 (referring to workers decision making within the context of organizing). For a discussion of the reasons for group (rather than individual) deliberation in the context of political decision-making, *see, e.g.,* James D. Fearon, *Deliberation as Discussion*, *in* Deliberative Democracy 44, 61-62 (Jon Elster ed., 1998).

[25] *See* Young, *supra* note 18, at 18. I follow Young in calling these ideas of the decision making process in democracy "models," to indicate that they are functioning as ideal types: each picks out features of existing practices and builds on them to create a general account of the ideal democratic process.

[26] *See* Young, *supra* note 18. On the relations between the aggregative model of democracy and industrial democracy, *see* Hugh Collins, *Against Abstensionism in Labour Law, in* Oxford Essays in Jurisprudence 81 (John Eekelaar & John Bell eds., 3rd. Series, 1987) (noting collective bargaining imitates a pluralist form of democratic government).

[27] *See* Jane Mansbridge, Beyond Adversary Democracy 17 (1980). Note that according to a deliberative view that conceives democracy not only as a matter of the organization of the state but as "a framework of social and institutional arrangements," democracy is not exclusively a form of politics. *See* Joshua Cohen, *Democracy and Liberty*, *in* Deliberative Democracy, *supra* note 24, at 185, 186. This approach makes the same distinction as I between the forms of collective decision making and models of democracy.

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legislative decisions reflects the aggregation of the strongest and the most widely held preferences in the population."[28] This model provides no account of the possibility of transforming preferences and interests endogenous to the political process, and does not insist on normative persuasion and argumentation in politics, based on appeals to the good and just.[29] No higher truth is sought or discovered in this political process; votes are merely tools for self-advancement of citizens and politicians, the "political merchants buying and selling votes."[30]

The deliberative model generally associates democracy with open discussion among citizens, leading to agreed-upon policies and ideas. This model highlights the place of persuasion and reasoning, and seeks out the good and the just as ways of resolving problems or meeting needs. Participants decide according to the reasons and arguments presented to them and not merely on the basis of aggregating pre-determined preferences.[31] While this model is the keystone of ED, the development of a comprehensive understanding of the notion of ED requires drawing on a particular concept of the self.

The concept of the self that underlies the interest formation model and, more broadly, the notion of ED are premised on the acceptance of the self as an embedded self.[32] This concept emphasizes the contingent processes of socialization, by which the subject becomes a person, processes that can only occur in a human community,

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[28] *See* Young, *supra* note 18, at 19.

[29] *Id.* at 20-21.

[30] Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, 275-76 (1998). A comprehensive discussion of the advantages and drawbacks of the model is beyond the scope of this Article. For a concise and critical discussion of some of the most potent criticism of aggregating preferences *see, e.g.,* James Johnson, *Arguing for Deliberation in* Deliberative Democracy, *supra* note 24, at 161, 162-65. For the best deontological argument for the deliberative process as legitimizing political decision making, *see* Bernard Manin, *On Legitimacy and Political Deliberation,* 15 Pol. Theory 338 (1987). For a short portrayal of the appeal of a deliberative conception of democracy in terms of community, *see* Cohen, *supra* note 27, at 221-24.

[31] This understanding of democracy is inspired by the Greek Polis or the tradition of civil republicanism, both of which see politics as a process of deliberation between free and equal citizens. In their pure form, these traditions tended to overlook practicalities and economic day-to-day considerations, *see* Dorf & Sabel, *supra* note 30, at 275. As to the notion of "reasoned argument," I am not committed to a strict understanding of "reasoned argument" as precluding demonstration of various feelings in the debate. *See* Sharon R. Kraus, Civil Passions: Moral Sentiments and Democratic Deliberations 113-18 (2008).

[32] This insight formulates an important element of Habermas' theoretical project. *See, e.g.*, Jürgen Habermas*, Moral Development and Ego Identity*, *in* Communication and the Evolution of Society 93 (Thomas McCarthy trans., 1979). This was later adopted by many; *see, e.g.*, Seyla Benhabib, Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics (1992).

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a community of speech and action.[33] This understanding of the self stands in opposition to the liberal idea of the rational self, as it encompasses deontological themes,[34] and is further distinguished from the enlightened conception of a socially disembedded cognito.[35] The group decision making process is not merely an instrumental process to achieve exogenous interests, but part of the continuous process of socialization, interest formation, and even identity formation.[36]

In its extreme, the notion of the embedded self accepts structural social relations as constitutive of the subject. The danger of such an understanding, of course, is that it leaves little room for agency and individuality. To counter this limitation, the proposed approach draws on theories that understand the self not as determined but rather as "relatively constrained" or conditioned by positions related to class, race, gender, nationality, and a myriad of other group processes that cannot be defined *a priori*.[37] Social institutions, culture, or "causes" in deontological terminology can be understood not merely as constraints but also as possibilities for action and agency, as they provide meaning and context in which the subject can express freedom.[38] Identity is thus "a process of negotiating through social relationships of power and culture,"[39] a process that is fluid, not fixed, and contains potential for agency. There is a constant tension between "the invented and the always already there."[40] This concept, which focuses on the constant process of building and rebuilding, underscores the fluidity of the "self." Intersectionality,

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[33] This process entails acquiring language and reason, developing a sense of justice, autonomy, and identity. This conception of self then incorporates communitarian insights as part of the inter-subjective constitution of the self, and in particular Habermas' approach regarding the evolution of self-identity through communicative interaction with others. Benhabib attractively formulates this position: "The 'I' becomes an 'I' only among a 'we', in a community of speech and action. Individuation does not precede association; rather, it is the kind of associations which we inhibit that define the kind of individuals we will become." In this sense, we are "historical creatures" and our identity is enmeshed with the identity of others. Benhabib, *supra* note 32.

[34] Benhabib, *supra* note 32, at 84.

[35] And from the empiricists' tradition, which constructs the self as continuity of substance in time.

[36] For a description of identities that are forged by political parties and their consequences, *see, e.g.,* Susan C. Stokes, *Pathologies of Deliberation, in* Deliberative Democracy, *supra* note 24, at 123, 134-35 (identities "crafted" by political parties may serve useful purposes but some identities (pseudo-identities) could work against the needs and interests of their bearers).

[37] *See* Young, *supra* note 18, at 100.

[38] *Id.* at 100-01.

[39] Martha Minow, Not Only for Myself 31 (1997).

[40] *Id.* at 30.

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the idea that all individuals stand at a crossroads of multiple, intersecting groups, becomes a key theme in this concept.[41]

ED further endorses a general commitment to freedom and more particularly, a commitment to an autonomous preference formation,[42] guided by a decision making process that is free from coercion and domination.[43] This commitment is crucial when embracing the notion of the deciding agent as an embedded self, for whom the development of preference formation is part of the decision making process.

Autonomous preference formation entails the exercise of deliberative capacities, in order to consider and subsequently accept or reject interests, preferences, or descriptive conceptions of reality that were historically adopted due to the subject's social position. This self-reflective process is designed to avoid, *inter alia*, the danger of non-autonomous "adaptive preferences."[44] "'Accommodationist preferences'—preferences that accommodate, even after individual or group self-reflection, unjust relations of subordination, such as the Stoic slave's preference to remain enslaved"[45] are another form of non-autonomous preference formation. Accommodationist preferences may result from extreme power imbalances between groups. Avoiding this danger would entail eradicating power imbalances or, positively speaking, endorsing substantive equality. In other words, this commitment to autonomous preference formation constrains the deliberative process, by requiring that it be likely "to make participants (1) aware of the implication of their own preferences and interests, the preferences and interests of others and the interests of the polity as a whole, and (2) capable of transforming their interests in ways that they themselves, looking back on that transformation from the state of reflection and awareness would approve."[46]

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[41] Recognizing "intersectionality" helps avoid "essentialism," the reduction of a complex person into one trait (the trait that draws the person into a particular group) and then equating that trait with a particular viewpoint, stereotype, political interests or commitment. YOUNG, *supra* note 18, at 102.

[42] Freedom is a general commitment that includes various aspects, such as self-development and self determination (in Young's terminology). *See* YOUNG, *supra* note 18, at 32.

[43] *See* Barenberg, *supra* note 21, at 796 (for the formulation of this idea as it relates to the regulation of unionizing elections in the U.S.).

[44] The idea of the process of autonomous free choice embraced here is a one of deep reflection, after which the agent decides to identify with their own internal traits or will, even if those were historically determined and un-chosen. *See* Barenberg, *supra* note 21, at 797.

[45] *Id.*

[46] Jane Mansbridge, *Practice-Thought-Practice*, *in* DEEPENING DEMOCRACY 173, 179 (Archong Fung & Erik O. Wright, eds., 2003).

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Accommodating autonomous preference formation requires a framework that directly and extensively addresses issues of equality and power.[47] Severe power imbalances might enable either powerful participants[48] who are part of the deliberation or external actors to dominate other participants and render their choice "un-free." In addition, severe inequalities may also prevent diverse perspectives from emerging and thus undermine the deliberations' legitimacy.[49]

ED therefore emphasizes the direct linkage between equality and free choice. The sort of equality required in such a decision making process is both substantive and formal. Participants are substantively equal if the "existing distribution of power and resources does *not* shape their chances to contribute to deliberation, *nor* does that distribution play an authoritative role in their deliberation."[50] Any tolerance of power disparities would allow influential actors (such as the state, management, and authoritative groups within unions) to impede workers' free choice and impose their own views, through a wide range of "technologies of power."[51]

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[47] Employing the concept of a dialogue that is equitable gives rise to the preliminary question of whether a dialogue can ever be equitable; in other words, whether power can ever be eradicated in a dialogue, rendering *equitable* dialogue plausible as an ideal. Basically, there are two extreme perceptions of the dialectic model: the "classic" liberal model and the post-modern critique that denies any possibility of "power free" dialogue. While the liberal model centers on reason, rationalism, objectivism, and elimination of power disparities, thus creating an appropriate environment for freely and rationally accepting the norms at hand (and thus legitimizing them), the post-modern critique exposed the many fallacies in this conception. In the spirit of Foucault, the postmodern critique pointed to the implausibility of absolute elimination of power, ideology and feelings in any dialogue, potentially leaving any deliberative-based process at a deadlock. I undertake a middle ground position. While the insights of the post-modern critique of the rational paradigm of dialogue are valuable and indispensable, I maintain that coercion and domination can be seen as a spectrum. On this spectrum it *is* possible to discern *more* and *less* coercive practices. I believe this position is an appropriate starting point, enabling reconstruction (instead of deconstruction) of existing institutions. As demonstrated below, I intend to embrace the possibility that the liberal model loosens the deadlock and moves toward a more equitable dialogue. At the same time, I intend to transcend this model, by taking into account the substantive powers and emphasizing communication, interests and identity transformation.

[48] These power imbalances may stem from various circumstances: material differences; class backgrounds; disadvantages in credibility related to gender, race, ethnicity, age etc.; knowledge or information gaps between experts and laypersons; as well as differences in the personal capacity for deliberation or persuasion, which in turn may be as much associated with educational advantages as with character and charisma, etc. *See* Fung & Wright, *supra* note 20, at 3, 34 for a similar description of the bases for inequality.

[49] Mansbridge, *supra* note 46, at 192.

[50] Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* The Good Polity: Normative Analysis of the State 17 (Alan Hamlin & Philip Petit eds., 1989).

[51] Barenberg, *supra* note 21.

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Lastly, a commitment to inclusion is a precondition to ED, and is justified on several grounds. First, it derives from the general commitment to freedom, understood here as self-determination. People are free only if they can participate in the decisions that affect their actions (and in decisions regarding constructing the procedures of such decision making); therefore, inclusion is necessary for freedom. Second, inclusive participation makes it more likely that decisions will affect a wide range of participants *fairly*.[52] If positive efforts yield inclusion of commonly marginalized groups and citizens, then it can be claimed that such commitment also promotes social justice.[53]

Following this conception of deliberation, the next section demonstrates that such a model coincides with the underlying principles that guide the jurisprudence of the ILO. It examines the contested conceptions of free association embedded in the ILO, and explores the position of ED in respect to each of the doctrinal issues surveyed.

II. Contested Conceptions of Free Association Embedded in Key Legal ILO Doctrines

The thesis of this Article is that understanding the right to freedom of association in terms of ED constitutes the best view of this norm, which in fact is already partially embedded in ILO jurisprudence. Given that the ILO jurisprudence is sparse compared to domestic law, this Article draws upon other national labor law systems, specifically that of the Anglo-American tradition, to demonstrate doctrinal possibilities and limitations implicit in an expansion of the ILO's conception of workers' freedom of association. The aim is to show that the ILO itself already provides a potential foundation for an alternative framework, one that would allow for full rather than partial realization of the normative commitments underlining freedom of association.

In what follows, I survey the jurisprudence of the ILO with respect to the five key doctrines of freedom of association. This section is rather lengthy and a short "road map" is in order. The first two doctrines, i.e., workers representatives' right to access the workplace and the doctrine of exclusive representation, are components of the right to organize. The right to organize strengthens the ability of workers to organize in associations of their choice, acting of their own free will. The

[52] Fung & Wright, *supra* note 20, at 26.

[53] *Id.* (discussing the ways experiments promote equity, pointing to their ability to provide public goods to marginalized groups that usually do not enjoy them, and thus promoting social justice).

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next three doctrines, the doctrine affecting the degree and form of organizational decentralization, regulating unions' internal elections, and the doctrine of worker-employer cooperation, are all related to the broader context of regulatory autonomy of worker's organizations.

In general, the current approach of the CFA to the right of organization and union autonomy is marked by a tension between two competing principles. The first is the principle of non-interference, embodying the aspiration to promote freedom of association by protecting unions from disruptive intervention, mainly state intervention. This aspect bears resemblance to what Otto Kahn-Freund termed the "negative" aspect of freedom of association.[54] The second principle could be termed "democratic imposition," embodying the principle of the state's proactive establishment of ground rules for the democratic functioning of a workers' organization.[55]

The principle of non-interference, shielding workers from outside domination and coercion, embodies a concept of freedom of association that, for several reasons, can be viewed as a "thin" concept. It often concentrates on the power of the state and mostly ignores the overwhelming, direct power that employers may exercise over workers. Furthermore, it reflects a limited, "rational choice" understanding of group action, as explained below.

The principle of "democratic imposition" embodies a deeper concept of freedom of association, recognizing not only the power of the state over workers, but also the power of employers and the power of workers' organizations themselves. This understanding of power relations enables the concept to account for the processes through which workers' interests are formed and transformed and ultimately demonstrates the desirability of implementing democratic ground rules in the creation and functioning of workers' organizations. [56]

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[54] Compare with Otto Kahn-Freund's concept of the "negative" aspect of freedom of association, describing this "negative" aspect as "primitive and simple: the State does not prevent a man or woman from helping to form a union, or from joining or working for an existing union and from remaining its member." *See* Otto Kahn-Freund, Labour and the Law 167-72 (1972). These concepts, though, do not overlap.

[55] Compare with what Otto Kahn-Freund calls "positive guarantees." *Id.* at 172-95.

[56] In terms that are closer to European terminology of labor law, this distinction could be partly analogous to the distinction between "abstentionism" and "supportive legislation" or "promotional policies." *See, e.g.,* Lord Wedderburn, Employment Rights in Britain and Europe 236-59 (1991). "Wedderburn gives the Italian 1970 *Statuto dei lavoratori* (the "Workers' Statute") as an example of supportive legislation, enacted to 'guarantee the effective enjoyment of trade union rights and, more generally, to protect from all attacks on the union's presence in the enterprise …'" Wedderburn cites Mariucci stating that The Workers' Statute Act, and in particular Article 19 thereof (constituting the *rappresentanza sindacale eziendale,* constituted by workers' initiative),

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The terms used here, i.e., "non-interference" and "democratic imposition," are intended to emphasize that these principles go beyond what could also be framed in terms of "state neutrality" versus a "promotive stance."[57] The core principles underlying the concepts introduced herein do correlate with these familiar terms. For example, in his essay, White defines neutrality as "the absence of any prohibition on the formation and membership of trade unions."[58] The thin conception of freedom of association coincides with the neutrality of the state, whereby the state "does absolutely nothing to promote union formation or even to protect union formation."[59] Despite the unique effect of British labor law on ILO jurisprudence,[60] the terms I use below depart from the British terminology; the reason being is that the terminology adopted for the purposes of this Article encompasses particular normative commitments, related to self and group decision making processes, which were described above and are absent in the British literature. These concepts are further developed in the following doctrinal analysis, starting with the workers' representatives' right of access to the workplace.

A. The Right to Organize: Worker Representatives' Right of Access to the Workplace

The doctrine of the right of access aims at balancing the employer's right to property and employees' right to freedom of association. It defines the scope of the employer's control over the property vis-à-vis the right of trade unions to communicate with workers on the property of the employer. The right of access is usually first triggered during a recognition process, that is, when trade unions engage in an organizing operation. Given that the declining rates of union density

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"constituted a change of direction from the abstentionism of the 1950-1960s … an interventionalist policy to support the confederate unions." *See* L. Mariucci, Le Fonti del Dirrito del Lavorro 39 (1988), *cited in* Wedderburn, *supra* at 248. I do not use this terminology, however, as it alludes to a full-blown debate as to abstentionism in labor law, which is clearly beyond the scope of this Article that focuses merely on the norm of freedom of association. For a clear and concise example of an attack on abstentionism in labor law, *see* Collins, *supra* note 26, at 79. Moreover, I do not necessarily advocate generating or embracing additional, new legislation, conventions, or other particular forms of labor law. The adoption of the principle of democratic imposition could, in the ILO context, result in a shift in interpretation of existing norms, in a manner described below.

[57] White, *supra* note 19, at 330.

[58] *Id.* at 337.

[59] *Id.*

[60] Creighton, *supra* note 6. This link between British labor law and the ILO may help explain why state neutrality, which is the basis for the non-intervention principle, was so strongly grounded in the ILO's legal mechanisms.

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in most industrialized states[61] suggests the need to invigorate the labor movement through renewed focus on complex and diversified mechanisms of representation and organizational efforts,[62] a clear definition of the right of access is sure to become increasingly significant.

The ILO has had little chance to address the right of access, and when it had such an opportunity, it seemed to adopt a "thin" conception of this right. Nevertheless, as shown below, seeds of a thicker approach, one that incorporates a deeper understanding of power and deliberation can be discerned. In general terms, the ILO did enshrine the legal right of access to the workplace. Convention No. 135 calls for states to supply whatever facilities required to enable workers' representatives to "carry out their functions promptly and efficiently."[63] The CFA has repeatedly ruled that governments should guarantee trade union representatives access to the workplace, with due respect for the rights of property and management, so that trade unions can inform workers of the potential advantages of unionization.[64]

In practice, the principle that requires that union representatives be afforded access to employer premises has been mostly applied to situations in which workers were both employed and *housed on their employers' premises*, in particular, farm workers, domestic workers, and workers in the mining and plantation industries.[65] The CFA viewed these particular situations as requiring government intervention, which should include measures to ensure that trade unions and their officials are granted access to the premises of the employer for the purpose of carrying out normal union activities.[66]

Plantations are a paradigmatic example of a situation where workers live on the private property of the employer. Having access to plantations is essential for carrying out normal trade union activities. Thus, the CFA held that trade unions should be given access to plantations, provided that "there is no interference with the carrying out of the work during working hours."[67] When the police threw out

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[61] For a discussion of this phenomenon as it relates to Europe, *see, e.g.*, Alain Supiot, Beyond Employment (Changes in Work and the Future of Labour Law in Europe) 114-16 (2001).

[62] *Id.* at 130-31.

[63] ILO, Workers' Representatives Convention, June 29, 1971 (No. 135), Article 2; ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 950 (1996).

[64] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 954 (1996); ILO, Comm. on Freedom of Ass'n, *Report 284: United States (Case No. 1523),* ¶ 195, ILO Doc. LXXV (ser. B) No. 3, (Mar. 1990) [hereinafter *Report 284, Case No. 1523*].

[65] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 956 (1996); ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 1108 (2006).

[66] ILO, Comm. on Freedom of Ass'n, *Report 334: South Africa (Case No. 2197*) ¶ 60 (b) (vii) (Measures taken by the Government of the Republic of South Africa to implement the recommendations of the Fact-Finding and Conciliation Commission of Freedom of Association).

[67] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 958 (1996).

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union leaders from an area owned by the foreign-owned Ticaban Banana Company in Costa Rica, the CFA held that these acts constituted a breach of the right to freedom of association[68] and required additional steps to ensure free organization in plantations, specifically, that employers "remove existing hindrances, if any, in the way of the organizations of free, independent and democratically controlled trade unions."[69] The CFA stated that plantation owners should provide unions with facilities to conduct their normal activities, including office accommodations, the freedom to hold meetings, and freedom of entry.[70] This description and its emphasis on the peculiarity of the plantation cases reflect a narrow approach to the right of access and the right of communication.

In essence, this thinner approach identifies the instances of workers residing on employer premises as problematic with regard to the right of access because in these cases denial of access results in *physically disabling* any communication. In other words, in these cases, the ILO's approach applied the most formalistic understanding of the right to free dialogue. A thicker approach might have opted to consider the power relations that affect the actual implementation of such formal rules. It would have further recognized that communication could be hindered by more than mere physical obstacles; various other forms of employer's activity could prohibit communication as well. Furthermore, this approach is limited, as it underscores the "information flow" to the employee and fails to provide opportunities for equitable group deliberation and adequate communication among various group members over an extended period of time.

A similarly narrow approach can be found in the U.S., and to a lesser extent, in Britain and Canada, in the context of the organizational stage. These are legal systems in which the right of access is particularly significant, since the recognition process necessarily (U.S., Canada) or frequently (Britain) involves elections. The problem is acute in the U.S., where a secret ballot election to determine majority preferences is preceded by a brutal and relentless campaign in which both the employer and the union engage in an attempt to defeat or promote unionization and implementation of workers' freedom of association therefore takes place in a pitched battlefield. In Canada, the employers' speech is comparatively circumscribed and limited to factual information, and the election process is legally confined in time so as to reduce the influence of employers' hostile tactics.[71] Therefore, in the

[68] ILO, Comm. on Freedom of Ass'n, *Report 119: Costa Rica (Case No. 611)* ILO Doc. LIII No. 4 S (Oct. 1969).

[69] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 958 (1996).

[70] *Id.*

[71] Barbara Townley, *Union Recognition: A Comparative Analysis of the Pros and Cons of a Legal Procedure,* 25 Brit. J. Ind. Rel. 177, 217-18 (1987).

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Canadian context, the absence of any mandated right of access may be considered a less significant loss. In Britain, ballots are not necessarily required in the process of trade union recognition; however, for various reasons, "ballots on recognition could well become the norm even where the union has majority membership in the bargaining unit."[72] Trade Union and Labour Relations (Consolidation) Act (TULRCA) grants trade unions the right of reasonable access to workers during the recognition process, but only during the balloting period.[73] The law does not prescribe any further legal right of access; however, the ACAS Code of Practice, issued under TULRCA, advocates that the employer facilitate trade unions' activities by providing them with essential facilities.[74] The Code suggests that in accordance with the resources available to the employer, and the amount of the trade unions' activity, facilities such as message boards, meeting rooms, telephones and even office space should be provided.

A limited understanding of the right of access can be seen as "leveling the playing field" between employers and employees, by providing minimal and formal opportunities for information exchange during the balloting period. However, such an assessment ignores the vast power imbalances between employers and workers and incorporates a particular vision of the worker's decision making process. A legal system that envisions the vote on unionization as analogous to political general elections[75] conceptualizes the employee's decision making process is conceptualized by the rational choice model, which encourages the discovery of a descriptive truth by ensuring a sufficiently robust market of information.[76] Furthermore, a narrow right of access is in line with formal rather than substantive equality, as it concentrates on procedural rules to maximize weaker participants'

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[72] Bob Simpson, *Trade Union Recognition and the Law, A New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992,* 29 Indus. L.J. 193, 209 (2000).

[73] Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992, Sch. A1, ¶¶ 26-27.

[74] ACAS Code of Practice 3, Time off for Trade Union Duties and Activities (1997) ¶. 28.

[75] Most clearly, in the U.S., the union and the employer are perceived as the best sources of information with respect to unionization and un-unionization, respectively. The underlying conception of this construction of the election is that it is legitimate to allow the employer to play "the same role in a representation campaign against the union that the Republican Party plays in a political campaign against the Democrats." Weiler suggests instead that a better analogy is comparing the employer with a foreign country. *See* Paul Weiler, *Promises To Keep: Securing Workers' Rights to Self Organization under The NLRA*, 96 Harv. L. Rev. 1769, 1813-14 (1983).

[76] To determine the uninhibited desires of employees, the National Labor Relations Board (NLRB) attempts to provide a laboratory in which an experiment may be conducted, under conditions as ideal as possible. *See* Barenberg, *supra* note 21, at 796.

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effective participation in, and influence on, deliberation. In contrast, substantial equality would be concerned with all of the factors that could potentially influence the workers' ability to realize this goal.

A thicker concept would increase the scope of what is to be considered equitable communication, by placing the debate regarding the right of access within the more general context of power imbalances between employers and workers. Writing from the British perspective, Bogg described these inequalities:

> The voices of professional trade union organisers, economically independent of the employer, may well be imbued by candor and eloquence lacking from those whose livelihoods remain in the hands of the employer. The employer can also exercise its legally sanctioned managerial prerogative and simultaneously prohibit employee solicitation of union support during working hours whilst stopping production to conduct its own campaign.[77]

This reality of the superior capability of the employer to dominate communication with workers is generally true, not merely in the context of plantations. Even when workers do not reside on the employer's property, researchers, such as Barenberg for example, pointed out that alternatives to communication on the premises of the workplace are tainted with inequalities, making communication after work hours necessary.

First, even when a union overcomes the initial problem of identifying and locating relevant employees,[78] any intrusion on workers' leisure time or at-home time in the age of urban sprawl is extremely burdensome.[79] In contrast, employers'

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[77] Alan L. Bogg, *The Political Theory of Trade Union Recognition Campaigns: Legislating for Democratic Competitiveness,* 64 Mod. L. Rev. 875, 878 (2001). For an analysis of the process of recognition in the British system, *see* Simpson, *supra* note 72.

[78] In the U.S., unions are entitled to employee names and addresses only after the NLRB has directed an election, *see* Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966). Similarly, in Britain, the right to privacy (the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 222) prevents, allegedly, a legal requirement from the employer to provide a list of employee names and addresses to the union, and thus, such lists are provided to the Central Arbitration Committee (CAC). Unions are to communicate with workers strictly through the CAC. *See* Simpson, *supra* note 72, at 211.

[79] S*ee* Cynthia Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1538 (2002); *see also* the dissent in Lechmere: "Nor indeed did *Babcock* indicate that the Board could not consider the fact that employees' residences are scattered throughout a major metropolitan area; *Babcock* itself relied upon the fact that the employees in that case lived in a compact area, which made it easily accessible." Lechmere, Inc. v. NLRB, 502 U.S. 527, 543 (1992) (Dissent). As Estlund notes, this interpretation in Lechmere is not necessarily foreordained by the text of the Act. Until 1956, the NLRB interpreted the Act to allow access to non-work areas and in particular with respect to outdoor areas on employers' facilities. *See* Estlund, *supra*.

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control over work communication on the premises affords them ample opportunity to affect workers' attitudes toward unionization, long before a recognition process begins. Thus, prior to either the recognition process or the election campaign itself, the employer has an unlimited capacity to integrate subtle anti-unionist intimations into organizational routines, through psychological testing, relentless managerial communications, and spatial disruption of workplace communities, to name a few options.[80] Depending on the particulars of the legal system, during an organizational drive, employers can either require workers to attend speeches given during work hours, thus making them the "captive audience" of managers advocating non-unionization,[81] or they can find ways to discourage small group meetings and one-on-one encounters.[82] In light of the American experience, British Codes of Practice on Access (issued by the Secretary of State) require adhering to the principle of parity in assessing what should be considered "reasonable access." This is, of course, a major improvement, but nevertheless provides only a partial response to these problems. The principal of parity requires affording trade unions an opportunity to communicate with employees, individually, in small groups, or in a form equivalent to that used by the employer. However, the actual implementation of this principle depends on various restrictions,[83] and regardless, it cannot account for the period before the recognition process begins.

It is clear that there is a need to address the issue of equitable channels of communication, corresponding to the need for a thicker conception of freedom of association. Indeed, recognition of this need is apparent in ILO jurisprudence. In fact, the Committee upheld the right of access even in an exceptional case, in which employees did not reside on company property. The United Food and Commercial Workers International Union (UFCW) presented a complaint of violations of trade union rights against the government of the U.S., claiming that U.S. law did not

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[80] Barenberg, *supra* note 21, at 934. Under current U.S. law, the employer may further cut down uncontrolled communication in the workplace by banning all speech about workplace governance except speech during work breaks. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945). The court explained that employers have the right to exercise control over their employees during work time in order to ensure production.

[81] In the U.S., in the case of *NLRB v. United Steelworkers*, the court affirmed the Board's decision to deny the union access to company property in order to reply to "captive audience" communication, *see* NLRB v. United Steelworkers, 357 U.S. 357, 363-65 (1958).

[82] In the U.S., employers may further require management attendance at all meetings among workers or workers' representatives, a presence that could very well have a "chilling effect" on pro-union speech.

[83] Article 31 of the British Code of Practice on Access provides that reasonable access is contingent on the determination that such parity would circumvent the unacceptable increase in tension in the workplace.

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adequately protect the right to organize, since union organizers could not in fact exercise the right of access in order to address employees on company property.[84] Food Lion, the company at hand, issued a broad non-solicitation rule and also blocked attempts to contact employees after work hours on non-work premises, by threatening union organizers with arrest and expulsion from the premises. The Committee noted that "[o]bviously, such intimidation and threats cannot but create a climate unfavorable to legitimate union activities, in particular those aimed at unionizing workers."[85] The Committee ruled that the U.S. should protect organizers' access to company property for the purpose of communicating with workers about the advantages of collective action.

The *Food Lion* case reflects a thicker conceptualization of freedom of association than that which generally prevails within the ILO, since it attempts to secure the conditions for enabling dialogue between workers and unions facing employer resistance. This decision goes beyond the removal of state-based hindrances to achieve such dialogue. The decision in this case acknowledges the need to actively create positive conditions for communication between employees and union organizers, and requires that states alter the balance between property rights and the right to organize, at the expense of what has traditionally been viewed as private law and was therefore considered out of bounds.

However, the *Food Lion* case is an anomaly in ILO jurisprudence, where the prevailing approach continues to view the cases where workers both reside and work on the property of the employer as the paradigmatic context for rights of access. This Article argues that the ILO should explicitly adopt the more robust approach, expanding the right of access to all workers and organizers, rather than limiting it to atypical workplaces such as plantations. The thicker conception could be understood to require proactive doctrines, such as a mandate obligating employers to permit employee meetings on company-paid time. It could also mandate the right of access to employer property for purposes such as leafleting, face-to-face communication, and responding to employers' captive audience speeches.[86] The British principle of parity could provide a good starting point in that direction, as it meant to ensure that workers are afforded ample time and informational resources to engage in group-dialogue among themselves, free of the multiple coercive technologies[87] available to employers under existing law. Such measures would

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[84] Report No. 284, Case No. 1523*, supra* note 64.

[85] *Id.* ¶ 194.

[86] *See, e.g.,* the dissent of Justice White, with whom Justice Blackmun joins, to the *Lechmere* case. *See also* James G. Pope, *How American Workers Lost the Right to Strike and Other Tales*, 103 Mich. L. Rev. 518, 539-44 (2004).

[87] I borrow this term from Barenberg, *supra* note 21.

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entail broader state intervention (starting from the baseline of traditional private law rules) to reform internal rules of private institutions. The ILO has gestured in this direction in the *Food Lion* case described above.

B. The Right to Organize: Exclusive Representation versus Pluralist Representation

The ILO endorses the pluralist model of worker representation (sometimes called "members only bargaining"), affording workers the right to establish organizations of their own choosing, including the right to create and join more than one workers' organization within any designated workers' group.[88] That is, the pluralist model grants each worker the right to designate any organization as his or her collective representative, regardless of whether it is a majority or minority-endorsed organization. The pluralist model then requires the employer to bargain with any and all organizations that show a membership list, or, alternatively, it limits the duty to bargain to organizations that showed substantial support (above a certain fixed percentage).

Adversely, according to the doctrine of "exclusive representation," unique to North American legal systems, all workers in a bargaining unit must be represented by a majority-selected union and may not seek representation through the collective bargaining of any other organization.[89] This doctrine, at the very least, reveals

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[88] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 280 (1996). The Committee clearly stated that provisions that require a single union for each enterprise, trade or occupation are not in accordance with Article 2 of Convention No. 87 (*supra* note 16). The Committee interpreted the words "organizations of their own choosing" in Convention No. 87, as making allowance for the fact that in certain countries there are a number of different workers' and employers' organizations, which an individual may choose to join for occupational, denominational or political reasons; it did not pronounce, however, whether a unified trade union movement is preferable to trade union pluralism. The ILO recognized thereby the right of any group of workers (or employers) to form organizations in addition to an existing organization, if they consider it advantageous for the purpose of safeguarding their material or moral interests.

[89] Few places (Israel and Mexico) other than the U.S. and Canada adopted some version of the exclusive doctrine; *see* Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a Unique American Principle,* 20 Comp. Lab. L. & Pol'y J. 47, 49 (1999). Summers distinguishes between three distinct features of the exclusive representation doctrine: first, the power of the designated union to represent all members of the bargaining unit, regardless of their union membership or explicit desire. Second, the specific method designed to determine the identity of such designated union, i.e., majority rule. Third, the inability of the employees to avoid the full coverage of the collective agreement, an agreement that might prevent the stronger employees from achieving better terms of employment through an individual contract. *See* Summers, *supra* at 48-49.

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serious problems from the perspective of ILO jurisprudence.[90]

In complaints presented by the Peruvian Workers' Confederation against the Government of Peru, for example, the Committee considered a particular provision in Peruvian labor law that provided that a union can exist only if it organizes more than fifty percent of the workers.[91] More specifically, the legislation provides that a trade union should consist of more than fifty percent of the workers, if it is a workers' union; more than fifty percent of the salaried employees, if it is a union of salaried employees; and more than fifty percent of both categories if it is a mixed union.[92] The Committee held that such provision was not in conformity with Article 2 of Convention No. 87, as it placed a major obstacle in the way of trade unions capable of "furthering and defending the interests" of their members. Moreover, the provision had the indirect result of prohibiting the establishment of a new trade union whenever one already existed in the undertaking or establishment concerned.[93] The Committee further held that the local labor legislation should clarify to the state-registrar that it cannot refuse to register a new union just because a different one already exists for the same unit of employees that wants to organize.[94] This debate over the pluralist and exclusive-representation models raises crucial questions about the nature of group membership.

A key issue underlying the doctrine of exclusive representation is the relation between interest-formation and defining group membership. In international and domestic labor law, "common interest" among workers is an accepted norm for evaluating the boundaries of group membership for the purpose of collective action. Determining the appropriate bargaining unit that will define membership boundaries has an enormous significance under the exclusive representation doctrine,[95] and the

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[90] James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 Employee Rts. & Emp. Pol'y J. 65 (1999) (noting that exclusive representation is problematic from the ILO perspective).

[91] *See* ILO, Comm. on Freedom of Ass'n, *Report 85: Peru (Case No. 335)*, ¶¶ 438 & 439, ILO Doc. XLIX, No. 1 S (May. 1963).

[92] *Id.*

[93] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 294 (1996).

[94] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 295 (1996); ILO, Comm. on Freedom of Ass'n, *Report 93: Ghana (Case No. 303)*, ¶ 100, ILO Doc. L, 1967, No. 1 S (June 1962) (A complaint presented by the International Confederation of Free Trade Unions against the Government of Ghana).

[95] In addition to the U.S. rules prescribing that the decision to organize be made by the majority of employees in a bargaining unit; and that the union that wins the majority vote represents all employees in the bargaining unit (*see* 29 U.S.C.§159(a). Section 9(a) of the Federal Labor Act), the collective agreement signed by such an organization supersedes all prior contracts between the employer and individual employees. Moreover, the exclusive representative union can, and usually

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National Labor Relations Board (NLRB) attempts to include all employees with similar economic interests within the same bargaining constituency.[96] Thus, the definition of "common interest" is predicated on an understanding of the process through which interests are identified or articulated. The dominant tension between alternative understandings of "common interests" is grounded in the approach to the notion of interests, whether pre-determined and stable, or subject to formation and transformation through group processes.

From this perspective, it would appear that under certain conditions both the doctrine of exclusionary representation and the pluralist model may facilitate extensive deliberation. The debates surrounding the doctrine of exclusionary representation in U.S. law,[97] where it is most prevalent, and their corresponding implications for conceptions of freedom of association, illuminate the ILO's limited jurisprudence in this arena.

Indeed, it is not immediately obvious which doctrine provides better opportunities for egalitarian deliberation and is therefore more compatible with ED. The doctrine of exclusive representation would appear to promote communication within a restricted work group, promoting the key value of inclusiveness. That is, it is precisely the lack of opportunity to break away from the group that brings about the necessity to deliberate. This doctrine provides a common ground for developing a deliberative group dynamic in response to issues such as internal union politics and policies, the formulation of demands in a negotiation, a decision to strike, and the like. This inclusive deliberation may have the benefits of avoiding "groups' polarization"—the tendency of deliberative groups to shift toward the extreme in the direction of the view most of them were already tending.[98] Groups' polarization, as Sunstein pointed out, tends to occur in "deliberative enclaves," that is, deliberation in groups that are not heterogeneous in nature. In addition, the exclusive representation doctrine addresses the "wage gap" concern. Unlike the "members only" system, in which skilled workers may go their own way and use their disproportionate power to exact a wage premium (or "rent") at the expense

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does, exercise complete control over any grievance system that a collective bargaining agreement creates. On the latter point, *see, e.g.,* Herbert Schreiber, *The Origin of the Majority Rule and the Simultaneous Development of Institutions to Protect the Minority: A Chapter in Early American Labor Law,* 25 Rutgers L. Rev. 237, 238 (1971).

[96] The NLRB applies a multi-factor test to determine "common interests," taking into account factors such as similar skills and tasks, and payments and benefits, geographical proximity and bargaining history.

[97] George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?,* 123 U. Pa. L. Rev. 897, 898 (1975).

[98] Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes,* 110 Yale L. J. 71, 74-75 (2000).

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of those less skilled or less in demand, the exclusive representation model merges the bargaining power of both, creating solidarity between skilled and unskilled workers.

While today, commentators often point to the doctrine of exclusive representation as a major reason for the decline in union membership in the U.S., when U.S. Congress first adopted the doctrine of exclusive representation in the Wagner Act of 1935, it was the proponents of unionization that advocated this doctrine. They did so out of belief that it would promote solidarism and unionization in the face of employer efforts to "divide and conquer" primary through the institution of company unions.

Wagner, supporting the exclusive representation doctrine, viewed unions as "organic groups unified by solidarity interests and norms,"[99] and assumed that the preferences of individual employees would align with the group's interest, or would become so aligned either through the force of law or the formal or "informal inculcation of norms" and sanctions. If Wagner's view rested on a conception of "objective" or "fixed" interests, it cannot be compatible with ED, which assumes that individuals and groups have interests that are transformable, multiple, and fluid. However, if Wagner's view instead relied on a purely descriptive assumption, i.e., that workers' subjective interests would predictably align with those of a majoritarian union, then it is not necessarily at odds with ED. President Franklin Roosevelt's "purely associational ... conception of unionization" may be an indication that the Wagner Act likely represented the latter view.[100]

Although from the discussion so far, the exclusive representation model may seem more aligned with the ideal of deliberative consensus, the particular application of exclusive representation in the U.S. instead correlates with the rational choice model of decision making. The reason for this is that the system governing NLRB elections—rather than explicitly emphasizing opportunities for ED within the group—focuses on one moment of workers' decision making: the casting of secret ballots by an atomized aggregation of individuals. Critics of the exclusive representation doctrine point out that adopting the pluralist doctrine eliminates the regulations resulting from unit determination, election campaigns, and elections themselves.[101] Ending election campaigns may also reduce the

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[99] Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1379, 1452 (1993).

[100] Marion Crain & Ken Matheny, *Labor's Divided Ranks: Privilege and the United Front Ideology*, 84 Cornell L. Rev. 1542, 1557 (1999).

[101] Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 Chi.-Kent L. Rev. 195, 199 (1993); Clyde W. Summers, *Taft-Hartley Symposium: The First Fifty Years: Questioning The Unquestioned in Collective Labor Law,* 47 Cath. U.L. Rev. 791, 801 (1988); Crain & Matheny, *supra* note 100, at 1543-44.

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hostility and antagonism, which adversely affect the subsequent collective bargaining relationship.[102] Most importantly, perhaps, from the standpoint of free association, workers would not be compelled to be represented by organizations that are not in fact "of their own choosing," and worker participation may increase.[103] In addition, exclusive representation deprives a large number of employees of their right to bargain collectively. Surveys have found that more than one third of U.S. workers say they desire to associate in unions, but the law denies them the option of representation through minority unions. This simple fact constitutes a drastic limitation on workers' freedom of association.[104] However, this particular restriction is not inherent in the doctrine of exclusive representation; it is possible to imagine other methods of decision making that would be more hospitable to equitable speech.

Conversely, the arguable disadvantages of members-only systems relate to concerns about reducing the power of the unions in collective bargaining and undermining one another's efforts.[105] However, the experience of U.S. labor law reveals that similar concerns came up with respect to determining the appropriate unit of representation, and it has not deterred the NLRB from designating small units as appropriate election units, a decision that eventually did not reduce the power of unions in the collective bargaining.[106] In addition, such diminished power may be offset by greater solidarity among workers, which can be expected to increase and develop into hegemony of interests. Such hegemony is a crucial component in the ability to call a strike; it is a union's license to power and, most importantly, it cannot be superimposed.[107] The idea that exclusive representation can generate

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[102] Summers, *supra* note 101, at 801.

[103] According to this claim, the united front ideology ignores the race, gender and other specificity of class consciousness in ways that circumscribe union-organizing efforts. The image of a white, male, manufacturing-based working class shapes union praxis and public perception of the labor movement, and undermines organized labor's ability to respond to employer efforts to exacerbate these divisions. *See* Finkin, *supra* note 101, at 200.

[104] In addition, non-majority representation would have the potential of being more responsive to the growing tendency to hire "contingent" (or "atypical") workers for short terms of service, who cannot expect to have a permanent or long term relationship with any single employer yet are most in need of representation. *See* Finkin, *supra* note 101, at 217-18.

[105] Crain & Matheny, *supra* note 100, at 1558.

[106] *See* Finkin, *supra* note 101, at 200; *see also* Labor Law, Cases and Materials 273-74 (Archibald Cox et al. eds., 12th ed., 1996) (the power of the union is a function of the size of the bargaining unit).

[107] Crain & Matheny, *supra* note 100, at 1621 (one cannot, however, create solidarity by imposing it from above; illusory and superficial at best, such solidarity will dissolve quickly when the employer attempts to undermine it); *see also* Finkin, *supra* note 101, at 201. Further, one may cast doubt on the very assumption that strikes are the best method of achieving economic benefits.

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pressure to reach a deliberative consensus, however, cannot be overstated. There is also ample opportunity for deliberation in the pluralist system, although in the form of cross-group discussions, as multiple unions seek to build coalitions in order to present employers with united fronts. Such deliberations may be as meaningful and transformative as the pressure for internal coalition building in the exclusive representation doctrine.

Moreover, exclusive representation may silence the voices of minority groups that are submerged within the majoritarian work unit. Indeed, evidence show that "participants in heterogeneous groups tend to give least weight to views of low status members."[108] As Crain and Matheny point out, *Emporium Capwell Co. v. Western Addition Community Organization* is an example that demonstrates the problems of exclusive representation.[109] In this case, African-American workers, who were discriminated against, picketed the employer's department store and distributed leaflets that urged consumers to boycott the store until it ceased discriminating against minorities. The employer fired two of the workers. The NLRB and the Court decided that the picketing was not considered concerted activity protected by Section 7 of the National Labor Relations Act (NLRA). The Supreme Court held that if law had permitted separate protest and bargaining by minority of workers, the power of the union would ultimately have been undermined.

The above example demonstrates that ED's commitment to inclusion might be ill-served by exclusive representation. It also reveals a built-in tension that is deeply embedded in the concept of ED, which promotes consensus building through deliberation, on the one hand, while it endeavors to contain multiple and fluid understandings of identity, on the other hand. The hope for deliberative consensus would encourage, in the above-mentioned *Emporium* case, negotiations between minority and majority workers *within* the union, discouraging the fragmentation that a plural model would cause in this case. Fragmentation would underscore the racial identity of the black workers, instead of their identity as "workers." (In the *Emporium* case, the term *workers* reflected only white employees' interests.) The plurality model may have resulted in the abandonment of any hope for deliberation and consensus building in this case.

In sum, it is not clear that one system is intrinsically preferable in terms of promoting ED.[110] Therefore ILO jurisprudence on free association would do well

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Abolishing exclusivity may "breathe new life" into economic weapons that are alternatives to strike, such as boycotts and picketing. Crain & Matheny, *supra* note 100, at 1623.

[108] Sunstein, *supra* note 98, at 76.

[109] Crain & Matheny, *supra* note 100, at 1542.

[110] Sunstein, in his discussion of "enclave deliberation" points out that "*In the abstract*, it is not possible to specify the appropriate mix of enclave deliberation and deliberation within larger publics." Sunstein, *supra* note 98, at 119 (emphasis added F. M.-S.).

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to allow experimentation with various versions of both models. Within the pluralist model, this would entail establishing mechanisms to ensure deliberations and cooperation among different unions that exist in similar plants or industries. Within the exclusive representation model, mechanisms should be installed to ensure that minority group voices are not silenced. Although the particular implementation of the U.S. model fails to optimize ED, this is not dictated by the doctrine of exclusive representation itself.

C. The Right to Regulatory Autonomy: Internal Elections within Worker Organizations

The inherent tension between the principles of democratic imposition and non-intervention is manifested mostly in the context of regulating the internal affairs of worker organizations. Basically, the tension arises over the issue of identifying which source constitutes the predominant threat to workers' independent decision making: the state, the employer, or the oligarchic structure of the union itself. The answer to this question must take into account alternative concepts of group decision making, guided by alternative concepts of free association. All legal systems utilize both of these opposing principles, so eventually it becomes a matter of degree.

Traditionally, the ILO's approach has been guided by the principle of non-intervention, supporting legislative regulation of internal functioning of worker organizations only when "absolutely necessary,"[111] and even in those cases, limiting regulation to the establishment of an overall framework that grants the organizations the "autonomy" to administer their internal affairs.[112] As a normative matter, of course, everything depends on the interpretation of the loaded terms "necessity" and "autonomy."

One context in which the ILO allows state regulation is that of voting procedures related to constitution drafting within worker associations in the context of constitution drafting. The imposition by law of secret ballot, direct voting,[113] and

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[111] ILO, Comm. on Freedom of Ass'n, *Report 294: Lebanon (Case No. 1704)*, ¶ 146, ILO Doc. LXXVII, (Ser B) No. 2 (Jan. 1993).

[112] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 331 (1996); Report 294, Case No. 1704, *supra* note 111, ¶ 156. In the case at hand, the FAC considered an allegation against the Government of Lebanon in 1993, relating to a bill on trade union structure in Lebanon. The draft Bill provided for detailed regulation of the trade unions' bodies and administration. The Committee viewed such detailed legislation as posing a serious risk of interference, which may hinder the creation and development of trade union organizations. However, formal and general regulation, such as legislation providing that union rules shall comply with national statutory requirements, or listing the particulars that must be contained in a union's constitution were permissible.

[113] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 339 (1996).

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majority votes on issues that touch upon constitutive practices of the organization,[114] are deemed as not interfering with the norm of freedom of association, as long as these regulations are imposed for the sole objective of "guaranteeing democracy."[115] Also acceptable are government mandates limiting the term of office of union executives.[116] Such regulations are deemed as affirmatively contributing to freedom of association, rather than inhibiting it, by guaranteeing workers' the right to freely participate in matters that affect the very existence and structure of their organizations.[117] These doctrines rest on unarticulated notions of "democracy" and are subject to normative questioning of the extent that alternative models of democracy can be brought to bear on workers' associational activity. However, the Committee remained suspicious toward an imposition of an obligation to vote, and considered such an obligation illegitimate,[118] and thus prohibited the imposition of penalties on workers who did not vote in the elections.

The contested nature of associational freedoms, and the ILO's failure to explore it in a normative context, is reflected in the intractable line drawn between permissible and impermissible interventions in organizational affairs. The CFA holds, for example, that regulatory autonomy in internal elections requires that public authorities refrain from any of the following interventions:[119] (1) determining the conditions of leaders' eligibility, (2) regulating the actual conduct of the elections themselves, or (3) imposing penalties against workers who choose not to vote in internal elections.[120] It should be noted that some of these rules run counter to widespread democratic practices in ordinary political elections in various countries, and therefore could not have been mechanically derived from the norm of democracy, as the ILO would have it.

Indeed, democratic practices cannot be uncontroversially transferred from common political discourse to associational activities among workers. The ILO implicitly understands, for example, that state power can distort union processes in ways that would not necessarily be deemed problematic in ordinary political

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[114] ILO, Comm. on Freedom of Ass'n, *Report 197: Chile (Case No. 823)*, ¶ 382, ILO Doc. LXII (ser. B) No. 3 (Nov 1979). This case involves a complaint against the Government of Chile, which required such majority in Article 18 of its trade law legislation.

[115] Report 294, Case No. 1704, *supra* note 111, ¶ 156.

[116] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 358 (1996).

[117] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 343 (1996).

[118] *See* ILO, Comm. on Freedom of Ass'n, *Report 191: Uruguay (Case No. 763)*, ¶¶ 28 & 29, ILO Doc. LXII, (Ser. B) No. 1 (July. 1979).

[119] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 351 (1996).

[120] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 353 (1996); Report 191, Case No. 763, *supra* note 118.

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elections. For example, the CFA prohibits authorities to express their opinions regarding the candidates and the consequences of an election.[121] This was exemplified by the ruling of the CFA in the case that emerged during the eighth congress of the Standard Fruit Company Union (SITRASFRUCO) in Honduras (1963). In the process of the elections, the President of Honduras sent a telegram to the Department of Political Governor, in order to "remind" the workers that "any infiltration of Marxist elements into the ranks of the executive members would be considered a practice harmful to the trade union movement, to work/employer relations and to the relationships between the Government and the workers' trade union organizations."[122] The President further requested that his message be conveyed to the trade union leaders "with democratic views," and that he be informed about the success of these steps. After receiving the telegram, a group of dissenting delegates abandoned the meeting at a time when a new Executive Committee was to be elected. The CFA considered such an intervention a serious challenge to the principle of full freedom in internal elections, as "the intervention … may have influenced the mood and the purpose of the delegates, as well as influencing the attitude adopted in regards to the elections."[123] By doing so, the Committee recognized the importance of speech and communications to the workers and the ability of the authorities to exert pressure and inhibit free choice through communication. It also implicitly recognized that the period preceding the elections, as well as the communications delivered during such a period, are an integral part of the election process, and as such subjected to the grave power imbalances between union representatives and the state or the employer.

The ILO further precludes the presence of representatives of the authorities during elections, as it is "likely to constitute interference" in the election process.[124] In a complaint presented by the World Federation of Trade Unions, for example, the U.S. Secretary of Labor was accused of having intervened in trade union elections. In May 1950, the Secretary spoke at a rally of one of the unions competing in the elections for the votes of the workers of a General Electric Corporation plant, expressing support for that union. The complainants alleged that such a speech conveyed implicit threats by the government, the workers considered it a threat, and thus the elections were distorted.[125] The Government of the U.S. asserted that

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[121] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 397 (1996).

[122] ILO, Comm. on Freedom of Ass'n, *Report 73: Honduras (Case No. 348)* ¶ 104, ILO Doc. XLVII, No. 3 S II (July. 1963).

[123] *Id.* ¶ 112.

[124] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶¶ 400-01 (1996).

[125] ILO, Comm. on Freedom of Ass'n, *Report 2: United States (Case No. 33)* Sixth Report, Appendix V (1952).

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no threat was involved,[126] and noted that the Secretary of Labor had no official duty connected with the elections; moreover, the workers had complete freedom to vote by way of secret ballot. The Committee held that such allegations might nonetheless be considered "interference,"[127] depending on whether the participation of the Secretary of Labor "was or could reasonably have been regarded by the workers concerned as a threat that limited their complete freedom to vote by secret ballot for the union of their choice."[128]

The debate regarding the imposition of secret ballot procedures in internal elections hinges on distinct conceptualizations of legitimate collective choice in the exercise of free association. A thin conceptualization is embodied in the doctrine that emphasizes the moment of choice itself, i.e., when workers register their preferences through their vote. According to this "rational choice" view, as long as workers are able to vote by secret ballot election, free association is protected, regardless of the social processes that shape interests before and after the moment of choice. A thicker approach conceptualizes preferences and interests as constantly forming through deliberation and communication. Such an approach would support the expansion of regulation to include sites of deliberation before and after secret ballot elections takes place. A deliberative view of decision making would therefore prescribe intervention, or supervision not only with respect to voting procedures (i.e., secret ballot), but also in other contexts of associational activity.

To that end, a transformative approach that views the formation of interests as a dynamic, fluid process would insist that such deliberations be non-coercive. A thicker approach would have to take into account and try to mitigate the power imbalances that could be used to affect the outcome of such deliberations. Sources of power imbalance include inequalities among workers, the state, employers, and the oligarchic tendencies of unions.[129]

Indeed, securing a secret ballot is a mechanism that promotes open and robust deliberation. It may significantly contribute to reducing coercion through blunt or implicit power. In this sense it enhances the *equitable* element of ED. To this end, the ILO should mandate secret ballot procedures rather than merely permit them to take place. Nevertheless, limiting the notion of what makes elections

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[126] *Id.* ¶ 104.

[127] *Id.* ¶ 130.

[128] *Id.* ¶ 134.

[129] The law of oligarchy and the power disparity between the employer and the employee suggest that merely preventing state interference in structuring the procedures to such elections would not prevent coercion either by a higher level of the trade organization, dictating results from the center, or by the employer. State intervention to modify such concerns would be seen as promoting, rather than hindering, regulatory autonomy.

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democratic to the secret ballot process is insufficient, as it fails to take into account the preconditions for a meaningful deliberative process that precedes the moment of electoral choice. The ILO needs to broaden its conception of democratic election and mandate state intervention promoting the norms of ED, in the spirit of successful examples garnered from national contexts.

Democratic practices within unions are often thwarted by the myriad forms of hierarchy that fall under the "law of oligarchy," first delineated by Michels.[130] Maintaining vibrant political life cannot be achieved by focusing merely on formal election procedures. Both the structural organization of the union and the electoral process may account in part for the lack of vibrant political life in unions. U.S. law is but one example that demonstrates the severity of power disparities within unions between the official elite and rank and file members.

Researchers have found that as one ascends levels of union government, from the local to the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), for example, it becomes more difficult to exercise bottom up control and to achieve genuine accountability. While local leadership is subject to the "ordinary unpredictable vagaries of democracy," the national administration has stability and continuity.[131] This reality cannot be explained solely by abuses of the election process. Although abuses of the system have occurred, close studies of union election procedures maintain that the incidence of abuse is negligible. Bureaucracy secures power in the hands of union officers, who control union resources and communication; therefore, incumbents have an unfair advantage over opposition.[132] The organizing staff, which often serves the administration in campaigns for union elections, is fired and hired by the same administration (usually the international president); therefore, the interests of the organizational staff members' lie with the administration.[133] The professional staff, including legal

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[130] The literature widely discussed the various tools incumbents use to remain in power, originally presented by the German sociologist Robert Michels in what he famously termed "The Iron Law of Oligarchy." His insights were reaffirmed in the key study Seymour M. Lipset, Martin Trow, & James Coleman, Union Democracy: The Internal Politics of the International Typographical Union (1956). For a summary of the sources of oligarchy *see, e.g.*, Clyde Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin,* 43 Maryland L. Rev. 93, 96-99 (1984).

[131] Herman Benson, *The Fight for Union Democracy*, *in* Unions in Transition 323, 324 (Seymour M. Lipset ed., 1986).

[132] Summers enumerates Michel's four sources of oligarchy: an attitude whereby opposition is looked upon as disloyally, control over union bureaucracy and its resources, domination of channels of communication, and finally centralization of control over unions. *See* Summers, *supra* note 130, at 96-99.

[133] Section 401(g) of The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. § 401 et seq. (LMRDA) provides that union resources cannot be employed to support any candidate for union election. However, when, in a famous case, Ed Sadlowski tried to invoke

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staff and union press, constitutes yet another component in the oligarchy of the union.[134]

Recognizing the substantive inequalities in power and resources inherent in union structure, U.S. labor law codifies a rather broad regulatory arsenal to ensure democratic governance in internal union affairs.[135] The Landrum Griffin Act of 1959 provides for extensive control over the election of unions officers. It regulates the frequency with which elections are held, the opportunity to nominate and vote for the candidates,[136] and the opportunity to conduct a fair electoral campaign. The Act also guarantees rights of speech and voting to individual members. After the 1980s, when the Act was strictly enforced, its more dormant provisions have proven quite effective in disentrenching non-democratic, or corrupt union elites.[137]

The particular strategies for establishing conditions for union democracy are likely to vary from one domestic context to another. In the U.S., dissident strategies included, for example, establishing new lines of communications with union members; coordinating efforts with government-imposed trustees to institutionalize procedures to guard against misuse of funds; open access to union newspapers; building upward from local democratization to liberalize the central organism; and

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that section to object to paid staff campaigning for the administration on union time, the NLRB noted that staff representatives had no set working time and therefore separating between the staff's personal time and their working time was almost impossible. Thus, the staff was free to campaign any time during the day, in that respect *de facto* emptying Section 401(g) from substantial content. *See* Benson, *supra* note 131, at 333-40.

[134] The professional staff usually monopolizes the union press, thereby creating an aura of leadership omnipotence that discourages opposition. Union lawyers are used to serving the incumbents and when dissenters challenge the union elections, they usually uphold the officials' position. The structure of trials, appeals and conventions is usually one-sided as well, intertwined in the power structure of the union, as legislation, executive and judicial functions are centralized. This background reality exists in all, not just corrupt, unions.

[135] The U.S. political system, for contingent reasons, has not fully enforced legal antidotes to union oligarchy. However, as stated above, LMBRA added to the otherwise available state and federal remedies to combat union corruption. In the 1980s, the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1961–1968 emerged as the modern statutory basis for similar remedies. This act was designed to generally combat organized crime, and union corruption was only one of its concerns. RICO made available a vast variety of intrusive remedies, some in tension with the union and its workers' associational rights. RICO expressly authorized the courts to order "the reorganization" of "corrupt enterprises," the latter being interpreted broadly to include unions, welfare and pension funds and employers. *See* Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement,* 1989 Duke L. J. 903, 920 (1989).

[136] Archibald Cox, *Internal Affairs of Labor Unions under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 842 (1960).

[137] *See, e.g.*, the efforts to "clean up" the Teamsters, the largest union in the U.S., in 1992, analyzed in George Kannar, *Making the Teamsters Safe for Democracy*, 102 Yale. L. J. 1 (1993).

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ensuring open agendas and broad opportunities for discussion at union meetings.[138] The Labor-Management Reporting and Disclosure Act (LMRDA), then, did not focus exclusively on the "moment of voting," but employed a comprehensive scheme of reforms aimed at ensuring free elections, including the expansion of spaces for ED. For example, it guaranteed freedom of speech and freedom of assembly in Section 101(a)(1) and (2). Senator McClellan described the freedom of assembly provision:

> That [provision] gives union members the right to assemble in groups, if they like, and to visit their neighbors and to discuss union affairs, and to say what they think, or perhaps discuss what should be done to straighten out union affairs, or perhaps discuss the promotion of a union movement, or perhaps a policy in which they believe. They would be able to do all of that without being punished for doing it, as is actually happening today.[139]

The fundamental principle was that all members should be allowed to take part in deliberations,[140] guaranteeing the ability of the opposition to prosper. The ILO should expand its notion of free elections beyond the focus on the moment of voting. The doctrines discussed above could inspire the ILO to articulate a thicker fuller and broader conception of democratic elections.

D. The Right to Regulatory Autonomy: Decentralization of Worker Associations

From abstract notions of free association alone, it is difficult to formulate a conclusive preference for either decentralized or centralized structures of worker associations. The more robust perspective of ED, however, warrants a strong preference for decentralization, which coincides with a commitment to inclusion, better problem-solving capabilities, intense face-to-face deliberations, situated justice, and recognized measures against oligarchy.[141] Indeed, the rank and file

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[138] Eric A. Tilles, *Union Receivership under RICO: A Union Democracy Perspective*, 137 U. Pa. L. Rev. 929, 955-65 (1989).

[139] 105 Cong. Rec. 6477 (1959), 2 Leg. Hist. 1104, cited in United Steel Workers of America, AFL-CIO-CLC v. Sadlowski et al., 457, U.S. 102, 110 (1982).

[140] Cox, *supra* note 136, at 834.

[141] Evidence shows that in the U.S., the law of oligarchy is probably less embedded in local unions compared with the national governance structure. *See* Roger C. Hartley, *The Framework of Democracy in Union Government*, 32 Cath. U. L. Rev. 13, 83 (1982). Smaller local unions, as opposed to larger, wealthier, and more bureaucratically structured unions are a more promising site for implementing genuine democracy (*id*. at 84), and as described below, equitable dialogue.

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members actively participate in the life of the union at the local level, which has traditionally been the stronghold of democracy, primarily because of the relations between members and local officers.[142] Although advocates of centralization argue that it is necessary to achieve a balance of power vis-à-vis centralized employers, there is strong reason to believe that decentralized unions gain power from their members' greater democratic commitment to active associational activity, which is particularly significant at the key moment of strike action.

State regulation of the degree of centralization within worker organizations, like the case of internal election policies, reflects contested understandings of the norm of free association. The CFA has announced a general rule that public authorities should respect the autonomy of trade unions' higher-level leaders and defer to them the degree of centralization between their central and local units. Impingement on this autonomy, through, for example, the imposition of legal provisions that protect local units against various forms of domination by higher-level organizations, should be the exception.[143] In practice, however, the Committee does not hesitate to deploy this exception, and it did so in the two cases that came before it, thereby demonstrating its inclination to support decentralization to some extent.

In a case filed against the Government of Ontario, the Committee upheld legislative amendments that reduced the power of central units to control their local units. The Committee held that such provisions were designed to enhance union democracy.[144] The Government of Ontario stated that the Act in question was designed to promote democracy and local control in the relationships between Ontario's local construction unions and their international parent unions based in the U.S. It gave Ontario's local construction units the following protections against unjust interference from their parent unions: protection of local jurisdiction from unjust alteration by their parent union; proportionate control over their pensions and benefit plans; and shared bargaining rights with their parent unions in cases where the parent unions held exclusive bargaining rights on behalf of its locals.[145] The Government further claimed that the Act was introduced in response to long-

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[142] Donald R. Anderson, *Landrum-Griffin and the Trusteeship Imbroglio*, 71 Yale L.J. 1460, 1464 (1962).

[143] And even then there should be guarantees against coercion by the state. *See* ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 348 (1996); ILO, Comm. on Freedom of Ass'n, *Report 294: Guatemala (Case No. 1734)*, ¶ 468, ILO Doc. LXXVII, (Ser. B No. 2 (Oct. 1993).

[144] ILO, Comm. on Freedom of Ass'n, *Report 294: Canada (Case No. 1735)*, ILO Doc. LXXVII, (Ser. B) No. 2 (Sep. 1993). The Committee emphasized that no general principle should be derived from that decision, Report 294, Case No. 1734, *supra* note 143, ¶ 475.

[145] Report 294, Case No. 1735, *supra* note 144, ¶ 442.

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standing complaints from local construction unions regarding the powers of their international parents to interfere with their autonomy when the parent disagreed with local decisions reflecting local interests.[146] These claims had a strong basis. The Act was legislated after three weeks of public hearings and a large number of the Ontario locals went on record supporting the Bill.[147]

The complainants, the Building and Construction Trades Department (AFL-CIO), argued that this measure constituted unwarranted interference in trade unions' affairs, contrary to Convention No. 87. The Committee paid particular attention to specific provisions, which empowered the Ontario Labour Relations Board (OLRB) to disregard a trade union's constitution when considering interference.

The Committee held that several qualifying factors rendered the legislative amendments in question legitimate.[148] First, the Act was designed to prevent possible abuses by parent unions against local unions and their members. Therefore, actions by parent unions that respected the democratic will and interests of local trade unions should not have raised problems or triggered applications by the OLRB.[149] Second, government intervention was not systematic but rather discretionary, based on the notion of just cause, and driven by the filing of an application by an interested party, all of which imply compliance with due process.[150] Third, the OLRB, an independent body with tripartite representation, exercised external control over the process. Thus all parties were allowed to appear at hearings and present evidence and arguments, that allegations had to be established and fair rules observed.[151] In addition, even though the OLRB is not bound by the union's constitution, it must consider the constitution in its decision.[152] The combination of all of these factors renders this state intervention in the regulatory autonomy of unions acceptable.

In another case with a completely different legal backdrop, presented against the Government of China, the Committee perceived the subjecting of grass-roots

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[146] *Id.* ¶ 443. The Government noted that over the last several years, local construction unions had complained about their parent unions taking arbitrary and unjustified punitive action against locals and individuals.

[147] *Id*. ¶ 444. The Government noted that extensive consultations took place from the time the Bill was introduced, in June 1992, right through the public hearings stage. While all the international unions opposed the Bill, a large number of their Ontario locals went on record supporting the Bill.

[148] *Id*. ¶¶ 470-75.

[149] *Id*. ¶ 471.

[150] *Id*. ¶ 472.

[151] *See* Report 294, Case No. 1735, *supra* note 144, ¶ 473.

[152] In determining "just cause," the OLRB is instructed to consider the constitution, but is not bound by it (*see* Bill No. 80: An Act to Amend The Construction Industry Labour Relations Act 1992).

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organizations to the control of trade union organizations at a higher level, including a requirement to receive approval for their establishment and constitution by such higher level unions, as constituting major constraints on the rights of unions to establish their own constitutions, organize their activities, and formulate their programs.[153] The Committee held that such intervention is necessary in order to enable the free participation of all workers in union activities. Thus, while the Committee asserts that the protection of local units of worker organizations from higher-level coercion is the exception to the rule, it seems that in practice,[154] the Committee has been easily inclined to maintain such protection.

The Committee's actions seem to be driven by concern for values of localism, at the expense of the autonomy of centralized worker organizations. At least implicitly, the Committee adopts a more participatory model of democracy, but again fails to openly articulate the contested nature of that model as a normative foundation for its vision of free association. The Committee also recognizes the potential for centralized organs to pose a threat due to their oligarchic structure. Thus it engages in an in-depth analysis of the power asymmetries between workers and their organizations, and between local and centralized organizations as shown in the next section. This analysis has a strong historical basis related to the U.S. legal system, which formed the backdrop for the previously described Canadian case.

Historically, during the growth of the American labor movement as centralization proceeded, it was accompanied by the introduction of various disciplinary tools, including the acute measure of trusteeship imposition.[155] The parent union's intervention into the affairs of union affiliates by actual or threatened imposition of trusteeships is perhaps the strongest demonstration of the need to encourage democracy.[156] A parent union's declaration of trusteeship over a local union allowed the central organ to impose virtually total control over the associational

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[153] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 349 (1996); ILO, Comm. on Freedom of Ass'n, *Report 286: China (Case No. 1652)*, ¶. 717, LXXVI, (Ser. B) No. 1 (June. 1992).

[154] These are the only cases on this subject to date.

[155] During the growth of the labor union movement in the U.S., international control grew at the expense of local independence. The organizational scheme of the labor movement features interlocking patterns of regions, districts, and trade councils; the path to centralization emerged, as local unions realized its advantages and surrendered their independence in order to gain strength, *see* Anderson, *supra* note 142, at 1460-61.

[156] Other conflicts that may arise between parent union and its affiliates include the right to union membership, the conduct of union elections, financial management of unions, union discipline, and the protection of rights and enforcement of duties in union constitutions. *See* Hartley, *supra* note 141, at 19.

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activities of the local membership.[157] Before the enactment of the LMRDA, common law remedies proved inadequate to address the misuse of trusteeships by central union organs.[158] For this reason, Title III of Landrum-Griffin Act closely regulates the imposition and administration of trusteeships. Central organs of the union are required to show legitimate justification for the imposition of trusteeships by filing reports explaining the reason for seeking the trusteeship and the manner in which it will be carried out.[159] Also, the law limits conditions for the imposition of trusteeships,[160] closely regulates election of local unions under trusteeships,[161] and restricts fund transfers from local to national unions.[162] In addition, it prescribes the means for locals to challenge the grounds for trusteeships.[163]

Thus, the ILO jurisprudence, as described above, promotes decentralization despite contradictory rhetoric according to which the state should refrain from intervention. Guided by the robust ideal of ED, ILO jurisprudence should more explicitly support decentralization of workers' exercise of free association, allowing the state to ensure greater decentralization in appropriate cases, such as the considerable regulation imposed by the LMRDA in the U.S. and, particularly, the close regulation of trusteeships and other modes of invasive control initiated by central union organs over local worker associations. Indeed, U.S. labor law

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[157] The constitutions of many international unions authorize the international officers to impose trusteeship on local branches. Under trusteeships the international officers have the authority to suspend the leadership of a constituent local union, assume control of its property and conduct its affairs. *See* Hartley, *supra* note 141, at 19.

[158] James R. Beaird, *Union Trusteeship Provisions of the Labor-Management Reporting and Disclosure Act of 1959*, 2 Ga. L. Rev. 469, 485 (1968).

[159] LMRDA, Section 301 (c) requires every labor organization that assumes trusteeship to file a report with the Secretary of Labor, setting forth various details regarding the reasons for the trusteeship and the way it is carried out.

[160] *Id.* Section 302 restricts the purpose of imposing trusteeships to "correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements to other duties of the bargaining representatives restoring democratic procedures or otherwise carrying out the legitimate objectives if such labor organization."

[161] *Id.* Section 303 prohibits the counting of any votes from local union in trusteeship for an election of a national officer unless the delegates from the local branch were elected by secret ballot, in an election in which all local members in good standing were eligible to participate.

[162] *Id.* Section 303 provides that no funds may be transferred from the local to the national union in excess of the normal assessments levied upon other locals that are not in trusteeship. This provision aims to prevent the looting of rich locals.

[163] The U.S. experience with the regulation of trusteeships demonstrates that it is difficult to restore local autonomy after the imposition of trusteeships. Suspended local officers are the ones likely to initiate trusteeship complaints, and remedy must be provided quickly in order for them to maintain their political base in their home locals.

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demonstrates the need for state intervention and its potential to encourage democracy by promoting more decentralized structures for union organizations. Such an approach, however, should be adopted with caution, so as to avoid overly intrusive regulation of free association. The British experience provides a cautionary tale in this matter. Such an approach would therefore greatly benefit from a precise articulation of the compelling vision of democratic practices that legitimizes it.

E. The Right to Regulatory Autonomy: Cooperation with the Employer

The question whether to legally allow worker-employer cooperative schemes is highly debated and revolves around the concern that worker associations (and associational activity in general) will be co-opted due to management's inherent power. This is the rationale of Article 2 of Convention No. 98, enshrining the complete independence of unions from employers. It covers incidents of blatant violation of the principle of protection against the acts of interference by employers, such as "bribes offered to union members to encourage their withdrawal" and "efforts to create puppet unions."[164] In general, the employer is prohibited from performing any act that "might seem to favor one group within a union at the expense of the other," and must exercise restraint as to interference in the internal affairs of the union, similar to the duty of restraint imposed by the state.[165] Negotiations should not, therefore, be concluded (on the employees side) by representatives that are appointed by or under the domination of employers.[166]

Banning collaborative employer-employee schemes is prompted by the fear that they may overtly or subtly manipulate workers' behavior and subjectivity, paternalistically altering workers' descriptive perception of workplace reality or their normative sense of their own preferences and interests, in ways that serve managerial interests. The contested issue is whether power inherently and necessarily operates in such a manner. The answer depends on which model of collective decision making process is adopted. Different conceptions of how workers' interests are formed and how their perception of the workplace is developed may lead to different answers.

One case in which the ILO had to address the meaning of cooperative schemes concerned the phenomenon of solidarist associations. Such associations thrived in Costa Rica generating several investigations by the CFA. Solidarist associations were initiated and usually financed in part by employers. These organizations are comprised of workers, but also of senior staff and personnel,

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[164] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 858 (2006).
[165] *Id.* ¶ 859.
[166] *Id.* ¶ 868.

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who enjoy the employer's confidence. They are financed in accordance with the principles of mutual benefit societies, that is, both workers and employers make contributions to "welfare" activities such as savings, credit, investment, housing, and educational programs.[167] The organizations are typically dependent on employer contributions.

The Committee considered the accusations that solidarist associations competed with trade union organizations. The accusations asserted that solidarist organizations, once formed, used legal structures, such as the direct settlement mechanism, to evade collective bargaining. According to trade union representatives, various academic figures and labor lawyers in Costa Rica asserted that in practice, the direct settlement had been used by employers and by solidarist leaders not as a dispute settling mechanism, as provided in the Labour Code, but as a substitute for a collective agreement and to the detriment of any union presence. The legal protection was wider in the case of solidarist associations and clearly more advantageous for their workers. The Committee found signs of close links between labor relations councils (optional mechanisms for enforcing obligations established by agreement between workers and the employer) and solidarist associations. Frequently, the worker members of labor relations councils were members or even leaders of the corresponding solidarist association.[168] The Committee declared that the weakening of the trade union movement in Costa Rica and the considerable decline in the number of trade union organizations was connected with the development of solidarist associations and found that the practices of solidarist associations were not consistent with the principle of full independence of workers' organizations in carrying out their activities, contained in Article 2 of Convention No. 98.[169]

The Committee concluded that the very act of setting up solidarist associations was dependent on the wishes of the employer, since the employer agreed to finance the association and could insist on the fulfillment of particular conditions, thereby placing the association under the employer's dominance.[170] The Committee noted that nothing in the principles contained in Conventions Nos. 87 and 98 prevented workers and employers from seeking various forms of cooperation, including those of a mutualist nature, to pursue social objectives. However, insofar as such forms of cooperation crystallize into permanent structures and organizations, it is up to

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[167] ILO, Comm. on Freedom of Ass'n, *Report 275: Costa Rica* (Case No. 1483) ¶¶ 316-21, LXXIII, (Ser. B) No. 3 (Dec. 1988).

[168] *See* ILO, Comm. on Freedom of Ass'n, *Report 275: Costa Rica (Case No. 1483)* Annex, Report on the direct contacts mission carried out in Costa Rica, from Apr. 3-10, 1991, ¶ 30 (Annex Report).

[169] Report 275; Case No. 1483, *supra* note 167, ¶ 188.

[170] Annex Report, *supra* note 168, ¶ 27.

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the Committee to ensure that the legislation on, and the functioning of, solidarist associations do not interfere with the activities and roles of trade unions. In this case, state legislative support for solidarist associations amounted to legally disfavoring trade unions. [171]

The Committee stated that the government should take measures necessary to guarantee that solidarist associations abstain from trade union activities and that the government should not treat solidarist associations and trade unions equally.[172] The Committee probed beyond the formal construction of solidarist organizations, which was allegedly a product of voluntary agreement between the employer and workers. It investigated the effects of such "voluntary agreements" and suggested intervention in a realm that was perceived as "private." Equally important was the fact that the Committee took into account the power relations between workers and employers in its insistence on independence from employer domination.

In other cases that involved solidarist associations, the Committee emphasized the fundamental importance of the principle of tripartism, which presupposes organizations of workers and of employers that are independent of each other and of the public authorities.[173] The Committee requested that governments take measures, in consultation with the trade union confederations, to create the necessary conditions for strengthening the independent trade union movement.[174]

The Committee's approach to solidarist bodies is another example of ILO practices that go beyond the principle of non-intervention, gauging the state and the employer's power relative to that of the workers. Again, however, the Committee demonstrated naiveté in its premise that state support for solidarist associations was a form of state favoritism, while state support for unionization was a "neutral" means of sustaining workers' associational activity.

In addition, diverging conceptions of interest formation underlie the debate regarding governance schemes that promote or ban cooperation with the employer. The ban on cooperation is guided by the assumption that employee organizations with any employer involvement are a sham, designed to resist genuine representation. This approach is driven by an understanding of the inherent power imbalances between workers and employers. These were the concerns that

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[171] Report 275: Case No. 1483, *supra* note 167, ¶ 24.

[172] ILO, Comm. on Freedom of Ass'n, *Report 278: Costa Rica (Case No. 1483)* ¶ 191 (c), LXXIV, (Ser. B) No. 2 (Dec. 1988).

[173] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 780 (1996).

[174] *See* ILO, Comm. on Freedom of Ass'n, *Report No. 272: Costa Rica (Case No. 1483)*, ¶ 442, LXXIII, (Ser. B) No. 2 (Dec. 1988) (complaint against the government of Costa Rica presented by the international confederation of free trade unions).

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led U.S. law to enshrine a broad ban on any cooperative schemes under Section 8(a)(2). This prohibition is particularly broad and "has not crossed the Atlantic" to be implemented in the British Industrial Relations Act (1971), otherwise heavily influenced by U.S. law.[175] Today, many voices in the U.S. propose that banning all cooperation with the employer may not be the best strategy to realize values that are concordant with ED.

Several reasons support the call for narrowing the ban imposed in Section 8(a)(2). First, within legal systems such as that of the U.S., where there is a severe decline in union membership, some claim that even a diluted form of employee representation may be better than no employee representation at all.[176] Second, the inclusion of employees in the workplace decision making process may be a tool for enhancing productivity. Thus, many contemporary managers, at least in their public pronouncements, seem to understand that employee cooperation is best secured through real employee involvement rather than through manipulative company union schemes that employers used to engage in over a half century ago.[177] Third, survey findings indicate that workers may have a high level of interest in cooperating with employers. For example, surveys have found that a majority of non-managerial employees prefer an employee organization that is run jointly by employees and management.[178] Fourth, if cooperative schemes become co-opted, modern workers, which are more sophisticated now than in the 1930s, are likely to discover by themselves any cooptation.[179] In addition, history has shown that company unions, albeit co-opted, sometimes had the effect of enhancing workers "appetite" for more independent worker organizations.[180] Employee schemes may "enhance workers'

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[175] *See* Kahn-Freund, *supra* note 54, at 181. Nevertheless, the Act does require that unions are "independent" in order to be registered and thus receive the protection of the Act.

[176] This paragraph draws on Estlund's analysis in Estlund, *supra* note 79, at 1547.

[177] In Britain, for example, Collins states that "most large enterprises establish consultative committees, which serve the dual function of weakening the sense of domination within the organization and at the same time provide avenues by which information may pass up to hierarchy leading to improvements in productivity. Usually these consultative committees pass alongside the system of collective bargaining like ships in the night." *See* Collins, *supra* note 26, at 99.

[178] *See* Estlund, *supra* note 79, at 1550, *referring to* Richard B. Freeman & Joel Rogers, What Workers Want 56-57, 142 (1999). A bare majority (52%) of non-managerial employees also preferred that the committee provide staff and financial support. At the same time, there was widespread—though less overwhelming—support for a degree of independence in the form of elected employee representatives (preferred by 59%), resolution of disputes by outside arbitrators (59%), and some entitlement to confidential information (47%).

[179] Estlund, *supra* note 79, at 1550.

[180] Barenberg, *supra* note 21, at 831-35 (exploring how employer dominated unions in the 1930s had the unintended effect of enhancing workers' desire for greater power, and their ability to form more independent organizations).

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subjective trust in management, unleash their intrinsic motivation to work creatively and collaboratively, or spur them to seek greater workplace participation." In any event, such schemes do not distort employees' choice of workplace governance any more than do other employer-established benefits.[181] These arguments are met by counterarguments, grounded largely in fear of cooptation of workers' associational impulses and activities.[182]

From the perspective of ED, the question is whether particular legal mechanisms could level the playing field and allow genuine free choice and collective action by workers, even in contexts otherwise marked by power disparities. Barenberg offers the most compelling answer. He proposes that labor law distinguish between coercive and manipulative schemes, on the one hand, and schemes that are not flawed in such a manner, on the other. Only the former would be banned. His analysis of concrete practices yields a set of objective indicators to make this distinction. Thus, a list of indicator could be devised to discern coercive and legitimate Autonomous Teams[183] or various forms of joint representative committees (such as the German Work Councils).[184] Such indicators include, for example, the requirement that management must not unmilitary choose team leaders or employee representatives in the joint committees; teams, or employee representatives must have the right for time allocated to internal meetings that are conducted without the presence of management. Similarly, employees should have the opportunity to effectively monitor their leaders and representatives. For example, individual team members, or employees, should be entitled to full access to the minutes of team-leaders meeting or to observe the consultations of their representatives, respectfully. The ILO could similarly develop principles

[181] *Id*. at 762.

[182] Opponents of abolishing the prohibition assert that employee committees or any other structure that includes the employer may give the appearance of power sharing, while in fact they are controlled by the employer. In addition, unions claim that such schemes are dangerous, as they might simply deal management additional trump cards in the fight to remain non-unionized and accelerate the decline of genuine independent employee representation, see Estlund, *supra* note 79, at 1551. As management possesses asymmetric power and ample opportunities to apply it, employee schemes overtly coerce or subtly manipulate workers' behavior and subjectivity, paternalistically altering workers' descriptive perception of workplace reality or their normative sense of their own preferences and interests in ways that serve managerial interests, *see* Barenberg, *supra* note 21, at 762. Hence, they undermine the goal of protecting genuine freedom of association, that is, of allowing employees to freely choose their mode of governance.

[183] I refer here to various forms of group work process, that go beyond (in terms of autonomy to workers) the famous Toyota Model of lean production.

[184] The following indicators are based on Barenberg's discussion, *see* Barenberg, *supra* note 21, at 969-79.

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and structural indicators that would guide the process of distinguishing between coercive and non-coercive cooperative schemes. One such overarching principle, for example, is the requirement that such schemes may not be unilaterally imposed by the employer but must instead be freely established by workers in a process that satisfies the general norms of equitable deliberation.[185] This principle would be fleshed out through central and local deliberation. The ILO should continue experimenting with cooperative schemes as long as they satisfy these evolving principles and indicators. Based on its recent activities, it seems that the ILO is heading in this direction. It implicitly recognized that welfare associations could be legitimized if they succeeded to "present guarantees of independence in their composition and functioning."[186] Further elaboration of such guarantees could be the starting-point for the fine-tuning of a broader approach to cooperative schemes.

III. Equitable Dialogue and the ILO—Evaluation and Summary

This Article presents a normative framework for conceptualizing the norm of freedom of association. It offers ED as a regulatory ideal that should guide the ILO's substantive understanding of the norm. I argue that the ILO could (and should) gradually revise its jurisprudence, in accordance with this framework, through a careful analysis of particular doctrines of freedom of association. I also establish the claim that such a transformation is rooted in current ILO jurisprudence, albeit in a latent manner at the moment.

Ideally, the concrete path of realizing ED in the ILO jurisprudence should take place through an ongoing dialogue between the central and local levels of the ILO itself. The concept of ED does not depict the future evolution of these doctrines, since such developments will be the product of participants' deliberations and are therefore not pre-determined or fixed. Indeed, the practice of ED should induce constant development and reexamination of contingent substantive norms.[187] Thus, the ED framework entails a dialogic process among participants, which generates new information and new understandings of the contextual application of norms, and through which contingent substantive norms evolve.

Nonetheless, the analysis of the doctrines presented here *illustrates* some of the *likely* starting points and directions that could be pursued in such doctrinal deliberation. ED privileges democratic procedural norms; therefore, some form of periodic internal elections should be required to legitimate workers' and employers'

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[185] *Id.* at 948.
[186] ILO, Comm. on Freedom of Ass'n, *Digest of Decisions*, ¶ 878 (2006).
[187] For the full argument, *see* Milman-Sivan, *supra* note 11.

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organizations. In addition, such organizations must adhere to the broad principle of inclusiveness, thus precluding the exclusion of certain classes from their overall workforce, whether based on minority or majority groups, gender, race, religion, etc. The ILO already implicitly requires some degree of inclusiveness.[188] Furthermore, workers must be free to organize in some meaningful sense, even if domestic labor law adheres to a baseline that is closer to a thin specification of the doctrines examined above. The doctrine regarding the right of worker-organizers to access company property might be regularly applied to all cases, regardless of whether the workers reside on the employer's property, as in the *Food Lion* case. Along the lines of the British example, the ILO could mandate that states maintain an active role in ensuring the internal democracy of unions, by empowering them to impose secret ballot elections and to guarantee workers' opportunities to hold active deliberations prior to the vote, on company premises and during paid work time. As for doctrines regarding labor-management cooperation, the ILO might develop a set of objective, concrete standards to distinguish between coerced and non-coerced forms of worker-employer associations. This is an area that would be particularly suited to deliberative experimentation, combined with close monitoring and evaluation. ILO deliberations also might address more explicitly and fully the issues of decentralization of authority in the central-local relations within unions. Similarly, the question of plural versus exclusive representation would benefit from doctrinal experimentation, deliberation, and consideration of the various possibilities within each approach. This Article concludes with the suggestion that a concentrated understanding of freedom of association realigns this norm with deep appealing democratic principles and should be further developed by the ILO.

On a more substantial level, a full commitment to the ED as a touchstone for the ILO's institutional design has the potential to transform the ILO's entire normative structure. Indeed, to the extent that the ILO further develops the interconnections between the procedural and substantive aspects of freedom of association in accordance with ED, its current understanding of the very nature of international norms may undergo transformation. ED paves the way toward understanding norms as contingent rather then fixed, forever evolving rather that stable. Taking the idea of deliberation seriously points towards an institutional design where norms are constantly evolving, arising from a continuous dialogic relationship between central and local organs of the ILO. Such a vision suggests that the close analysis and critique presented here are anything but a singular endeavor. Rather, continuing

[188] This is apparent, for example, in the Myanmar case, where the Credentials Committee of the ILO, invalidated the Credentials of the Workers' representatives of Myanmar. On the connection between this and representativity *see id*.

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learning and critique, in the spirit of experimentation,[189] guided by the already existing articulation of core rights, performed by a broad range of local and central participants, would become the basis for the articulation of the entire range of ever-evolving ILO norms. The ILO need not remain the paradigm of traditional, "state centered" approach to international labor law.[190] It already incorporates, through the notion of ED, the seeds of a more "decentralized-deliberative" framework.[191] I leave the full articulation of such a vision for another time.

[189] Perhaps in the spirit of experimentalism, *see, e.g.*, Dorf & Sabel, *supra* note 30, at 275-76. This article was one of the major contributions in what was later termed New Governance Theories—a general term to describe a range of emerging theories that attempt to envision new approaches to regulation in diverse contexts, emphasizing dialogue, cooperation and participation. *See, e.g.,* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought,* 89 Minn. L. Rev. 342, 347 (2004).

[190] I utilize here Fung's terminology, currently identifying the ILO with old, ineffective modes of governance. *See* Archon Fung, *Deliberative Democracy and International Labor Standards*, 16 Gov. Int'l J. Pol'y Admin. & Inst. 51, 53 (2003) (describing two competing models of international deliberation. According to Fung, the ILO currently endorses the traditional model of harmonizing labor standards, while an alternative model would encourage open discussions between corporations, firms, unions, civil society organizations and consumers, in which standards are continuously contested and revised).

[191] *Id.*

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