Fordham Law Review

Volume 29 | Issue 2 Article 2

1960

Federal Protection of Employee Rights Within Trade Unions

Richard A. Givens

Federal Protection of Employee Rights Within Trade Unions

Cover Page Footnote
Member of the New York Bar

FEDERAL PROTECTION OF EMPLOYEE RIGHTS WITHIN TRADE UNIONS

*RICHARD A. GIVENS**

The "Bill of Rights" provisions of the Labor-Management Reporting and Disclosure Act of 1959 are designed to guarantee and protect employee representation in industrial government. The author, pointing to the method of Mr. Chief Justice Stone in Steele v. Louisville & N.R.R., suggests that the act's purposes may be advanced by an interpretation guided by the constitutional precedents applicable to public government.

Events of the last few years, including the adoption of ethical practices codes by the AFL-CIO, the expulsion of the Teamsters, the revelations during congressional hearings of improper practices by unions and employers, and finally the enactment of the Landrum-Griffin Act,[1] illustrate a ferment in the framework of employee representation in "industrial government."[2]

This ferment reflects the national concern with the persistent problem of reconciling individual rights and the public interest with the vast powers concentrated in government, business enterprises, trade unions, and other centers of decision-making in industrial society. One way of attempting to deal with the ferment caused by concentrated power and the criticisms it raises has been to concentrate all power in a monolithic State and to seek to suppress all criticism, as under Communist and Fascist dictatorships. A second theoretically possible approach, now foreclosed by the competition of the dictatorships, would be to atomize the major centers of concentrated power.[3] A third course is to evolve standards for the exercise of power and to provide representation in the making of decisions to those affected by them, while still preserving the vital functions performed by the institutions exercising the concentrated power. It is this course to which the American nation has been committed.

The underlying problem of concentrated power affects the question of the obligations of trade unions toward the employees they represent. The ultimate course of the evolution in this field will be decided by employees, union leaders, employers and the public. But the courts, by enforcing minimum legal standards of conduct and by illustrating

* Member of the New York Bar.

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

2. See Commons, Legal Foundations of Capitalism 305-12 (1924); cf. Commons et al., Industrial Government (1921).

3. See Brandeis, J., dissenting in Louis K. Liggett Co. v. Lee, 288 U.S. 517, 541-80 (1933); Comment, 66 Yale L.J. 69 (1956).

in concrete cases what is fair and just, may profoundly influence the judgments of these groups as to what should be done.[4] This article will seek to explore some of the legal standards which may assist or hinder this evolution.

The bill of rights included in the 1959 labor statute is of immense importance as a national decision that "the rights and interests of employees"[5] be given greater protection. In its recognition that the power to bargain collectively must carry with it the legal obligation to respect the interests of the employees for whom the unions bargain, however, the statute was anticipated by fifteen years by the historic decision of Mr. Chief Justice Stone in *Steele v. Louisville & N.R.R.*[6] The statute, therefore, cannot be viewed in isolation. It does not purport to be exclusive,[7] and prior decisions and their implications must be utilized to throw light upon its ambiguities.

Our inquiry, therefore, shall begin with the historic problems which brought the *Steele* case before the Court, and with Chief Justice Stone's resolution of those problems.

I. The Steele Case and Its Implications

A. *The Challenge of the Facts in Their Historic Setting*

Modern trade unionism is in part the outcome of the increasing size of economic units, vesting in an employer employing many workmen a far greater bargaining power than possessed by the individual employee,[8] and of the extension of markets, which tended to make the working conditions in one plant dependent on conditions in other plants. Employees became convinced that wages, hours and working conditions could be improved if the balance of bargaining power could be equalized.[9] Further, the individual employee felt no protection against arbitrary action by his supervisors. Through collective bargaining and representation in presenting grievances, trade unions sought to protect the em-

4. See Jones, Book Review, 58 Colum. L. Rev. 755, 758 (1958).

5. Labor-Management Reporting and Disclosure Act of 1959 § 2, 73 Stat. 519, 29 U.S.C. § 401(b) (Supp. I, 1959).

6. 323 U.S. 192 (1944).

7. Labor-Management Reporting and Disclosure Act of 1959 §§ 103, 603, 73 Stat. 523, 540, 29 U.S.C. §§ 413, 523 (Supp. I, 1959).

8. See National Labor Relations Act § 1, 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958).

9. The result might also differ from that which would occur if neither employer nor employee had substantial bargaining power, as is assumed in models of an economic system based upon the presupposition of pure competition, where no buyer or seller of goods or services can influence the effective market price. A detailed analysis of the effect of collective bargaining upon wages and employment is, however, beyond the scope of the present article.

ployee's right to his job[10] and to give him a voice in his "industrial government."

As enterprises grew in size and expanding transportation and communication facilities extended markets,[11] trade unions were forced to make decisions affecting larger and larger numbers of workers in order to bargain effectively,[12] since, if one plant paid lower wages than a competing plant, the higher paying plant, unless more efficient, would be under pressure to cut the union scale or lose business. But the increasing size of the decision-making units made the individual employee's participation in those decisions more difficult. Accordingly, the risk increased that the concentrated power of the union might be used less responsively to his needs, or that he would never secure a real voice in his "industrial government."[13] Indeed, the concentrated power of the union might even be used against him, as where "sweetheart contracts" are entered into by corrupt leaders, or payoffs extorted for the benefit of the leader.

In many ways the legal responses to trade unions have paralleled those to business corporations. At first corporate power was feared and its growth restricted,[14] but gradual recognition of the usefulness of the corporate form led to encouragement of the growth of the large enterprises existing today. However, experience showed that these large organizations acquired tremendous bargaining power as compared with that of their employees, their customers and others; that they often became independent of the control of their original sponsors, the stockholders;[15] and that, in some cases, those in control engaged in self-dealing for their own benefit.[16] Accordingly, legal standards were developed to insure fairness in the exercise of corporate power.[17] Trade unions themselves

10. Compare Perlman, A Theory of the Labor Movement (1928).

11. See Commons, American Shoemakers, 1648-1895, in Labor and Administration 219 (1913), and see also Thorp, Economic Institutions 93-96 (1928). Judicial recognition of the extension of markets as reflected in a tremendous increase in the importance of interstate commerce is manifested in United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949); Wickard v. Filburn, 317 U.S. 111 (1942); and United States v. Darby, 312 U.S. 100 (1941). Compare Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E. C. Knight Co., 156 U.S. 1 (1895).

12. Compare Dulles, Labor in America 95-100 (1949); Lipset, Trow & Coleman, Union Democracy 19 (1956); Rose, The Relationship of the Local Union to the International Organization, 4 Labor L.J. 334 (1953).

13. See Leiserson, American Trade Union Democracy 54 (1959).

14. See Louis K. Liggett Co. v. Lee, 288 U.S. 517, 548-64 (1933) (Brandeis, J., dissenting).

15. See Berle & Means, The Modern Corporation and Private Property (1932).

16. See the protest of Stone, J., dissenting in Rogers v. Guaranty Trust Co., 288 U.S. 123, 133-50 (1933).

17. E.g., labor legislation, the antitrust laws, securities regulation, and specific statutes

were an important response to this problem, along with the later imposition upon corporations of the legal duty to bargain collectively. Another response was the promotion of free and active competition through the antitrust laws.

Similarly, trade unions were originally condemned as illegal conspiracies.[18] But we have learned that unions frequently are vital for the protection of employees' welfare, counterbalancing the power of employers whose bargaining position would otherwise overshadow that of the individual employee.[19] Accordingly, the right to organize[20] and bargain collectively, and in many cases to engage in strikes and picketing,[21] has been given protection by federal law. In order to make collective bargaining effective, both the Railway Labor Act[22] and the National Labor Relations Act grant to a union representing a majority of the employees in an appropriate unit the exclusive authority to bargain collectively on behalf of all employees within the unit[23] and place a duty on the employer to deal with that bargaining agent. The Supreme Court has further strengthened this concept by holding that collective bargaining agreements supersede individual employment contracts to the extent of any inconsistency.[24] But, as with all power in

affecting particular industries, as well as the development of common law doctrines such as manufacturers' liability.

18. E.g., Philadelphia Cordwainers' Case, Commonwealth v. Pullis (1806), as reported in 3 Commons & Gilmore, Documentary History of American Industrial Society 59-236 (1910-1911).

19. See National Labor Relations Act § 1, 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958); cf. Galbraith, American Capitalism (2d ed. 1956) (discussing the concept of "countervailing power").

20. See National Labor Relations Act § 7, 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958); Staub v. City of Baxley, 355 U.S. 313 (1958); Hill v. Florida, 325 U.S. 538 (1945); Thomas v. Collins, 323 U.S. 516 (1945).

21. See Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951). See also Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-10, 113-15 (1958); cf. United States v. Hutcheson, 312 U.S. 219 (1941).

22. 48 Stat. 1185 (1934), 45 U.S.C. §§ 151-88 (1958). The provisions of the NLRA are clearer, but those of the RLA have been held to achieve the same result. Virginian Ry. v. System Fed'n, 300 U.S. 515, 548 (1937); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944).

23. Section 9(a) of the NLRA provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." 49 Stat. 453 (1935), as amended, 61 Stat. 143 (1947), 29 U.S.C. § 159 (1958). See also Weyand, Majority Rule in Collective Bargaining, 45 Colum. L. Rev. 556 (1945). A proviso in § 9(a) deals with the right of an individual employee to present a grievance directly to his employer.

24. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944) (under the NLRA); Order of R.R.

the hands of any group,[25] the concentrated authority of unions could not prove immune to abuse. The gradual process of seeking to formulate fair standards for the exercise of this power, as in the case of business corporations, has been made more difficult, on one side, by attempts to impose punitive rather than corrective restrictions, and, on the other, by the blanket resistance to all corrective measures which such attempts always excite.[26]

It was in this context that the facts of the *Steele* case arose.[27] Since the Brotherhood of Locomotive Firemen and Enginemen was selected by a majority of the employees in its crafts as exclusive bargaining agent, the railroads were required by the Railway Labor Act to bargain with it exclusively as to the condition of employment of all members of the crafts. The Brotherhood, refusing to admit Negro employees to membership, negotiated an agreement which, while it did not refer to Negroes specifically, would effectively oust them from their jobs.[28] Thus, far from representing these employees so as to assure that the economic power of the employer was exercised with fairness toward them, the bargaining agent refused them an opportunity to take part in its decisions and even acted adversely to their interests. Steele, a Negro employee of the Louisville and Nashville Railroad, sought to enjoin the performance of the agreement in the Alabama state courts, which held that the Railway Labor Act, while making the Brotherhood exclusive bargaining agent, did not impose any duties upon it which would preclude it from making the challenged agreement.[29]

The case presented a difficult legal problem, for, as Mr. Justice Murphy pointed out in his concurring opinion, "The Act contains no

---

Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) (RLA). See also Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84 (1944) (NLRA); Virginian Ry. v. System Fed'n, 300 U.S. 515, 548 (1937) (RLA).

25. Compare Hamilton, Legal Tolerance of Economic Power, 46 Geo. L.J. 561 (1958); cf. Johnson, American Heroes and Hero Worship 20 (1941); Jaffe, The Right to Judicial Review I, 71 Harv. L. Rev. 401, 404 (1958).

26. Cf. Summers, Union Powers and Workers' Rights, 49 Mich. L. Rev. 805, 813 (1951).

27. See the Court's statement of facts, 323 U.S. at 194-97. For an interesting discussion of the factual background of the Steele case and related litigation, see Comment, Judicial Regulation of the Railway Brotherhoods' Discriminatory Practices, 1953 Wis. L. Rev. 516, 518-20. See generally Bromwich, Union Constitutions 6-7 (1959); Northrup, Organized Labor and the Negro (1944); Jacobs, The Negro Worker and His Rights, The Reporter, July 23, 1959, p. 16; Summers, Admission Policies of Labor Unions, 61 Q.J. Econ. 66 (1946).

28. "By established practice on the several railroads . . . only white firemen can be promoted to serve as engineers, and the notice proposed that only 'promotable,' i.e. white, men should be employed as firemen or assigned to new runs or jobs or permanent vacancies in established runs or jobs." 323 U.S. at 195.

29. 245 Ala. 113, 16 So. 2d 416 (1944).

language which directs the manner in which the bargaining representative shall perform its duties."[30] It might have been easy to write a decision saying that we take the statute as we find it, and since the Railway Act contains no provisions which in terms impose on the bargaining representative duties to Steele and those in his position, it was not for the courts to impose them.[31] Whether the Brotherhood should be permitted to act as it did could have been characterized as a question of policy-making which was not the function of the Court to resolve.

This, then, was the challenge which faced Chief Justice Stone when Steele, the Louisville and Nashville Railroad and the Brotherhood argued their rival claims before the Court in November 1944.

B. *Chief Justice Stone's Decision*

Although Steele asserted that the discrimination against him was unconstitutional, earlier decisions had firmly held that the limitations of the Bill of Rights and of the due process and equal protection clauses of the fourteenth amendment applied only to governmental and not to private action.[32] However, an emerging line of decisions had already established, by 1944, that a private group exercising a public function must be held to the constitutional standards applicable to state action.[33] In other words, the state could not accomplish indirectly, through delegating its authority to a private group, what would be forbidden if done directly. Since the Brotherhood exercised important powers over those it represented by virtue of the act, Chief Justice Stone was able to write in strict accord with precedent:

> If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise.[34]

30. 323 U.S. at 208.

31. But see 1 Teller, Labor Disputes and Collective Bargaining § 77(5), at 217-21 (1940).

32. Corrigan v. Buckley, 271 U.S. 323 (1926); Civil Rights Cases, 109 U.S. 3 (1883). See Collins v. Hardyman, 341 U.S. 651 (1951). But see Harlan, J., dissenting in the Civil Rights Cases, supra, at 26, 57-59; Flack, The Adoption of the Fourteenth Amendment 262-63 (1908); Hale, Force and the State, 35 Colum. L. Rev. 149 (1935).

33. Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932) (Cardozo, J.). For subsequent developments see Terry v. Adams, 345 U.S. 461 (1953); Public Util. Comm'n v. Pollak, 343 U.S. 451, 462 (1952); Tucker v. Texas, 326 U.S. 517 (1946); Marsh v. Alabama, 326 U.S. 501 (1946); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945); Brown v. Baskin, 78 F. Supp. 933 (E.D.S.C. 1948), aff'd, 174 F.2d 391 (4th Cir. 1949); cf. Miller, Racial Discrimination and Private Education: A Legal Analysis 82-92 (1957); Berle, Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power, 100 U. Pa. L. Rev. 933, 948-49 (1952); Note, 61 Harv. L. Rev. 344, 352 (1948).

34. 323 U.S. at 198.

Chief Justice Stone earlier had called for greater recognition of "statutes as starting points for judicial law-making comparable to judicial decisions," to be treated as "both a declaration and a source of law, and as a premise for legal reasoning."[35] When forced now to search for a constitutional interpretation[36] of the Railway Labor Act, he began with the statute itself. By its creation of a bargaining representative, he found that, by implication, the statute also imposed a duty of fairness upon that representative:

> The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it.[37]

---

35. Stone, The Common Law in The United States, 50 Harv. L. Rev. 4, 12-13 (1936); see also id. at 14-18. Cf. Commissioner v. LoBue, 351 U.S. 243, 249 (1956); United States v. Hutcheson, 312 U.S. 219, 234-35 (1941); Electrolux Corp. v. Val-Worth, Inc., 6 N.Y.2d 556, 569, 161 N.E.2d 197, 204, 190 N.Y.S.2d 977, 987 (1959); Schuster v. City of New York, 5 N.Y.2d 75, 85-86, 154 N.E.2d 534, 540, 180 N.Y.S.2d 265, 273-74 (1958); Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213 (1934); Pound, The Formative Era in American Law 38-80 (1938); Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653, 654 (1957); Loyd, The Equity of a Statute, 58 U. Pa. L. Rev. 76 (1909); Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 388 (1908); Comment, 59 Colum. L. Rev. 487, 494 (1959).

By 1944, Chief Justice Stone had put his own recommendation into practice in several significant decisions. In sustaining a state agricultural marketing program under the commerce clause, he drew upon the judgments inherent in farm legislation even though that legislation had no direct application by its terms. Parker v. Brown, 317 U.S. 341, 367 (1943); see also Southern Pac. Co. v. Arizona, 325 U.S. 761, 773 (1945). In several landmark cases arising under the patent laws, he applied policies derived from the antitrust laws in finding that the powers granted by the patent laws implied corresponding responsibilities not to use this power against the public interest by employing it to secure a monopoly beyond that granted by the patent. Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942).

36. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Brandeis, J., concurring in Ashwander v. TVA, 297 U.S. 288, 348 (1936), quoting Crowell v. Benson, 285 U.S. 22, 62 (1932). See also Ex parte Endo, 323 U.S. 283, 297-300 (1944) (decided on the same day as the Steele case). For subsequent cases see, e.g., Greene v. McElroy, 360 U.S. 474, 507 (1959); Kent v. Dulles, 357 U.S. 116, 129 (1958). Compare Jaffe, The Right to Judicial Review I, 71 Harv. L. Rev. 401, 402 & n.2 (1958).

Mr. Justice Murphy, concurring in Steele, relied exclusively on the constitutional ground and on an interpretation of the statute that would avoid invalidity, rather than on inferences drawn from the statute independent of constitutional questions. 323 U.S. at 208-09.

37. 323 U.S. at 201. Compare James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1945); American Civil Liberties Union, Democracy in Trade Unions 3 (1959); cf. 3 Wash. & Lee L. Rev. 234 (1951).

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the *duty, which is inseparable from the power* of representation conferred upon it, to represent the entire membership of the craft.[38]

In determining the precise nature and extent of the obligations to be imposed, Chief Justice Stone looked to the past treatment of analogous situations. An analogy to the voluntarily appointed agent supported the general conclusion that a duty should be imposed.[39] But it proved of only limited value, since the powers of the bargaining agent were exercised by virtue of the agent's selection by a majority, not by the individual employee, and its authority could be revoked only through statutory procedures.[40]

The second analogy was stated thusly:

[T]he representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.[41]

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.[42]

Under the equal protection principle,[43] relevant differentiations are permissible, but not those plainly irrelevant. Applying this concept to the obligations of the bargaining agent, Chief Justice Stone would allow distinctions based on such factors as seniority or skill, while "discriminations based on race alone are obviously irrelevant and invidious."[44]

The Railroad and the Brotherhood argued that Steele should not be allowed to resort to the courts until he had exhausted the procedures of the Railroad Adjustment Board, made up of representatives of the

38. 323 U.S. at 204. (Emphasis added.)

39. "It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed." 323 U.S. at 202.

40. See Brooks v. NLRB, 348 U.S. 96 (1954); Jones, Self-Determination vs. Stability of Labor Relations, 58 Mich. L. Rev. 313 (1960); Comment, 66 Yale L.J. 223 (1956).

41. 323 U.S. at 198.

42. Id. at 202.

43. Chief Justice Stone here anticipated the holding of the District of Columbia segregation decision, Bolling v. Sharpe, 347 U.S. 497 (1954), in implicitly applying the constitutional requirement of equal protection to the federal government under the general requirement of due process even in the absence of a specific equal protection clause in the fifth amendment.

44. 323 U.S. at 203.

carriers and of the railway labor organizations. Chief Justice Stone pointed out that this would require the Negro firemen to appear before a group which was in large part chosen by those against whom their real complaint was made.[45] Therefore, he rejected any such requirement,[46] holding that the Adjustment Board's procedures applied to disputes which were primarily between employees and carriers, not those primarily between employees and their representatives.

As a result of the holding that the Adjustment Board did not have exclusive jurisdiction, the normal rule that state courts may enforce federal rights[47] applied, and the Supreme Court remanded the case to the state court for further proceedings.[48] Injunctive relief against both the Railroad and the Brotherhood was held proper:

> The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making.[49]

---

45. Id. at 206.

46. Chief Justice Stone cited Tumey v. Ohio, 273 U.S. 510 (1927), in which Chief Justice Taft, relying upon a tradition extending back to Dr. Bonham's Case, 8 Co. Rep. 113b, 77 Eng. Rep. 646 (K.B. 1610), held invalid a procedure whereby a criminal defendant could be tried before a mayor although the city for which he had executive responsibility received part of the proceeds of any fines levied on conviction. The Court held that to require a person's rights to be determined by a tribunal having a direct interest in the outcome violated the due process clause of the fourteenth amendment. See also In re Murchison, 349 U.S. 133, 136 (1955); Forer, Psychiatric Evidence in the Recusation of Judges, 73 Harv. L. Rev. 1325 (1960); Note, 60 Colum. L. Rev. 349 (1960). This principle is applicable in civil as well as criminal cases. See Hansberry v. Lee, 311 U.S. 32, 45 (1940); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73 (1936) (Brandeis, J., concurring); Brady v. TWA, 167 F. Supp. 469, 472 (D. Del. 1958); Johnson v. Milk Marketing Bd., 295 Mich. 644, 295 N.W. 346 (1940); Frome United Breweries Co. v. Bath Justices, [1926] A.C. 586, 590. It was applied to "private government" in ATC Agency Resolution Investigation, CCH Av. L. Rep. ¶ 22282, at 14533-35 (CAB June 10, 1959).

47. See The Federalist No. 82, at 422 (Beloff ed. 1948) (Hamilton); Claflin v. Houseman, 93 U.S. 130, 136 (1876). In fact, state courts not only may enforce federal rights where federal jurisdiction is not exclusive, but cannot discriminate against federal rights and, accordingly, are required to enforce them to the same extent as state-created rights of a similar nature. See Testa v. Katt, 330 U.S. 386 (1947); Ward v. Board of County Comm'rs, 253 U.S. 17 (1920).

48. In a companion case brought in a federal court, federal jurisdiction of the claim was upheld under a provision conferring federal jurisdiction in cases arising under laws regulating commerce. Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944), citing the predecessor of 28 U.S.C. § 1337 (1958). See Mulford v. Smith, 307 U.S. 38, 46 (1939); cf. Leedom v. Kyne, 358 U.S. 184 (1958).

49. 323 U.S. at 203-04. The propriety of injunctive relief in such cases under the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-10, 113-15 (1958), has been upheld where statutory duties were to be enforced in Textile Workers v. Lincoln Mills,

C. *The Historic Significance of the Steele Decision*

1. The Scope of the Holding

Within the confines of the specific facts of the case, *Steele* held that a collective bargaining agent under the Railway Labor Act could be enjoined from applying an agreement which discriminated on the basis of race against nonmembers who belonged to the craft. However, the chain of reasoning by which this result was reached turned upon concepts of far wider applicability.[50] Since each of these steps was important to the decision, they must be regarded as parts of the holding:

(1) By acknowledging that a substantial constitutional question would arise under any other construction of the statute, *Steele* indicated, although it did not expressly decide, that governmental action could be found in the exercise of powers delegated by law to private groups, thereby requiring that constitutional safeguards be respected in their exercise.

(2) As a rule of statutory interpretation apart from constitutional considerations, *Steele* established that where powers are granted by law, corresponding responsibilities of fairness may be enforced even though not explicitly spelled out in the statute granting the power.

(3) In the specific field of the duties of bargaining representatives, *Steele,* through its analogy between unions and the public government, established the constitutional limitations applicable to the latter as a yardstick by which the obligations of a union to those it represents may be measured.

That *Steele* arose under the Railway Labor Act was not controlling; decisions dealing with exclusive bargaining authority under both the RLA and the NLRA were cited in the opinion as being to the same effect,[51] and legislative history of the NLRA was cited in a footnote to show that the NLRA was derived from the RLA.[52] The same quasi-legislative powers are granted under both the NLRA and the RLA. Subsequent decisions have confirmed that the principles laid down in *Steele* are as applicable under the NLRA as under the RLA.[53]

353 U.S. 448 (1957); Brotherhood of R.R. Trainmen v. Chicago River & Ill. R.R., 353 U.S. 30 (1957). See Note, 72 Harv. L. Rev. 354 (1958).

50. "Here as elsewhere a position cannot be divorced from its supporting reasons; the reasons are, indeed, a part and most important part of the position." Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 5 (1959).

51. 323 U.S. at 200, citing Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) (RLA); J. I. Case Co. v. NLRB, 321 U.S. 332 (1944) (NLRA); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) (NLRA).

52. 323 U.S. at 202 n.3, citing H.R. Rep. No. 1147, 74th Cong., 1st Sess. (1935), and S. Rep. No. 573, 74th Cong., 1st Sess. (1935).

53. The leading case is Syres v. Oil Workers, 350 U.S. 892 (1955), which arose under

Although the discrimination in *Steele* was effectuated by means of a discriminatory contract, the broad nature of the duty of fairness imposed indicated that it would apply to all aspects of the bargaining process. In 1957 the Supreme Court held that the duties imposed in *Steele* extended to the handling of grievances as well as the negotiation of agreements.[54]

Although it was important that the unfair treatment in *Steele* consisted of discrimination based on race because racial distinction among employees was obviously "irrelevant and invidious," the opinion indicated that other unfair treatment would also be prohibited if it could be clearly identified as such, and this conclusion is borne out by later cases.[55]

---

the NLRA and held Steele applicable in a unanimous per curiam order citing, without further explanation, Steele and two RLA cases following it. Such per curiam decisions have the same technical precedent value as full opinions. See Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 460 (1959), and the concurring opinion therein, id. at 467-68; Berkshire Fine Spinning Associates v. City of New York, 5 N.Y.2d 347, 356-57, 157 N.E.2d 614, 619, 184 N.Y.S.2d 623, 630 (1959); Address by Mr. Justice Harlan, 13 Record of N.Y.C.B.A. 541, 546 (1958). In Syres, supra, the judgment below, which was reversed by the Supreme Court, had been based in part on an attempted distinction between the RLA and NLRA. See 223 F.2d 739 (5th Cir.), rev'd per curiam, 350 U.S. 892 (1955). The reasoning of the Supreme Court is probably reflected in the dissenting opinion of Judge Rives in the court of appeals, which demonstrates the inapplicability of any NLRA-RLA distinction to the Steele principle. 223 F.2d at 745. Additional support for the Syres holding is furnished by Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953) (clear dictum referring to RLA and NLRA as comparable); Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944); Radio Officers' Union v. NLRB, 347 U.S. 17, 47-48 (1954) (utilizing the Steele principle under the NLRA as a premise for its reasoning). See Comment, 59 Colum. L. Rev. 190, 199 (1959). Numerous lower court decisions following Syres have assumed the applicability of Steele under the NLRA but denied relief on other grounds, such as that the union conduct under review was not unreasonable, as was the case in Ford Motor Co. v. Huffman. See, e.g., Ostrofsky v. United Steelworkers, 171 F. Supp. 782, 793 (D. Md. 1959). Relief was granted by the state court in Crowell v. Palmer, 134 Conn. 502, 58 A.2d 729 (1948).

54. Conley v. Gibson, 355 U.S. 41 (1957). See also Dillard v. Chesapeake & O. Ry., 199 F.2d 948, 951 (4th Cir. 1952); Hughes Tool Co. v. NLRB, 147 F.2d 69, 74 (5th Cir. 1945); Hargrove v. Brotherhood of Locomotive Eng'rs, 116 F. Supp. 3 (D.D.C. 1953); Griffin v. Gulf & S.I.R.R., 198 Miss. 458, 21 So. 2d 814 (1945); Note, 36 N.C.L. Rev. 529 (1958).

55. The chief Supreme Court authority for the proposition that Steele is not confined to racial discrimination is a dictum in Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). Recent lower court decisions clearly support this position. E.g., Cunningham v. Erie R.R., 266 F.2d 411, 415 (2d Cir. 1959); Mount v. Grand Int'l Bhd. of Locomotive Eng'rs, 226 F.2d 604 (6th Cir. 1955), cert. denied, 350 U.S. 967 (1956); Cherico v. Brotherhood of R.R. Trainmen, 167 F. Supp. 635, 637 (S.D.N.Y. 1958); Crowell v. Palmer, 134 Conn. 502, 58 A.2d 729 (1948). To the same effect are the implications of Radio Officers' Union v. NLRB, 347 U.S. 17, 47-48 (1954), and Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944). The views of commentators are in accord. See Cox, The

Chief Justice Stone noted: "Since petitioner and the other Negro members of the craft are not members of the Brotherhood or eligible for membership, the authority to act for them is derived not from their action or consent but wholly from the command of the Act."[56] Did this mean that the obligations of the bargaining representative imposed by *Steele* were applicable only to those who were actively denied membership in the union? Chief Justice Stone called it a "duty to exercise fairly the power conferred upon it in behalf of *all* those for whom it acts, without hostile discrimination against them."[57] This language indicated that the duty of fairness runs to members and nonmembers alike. It is now clear that this interpretation is correct.[58] This is reasonable because it is the irrevocable and compulsory agency analogous to governmental power which is created by the statute, not any voluntary agency created by union membership,[59] upon which is based the duty imposed in *Steele*.

Duty of Fair Representation, 2 Vill. L. Rev. 151, 159-60 (1957). The same result is also reached if decisions under the equal protection clause are brought to bear by analogy. See Morey v. Doud, 354 U.S. 457 (1957); Griffin v. Illinois, 351 U.S. 12 (1956). The former view that the equal protection clause applied only to racial discrimination, expressed in the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 81 (1873), is no longer followed.

56. 323 U.S. at 199.

57. Id. at 203. (Emphasis added.)

58. The leading decision is Syres v. Oil Workers, 350 U.S. 892 (1955), discussed in note 53 supra, in which the plaintiffs were union members and were denied relief by the court of appeals on that ground and also because the case arose under the NLRA rather than the RLA. See 223 F.2d 739 (5th Cir. 1955). The Supreme Court unanimously reversed in a per curiam order, citing Steele and two cases following it, without further explanation, but the reasoning it probably used is indicated by Judge Rives' dissent in the court of appeals, 223 F.2d at 745. See Hargrove v. Brotherhood of Locomotive Eng'rs, 116 F. Supp. 3 (D.D.C. 1953). See also Thompson v. Moore Drydock Co., 27 Cal. 2d 595, 165 P.2d 901 (1946); cf. Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 599 (1958); Comment, 59 Colum. L. Rev. 190 (1959). Commentators agree that Steele is applicable to union members as well as nonmembers. Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 154-55 (1957); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1335 (1958); Comment, 49 Nw. U.L. Rev. 357, 360 (1954).

59. Although the union constitution is often considered a contract (see International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618-19 (1958); Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931)), it is a "contract of adhesion" and therefore should not be construed to easily waive important rights to fair treatment. See Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 204-06 (2d Cir. 1955) (Frank, J., dissenting); Ehrenzweig, Adhesion Contracts in the Conflict of Laws, 53 Colum. L. Rev. 1072 (1953); Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943); Llewellyn, Book Review, 52 Harv. L. Rev. 700 (1939); cf. Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 348, 126 N.E.2d 271, 273 (1955), and cases cited. Compare Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958);

Thus the facts that *Steele* arose under the RLA rather than NLRA, that discrimination was based on race and effectuated by means of a contract, and that Steele was not a member of the Brotherhood were merely incidental rather than essential to the result. The controlling facts in *Steele* were merely that a collective bargaining agent had acted unfairly toward some of those it was bound to represent, and that the unfairness was sufficiently clear that the courts could intervene without unduly disrupting the bargaining function. On a wider plane, the significant facts were that those holding private power over others by virtue of a federal statute had used that power unfairly, leading the Court to interpret the statute to ban such conduct.

As early as 1915, Harlan F. Stone had written that developments in the law arose less from the personal views of judges than from the "steady pressure of facts and events"[60] proved in court. His approach of adaptation of recognized concepts to new facts on the basis of past efforts in analogous situations was of the utmost significance to his conception of the judicial function.[61] But the sensitiveness to "the steady pressure of facts and events" exemplified in *Steele* is of further significance in dealing with the problems raised by concentrated power. To the extent that courts interpret broad language such as that found in *Steele* to confer rights to fair treatment in the exercise of power upon those affected by it, the arbitrary exercise of that power is limited without the necessity of comprehensive administrative regulation.[62] Regulation is achieved in the first instance by the participation of those most directly concerned, while the courts remain in reserve to illustrate in concrete cases the standards of what is permissible and to guarantee fairness where voluntary observance of the standards is lacking. Thus, a less complex system of administrative supervision becomes possible, and the much-discussed dangers that the administrative body itself may

Comment, 59 Colum. L. Rev. 190 (1959). An additional problem concerns whether the member knew what rights might be jeopardized by the provisions in question. Compare Sandler v. Commonwealth Station Co., 307 Mass. 470, 30 N.E.2d 389 (1940); Jones v. Great No. Ry., 68 Mont. 231, 217 P. 673 (1923); cf. Lambert v. California, 355 U.S. 225, 228-29 (1957) (actual or probable knowledge required for valid punishment for violation of criminal law imposing affirmative duty).

60. Stone, Law and Its Administration 39 (1915). See also id. at 47-48.

61. Konefsky, Chief Justice Stone and the Supreme Court 260-64 (1945); Mason, Harlan Fiske Stone: Pillar of the Law 233-51 (1955); Dowling, The Methods of Mr. Justice Stone in Constitutional Cases, 41 Colum. L. Rev. 1160, 1166-67 (1941). Cf. Commons, Legal Foundations of Capitalism 346-52 (1924).

62. This is the philosophy underlying the NLRA, which permits employees themselves to select collective bargaining representatives to bargain out terms and conditions of employment with employers, with the Government serving as a referee rather than as a central participant. Compare Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) (Harlan, J.).

not always act in the public interest, or that it may unduly favor one of the regulated groups over another,[63] are reduced.

This approach does not seem properly open to criticism as a judicial assumption of legislative functions so long as the express words of the statute and its fundamental purposes form the starting point for reasoning and so long as new developments are based upon precedent.

2. Steele as a Precedent in Adapting Our Traditions to the Problems of "Private Government"

A landmark decision like *Steele v. Louisville & N.R.R.*, like a parable illustrating a moral principle, can have important consequences in helping to form private judgments of what is right[64] as well as serving as a starting point for judicial reasoning in future cases. This educational function of *Steele* was greatly strengthened by its roots in the nation's traditional struggle with the problems of concentrated power. In the earliest days of the Republic, Thomas Jefferson, in the Declaration of Independence, had condemned government without representation, and the Constitution and Bill of Rights sought to protect the citizen from the arbitrary exercise of governmental power. In its union-legislature analogy, *Steele* evoked the experience built up in the national efforts to maintain a public government strong enough to protect and provide for the people while at the same time assuring representation of the governed and protection of the individual from arbitrary action,[65] and brought this experience to bear upon the emerging problems of the "private governments"[66] created by modern industrialism.[67] In being

63. See Hart & Wechsler, The Federal Courts and the Federal System 1131-32 (1953); Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105, 1107-13 (1954); Lewis, To Regulate the Regulators, N.Y. Times, Feb. 22, 1959, § 6 (Magazine), p. 13; Note, Regulated Industries and the Antitrust Laws, 58 Colum. L. Rev. 673, 678 (1958).

64. See Jones, Book Review, 58 Colum. L. Rev. 755, 758 (1958).

65. Compare Jones, The Rule of Law and the Welfare State, 58 Colum. L. Rev. 143 (1958).

66. See Miller, Private Governments and the Constitution (1959); Friedmann, Corporate Power, Government by Private Groups, and the Law, 57 Colum. L. Rev. 155 (1957). See also Hanslowe, The Need for a Political Science of Collective Bargaining, in Symposium on Labor Relations Law (Slovenko ed., to be published 1961).

67. "It will be found that as modern conditions arose the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrongs which it had been the purpose to prevent from the beginning. The evolution . . . will be found to be illustrated in various aspects by the decisions of this court which have been concerned with the enforcement of the act we are now considering." White, C. J., in Standard Oil Co. v. United States, 221 U.S. 1, 57-58 (1911) (announcing a rule of reason under the Sherman Act).

"[A] bill of rights is what the people are entitled to against every government on

guided by this tradition, Chief Justice Stone not only found criteria to aid him in evaluating the facts before him,[68] but also drew upon the reservoirs of the nation's common experience to aid public understanding[69] of his decision so that its example could be applied intelligently in the future.

Most of the subsequent cases dealing with the *Steele* principle did not explicitly refer to the analogy between public and private government employed by Chief Justice Stone, but the decisions may be explained in terms of that concept, and it appears to be the necessary underlying basis of several of the important results.

A bargaining agreement similar to that in *Steele,* designed to deprive Negro employees of their jobs, arose in *Brotherhood of R.R. Trainmen v. Howard.*[70] The *Steele* ruling was not directly applicable since the affected employees were not members of the craft for which the Brotherhood bargained, and therefore were not actually represented by it. But a legislature has a duty to protect the rights of all those for whom it legislates, both citizens and noncitizens within its jurisdiction. By analogy, then, the union would have a duty towards all those for whom it "legislates," *i.e.,* over whom it has effective power, whether or not they are actually represented by the union.[71] The Court's decision,

earth . . . ." Letter From Thomas Jefferson to James Madison, Dec. 20, 1787, in 6 The Writings of Thomas Jefferson 385, 388 (Monticello ed. 1904).

It may well be that Steele essentially applied the method described by Chief Justice White to the purpose stated by Thomas Jefferson in utilizing the analogy between public and private government to interpret the term "representative" in the statute conferring exclusive bargaining rights.

68. Cf. Commons, Legal Foundations of Capitalism 346-47 (1924).

69. Compare Commons, Legal Foundations of Capitalism 352 (1924); Drucker, The Future of Industrial Man 263-65 (1942).

70. 343 U.S. 768 (1952).

71. On the basis of this interpretation of Howard, Courant v. International Photographers, 176 F.2d 1000 (9th Cir. 1949), cert. denied, 338 U.S. 943 (1950), would appear to have been wrongly decided. Courant, a Canadian citizen, was denied admission to the union because he was an alien, and as a practical result he was unable to obtain work. The court refused relief because the union did not represent Courant, a contention made in the Howard case with respect to nonmembers of the craft but rejected by the Supreme Court. If Howard bans wholly arbitrary discrimination against the members of other crafts, the same principle should logically extend to those seeking employment. If what are permissible distinctions for public action furnish a guide, discrimination against aliens would be invalid where citizenship is not relevant to the needs of the union or the work to be performed. Yick Wo v. Hopkins, 118 U.S. 356 (1886). See Truax v. Raich, 239 U.S. 33 (1915); Rezler, Admission Policy of American Trade Unions Concerning Immigrant Workers, 11 Labor L.J. 367 (1960). Note, Constitutionality of Restrictions of Aliens' Right to Vote, 57 Colum. L. Rev. 1012 (1957). For Chief Justice Stone's views, see his concurring opinion in Hague v. CIO, 307 U.S. 496, 525 (1939); Lief, Introduction to Stone, Public Control of Business at xi (Lief ed. 1940); Mason, Harlan Fiske Stone: Pillar of the Law 113, 578-82 (1955).

granting relief to the complaining employees, was framed in terms which do not seem far from this principle: "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers."[72]

The public-private government analogy evokes also the principle that, as power implies responsibility, the latter further implies reasonable authority to meet it. This principle (without specific reference to the analogy) was applied in *Ford Motor Co. v. Huffman*,[73] involving a collective bargaining agreement giving seniority credit for time served in the armed forces to employees with no prior service in the company, thus placing them ahead of former employees who had longer service with the company but less military service. The contract was challenged by certain employees as a violation of their rights under the Selective Service Act requirements that returning veterans be restored to their jobs without loss of seniority.[74] In upholding the contract, a unanimous Court said: "The National Labor Relations Act . . . gives a bargaining representative not only wide responsibility but authority to meet that responsibility."[75]

In an earlier case, *Aeronautical Lodge v. Campbell*,[76] the Court had upheld an agreement providing "super-seniority" for union chairmen so that, because of their importance to the effectiveness of collective bargaining, they might remain at work even while others with longer service were laid off. The national policy encouraging collective bargaining,[77] therefore, overrode an otherwise applicable statutory provision which might injure the bargaining function, just as restrictions on public government in the interests of the rights of the individual are not permitted to cripple its functions. The same result would flow from application of the public-private government analogy, since the legislature is empowered to make reasonable classification in economic measures, and only where they are plainly arbitrary will they be invalidated. The task of preventing obvious unfairness while preserving the vigor of the bargaining function is a difficult one,[78] but essentially the same difficulty is

72. 343 U.S. at 774.

73. 345 U.S. 330 (1953).

74. Selective Training and Service Act of 1940 § 8(b), ch. 720, 54 Stat. 890, as amended, ch. 548, 58 Stat. 798 (1944). (now Universal Military Training and Service Act § 9(b), 62 Stat. 614 (1948), 50 U.S.C. App. § 459(b) (1958)).

75. 345 U.S. at 339.

76. 337 U.S. 521 (1949).

77. See, e.g., National Labor Relations Act §§ 1, 7, 9, 49 Stat. 449, 452, 453 (1935), as amended, 61 Stat. 136, 140, 143 (1947), as amended, 29 U.S.C. §§ 151, 157, 159 (1958); cf. Local 24, Teamsters Union v. Oliver, 358 U.S. 283 (1959).

78. See Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 167 (1957); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System,

encountered in applying the limitations imposed by the due process and equal protection clauses to public government, or whenever two competing policies are each of such importance that neither can be rejected in favor of the other but the demands of both must be recognized in a workable synthesis.[79]

It has been suggested[80] that, as a matter of constitutional interpretation, the limitations imposed by due process should be held applicable to private groups, such as unions and business corporations, which exercise substantial economic power. The view that these limitations apply only to governmental action would not prevent the gradual extension of the concept of governmental action itself to include action which has a coercive effect similar to that exerted by governmental sanctions, where this is made possible in part by action or underlying permission of public authorities who are themselves bound by the constitutional limitations. However, the analogy between public and private government was not actually applied as a constitutional requirement in *Steele* but as a guide in statutory interpetation. Reliance on statutory rather than constitutional interpretation had the advantage of greater flexibility and also avoided the necessity of defining in advance the precise limits of governmental action for constitutional purposes. Under this approach, legal protection of individual rights within "private governments" may develop both through the enactment of new statutes and by their interpretation in the light of the fundamental considerations explored in *Steele*, one of which was to construe the statute so as to avoid constitutional objections.

The Labor-Management Reporting and Disclosure Act of 1959[81] represents a basic national decision calling for greater protection of some of the rights guaranteed by the Constitution in the realm of private as well as public government, even though many difficult questions of interpretation must be resolved if the statute is to promote rather than restrict these rights. We turn now to the statute and its interrelation with the principles laid down in *Steele*.

---

67 Yale L.J. 1327, 1339-43, 1357-61 (1958); cf. King, Protecting Rights of Minority Employees, 11 Lab. L.J. 143 (1960).

79. Compare the synthesis between regulatory statutes and the antitrust laws discussed in Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Colum. L. Rev. 673 (1958); between labor and antitrust statutes, United States v. Hutcheson, 312 U.S. 219 (1941); between patent and antitrust policies, Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

80. Berle, Economic Power and the Free Society 17-18 (1957); Berle, Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power, 100 U. Pa. L. Rev. 933, 943, 948-57 (1952); Berle, Legal Problems of Economic Power, 60 Colum. L. Rev. 4, 9-10 (1960).

81. 73 Stat. 519, 29 U.S.C. §§ 401-531 (Supp. I, 1959).

II. The 1959 Legislation

The 1959 labor reform statute consists of three major groups of provisions. The first group deals with individual rights,[82] and the second with reporting requirements and prohibitions on such practices as payments by employers to union officials.[83] The third group amends the Taft-Hartley Act, forbids certain types of boycotts and picketing which had been found coercive in some cases,[84] and seeks to eliminate a "no man's land" between state and federal jurisdiction over labor disputes.[85] Our attention will focus chiefly on questions relating to the first group of provisions.

A. *Standards for the Rights of Union Members*

Section 101(a)(2) provides:

> Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.[86]

This section has been chosen for separate examination because its pattern of a broad statement of rights followed by a proviso permitting reasonable qualifications is followed throughout the individual rights sections of the act.[87] The rights are closely analogous to those guaranteed by the

82. Title I—Bill of Rights of Members of Labor Organizations, §§ 101-05, 73 Stat. 522, 29 U.S.C. §§ 411-15 (Supp. I, 1959). Title III—Trusteeships, §§ 301-06, 73 Stat. 530, 29 U.S.C. §§ 461-66 (Supp. I, 1959). Title IV—Elections, §§ 401-04, 73 Stat. 532, 29 U.S.C. §§ 481-83 (Supp. I, 1959).

83. Title II—Reporting by Labor Organizations, Officers and Employees of Labor Organizations, and Employers, §§ 201-10, 73 Stat. 524, 29 U.S.C. §§ 431-40 (Supp. I, 1959).

84. Title VI—Miscellaneous Provisions, §§ 601-11, 73 Stat. 539, 29 U.S.C. §§ 521-31 (Supp. I, 1959).

Title VII—Amendments to the Labor Management Relations Act of 1947, As Amended, §§ 701-07, 73 Stat. 541, 29 U.S.C. §§ 153, 158, 159-60, 186-87 (Supp. I, 1959). See comment, 28 Fordham L. Rev. 737 (1960).

85. Section 701(a), 73 Stat. 541, 29 U.S.C. § 164 (Supp. I, 1959).

86. 73 Stat. 522, 29 U.S.C. § 411(a)(2) (Supp. I, 1959).

87. E.g., § 101(a)(1) provides: "Equal Rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organizations, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

first amendment.[88] If constitutional precedents are used as a guidepost, limitations on the rights granted, in order to be sustained as reasonable, would have to be justified by important needs of the union[89] which otherwise could not be met effectively.[90] An interest in preventing criticism of officials, even unfounded criticism, would not suffice,[91] nor would an interest in checking ideas and opinions viewed as undesirable.[92] Restrictions which might be upheld include a ban on means of speech that would interfere with the rights of others,[93] such as a filibuster or uproar at meetings preventing the transaction of business.[94] The same principle would apply to "fighting words" tending to cause immediate violence.[95] Libel or slander poses a difficult problem, because while defamation is not considered constitutionally protected,[96] a ban on defamation might be used to cloak penalties for criticism of officials. By becoming a public figure in a union, as in politics, one should be held to have opened himself to fair, if critical, comment. It may also be that the defense of truth must be permitted where the statements do not threaten to cause violence or a breach of the peace.[97] Advocacy or action

73 Stat. 522, 29 U.S.C. § 411(a)(1) (Supp. I, 1959).

Section 401(e): "[E]very member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed). . . ." 73 Stat. 533, 29 U.S.C. § 481(e) (Supp. I, 1959).

88. "[N]o American living today, whether he is a member of a union or not, is without the rights contained in this so-called bill of rights, because they are substantially contained in the Bill of Rights of the Federal Constitution. The only argument is that we may be applying them in a field that is completely new." 105 Cong. Rec. 14377 (daily ed. Aug. 12, 1959) (remarks of Representative Landrum).

89. Compare Butler v. Michigan, 352 U.S. 380, 383 (1957); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952).

90. See Talley v. California, 362 U.S. 60, 63 (1960) (Harlan, J., concurring); Minersville School Dist. v. Gobitis, 310 U.S. 586, 603-04 (1940) (Stone, J., dissenting). Compare the approach in commerce clause cases such as Dean Milk Co. v. Madison, 340 U.S. 349 (1951); Southern Pac. Co. v. Arizona, 325 U.S. 761, 781-82 (1945); South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177, 186-87 n.4 (1938).

91. Compare Craig v. Harney, 331 U.S. 367 (1947); Near v. Minnesota, 283 U.S. 697 (1930), with Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73 (1958); Comment, 59 Colum. L. Rev. 190 (1959); see Summers, Union Discipline: What the Courts Do in Fact, 70 Yale L.J. 175, 192-96 (1960).

92. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959). But see Mitchell v. International Ass'n of Machinists, 45 L.R.R.M. 2926 (Cal. Super. Ct. 1960), upholding expulsion for right-to-work advocacy. The federal act would appear to dictate a contrary conclusion.

93. Cf. Kovacs v. Cooper, 336 U.S. 77 (1949) (blaring sound trucks); Cox v. New Hampshire, 312 U.S. 569 (1941) (street parades).

94. Cf. Robert's Rules of Order, Revised §§ 40, 58 (75th anniversary ed. 1951).

95. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

96. Beauharnais v. Illinois, 343 U.S. 250 (1952).

97. See id. at 254.

directly contrary to the unmistakable and urgent needs of the union as such[98] (as distinct from contrary to the policies of particular officials or their continuance in office[99]), such as urging a back-to-work movement or supporting a rival union after joining the disciplining union or after its selection by a majority,[100] might be contrary to "the responsibilities of every member toward the organization as an institution"[101] and therefore subject to union discipline.[102] The ban on ex post facto laws in public government[103] and two Supreme Court cases prior to the 1959 act, in which expulsion led to loss of employment in a closed shop,[104] suggest that support of a rival union by an employee prior to joining the disciplining union, or prior to its selection as bargaining agent, could not be penalized. It appears that the internal political activities of full time union member employees may be regulated to prevent their use for either side in election contests[105] and that Communists, Fascists and other totalitarians may,[106] and Communist Party members and those convicted of certain crimes must[107] be barred from union office. Payment of dues obviously is a reasonable prerequisite to participation in union decisions, although even this requirement may not be implemented by discriminatorily harsh sanctions not uniformly applied.[108]

98. Compare Schenck v. United States, 249 U.S. 47 (1919) (urging noncompliance with military draft).

99. See Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958); Comment, 59 Colum. L. Rev. 190 (1959).

100. See Seidman & Melcher, The Dual Union Clause and Political Rights, 11 Labor L.J. 797 (1960).

101. Labor-Management Reporting and Disclosure Act of 1959 § 101(a)(2), 73 Stat. 522, 29 U.S.C. § 411(a)(2) (Supp. I, 1959).

102. See Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, 617 (1959); Wollett & Lampman, The Law of Union Factionalism—The Case of the Sailors, 4 Stan. L. Rev. 177, 211 (1952); Comment, 59 Colum. L. Rev. 190, 200 (1959).

103. U.S. Const. art. I, § 9, cl. 3; United States v. Lovett, 328 U.S. 303 (1946).

104. Compare the facts in Wallace Corp. v. NLRB, 323 U.S. 248, 256 (1944), with those in Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 359 (1949). The Palmolive-Peet opinion, if not the actual result under the particular facts, seems open to criticism as avoiding discussion of the real issues before the Court. Cf. 1 Teller, Labor Disputes and Collective Bargaining § 77(5), at 217-21 (1940).

105. Cf. United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

106. Cf. American Communications Ass'n v. Douds, 339 U.S. 382 (1950). This question would arise directly under § 401(e) rather than § 101(a)(2), but only conduct for which a penalty would be permitted under § 101(a)(2) would probably form a "reasonable" basis for disqualification under § 401(e), quoted at note 87 supra.

107. Labor-Management Reporting and Disclosure Act of 1959 § 504, 73 Stat. 536, 29 U.S.C. § 504 (Supp. I, 1959).

108. NLRB v. Biscuit & Cracker Workers, 222 F.2d 573 (2d Cir. 1955); Brady v. TWA, 174 F. Supp. 360, 363 (D. Del. 1959); see Labor-Management Reporting and Disclosure Act of 1959 § 101(a)(3), 73 Stat. 522, 29 U.S.C. § 411(a)(3) (Supp. I, 1959); cf. Felter v. Southern Pac. Co., 359 U.S. 326 (1959); National Labor Relations Act § 8(b)(5), added

B. *The Rights of Employees Rejected for Membership*

A serious problem inherent in the structure of the act is that all of the rights explicitly conferred on individual employees are stated in terms of the rights of union members. Statements seeming to confirm that this was intentional appear frequently in the legislative history.[109] However, the grant of individual rights by the act would be easily evaded if these rights could be denied by the expedient of refusing union membership.[110] The result would be that, although section 101(a)(1) purports to confer "Equal Rights," some employees would be "more equal than others."[111] They would be second class citizens in their industrial government, denied not merely the rights conferred by the union itself, but also those conferred by the federal statute. However, the language of the statute does not compel such a result, nor does it appear permissible under the Constitution or under the obligations imposed in the *Steele* decision, which appear unaffected by the statute, as will be demonstrated.

1. Rights Under the 1959 Act

Section 3(*o*) of the act provides:

> "Member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.[112]

The term "requirements" clearly implies some degree of generality perhaps similar to that implied by the conception of law itself. This does not demand that results will be completely uniform even when the governing formulations remain the same, since "the life of doctrinal formulations is in their applications."[113] But while general rules grow and broaden under the pressure of facts and events, their development must

---

by 61 Stat. 142 (1947), as amended, 29 U.S.C. § 158(b)(5) (1958). See also NLRB v. Spector Freight Sys., 273 F.2d 272 (8th Cir.), cert. denied, 362 U.S. 962 (1960).

109. See, e.g., 105 Cong. Rec. 14389 (daily ed. Aug. 12, 1959) (remarks of Representative Landrum).

110. The denial could be effective against any who were not members at the time the decision to exclude was reached. Labor-Management Reporting and Disclosure Act of 1959 §§ 101(a)(5), 609, 73 Stat. 523, 541, 29 U.S.C. §§ 411(a)(5), 529 (Supp. I, 1959), would protect existing members from improper expulsion.

111. Orwell, Animal Farm (1946). See Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851, 860 (1960).

112. 73 Stat. 521, 29 U.S.C. § 402(o) (Supp. I, 1959).

113. Powell, More Ado About Gross Receipts Taxes, 60 Harv. L. Rev. 710 (1947). See his interesting specific examples in New Light on Gross Receipts Taxes, 53 Harv. L. Rev. 909, 924 (1940); cf. Blaustein & Field, "Overruling" Opinions in the Supreme Court, 57 Mich. L. Rev. 151, 174-75 (1958).

rest on principles transcending the result in any particular case.[114] In other words, decisions must be based on more than the mere fiat of those making them. Without at least this degree of generality, the term would have little meaning. If a completely arbitrary decision would satisfy section 3(*o*), it would more appropriately[115] have stated that "member" means one who has been admitted to membership by the organization rather than one who has fulfilled the requirements for membership.

Even a generally stated limitation should not automatically rise to the dignity of a "requirement" under section 3(*o*).[116] Otherwise a limitation as obviously arbitrary as a ban on specifically named persons[117] would have to be recognized. The enactment of a broad term such as "requirements" "necessarily called for the exercise of judgment which required that some standard should be resorted to. . . ."[118] If decisions under constitutional guarantees applicable to public government are drawn upon, those interpreting due process of law seem most appropriate as imposing the minimum standards of fairness. Thus, for recognition under section 3(*o*), a limitation should be required to have both general applicability beyond a particular case and some minimum relevance to legitimate union purposes. Racial discrimination would be an obviously invalid ground. Restrictions based on disagreement with the policies of particular union officials would fail before the free speech guarantee held inherent in due process.[119]

The same result would flow from application of the basic principle, applied in *Steele,* that power implies responsibility. Where a union is given power not merely to determine its membership for its own private purposes but to determine who is to receive rights under a federal statute, it may be required to exercise this power with minimum fairness toward those affected.

This *possible* interpretation of the term "requirements" must be tested

114. Patterson, Jurisprudence: Men and Ideas of the Law 97, 101 (1953); Jones, Edwin Wilhite Patterson: Man and Ideas, 57 Colum. L. Rev. 607, 615-16 (1957); cf. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19 (1959).

115. Compare Flora v. United States, 362 U.S. 145, 150 (1960).

116. "The same words, in different settings, may not mean the same thing." Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 678 (1950) (Frankfurter, J.); see R. H. Johnson & Co. v. SEC, 198 F.2d 690, 696 (2d Cir.), cert. denied, 344 U.S. 855 (1952).

117. Compare United States v. Lovett, 328 U.S. 303 (1946) (decided under ex post facto clause). Compare also Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 136 (1951), which interpreted the term "determination" to bar purely arbitrary action similar to that which might be held barred here by the term "requirements."

118. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) (announcing rule of reason under antitrust law).

119. Smith v. California, 361 U.S. 887 (1959); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959); Butler v. Michigan, 352 U.S. 380 (1957); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Near v. Minnesota, 283 U.S. 697 (1931).

against the underlying purposes of the act.[120] The declaration of findings, purposes, and policy in section 2 speaks in terms of the rights of employees,[121] not of union members as such. Granting the specified rights to union members leaves the union the power to make reasonable exclusions necessary for its own self-protection, but a denial of the rights conferred by the act through an arbitrary exclusion would destroy the purpose of the act and so should not be countenanced.

An amendment specifically outlawing racial discrimination was rejected by the House.[122] But inferences from the rejection of proposed provisions are generally inconclusive.[123] This is particularly so here, where many might find a specific anti-discrimination provision unnecessary in view of the well-settled judicial constructions holding racial distinctions affecting substantive rights effectively barred by language as general as the use of the term "representative" in *Steele*. Indeed, the judicial precedents against racial discrimination are so strong that if Congress had desired to permit racial distinctions in the enforcement of federal rights, explicit language would probably have been recognized as necessary to achieve this result.[124] Further, a specific provision barring racial discrimination alone might have weakened the general applicability of the term "requirements," raising a possible inference that, since only racial distinctions (or others listed) were specifically banned, other equally arbitrary types of discrimination might be permitted.[125]

The legislative history also shows that, in the bill passed by the Sen-

120. See Pennsylvania R.R. v. Rychlik, 352 U.S. 480, 488 (1957); Church of The Holy Trinity v. United States, 143 U.S. 457 (1892). Cf. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960).

121. Section 2(a) provides: "The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection. . . ."

Section 2(b) provides: "The Congress further finds . . . that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees . . . which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees. . . ." 73 Stat. 519, 29 U.S.C. §§ 401(a), (b) (Supp. I, 1959).

122. 105 Cong. Rec. 14388-89 (daily ed. Aug. 12, 1959).

123. "We walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." Helvering v. Hallock, 309 U.S. 106, 121 (1940), quoted in Commissioner v. Estate of Church, 335 U.S. 632, 651 n.11 (1949). See Breitel, The Courts and Lawmaking, in Legal Institutions: Today and Tomorrow 1, 11-15, 25-26 (Paulsen ed. 1959); Hart, Comment, in Legal Institutions: Today and Tomorrow 40, 45-48 (Paulsen ed. 1959). Compare United States v. UMW, 330 U.S. 258, 282-83 (1947).

124. Compare Ex parte Endo, 323 U.S. 283, 303 (1944); cf. Greene v. McElroy, 360 U.S. 474, 506-07 (1959).

125. Compare the result reached in Woollcott v. Shubert, 217 N.Y. 212, 111 N.E. 829 (1916).

ate, "member" was defined to include any person who had met "the lawful requirements for membership."[126] The Conference Committee version finally enacted omitted the word "lawful." It might be argued that this change indicated an intent to recognize any limitation whatever, whether lawful or otherwise, that the union imposed. Another interpretation, however, is more consistent with the stated purposes of the act. The Senate version might have been read to mean that there were unlawful as well as lawful requirements for membership. If it had been so enacted, adherence to "unlawful" qualifications, even for internal union purposes not regulated by the act, might be held enjoinable as contrary to legislative policy despite the absence in the bill of specific remedies for this purpose.[127] But this would require the union to admit persons to membership against its will, contrary to the intention of Section 8(b)(1)(A) of the Taft-Hartley Act.[128] Omission of the word "lawful," on the other hand, avoids this dilemma.

As enacted, therefore, the statute recognizes a distinction between "membership" for private, internal union purposes and "membership" for purposes of determining the beneficiaries of the rights conferred by the statute. The distinction will be relevant when the union discriminates upon a purely arbitrary basis. For its own purposes, no limitation upon membership will be unlawful. But an employee arbitrarily excluded should still be entitled to the rights specified in the statute, including the right to vote in union elections[129] and to express his views at union meetings consistent with reasonable restrictions.

An intent to permit exclusion of Communists is indicated in the Senate debates;[130] this would find support in the judicial holding prior to the act that Communists may be barred from union office because of the history of instigation of political strikes.[131] However, application of constitutional precedents might well require for recognition of an exclusion

126. S. 1555, 86th Cong., 1st Sess. § 601(n) (1959) (as passed).

127. See Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 290-91 (1960); Steele v. Louisville & N.R.R., 323 U.S. 192, 207 (1944); Virginian Ry. v. System Fed'n, 300 U.S. 515, 552 (1937); Texas & N.O.R.R. v. Brotherhood of R.R. & S.S. Clerks, 281 U.S. 548, 569 (1930).

128. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958). See also Steele v. Louisville & N.R.R., supra note 127, at 204 (dictum); Oliphant v. Brotherhood of Locomotive Firemen & Enginemen, 262 F.2d 359 (6th Cir. 1958), cert. denied because of "the abstract context in which the questions . . ." were presented, 359 U.S. 935 (1959); Ross v. Ebert, 275 Wis. 523, 82 N.W.2d 315 (1957). Contra, Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946). For a succinct discussion of the constitutional problems involved, see 29 Miss. L.J. 335 (1958).

129. Labor-Management Reporting and Disclosure Act of 1959 §§ 101(a)(1), 401(e), 73 Stat. 522, 533, 29 U.S.C. §§ 411(a)(1), 481(e) (Supp. I, 1959).

130. 105 Cong. Rec. 6721 (1959).

131. American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

under section 3(*o*) that Communist, Fascist, or other totalitarian activities be recent or present[132] and with full knowledge[133] of their nature, as distinct from activities in the past which have been since clearly abandoned.

The determinative question in the interpretation of section 3(*o*) is probably whether the statutory statement of objectives, including protection of the rights of employees, or the contrary implications of some of the statements in the legislative history, are to control. The courts have looked to legislative history to an increasing extent in recent decades to give meaning and purpose to ambiguous statutory words, because the legislative history can convey a thrust toward a definite objective where the bare words of the statute fail to do so. Here, on the other hand, we are not dealing with an alleged "plain meaning" of operative words in the statute, but a clear-cut statement of congressional purpose enacted into law in the statute itself. In this context, the reasons for the primacy of legislative history should no longer apply. As Mr. Justice Jackson once pointed out, the President does not sign into law the entire Congressional Record.[134] When Congress speaks in the authoritative form of statutory provisions whose objectives are unmistakably stated, those objectives should control over any statements by individual legislators in debate.[135]

Even aside from the interpretation by section 3(*o*), however, the constitutional requirements of due process of law and the duty of fair representation imposed in *Steele* must be considered.

2. Rights Guaranteed by Due Process of Law

The statute confers rights on "members" of labor organizations. By controlling who may become a "member," the union may determine who is entitled to the rights. Since the rights involved are conferred by a federal statute, this determination is clearly a governmental function delegated to a private group, and therefore subject to constitutional limitations.[136] If construed to deny the rights conferred by it to employees

132. Compare the views of eight members of the Court (one Justice not participating) in Schware v. Board of Bar Examiners, 353 U.S. 232, 243-46 (1957), and concurring opinion at 249-51.

133. See Smith v. California, 361 U.S. 147 (1959); Wieman v. Updegraff, 344 U.S. 183 (1952); cf. Rowoldt v. Perfetto, 355 U.S. 115 (1957).

134. Jackson, J., concurring in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951).

135. As stated by Mr. Justice Frankfurter in Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 543 (1947), reprinted in Frankfurter, Of Law and Men 67 (1956): "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute."

136. See cases cited in note 33 supra; see also Railway Employees' Dep't v. Hanson, 351

arbitrarily rejected for union membership, the statute would encounter the due process and equal protection objections raised but avoided in *Steele*.

It may be argued that it is the fact of union membership and not the grounds upon which it was denied which is relevant under the statute. However, to give controlling legal effect to arbitrary private discrimination is to cause the statute as well as the private group to discriminate on the invalid ground. If Congress cannot discriminate directly on the basis, for example, of race, it is hard to see why it could make federal rights directly dependent upon private discrimination of the same type.[137]

A second ground for rejecting this argument is the basis of the statute in Congress' power under the commerce clause. The treatment of union members affects commerce only because they are employees in industries engaged in commerce.[138] The statute is explicitly based, not upon any effect upon commerce of the treatment of union members as such, but upon a need for legislation to "afford necessary protection of the rights and interests of employees . . ."[139] and upon a congressional finding that "the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation. . . ."[140] Thus, union membership is merely an incidental fact which may be used in implementing the rights of employees, and it would seem that the implementation itself cannot be based upon purely arbitrary discrimination.

It has been stated,[141] enacted,[142] and held[143] that a union may prescribe its own qualifications for membership. These holdings will not be disturbed in any way if it is also held that, where such discriminations are

U.S. 225, 232 (1956); Comment, 59 Colum. L. Rev. 782, 791 (1959) (the degree of regulation associated with private conduct is significant in classifying it as public action).

137. Cf. Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Capital Fed. Sav. & Loan Ass'n v. Smith, 136 Colo. 265, 316 P.2d 252 (1957), 58 Colum. L. Rev. 571 (1958).

138. See NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951); Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34-41 (1937); Johnson v. Local 58, Int'l Bhd. of Elec. Workers, 181 F. Supp. 734 (E.D. Mich. 1960) (upholding § 101(a)(2) under the commerce clause).

139. Labor-Management Reporting and Disclosure Act of 1959 § 2(b), 73 Stat. 519, 29 U.S.C. § 401(b) (Supp. I, 1959).

140. Labor-Management Reporting and Disclosure Act of 1959 § 2(a), 73 Stat. 519, 29 U.S.C. § 401(a) (Supp. I, 1959).

141. Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944) (dictum); cf. International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 620 (1958) (dictum).

142. National Labor Relations Act § 8(b)(1)(A), added by 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958).

143. See cases cited in note 128 supra.

arbitrary, they cannot constitutionally be recognized for the purpose of determining rights under a federal statute.

3. Rights Implicit in the Concept of Fair Representation

Section 603(b)[144] of the 1959 statute specifies that nothing in the act (except provisions explicitly amending the Taft-Hartley Act) shall impair rights under the National Labor Relations Act or the Railway Labor Act. Since the obligation of fair representation imposed in *Steele* is derived from the exclusive bargaining authority conferred by these statutes, the correlative employee rights are not impaired by the 1959 act. Our inquiry therefore is to determine what rights are implicit in the concept of fair representation.

Since the duty imposed in *Steele* was based in considerable part on the analogy between the powers of an exclusive bargaining agent and those of a legislature, this analogy must be examined to determine whether it is relevant here.

The task of reviewing collective bargaining decisions in order to prevent unfairness, while at the same time avoiding hobbling the bargaining function, is a difficult one.[145] In *Huffman*[146] and *Campbell*,[147] the Supreme Court recognized that bargaining agents must be given broad discretion in order to perform their function. But difficulties involved in seeking an accommodation between the need for broad powers to act and the need to protect individual rights are not new ones. Precisely the same problem has been encountered in judicial review of the acts of public government. From 1905 to 1937 the Supreme Court responded in many instances by striking down as unconstitutional[148] legislation which conflicted with conceptions of individual rights and limited governmental powers accepted by many at that time but which are not now believed to have been embodied in the Constitution. Many of these

144. 73 Stat. 540, 29 U.S.C. § 523(b) (Supp. I, 1959), which provides: "Nothing contained in this chapter . . . shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the rights, benefits, privileges or immunities of any carrier, employee, organization, representative or person subject thereto; nor shall anything contained in this chapter be construed . . . to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

145. See authorities cited in note 78 supra.

146. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-39 (1953); see discussion accompanying notes 73-75 supra.

147. Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949); see discussion accompanying note 76 supra. Compare Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 167 (1957).

148. E.g., Tyson v. Banton, 273 U.S. 418 (1927); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Hammer v. Dagenhart, 247 U.S. 251 (1918); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905).

decisions have since been overruled,[149] and the approach of strict confinement of governmental authority represented by some of the earlier cases has been abandoned in favor of a strong presumption of the validity of legislation.[150] But this has not diminished the importance of judicial review. On the contrary, the Court developed a new philosophy placing major reliance upon the restraints of the political processes acting through free discussion and the ballot for the protection of individual rights.[151] Under this approach, developed in large part under the leadership of Chief Justice Stone,[152] judicial intervention was called for where the political processes themselves were restricted, as by limitations on freedom of expression[153] or on voting rights,[154] or where they could be expected to be clearly inadequate, as where state action affects interests outside the state,[155] or where there is discrimination against discrete racial or religious minorities.[156] This philosophy does

149. E.g., United States v. Darby, 312 U.S. 100, 117-18 (1941), overruling Hammer v. Dagenhart, supra note 148; West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), overruling Adkins v. Children's Hospital, supra note 148; cf. Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956), illustrating the complete reversal of Adair v. United States, supra note 148.

150. E.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Berman v. Parker, 348 U.S. 26 (1954); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

151. See United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); cf. Helvering v. Gerhardt, 304 U.S. 405, 406 (1938).

152. Dowling, The Methods of Mr. Justice Stone in Constitutional Cases, 41 Colum. L. Rev. 1160 (1941). See also Konefsky, Chief Justice Stone and the Supreme Court 195-215 (1945); Mason, Harlan Fiske Stone: Pillar of the Law 511-35 (1956); cf. 58 Colum. L. Rev. 1080 (1958).

153. See Talley v. California, 362 U.S. 60 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); Smith v. California, 361 U.S. 147 (1959); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959); Staub v. City of Baxley, 355 U.S. 313 (1958); Butler v. Michigan, 352 U.S. 380 (1957); Thomas v. Collins, 323 U.S. 516 (1945); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota, 283 U.S. 697 (1931).

154. See Gomillion v. Lightfoot, 364 U.S. 339 (1960); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927). See also United States v. Raines, 362 U.S. 17 (1960); United States v. Thomas, 362 U.S. 58 (1960).

155. See explanations by Chief Justice Stone in Southern Pac. Co. v. Arizona, 325 U.S. 761, 767-68 n.2 (1945); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45-47 n.2 (1940); Helvering v. Gerhardt, 304 U.S. 405 (1938); South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184-85 n.2 (1938). See also Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Nippert v. City of Richmond, 327 U.S. 416, 434 (1946); Edwards v. California, 314 U.S. 160, 174 (1941); cf. Leisy v. Hardin, 135 U.S. 100, 125 (1890).

156. Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954); Shelley v. Kraemer, 334 U.S. 1 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S.

not necessarily place any constitutional rights in a "preferred position"[157] over others; rather, the approach developed by Chief Justice Stone has been applied in the substantive interpretation of the meaning of broad provisions of the Constitution, such as the due process clauses.

If this philosophy is brought to bear in determining what rights are inherent in the duty of fair representation imposed in *Steele*, it is clear that all employees must be granted the right to free expression and the right to vote for officers of their bargaining agents, subject only to reasonable requirements (e.g., payment of dues) imposed without undue discrimination.[158]

Laws enacted by a legislature elected under discriminatory suffrage requirements have not been held invalid for that reason. Relief has been confined to barring discrimination in the future. Similarly, several cases have quite wisely held that an existing collective bargaining agreement may not be impeached for lack of prior notice to employees, or of employee opportunity to participate.[159] Furthermore, section 403 of the 1959 act makes the remedy provided in the act the exclusive means of challenging an election already conducted.[160] The remedy left open to enforce rights inherent in the duty of fair representation is therefore chiefly an injunction requiring that employees represented by the union concerned be permitted to vote in future union elections unless disqualified for reasonable cause.

It may be argued that the requirement that internal union remedies be exhausted would make it difficult to secure pre-election relief in advance of the actual election. However, section 403 clearly contemplates that pre-election relief is possible, since it explicitly pre-empts only the field

337 (1938); cf. Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (aliens). See Givens, The Impartial Constitutional Principles Supporting Brown v. Board of Education, 6 How. L.J. 179 (1960).

157. See Ullmann v. United States, 350 U.S. 422, 428 (1956); but see the concurring opinion, id. at 439-40. See generally Cahn, The Firstness of the First Amendment, 65 Yale L.J. 464 (1956).

158. The arguments which might sustain such a result even aside from the wider implications of Steele v. Louisville & N.R.R., developed in the first part of this article, are presented in Givens, The Enfranchisement of Employees Arbitrarily Rejected for Union Membership, 11 Lab. L.J. 809 (1960); cf. Comment, 59 Colum. L. Rev. 190, 199-200 (1959).

159. Goodin v. Clinchfield R.R., 125 F. Supp. 441, 452 (E.D. Tenn. 1954), aff'd, 229 F.2d 578 (6th Cir.), cert. denied, 351 U.S. 953 (1956); Marshall v. Central of Ga. Ry., 147 F. Supp. 855, 858 (S.D. Ga. 1956); Cook v. Brotherhood of Sleeping Car Porters, 309 S.W.2d 579, 587 (Mo.), cert. denied, 358 U.S. 817 (1958); Hudson v. Atlantic Coast Line R.R., 242 N.C. 650, 89 S.E.2d 441, 450-51 (1955), cert. denied, 351 U.S. 949 (1956).

160. 73 Stat. 534, 29 U.S.C. § 483 (Supp. I, 1959). See text accompanying note 164 infra.

of post-election relief. The exhaustion principle would seem to apply only if the union itself provided a pre-election remedy, since otherwise there would be no procedures dealing with the relief sought which could be exhausted. Relief only after the election may be too late for many purposes and is contemplated as a different question by section 403. The exhaustion-of-internal-remedies principle should not be permitted, as a procedural principle, to bar otherwise existing substantive relief.[101] In order to assure adequate time for the exhaustion of any available pre-election remedies within the union, and to allow time for adjudication of any procedural issues which might arise, it would of course be prudent for any action seeking pre-election relief to be considered well in advance of the actual election involved.

Because of section 603(b),[162] the 1959 act appears to pose no obstacle to the enforcement of the implications of *Steele* by a pre-election injunction. Interpretation of section 603(b) to permit enforcement of rights of employees arbitrarily rejected for union membership would be in accord with the act's fundamental purpose, which is to protect the rights of employees.

Even in the absence of section 603(b), the obstacles presented by section 403 in title IV, regulating union elections,[163] do not seem insurmountable. It provides:

---

161. Compare as to the procedural doctrine of primary jurisdiction of administrative agencies, Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 496-500 (1958); Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Colum. L. Rev. 673, 689-94 (1958); Note, The Isbrandtsen Decision: Anti-trust Laws, Regulated Industries and the Doctrine of Primary Jurisdiction, 53 Nw. U.L. Rev. 803, 812-13 (1959).

162. 73 Stat. 540, 29 U.S.C. § 523 (Supp. I, 1959).

163. The same principles discussed in connection with § 403 apply equally to § 401(e), which provides in part: "The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title." 73 Stat. 533, 29 U.S.C. § 481(e) (Supp. I, 1959). This provision, being part of title IV, would not seem able, under § 603(b), to override rights otherwise available under the RLA or NLRA, including rights under Steele. Such a construction would be in accord with the fundamental purpose of the 1959 act to protect employees as expressed in § 2.

Section 401(e) also provides that "Each member in good standing shall be entitled to one vote." This provision is affirmative and does not deal specifically with whether others may vote if arbitrarily excluded from membership although represented by the union in question. It appears to be designed to preclude the possibility of weighted voting. However, in any event, as a part of title IV, it should not limit rights under the RLA or NLRA and therefore under Steele if § 603(b) is held to apply, as it should be in view of the purposes expressed in § 2.

In Byrd v. Archer, 45 L.R.R.M. 2289 (S.D. Cal. 1959), the court held that the right to run for union office under § 401(e) could not be enforced by injunction in the federal courts when title IV, including §-401, was not in effect as to the union in question. The

No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive.[164]

Since voting rights for those arbitrarily excluded from membership would not be provided by the constitution or bylaws of the union in most cases, a suit claiming such rights would not fall within the second sentence of section 403. On the other hand, if brought prior to the election, it would not fall within the ban of the third sentence. Therefore the question, in the absence of section 603(b), would become whether "who may vote" is within the "form or manner" of conducting elections as used in this section.

Section 603(a) provides: "Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization . . . under any other Federal law. . . ."[165] The "form or manner" of conducting elections might refer to such matters as the time and place of voting, number of inspectors, method of counting ballots, majority required for election, and similar matters, or might be given a broader sweep to include such matters as who may vote. Because of this ambiguity, the section should not be viewed as "explicitly" interfering with rights based upon the concept of fair representation, particularly in view of the act's fundamental purpose of protecting employee rights. Therefore, rights based upon *Steele* should not be limited even aside from section 603(b).

We have concluded that access to participation in collective bargaining decisions, subject only to qualifications having some minimum connection with legitimate union principles, must be granted to all employees represented by the union. Three routes have brought us to this

court's further statement that even if title IV had been in effect, the remedies specified in § 402 are exclusive, was clearly dictum, and in any event did not deal with rights under the NLRA or RLA, which are preserved by § 603(b). Furthermore, it is contrary to the approach adopted in Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 290-91 (1960). The court's suggestion that even if title IV had been in effect the court would have lacked jurisdiction to enforce the ban of § 401(e) on arbitrary denials of the right to run for union office because of lack of a specific jurisdictional grant is, in addition, contrary to the position taken in Leedom v. Kyne, 358 U.S. 184 (1958). There it was said that a statutory command itself creates federal question jurisdiction by virtue of 28 U.S.C. § 1337 (1958), which confers general jurisdiction on the federal courts in cases arising under laws regulating commerce. See also Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 213 (1944); Mulford v. Smith, 307 U.S. 38, 46 (1939).

164. 73 Stat. 534, 29 U.S.C. § 483 (Supp. I, 1959).

165. 73 Stat. 540, 29 U.S.C. § 523 (Supp. I, 1959).

point: interpretation of section 3(*o*) to effectuate the purposes expressed in section 2, application of constitutional precedents under the due process clauses, and application of the concept of fair representation established in *Steele*. We now consider the reasonableness of this result.

4. The Reasonableness of the Result

One of the grounds of attack upon the discriminatory contract in *Steele*, was that Negro employees were barred from membership and given no notice or opportunity to be heard concerning the Brotherhood's plans. Chief Justice Stone said:

> While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining . . . to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining and to give to them notice of and opportunity for hearing upon its proposed action.[166]

The right of a union to determine eligibility to its membership has great historical momentum behind it, because it has always been respected in the past and because many unions derive from fraternal orders which had many social functions in addition to collective bargaining. It has practical significance in permitting the union to protect itself from persons seeking to join only to disrupt, perhaps sent by a rival union, an employer, or a political faction seeking to dominate the union.[167]

The right of those arbitrarily excluded from membership to participate in collective bargaining decisions also has a great tradition behind it, made applicable by the analogy between private and public government. This is the tradition exemplified by the principle stated in the Declaration of Independence that governments derive their just powers from the consent of the governed, and by the constitutional protection afforded the right to petition for redress of grievances[168] and to have the expression of one's views considered through the ballot without arbitrary discrimination.[169] These principles also have practical force behind them, for experience has taught that the power to govern, be it the public power of official government or the power of "private governments," if it is not to be abused, must be limited by representation of the governed and their right to be heard. The precise manner of reconciling

166. 323 U.S. at 204.

167. See American Communications Ass'n v. Douds, 339 U.S. 382 (1950); cf. 105 Cong. Rec. 6721 (1959).

168. U.S. Const. amend. I.

169. See cases cited in note 154 supra; U.S. Const. amend. XV (barring discrimination in voting on account of race, color, or previous condition of servitude); U.S. Const. amend. XVII (direct election of Senators); U.S. Const. amend. XIX (woman suffrage).

these competing principles and practical needs, each rightfully entitled to respect, was not spelled out in detail in *Steele*. The opinion did, however, indicate an avenue of approach which appears to be sound and in accord with the results reached under our suggested interpretation of section 3(*o*), under the due process clause, and under the emphasis on the freedom of the political processes emerging from constitutional decisions. A union's privilege to set its own qualifications for actual membership would be preserved, but an obligation would be imposed to consider the views of others in making collective bargaining decisions. Consideration of the views of those arbitrarily excluded from membership would be assured by requiring that those rights specified in the act which are inherent also in the political restraints relied on in constitutional decisions be available to employees who apply for membership but are excluded on grounds not having some minimum connection with union purposes. A union would retain the power of complete exclusion from its processes where it could show grounds having some connection with its objectives.

Some might argue that it would be preferable to enact a statute requiring unions to admit to membership all employees represented by the union, subject to reasonable qualifications.[170] But in the absence of such a statute, the question must still be faced whether employees who apply for union membership and are rejected without good reason may be entirely excluded from taking part in collective bargaining decisions. The use of the term "requirements" in section 3(*o*), the constitutional objections to making federal rights dependent upon private discriminatory action, and the implications of the *Steele* case each indicate that the answer to this question should be "no."

Guarantees of the individual right to participate will not assure the end of corruption or racketeering,[171] any more than such rights have prevented corruption from arising in public government. However, democratic rights will permit reform movements to gain power if and when employees become dissatisfied with the conduct of their representatives.[172]

---

170. See American Civil Liberties Union, A Labor Union Bill of Rights (1952 & 1958); Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851, 860-61 (1960); Hanslowe, Individual Rights in Collective Labor Relations, 45 Cornell L.Q. 25, 53 (1959); Meltzer, Some Introductory Observations, 35 Notre Dame Law. 595, 602 (1960); Rauh, Civil Rights and Liberties and Labor Unions, 8 Lab. L.J. 874 (1957); Summers, The Right to Join a Union, 47 Colum. L. Rev. 33 (1947).

171. Hays, The Union and Its Members: The Uses of Democracy, in N.Y.U. 11th Conf. on Labor 35-38 (1958).

172. Kerr, Unions and Union Leaders of Their Own Choosing 17-19 (1957); cf. Taft, Opposition to Union Officers in Elections, 58 Q.J. Econ. 246 (1944).

Furthermore, democratic rights will not prevent a majority from flouting the interests of a minority who can be outvoted even though granted the right to vote.[173] However, realization that the votes of even a small minority may be decisive against the incumbents in some future controversy[174] will assure that the minority is not treated so harshly that wounds will remain to prejudice the leadership. The rights to free expression and the ballot also help to insure that a majority cannot be exploited by a dictatorial minority which has gained power and proposes to act without regard for other minorities not in office who together amount to a majority.[175]

Finally, no amount of democratic rights can prevent apathy or lack of interest, but the opportunities they provide may eventually lessen it. Individual rights cannot provide absolutely equal participation for all, because this is simply not practicable.[176] But the opportunity to participate can be kept open, and with the opportunity open, grass roots participation may gradually grow, particularly in local matters delegated to local decisions rather than centralized in distant offices.[177]

---

173. Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1356-57 (1958); cf. Stone, Law and Its Administration 130 (1915).

174. See Friedrich, Constitutional Government and Democracy 586 (1941); Hermens, Democracy and Good Government 10 (1943); McLaughlin, Political Processes in American National Student Organizations 1-10, 76 (Ph.D. Thesis, Notre Dame, 1948).

175. McLaughlin, op. cit. supra note 174, at 1-10, 76; Quincey, The Protection of Majorities (1876). Compare Rauh, Civil Rights and Liberties in Labor Unions, 8 Lab. L.J. 874, 875 (1957).

176. Lippmann, Public Opinion, chs. XIV, XV (1922); McLaughlin, op. cit. supra note 174, at 4-8; Michels, Political Parties 401 (1949). See Lipset, Trow & Coleman, Union Democracy 4 (1956); Magrath, Democracy in Overalls: The Futile Quest for Union Democracy, 12 Ind. & Lab. Rel. Rev. 503 (1959).

177. See sources cited in note 261 infra; cf. De Huszar, Practical Applications of Democracy (1945). The extension of these opportunities to participate to employees arbitrarily rejected for membership who are represented by the union in question would probably have its chief impact in such instances as those involving racial discrimination. Most unions do not reject for membership employees willing to join and conform to the union's reasonable requirements. Those which have restrictive membership policies usually do so where union membership is essential to obtain work. See generally Summers, Admission Policies of Unions, 61 Q.J. Econ. 66 (1946); Summers, The Right to Join a Union, 47 Colum. L. Rev. 33 (1947). Where such job consequences flow from denial of membership, Steele, as interpreted in Howard, may be violated. See note 71 supra. An unfair labor practice may also be involved unless some exception is applicable or commerce is insufficiently affected. See National Labor Relations Act §§ 8(a)(3), (b)(2), as amended, 61 Stat. 140, 141 (1947), as amended, 29 U.S.C. §§ 158(a)(3), (b)(2) (1958), as amended, 29 U.S.C. § 158(a)(3) (Supp. I, 1959). See generally James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1945); 8 Wash. & Lee L. Rev. 234 (1951).

C. *The Usefulness of Internal Procedures*

The rights guaranteed by the 1959 act or implicit in *Steele* will be far more effective in promoting individual opportunity to participate in union decisions if they are effectuated by the unions themselves and not merely by outside coercion. The role of internal union procedures in enforcing these rights is therefore of great importance.

Section 101(a)(4) of the act provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organization or any officer thereof . . . .[178]

Neither this provision nor those conferring jurisdiction on the federal courts to enforce rights guaranteed by the act[179] or implied under *Steele*[180] state when that jurisdiction should be exercised.

Although a member may not be required by the union to exhaust remedies for more than four months, nothing prohibits the court in its discretion from seeking further clarification from internal union tribunals if such clarification would be useful and undue delay would not result. For example, if a union member himself had caused the delay to exceed four months by not diligently prosecuting his claim, or if the four-month period expired immediately before the scheduled argument of an appeal before union tribunals, the court might stay a suit for a reasonable time to permit completion of internal procedures.

Two lines of precedents dealing with public government illustrate judicial power to delay exercise of jurisdiction in order to secure assistance from another body with particular experience in the problem before the court. The first series of cases apply the doctrine of "equitable abstention" under which federal courts withhold the exercise of jurisdiction pending resolution of state questions by the state courts when state law is uncertain, where a federal constitutional question may be avoided by clarification of state law, or where the exercise of jurisdiction would unnecessarily interfere with state functions.[181] At the same time, it is clear

178. 73 Stat. 522, 29 U.S.C. § 411(a)(4) (Supp. I, 1959).

179. E.g., Labor-Management Reporting and Disclosure Act of 1959 §§ 102, 304, 402, 73 Stat. 523, 531, 534, 29 U.S.C. §§ 412, 464, 482 (Supp. I, 1959).

180. See 28 U.S.C. § 1337 (1958) and interpretations in Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 213 (1944); Mulford v. Smith, 307 U.S. 38, 46 (1939).

181. Harrison v. NAACP, 360 U.S. 167 (1959); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); see generally Note, Judicial Abstention from the Exercise of Federal Jurisdiction, 59 Colum. L. Rev. 749 (1959); Note, 69 Yale L.J. 643 (1960).

that if state remedies prove inadequate or if unreasonable delay is encountered, the federal jurisdiction remains available to afford relief.[182]

The second line of precedents apply the doctrine of "primary jurisdiction," which requires that initial resort be had to an administrative agency which has experience in or jurisdiction over the subject matter, before the court will exercise jurisdiction.[183] However, primary jurisdiction does not apply where the facts and applicable law are so clear that reference to the agency would not justify the delay.[184]

Application of public government precedents to enforcement of rights conferred by the 1959 act or implicit in *Steele* would suggest that the court may delay exercising jurisdiction to await pending action by internal union tribunals where further classification would be helpful, but should not do so where excessive delay or inadequate internal procedures are found. A third series of precedents supporting the same conclusion are those holding that unfair labor practice charges may be held in abeyance in appropriate cases to await the result of private arbitration under a collective bargaining agreement if no undue delay results.[185] Furthermore, decisions dealing with internal union affairs under state law hold that internal remedies must be exhausted,[186] but a well-recog-

182. See Harrison v. NAACP, supra note 181, at 178-79 (1959); Note, 59 Colum. L. Rev. 749, 766-68 (1959); cf. 28 U.S.C. §§ 1341-42 (1958).

183. United States v. Western Pac. R.R., 352 U.S. 59 (1956); Far East Conference v. United States, 342 U.S. 570 (1952); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); see also Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 498-99 (1958); see generally Von Mehren, The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929 (1954); Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Colum. L. Rev. 673, 689-94 (1958).

184. Public Utils. Comm'n v. United States, 355 U.S. 534, 539-40 (1958); Great No. Ry. v. Merchants Elevator Co., 259 U.S. 285 (1922). Cf. City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958); Staub v. City of Baxley, 355 U.S. 313, 319 (1958).

185. See International Ass'n of Machinists v. Cameron Iron Works, 257 F.2d 467 (5th Cir.), cert. denied, 358 U.S. 880 (1958); Beatty, Arbitration of Unfair Labor Practice Disputes, 14 Arb. J. 180 (1959); Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Colum. L. Rev. 52, 59-64 (1957); Samoff, The NLRB and Arbitration: Conflicting or Compatible Currents, 9 Lab. L.J. 689 (1958); Note, 69 Harv. L. Rev. 725 (1956); Note, 20 La. L. Rev. 767 (1960); Note, 69 Yale L.J. 309 (1959).

186. See Derling v. Di Ubaldi, 59 N.J. Super. 400, 157 A.2d 864 (Ch. 1960); Falsetti v. UMW, 400 Pa. 145, 161 A.2d 882 (1960); Trainer v. International Alliance of Theatrical Stage Employees, 353 Pa. 487, 46 A.2d 463 (1946); Montemuro, The Doctrine of Exhaustion of Union Remedies, 2 Duke B.J. 148, 149-51 (1952). Under the 1959 act, see Tomko v. Hilbert, 46 L.R.R.M. 2853 (W.D. Pa. 1960); Rizzo v. Ammond, 182 F. Supp. 456 (D.N.J. 1960); Smith v. General Truck Drivers, 181 F. Supp. 14 (S.D. Cal. 1960); Flaherty v. McDonald, 183 F. Supp. 300 (S.D. Cal. 1960). But cf. Harper v. Gribble, 46 L.R.R.M. 2860 (Colo. 1960) (no exhaustion required where only damages were sought for wrongful expulsion).

nized exception applies where recourse to such remedies would appear to be futile.[187]

The legislative history of the 1959 act indicates that the four-month period of exhaustion of reasonable internal procedures specified in section 101(a)(4) need not be exclusive. Indeed, Senator Kennedy stated:

> Nor is it the intent or purpose of the provision to invalidate the considerable body of State and Federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case. So long as the union member is not prevented by his union from resorting to the courts, the intent and purpose of the "right to sue" provision is fulfilled, and any requirement which the court may then impose in terms of pursuing reasonable remedies within the organization to redress violation of his Union constitutional rights will not conflict with the statute. The doctrine of exhaustion of reasonable internal union remedies for violation of Union laws is just as firmly established as the doctrine of exhausting reasonable agency provisions prior to action by the courts.[188]

A question as important as that of when exercise of jurisdiction should be stayed pending an internal decision concerns the degree of finality which can be accorded to internal union decisions.

Section 101(a)(5) provides:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues . . . unless such member has been (A) served with written specific charges; (B) given reasonable time to prepare his defense; (C) afforded a full and fair hearing.[189]

It would appear that if standards consistent with the act and with *Steele* are applied, if the procedures are reasonable, and if the hearing is full and fair, the objective of avoiding unnecessary interference with the bargaining function which governed in *Huffman*[190] and *Campbell*[191] should lend considerable weight to the conclusions reached, unless they are clearly arbitrary.[192] On the other hand, if the standards applied are insufficient or the procedure unfair, not only should little weight be accorded to the conclusions, but no delay to the exercise of jurisdiction would be justified.

187. Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851, 859 (1952); O'Neill v. United Ass'n of Journeymen Plumbers & Steamfitters, 343 Pa. 531, 36 A.2d 325 (1944); Montemuro, The Doctrine of Exhaustion of Union Remedies, 2 Duke B.J. 143, 154-55 (1952); Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1097-98 (1951); Note, 1954 Wash. U.L.Q. 440, 445 (1954).

188. 109 Cong. Rec. 16414 (daily ed. Sept. 3, 1959).

189. 73 Stat. 523, 29 U.S.C. § 411(a)(5) (Supp. I, 1959).

190. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-39 (1953).

191. Aeronautical Lodge v. Campbell, 337 U.S. 521, 527-29 (1949).

192. Compare Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Yakus v. United States, 321 U.S. 414, 424-25 (1944); Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 303-04 (1937).

Since the act does not specify what constitute reasonable procedures or a fair hearing, it may be appropriate to turn to prior decisions as guideposts. Several questions may be crucial, such as whether the right of cross-examination must be accorded.[193] However, here we will consider in detail only the requirement of the impartiality of the tribunal.

Reference of the dispute in *Steele* to the Railroad Adjustment Board was rejected because representatives of the Brotherhood, which had a direct interest in the outcome, took part in selecting the members of the Board.[194] In support of this conclusion, Chief Justice Stone cited *Tumey v. Ohio*,[195] which held it a denial of due process to try a person before the mayor of a city which would receive part of any fine imposed.

Where internal union proceedings take place before persons who are directly connected with or personally involved in the dispute,[196] *Steele* and *Tumey* indicate that little weight can be accorded to the conclusions reached.[197] Several avenues are open to overcome this defect.

One is suggested by the Public Review Boards[198] established by some unions, which consist of impartial outside persons who act as an internal judicial body to insure compliance with the individual rights guar-

193. On the general procedural requirements which would be necessary, only a few of which are considered here, see generally American Civil Liberties Union, A Labor Union "Bill of Rights" 6-7 (1958); Leiserson, American Trade Union Democracy 264-64 (1959); Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483 (1950); Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951); Taft, Judicial Procedure in Labor Unions, 59 Q.J. Econ. 370 (1945); Note, Procedural "Due Process" in Union Disciplinary Proceedings, 57 Yale L.J. 1302 (1948); cf. Greene v. McElroy, 360 U.S. 474 (1959) (right of cross-examination of accusing witnesses); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (notice and opportunity to be heard).

194. 323 U.S. at 206. See cases cited in note 46 supra.

195. 273 U.S. 510 (1927).

196. See Leiserson, American Trade Union Democracy 264-65 (1959); Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L.J. 175, 204-05 (1960). Cf. Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1082-83 (1951).

197. A similar problem, that of the great influence often exerted upon regulatory bodies by those regulated, has caused great concern in the application of such doctrines as primary jurisdiction and the conclusiveness of administrative determinations even in the field of public government. See Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105, 1107-13 (1954); Note, 58 Colum. L. Rev. 673, 678 (1958); 58 Colum. L. Rev. 115, 117-18 (1958).

198. See News Developments, 39 L.R.R.M. 39, 41 (1957) (UAW); 1959 UAW Pub. Rev. Bd. Ann. Rep.; 1958 UAW Pub. Rev. Bd. Ann. Rep.; see also News Developments, 34 L.R.R.M. 65 (1954) (Upholsterers Union); see generally Stieber, Oberer & Harrington, Democracy and Public Review (1960); Oberer, Voluntary Impartial Review of Labor, 58 Mich. L. Rev. 55 (1959); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1349 (1958); Note, Public Review Boards: A Check on Union Disciplinary Power, 11 Stan. L. Rev. 497 (1959).

anteed by the union's constitution. So long as it is clear that truly impartial persons are in fact appointed to serve on such boards, and where the standards applied under the union constitution measure up to those which a court must apply under the 1959 act and under *Steele*, their conclusions should be given great weight.[199] They should not be given the complete conclusiveness often accorded the decisions of arbitrators,[200] however, since even with safeguards it is difficult to insure the complete impartiality of tribunal members appointed by those whose action is to be reviewed. The weight accorded to determinations of reasonableness of administrative agencies might form a better analogy.[201]

A second avenue of approach could be arbitration itself.[202] This need not be impractical if an arbitration system is provided for by the union as part of its judicial process, as a Public Review Board has been by some unions. A union could properly require the individual employee to accept arbitration provided he retained the power to nominate or object to particular arbitrators with the same effectiveness as the union, with an impartial body to break any deadlock, since procedure would not prejudice his right to a fair and impartial hearing.

A third approach which might be less expensive is suggested by the practice in many industries of appointing permanent umpires to arbitrate disputes between unions and management. A permanent umpire for a grievance procedure within the union would be similar to the procedure of a Public Review Board, except that a joint internal arbitration system might be maintained by more than one union, for example, with umpires apportioned geographically to act for several unions and thus save costs for each. A precedent for such joint action among several unions already exists in the AFL-CIO Codes of Ethical Practices and the No-Raiding Pact.[203]

199. See Oberer, The Impact of the Labor-Management Reporting and Disclosure Act of 1959 on Internal Union Affairs, 11 Lab. L.J. 571, 574-76 (1960).

200. See United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); Cournoyer v. American Television & Radio Co., 249 Minn. 577, 83 N.W.2d 409 (1957); Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 735 (1958), 58 Colum. L. Rev. 908. See Note, 59 Colum. L. Rev. 153, 171-73 (1959).

201. See cases cited in note 192 supra.

202. See Williams, The Political Liberties of Labor Union Members, 32 Texas L. Rev. 826, 836-38 (1954); Excerpts, Address by Walter Gellhorn, 40 L.R.R.M. 90, 92-93 (1957); cf. Leiserson, American Trade Union Democracy (1959); Note, Judicial Intervention in Revolts Against Labor Union Leaders, 51 Yale L.J. 1372, 1380 (1942); compare ATC Agency Resolution Investigation, CCH Av. L. Rep. ¶ 22282, at 14531, 14535 (CAB June 10, 1959).

203. See Hutchinson, The Constitution and Government of the AFL-CIO, 46 Calif. L. Rev. 739 (1958); N.Y. Times, Sept. 23, 1959, p. 1, col. 2. Aside from the usefulness of such

In order to secure finality and lessen the need for judicial scrutiny of the impartiality of the tribunal in each particular case, it might be possible to develop standards for the selection of members of such an internal judiciary, such as a minimum term of office and lack of prior position in the appointing unions or related organizations for a specified period. Also, the appointing unions might provide machinery requiring confirmation of the nominees by an outside impartial body such as a federal court, the Secretary of Labor, or an appropriate neutral private body.[204] If these appear to be onerous requirements for a union to accept, it must be remembered that the only alternative under the act and *Steele* is full judicial review of the merits of each case, with the conclusions reached by internal procedures receiving little conclusiveness because of the considerations pointed out in *Tumey* and *Steele*.

An independent internal judiciary within the trade union movement would lessen the necessity for outside intervention,[205] and the very existence of such an internal judiciary might exert a beneficial effect of even greater significance than the decisions in cases coming before its tribunals.[206]

The degree of impartiality of internal tribunals may properly be given

an arrangement in dealing with cases arising under the 1959 act or the Steele principle, an agreement between unions to abide by a plan of arbitration of internal grievances might be enforceable under § 301 of the Taft-Hartley Act, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), which confers federal jurisdiction in "suits for violation of contracts between an employer and a labor organization . . . or between any . . . labor organizations. . . ." A precedent for such enforcement may be the enforcement of the "No-Raiding Pact" in United Textile Workers v. Textile Workers, 258 F.2d 743 (7th Cir. 1958), and Local 2608, Lumber Workers v. Millmen's Local 1495, 169 F. Supp. 765 (N.D. Cal. 1958). Contra, International Union of Doll & Toy Workers v. Metal Polishers, 180 F. Supp. 280 (S.D. Cal. 1960). The problem of interference with NLRB jurisdiction involved in the enforcement of the No-Raiding Pact, discussed in 59 Colum. L. Rev. 202 (1959), and in Meltzer, The Supreme Court, Congress, and State Jurisdiction Over Labor Relations II, 59 Colum. L. Rev. 269, 295-301 (1959), would not arise in the case of an agreement to abide by machinery for resolving internal grievances. Since the agreement would be between international unions as in the No-Raiding Pact case, the question of the applicability of § 301 to suits for breaches of contracts between entities within a single international union as in Burlesque Artists Ass'n. v. American Guild of Variety Artists, 42 L.R.R.M. 2818 (S.D.N.Y. 1958), 69 Yale L.J. 299 (1959), would not arise. Enforceability might have important advantages in promoting the stability of the arrangement, since expulsion from the AFL-CIO has not proved an effective remedy.

204. Any private body utilized would have to be one whose independence, impartiality and devotion to the protection of employee rights was beyond question, if the problems encountered in Steele and Tumey are not to weaken reliance upon the conclusions of a tribunal appointed or confirmed by it.

205. Cf. Summers, The Role of Legislation in Internal Union Affairs, 10 Lab. L.J. 155, 159 (1959); Oppenheim, Trade Union Democracy, 1 Duke B.J. 234, 248 (1951).

206. 1959 UAW Pub. Rev. Bd. Ann. Rep. 20-22, 25-26; 1958 UAW Pub. Rev. Bd. Ann. Rep. 2, 17.

great weight in judicial review of the internal union decisions which are reviewable under the LMRDA or under state law. Nevertheless, further statutory amendments may be desirable if the objective of encouraging an impartial internal trade union judiciary is accepted. Provisions which would specify the considerations governing exhaustion of internal remedies and the weight accorded internal decisions would permit unions to rely upon these advantages if they sought to meet the prescribed standards of impartiality and effectiveness of internal procedures.

Such statutory amendments might provide that if one or more labor organizations establish internal tribunals which qualify as effective and impartial under stated standards, all claims of violation by the organizations of obligations toward their members or employees represented by them, arising under state or federal law or by virtue of the organizations' constitution or bylaws, must be initially presented to these tribunals for decision. The courts would be empowered to review the decisions reached and to afford relief in case of unreasonable delay, but decisions of the qualified tribunals would be given great weight on review unless arbitrary or not supported by substantial evidence.

Since the statute would explicitly provide for the conclusiveness of internal decisions unless clearly arbitrary and for the exhaustion of internal remedies where there is no undue delay, a high degree of effectiveness and impartiality should be required for a tribunal to be recognized as qualified under these provisions. The discussion above and the decisions in *Steele* and other cases imposing the requirement of impartiality might form the basis for the standards for qualification. Such standards might be formulated by an independent committee of outstanding experts in the labor field who might also be charged with the responsibility of confirming the nominations for membership on qualified tribunals made by participating unions if it found the nominees truly impartial.

No union would be required to establish a qualified tribunal, but those which did so, alone or together with other unions, would secure the specified advantages of exclusive preliminary jurisdiction of the internal tribunal and conclusiveness of its decisions. Qualification would be withdrawn if the tribunal ceased to function or be effective and impartial in operation.

Such amendments might enable the purposes of legal standards for the exercise of union power to be served more effectively, while at the same time moderating the restrictive impact of these standards upon union collective bargaining functions. Similar results may of course be achieved under existing law if trade unions establish effective and impartial internal tribunals which are recognized by the courts as warrant-

ing the accordance of greater weight to their decisions, and requiring exhaustion of their procedures.

An important class of employee-union disputes which come before internal tribunals as well as the courts consists of claims by individual employees that their bargaining representatives have failed to process meritorious grievances against employers. In *Conley v. Gibson*,[207] the Supreme Court held that the duty of fair representation imposed in *Steele* extended to the entire collective bargaining process, including the processing of grievances. At the same time, the union has broad discretion to settle grievances which it fairly considers to be without merit, in order to administer the collective agreement effectively.[208]

Since under most collective bargaining agreements, arbitration is the final step in the grievance procedure, and since arbitration agreements have been held enforceable under Section 301 of the Taft-Hartley Act[209] in *Textile Workers v. Lincoln Mills*,[210] there appears to be no reason why, in a proper case, a union could not be compelled to take a grievance to arbitration.[211] In fact, such a holding seems essential in view of many decisions precluding an individual employee from pursuing separate remedies because of an arbitration provision in the collective agreement.[212] These decisions are sound, since they provide the union with authority vitally necessary to its bargaining functions. But they mean that the employee must be permitted to require the union to arbitrate a grievance in a proper case if he is not to be left remediless.[213] Yet if the union is adverse to an employee grievance which is clearly justified and not properly within the union's discretion to decline to process, the *Tumey* problem may recur if the union selects some arbitrators as it selected members of the Adjustment Board whose jurisdiction was re-

207. 355 U.S. 41 (1957).

208. Compare Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949); Ostrofsky v. United Steelworkers, 171 F. Supp. 782, 791 (D. Md. 1959); see Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631, 635-36 & nn.10-11 (1959), and authorities cited.

209. 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

210. 353 U.S. 448 (1957).

211. See Note, 59 Colum. L. Rev. 153, 164-65 (1959); see also Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631, 658-62 (1959).

212. E.g., Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959); see Hanslowe, Individual Rights in Collective Labor Relations, 45 Cornell L.Q. 25, 26-43 (1959); Note, 59 Colum. L. Rev. 153, 158-65 (1959). Cf. Arsenault v. General Elec. Co., 147 Conn. 130, 157 A.2d 918, cert. denied, 364 U.S. 815 (1960).

213. Note, 59 Colum. L. Rev. 153, 163-65 (1959). The predicament in which the employee may find himself is illustrated by In the Matter of Soto, 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d 282 (1960).

jected in *Steele*. In a similar situation, it was held that the court itself must review the fairness of a settlement reached by the union through an adjustment board.[214] Accordingly, judicial review of the merits of an arbitration award might be necessitated on the authority of *Steele* where the problem of partiality in the tribunal exists. But this outcome would defeat one of the chief advantages of arbitration, namely, the avoidance of litigation. Such an outcome might be averted if the union permits the aggrieved employee to participate in the selection of an arbitrator and allows an impartial body to participate in the union's behalf if it cannot reach an agreement with the employee. A substitute arbitrator may be substituted for a permanent umpire unacceptable to the employee.[215] If that were done, judicial review of the merits of the award would not seem required. This does not mean that the employee must participate in selecting arbitrators in all or most cases, but rather only where the grievance may have merit, where a serious conflict of interests between the employee and the union exists, and where it is desirable for the award to be final rather than subject to full review on its merits.

D. *The State Courts and State Law*

The 1959 act confers jurisdiction on the federal courts to enforce many of its provisions. However, this jurisdiction is not exclusive except in the case of the remedy for challenging a union election already conducted.[216] Therefore, the general rule that state courts may enforce federal right applies.[217] Similarly, since *Steele* itself arose from a state court, it is obvious that the state courts have jurisdiction to enforce rights implicit in the duty of fair representation.

In cases arising under the act or under the implications of *Steele*, the state courts may of course enforce state as well as federal law so long as it does not conflict with federal rights. Section 603(a) of the 1959 act provides that nothing in the act limits rights under state law except

214. Edwards v. Capital Airlines, 176 F.2d 755 (D.C. Cir.), cert. denied, 338 U.S. 835 (1949). Compare Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959), rehearing denied, 8 Wis. 2d 264, 100 N.W.2d 317 (1960).

215. See Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631, 661-62 (1959).

216. Labor-Management Reporting and Disclosure Act of 1959 §§ 402, 403, 73 Stat. 534, 29 U.S.C. §§ 482, 483 (Supp. I, 1959).

217. See note 47 supra. The implication which might be drawn from U.S. Dep't of Labor Interpretive Statement, Dec. 11, 1959, 28 U.S.L. Week 2294, that state courts have no jurisdiction to enforce title I of the 1959 statute may be erroneous, since nothing in the statute deprives state courts of their normal jurisdiction to enforce federal rights. Compare McCarroll v. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958), 58 Colum. L. Rev. 278, 71 Harv. L. Rev. 1172.

as explicitly provided.[218] However, section 7 of the NLRA declares that employees have the right to organize and bargain collectively,[219] and section 9 provides for exclusive bargaining authority,[220] which is implemented by a requirement of bargaining in section 8.[221] Enforcement of state rules that would cripple the bargaining function would be prohibited as contrary to these provisions.[222] Therefore, the principle of union authority exemplified by *Huffman*[223] and *Campbell*[224] would seem to be as binding on the state courts as the principle of union responsibility exemplified by *Steele.*

Section 701 of the 1959 act amends section 14 of the NLRA to permit the NLRB to decline to exercise jurisdiction over industries having a minimal impact upon interstate commerce. The amendment provides that nothing in the NLRA "shall . . . prevent . . . any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction."[225] Since the state courts already had jurisdiction to enforce the duties imposed in *Steele,* section 701 would appear to make little change affecting the problems we are considering.

The substantive rule of exclusive bargaining upon which *Steele* is based should not be affected, since the only change made relates to *jurisdiction,* although there have been differing views as to whether this carries with it displacement of federal substantive law.[226] In any event, section 603(a) of the 1959 act provides that "Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization . . . under any other Federal law . . . ."[227] Section 701 cannot be said to explicitly affect the rules to be applied by the state courts under their jurisdiction to enforce *Steele.*

The jurisdiction of both state and federal courts is limited by the exclusive jurisdiction of the NLRB to prevent unfair labor practices, including discrimination to encourage or discourage union member-

218. 73 Stat. 540, 29 U.S.C. § 523(a) (Supp. I, 1959).

219. 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

220. 49 Stat. 453 (1935), as amended, 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).

221. 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958).

222. Compare Local 24, Teamsters Union v. Oliver, 358 U.S. 283 (1959); Hill v. Florida, 325 U.S. 538 (1945).

223. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

224. Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949).

225. 73 Stat. 542, 29 U.S.C. § 164 (Supp. I, 1959).

226. See especially Papps, Section 701 and the State Courts: What Law To Be Applied?, 48 Geo. L.J. 316 (1959). See also Blumrosen, The New Federalism, in Symposium on Labor Relations (Slovenko ed., to be published 1961).

227. 73 Stat. 540, 29 U.S.C. § 523(a) (Supp. I, 1959). See generally Comment, 28 Fordham L. Rev. 737, 738-48 (1960).

ship.[228] The exclusive jurisdiction of the Board, however, has been confined to cases primarily concerning encouragement or discouragement of union membership rather than internal union affairs. In *International Ass'n of Machinists v. Gonzales*,[229] a union member was granted reinstatement and damages for wrongful expulsion under state law. The state court viewed the union constitution as a contract which the union had breached by the improper expulsion. The Supreme Court held that the state court had jurisdiction, on the ground that internal union affairs were only remotely related to the concerns of the Taft-Hartley Act.[230] This statement, considered in the context of a case challenging state competence on the ground of exclusive NLRB jurisdiction, and in view of the Court's view that it is only NLRB jurisdiction which raises the problem of complete pre-emption of state jurisdiction[231] (as distinct from a bar to state action inconsistent with federal rights), means that internal union affairs are peripheral to the *Board's* concerns, not to the impact of the act as a whole as interpreted in *Steele*.[232] Viewed in this way, *Gonzales* establishes that neither state[233] nor federal[234] judicial jurisdiction to enforce the implications of *Steele* is ousted by the NLRB's limited authority in this field.[235]

E. *Preserving the Bargaining Function*

There are a number of provisions of the 1959 act whose consequences may conflict with the purpose of the individual rights sections to protect the rights of individual employees.[236] If restrictions on union ac-

228. See National Labor Relations Act §§ 8(a)(3), (b)(2), as amended, 61 Stat. 140, 141 (1947), as amended, 29 U.S.C. §§ 158(a)(3), (b)(2) (1958), as amended, 29 U.S.C. § 158(a)(3) (Supp. I, 1959), as interpreted in Radio Officers' Union v. NLRB, 347 U.S. 17 (1954). See also International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958) (dictum).

229. 356 U.S. 617 (1958).

230. 356 U.S. at 621. See also id. at 619.

231. 356 U.S. at 619. See also San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959); Note, 69 Yale L.J. 309, 318 (1959).

232. See Meltzer, The Supreme Court, Congress, and State Jurisdiction Over Labor Relations I, 59 Colum. L. Rev. 6, 45-46 (1959).

233. Compare also Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (arising from state court); cf. Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

234. Compare Syres v. Oil Workers, 350 U.S. 892, reversing per curiam 223 F.2d 739 (5th Cir. 1955); see Rives, J., dissenting, 223 F.2d at 745.

235. See Comment, 59 Colum. L. Rev. 190, 198-201 (1959); compare San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 249 (1959) (concurring opinion). See the discussion of the difficulties created by excessively rigid mutual exclusivity of remedies in Davis v. Department of Labor, 317 U.S. 249 (1942), followed in Hahn v. Rock Island Sand & Gravel Co., 358 U.S. 272 (1959).

236. Labor-Management Reporting and Disclosure Act of 1959 § 2, 73 Stat. 519, 29 U.S.C. § 401 (Supp. I, 1959).

tivity had the effect of unduly hampering collective bargaining, individual rights within the union would be to that extent valueless because the union itself within which the rights were granted would have lost its effectiveness to act on behalf of the employees. Similarly, if restrictions deter individual employees from taking part in bargaining functions because of fear of penalties or because they cannot understand the regulatory requirements, the conferring of rights to participate will become to that extent a largely empty ritual. And if a union's existence is threatened, the urgency of unity to overcome such a threat would be likely to hinder the achievement of greater individual freedom within the union.

Such results would be contrary to the purposes of the individual rights sections both of the 1959 act and of the National Labor Relations Act. The presumption that the objectives of an earlier statute are not to be deemed repealed by implication by a later one[237] is particularly applicable here, where these objectives are repeated in the statement of purposes of the later legislation.[238] There are ample precedents for dealing with this kind of problem by construing the broad terms of a statute to imply a rule of reason in its application.[239] A rule of reason has already been adopted, at least by the Secretary of Labor, in the application of the bonding provisions of the act.[240] One example may serve to illustrate how this approach might be applied under the 1959 act.

Section 704(c) of the act adds a section 8(b)(7) to the NLRA banning recognition picketing "where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act . . . ."[241] This provision is designed to prevent a

237. E.g., FTC v. A.P.W. Paper Co., 328 U.S. 193, 202 (1946); United States Alkali Export Ass'n v. United States, 325 U.S. 196, 206 (1945); United States v. Borden Co., 308 U.S. 188, 198 (1939).

238. "The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection. . . ." Labor-Management Reporting and Disclosure Act of 1959 § 2(a), 73 Stat. 519, 29 U.S.C. § 401(a) (Supp. I, 1959).

239. See Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911). "As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) (Hughes, C. J.).

240. 29 C.F.R. § 453 (Supp. 1960); see N.Y. Times, Dec. 12, 1959, p. 14, col. 1.

241. Labor-Management Reporting and Disclosure Act of 1959 § 704(c), 73 Stat. 544, 29 U.S.C. § 158(b)(7) (Supp. I, 1959). The employer, however, cannot sue a union for attempting to compel it to breach a collective bargaining agreement with another union. Aacon Contracting Co. v. Association of Catholic Trade Unionists, 178 F. Supp. 129

union from applying pressure on an employer, and through him on his employees, where another union representing a majority of employees is already bargaining with the employer. Section 8(b)(7) does not apply unless the existing union represents a majority, since otherwise the employer could not validly recognize the existing union under the terms of section 9(a).[242] The difficulty arises where no certification election has been held. If it is not certain which of two competing unions represents a majority, it becomes questionable whether the existing recognition is in accordance with the act. If, as some state courts have held,[243] the very existence of a collective bargaining agreement raises a presumption of the validity of the contract, a corrupt or racketeering union could sign a contract with an employer and automatically exclude a bona fide union until it had overcome the presumption of validity by introducing proof. This is an extremely dangerous possibility because of the widespread incidence of "sweetheart contracts" designed for such purposes.[244] To construe section 704(c) to make "sweetheart contract" arrangements even more effective would be to run directly counter to the purposes of the act stated in section 2 and to the principle against undue interference with legitimate union functions. It would also be contrary to the right of employees to or-

(E.D.N.Y. 1959), aff'd, 276 F.2d 958 (2d Cir. 1960) (National Labor Relations Act § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), authorizes only suits between the contracting parties).

242. "Representatives designated or selected . . . by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives . . ." for collective bargaining. National Labor Relations Act § 9(a), 49 Stat. 453 (1935), as amended, 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958). Certification following an NLRB election under § 9(c) is conclusive when invoked, but in its absence informal majority selection appears to satisfy § 9(a) to the extent that if the union is truly representative the employer may deal with it without certification, as prior to the act. However, § 9(a) would appear to be violated if an employer bargained with a union which did not represent a majority of the employees in an appropriate unit. See ILGWU v. NLRB, 280 F.2d 616 (D.C. Cir. 1960), cert. granted, 364 U.S. 811 (1960) (No. 284, 1960 Term); Dixie Bedding Mfg. Co. v. NLRB, 268 F.2d 901 (5th Cir. 1959); District 50, UMW v. NLRB, 234 F.2d 565, 569 (4th Cir. 1956); Statement of Secretary of Labor Mitchell, Hearings on S. 505 Before a Subcommittee of the Senate Committee on Labor and Public Welfare, 86th Cong., 1st Sess. 407, 409 (1959), in McDermott, Recognition and Organizational Picketing Under Amendments to the Taft-Hartley Act, 11 Lab. L.J. 727, 731 (1960); compare NLRB v. Drivers Union, 362 U.S. 274 (1960), with Local 1424, Int'l Ass'n of Machinists v. NLRB, 362 U.S. 411, 414 (1960).

243. E.g., J. Radley Metzger Co. v. Fay, 4 App. Div. 2d 436, 166 N.Y.S.2d 87 (1st Dep't 1957). The Metzger opinion relied upon International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957), but ignored the implications of Hill v. Florida, 325 U.S. 538 (1945), and appears to be contrary to Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957).

244. See N.Y. Times, Feb. 16, 1959, p. 1, col. 8, at 18, col. 4.

ganize guaranteed by section 7 of the NLRA,[245] since that right could then be exercised only after a long, uncertain and expensive proceeding to prove that the existing agreement was invalid. The broad qualification that an existing union must be "lawfully recognized in accordance with this Act," therefore, should be interpreted to be satisfied only when affirmative evidence of majority support is offered.[246]

Some protection of the right of recognition picketing is afforded by section 10(*l*) of the NLRA, as amended by section 704(d) of the 1959 act, which precludes an injunction under section 8(b)(7) while an unfair labor practice charge of employer assistance of domination of the existing union is pending under NLRA section 8(a)(2).[247] But in the absence of such a charge, the implications of section 7 of the NLRA and the purposes of the 1959 act should bar injunctions under either state law or section 8(b)(7) based upon an existing bargaining agreement where majority support of the union is not affirmatively shown through NLRB certification or other expression of employee views through secret ballot.[248] Where a certification election is not practicable, the NLRB might hold an advisory election[249] or the court itself might arrange for the conduct of a secret ballot referendum among the employees.[250] Testimony, membership cards, depositions or similar evidence should not be admitted to show majority status because the lack of secrecy might permit pressure upon employees which could alter the result, contravening the policy underlying the secret ballot requirement in certification elections.[251]

We have seen, then, how the recognition picketing provisions of section 704(c) illustrate the potential conflicts which may arise between possible interpretations of individual provisions of the act on the one hand and the objectives of the act's individual rights sections and of the

245. 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

246. Compare Jarvis Surgical Co. v. Davis, 15 Misc. 2d 1035, 186 N.Y.S.2d 357 (Sup. Ct. 1958), 59 Colum. L. Rev. 810 (1959). See Givens, Section 301, Arbitration and the No-Strike Clause, 11 Lab. L.J. 1005, 1015-17 (1960).

247. Where an unfair labor practice charge is dismissed because of the six-month statute of limitations (see Local 1424, Int'l Ass'n of Machinists v. NLRB, 362 U.S. 411 (1960)), § 10(*l*) might provide no further protection against an injunction under § 8(b)(7) even though the contracting union did not represent a majority. However, the suggested interpretation of § 8(b)(7) itself would provide protection for the desires of the majority of employees in such a case.

248. Compare Hill v. Florida, 325 U.S. 538 (1945).

249. Cf. NLRB v. District 50, UMW, 355 U.S. 453 (1958).

250. See N.Y. Times, Oct. 21, 1959, p. 35, col. 2.

251. To the extent that the NLRB determines majority status other than by secret ballot (see 29 C.F.R. §§ 101.22-.25 (Supp. 1960)), §§ 7, 9(a) of the NLRA, as given specific meaning by § 9(c), would appear to be violated.

NLRA on the other. However, if the act's stated objectives are allowed to shape the interpretations, these conflicts will be minimized. The extent to which conflicts will arise is difficult to predict in advance,[252] but where conflicts emerge, the basic national judgments expressed in section 2 should be given greater weight as probably a deeper expression of "the sober second thought of the community, which is the firm base on which all law must ultimately rest,"[253] than any punitive purpose which may have been translated into a particular provision.

The answers to many of the great questions under the statute, including the position of employees arbitrarily excluded from union membership, the role of internal union procedures, and others discussed herein, must be reached through judicial reasoning based upon the fundamental purposes of the act, rather than flowing unmistakably from the operative language of its provisions.[254] In order to achieve the purposes stated in section 2 of the act, the courts will be called upon to interpret the many ambiguous provisions of the act in the light of an understanding of industrial conditions and the basic aims stated in section 2. Although this is a most difficult and perplexing task, we may draw encouragement from the fact that the Supreme Court has begun to develop such an approach of purpose-interpretation based upon a recognition of industrial conditions in cases under Section 301 of the Taft-Hartley Act,[255] conferring jurisdiction over suits for violation of collective bargaining agreements.[256]

III. The Continuing Challenge

The 1959 act and the implications of the *Steele* decision pose a momentous challenge for the trade union movement, for employers, for individual employees, and for the public. How this challenge is met will have far-reaching effects on our efforts to deal with the problems presented by concentrated power, and on the competition between democratic government and Communist totalitariansm.

---

252. Cf. Hays, Foreword, 59 Colum. L. Rev. 1, 4-5 (1959).

253. Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936).

254. Compare Handler, Antitrust in Perspective, ch. I (1957); see San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 239-41 (1959); International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958); Jones, Statutory Doubts and Legislative Intention, 40 Colum. L. Rev. 957 (1940).

255. 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

256. See United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960); Lewis v. Benedict Coal Corp., 361 U.S. 459, 468 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

A. *The Challenge to Trade Unions*

The challenge to the union movement has two facets, one presented by the individual rights sections of the 1959 act and by *Steele,* the second by other provisions of the act.

The expanded individual rights which may flow from the act and the implications of *Steele* present a historic opportunity to American trade unionism. The rights which may be conferred are in accord with the basic traditions of American trade unionism[257] and can offer several crucial advantages to unions. First, the basic objective of unions of securing greater participation for employees in decisions which affect them will be better served. Second, dissatisfaction among employees represented by unions may be transformed into constructive union activity[258] and criticisms will have an outlet which can lead to correction of the underlying conditions causing dissatisfaction. Third, to the extent that individual participation grows, pressure for further drastic legislation curbing union independence may be lessened and even turned into opposition to such legislation. Fourth, organizing campaigns should be assisted, since employees will be assured that their rights will be protected. Fifth, if individual participation actually expands, union standing before public opinion, with its long run political consequences, will be greatly improved. To realize these advantages, the opportunity to participate will have to be made real.[259] For this reason and because of the lessening of the need for direct judicial intervention which might result, substantial benefits might flow from an effective system of impartial internal tribunals or Public Review Boards created by unions themselves.[260] Another important stimulant to individual participation would be the decentralization of as many decisions as possible to local units in which employees can take a more active part.[261] Of course, neither of these measures nor any others can achieve

257. See Goldberg, The Rights and Responsibilities of Union Members, 9 Lab. L.J. 298, 299 (1958); AFL-CIO Constitution, art. II, § 10; Code VI, Union Democratic Practices, in AFL-CIO Codes of Ethical Practices 41 (1957).

258. Compare Lipset, Trow & Coleman, Union Democracy 268-69 (1956); Kovner, The Legal Protection of Civil Liberties Within Unions, 1948 Wis. L. Rev. 18, 19; Seidman & Melcher, The Dual Union Clause and Political Rights, 11 Lab. L.J. 797, 808 (1960); 1959 UAW Pub. Rev. Bd. Ann. Rep. 20-22; cf. Selznick, TVA and the Grass Roots (1949), discussed in Blumrosen, Legal Protection of Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631, 632-33 n.4 (1959).

259. Much progress has already been made. See sources cited in notes 198 and 258 supra.

260. See note 198 supra.

261. See Lipset, Trow & Coleman, Union Democracy 14, 69 (1956); Summers, The Usefulness of Law in Achieving Union Democracy, 48 Am. Econ. Rev. 44, 46 (Supp. 1958); cf. Caplow, Organizational Size, 1 Ad. Sci. Q. 484, 502-05 (1957); Parkinson, Parkinson's Law 33-44 (1957).

the impossible and transform a trade union into a model of theoretically perfect democracy, with absolutely equal participation by everyone in its decisions, any more than each of us participates equally in the decisions of the most democratic public governments. It is possible, however, for the opportunity to participate to expand so as to come closer to the goal of a workable democracy in which the minority which actually formulate decisions are ultimately responsible to the majority who are affected by these decisions, and in which an organization is invigorated by participation from the bottom up as well as direction from the top down.[262]

Expanding individual participation may well be given greater stress as part of a re-evaluation of the aims of the trade union movement,[263] in which a greater voice for the employee in his industrial government as well as the protection of his job rights[264] and the traditional goals of higher wages, shorter hours, and better working conditions would be considered significant.[265]

It is tragic for the union movement that the individual rights provisions of the 1959 act had to be enacted as part of a measure which also included provisions relating to labor-management relations bitterly opposed by the unions. Many unionists will condemn the statute and all of its supporters *in toto*. They will not make the painful effort necessary to separate the various facets of the act to determine which parts are necessary, if perhaps unpleasant, medicine which will nonetheless help to cure real ills, and which are simply part of a contest between unions and employers carried over into the political arena. If the effort can be made to make this separation, it may well be found that the "Bill of Rights" provisions, if construed in the light of the principles laid down in *Steele* and in *Campbell* and *Huffman* and in the light of the judicial philosophy of reliance upon political restraints, will prove of ultimate benefit rather than detriment to the trade union movements.

262. Cf. Acheson, Thoughts About Thought in High Places, N.Y. Times, Oct. 11, 1959, § 6 (Magazine), p. 20 at 86-87.

263. Compare Tyler, A New Philosophy for Labor (1959).

264. See Perlman, A Theory of the Labor Movement (1928); Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631, 651-53 (1959).

265. To the extent that this took place, it would become particularly clear that extension of governmental ownership of industry would be disadvantageous to labor. Under government ownership, some employee political rights, in some instances collective bargaining and almost certainly the right to strike, would be lost. As to political rights, see Act of Aug. 2, 1939, 53 Stat. 1148, as amended, 5 U.S.C. §§ 118i-k (1958); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); Note, 45 Geo. L.J. 233 (1957). As to collective bargaining, see City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947); but cf. California v. Taylor, 353 U.S. 553 (1957). As to the right to strike, see United States v. UMW, 330 U.S. 258 (1947); Act of Aug. 9, 1955, 69 Stat. 624, 5 U.S.C. §§ 118p-q (1958).

Most of the problems raised by provisions of the 1959 act other than those dealing with individual rights are beyond the scope of this article. But the individual rights provisions may form the basis of a persuasive argument open to unions that the restrictive provisions should be interpreted reasonably so as not to impair collective bargaining and thereby reduce the value of the individual rights conferred by the act.

B. *The Effect Upon Employers*

Some employers may find that as a result of rights granted to individual employees, unions become more active and energetic, and grievances and demands which might otherwise lie dormant are vigorously presented.[266] On the other hand, wildcat strikes might be less prevalent, because employees would be more fully represented in the formulation of the original contract and therefore more likely to be satisfied with the settlement at least for the time being.[267] Furthermore, unions which better represent employees will bring the real wishes of the employees more to management's attention, perhaps resulting in an improvement of morale. Employees may also come to share a greater sense of participation in their "industrial government" through their rights in the union, and therefore a greater sense of belonging and satisfaction in their work. If so, and if a guarantee of retraining, substantial severance pay or new opportunities for those who were displaced due to technical advances were provided, employees might become more willing to take part in the effective ordering of their work so as to produce more efficiently and at the same time make their jobs as interesting as possible.[268]

C. *The Opportunity for Employees*

Any extension of the right to participate in union decisions would be important in helping to make unions more effective guardians of individual employee rights. However, the opportunity to participate has little meaning unless employees accept the challenge it offers and take the time and effort necessary to make it real. Greater participation can be significant not merely in terms of its effects upon demands for changes in wages, hours, and working conditions, but also in providing a greater opportunity for work ultimately to become more meaningful.[269] Carried down to the local level, participation would be expanded not merely

266. See Raskin, One Cost of Democracy, N.Y. Times, April 21, 1959, p. 25, col. 1.

267. Cf. Taylor, The Role of Unions in a Democratic Society, in Senate Committee on Labor and Public Welfare, 85th Cong., 2d Sess., Government Regulation of Internal Union Affairs Affecting the Rights of Members (Comm. Print 1958).

268. See N.Y. Times, Nov. 27, 1959, p. 28, col. 7; id., Jan. 12, 1960, p. 14, col. 1.

269. Compare the ultimate hopes expressed in Gibran, The Prophet 27-31 (Pocket ed. 1955).

in collective bargaining decisions, but in all aspects of the job. Rights on the job would then be secured by a grievance procedure under the collective bargaining agreement, and rights within the union by an internal grievance procedure within the trade union, each providing impartial determinations, thus securing to the employee the benefits of "due process of law" in his industrial government as well as in his public government.[270]

D. *The Public Interest*

Powerful private groups are inevitable in modern industrial society, unless a totalitarian state is substituted in their stead, gathering all power to itself. We have sought to deal with this problem in two ways: first, by expanding governmental control, and second, by strengthening new private interests to offset the old. We have considered the second method far preferable when it can be used. Experience has shown that private power can be a vital source of initiative and new ideas when limited by the countervailing power of those affected by it. Thus unions became necessary to balance the power of employers. Similarly, it is now necessary to extend "grievance procedures" within the unions to give a greater voice to individual employees.

A free, responsible and democratic trade union movement, with its promise of employee partnership in the government of industry, is one of our most important weapons in the contest with Communist totalitarianism. One of the most striking contrasts between a free society and one dominated by a Communist or Fascist dictatorship is that in the latter, free trade unions are stamped out. The health of the American labor movement has a vital bearing on how our economic and political system is judged by the newly developing nations. These elements in the world struggle for men's minds are at stake in the issue of whether the 1959 act is construed so as to further the opportunities of individual employees while not unduly impairing the bargaining function.

Chief Justice Stone's decision in *Steele v. Louisville & N.R.R.* can have tremendous significance both as a guidepost in the interpretation of the statute to achieve its stated purposes and as a precedent for principles of far wider applicability. Chief Justice Stone's sensitivity to the steady pressure of facts and events and his respect for the past as a foundation to be built upon in meeting new problems remains an inspiring example. His decision indicates that private groups possessing legislatively conferred authority may be held to the constitutional standards applicable to the legislature itself in the exercise of the authority granted.

The great principle that power implies responsibility toward those

270. Commons, Legal Foundations of Capitalism 312 (1924).

affected by it is of course not limited to the obligations of collective bargaining representatives. It is the underlying basis of much of our economic legislation. And it has potential judicial application, in varying degrees, under all of the great enactments which express national judgments that fairness be required, as well as under statutes conferring powers upon private groups.[271]

This great principle at the core of the *Steele* decision is the antithesis of totalitarian forms of government, under which power may be exercised over others without responsibility to them, and free from political restraints which may check its excesses. We stand historically committed to this principle and are struggling to vindicate it as superior for meeting human needs. In the end, it will also be more efficient because it can command the allegiance of the free human spirit, which the totalitarian principle cannot do. The problems arising in the interpretation of the 1959 act and the implications of *Steele* in the labor field are one chapter in the history of that enterprise.

271. Cf. Berle, "Control" in Corporate Law, 58 Colum. L. Rev. 1212 (1958); Berle, Legal Problems of Economic Power, 60 Colum. L. Rev. 4, 7-11 (1960); Givens, Parallel Business Conduct Under the Sherman Act, 5 Antitrust Bull. 273 (1960).