

# Affirmative Action in Union Government: The Landrum-Griffin Act Implications

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## I. INTRODUCTION

In 1974 the 50,000 member Illinois Education Association (IEA)<sup>1</sup> suffered from a problem that plagues virtually the entire labor movement: the severe underrepresentation of minority group members in union leadership positions.<sup>2</sup> At a time when an estimated fifteen percent of the IEA's membership was comprised of minority group members,<sup>3</sup> the Association had no minority officers and no minority members on the fifty-person board of directors.<sup>4</sup> The IEA's representative assembly, the 600 member "policy-forming body of the Association,"<sup>5</sup> had only five to ten minority members, or less than two percent.<sup>6</sup>

By 1980, however, the picture looked entirely different. One of the IEA's principal officers was black, the board of directors was approximately fifteen percent minority, and the representative assembly was eight percent minority.<sup>7</sup> This remarkable turnaround was largely the product of an affirmative action plan<sup>8</sup> voluntarily

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1. The IEA is a not-for-profit Illinois corporation whose stated object is "to advance Public Education in Illinois and to promote the welfare of nonmanagement school personnel." IEA BYLAWS, arts. I, II (1978, amended 1982), reprinted in part in Brief for Appellee, Appendix, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982) [hereinafter cited as 1978 BYLAWS]. The IEA is a state affiliate of the National Education Association (NEA), *id.*, art. I, a professional organization which was founded in 1857 and incorporated by special act of Congress in 1906. NEA, NEA HANDBOOK 133 (1981-82). Over the past twenty years or so, the NEA and its state affiliates have taken on many of the characteristics of traditional labor unions and now frequently represent teachers and other school personnel in collective bargaining. See generally A. CRESSWELL & M. MURPHY, *TEACHERS, UNIONS, AND COLLECTIVE BARGAINING IN PUBLIC EDUCATION* 53-100 (1980). The NEA's principle rival in representing teachers is the American Federation of Teachers, AFL-CIO (AFT), and its affiliates. Many small, independent teachers' unions also are spread throughout the nation's school systems. See *id.* at 26.

2. See *infra* text accompanying notes 40-56.

3. See *infra* note 171.

4. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 148 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

5. 1978 BYLAWS, *supra* note 1, at art. VI, § 3.

6. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 148 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

7. Affidavit of Reginald L. Weaver at 1, 4-5, reprinted in Brief for Appellee, Appendix, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982) [hereinafter cited as Weaver Affidavit].

8. The United States Commission on Civil Rights has defined "affirmative action" as "active efforts that take race, sex, and national origin into account for the purpose of remedying discrimination." U.S. COMM'N ON CIVIL RIGHTS, *AFFIRMATIVE ACTION IN THE 1980s: DISMANTLING THE PROCESS OF DISCRIMINATION* 3 (1981) [hereinafter cited as *AFFIRMATIVE ACTION IN THE 1980s*]. An enormous body of literature exists on the subject of affirmative action. Among the more helpful or frequently cited authorities are: N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975); REVERSE DISCRIMINATION (B. GROSS, ed. 1977); *AFFIRMATIVE ACTION IN THE 1980s*, *supra*; Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Freeman, Bell & McGee, *Race, Class and the Contradictions of Affirmative Action*, 7 BLACK L. J. 270 (1982); Ginger, *Who Needs Affirmative Action?*, 14 HARV. C.R.-C.L. L. REV. 265 (1979); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem*

adopted by the IEA's "overwhelmingly white"<sup>9</sup> 1974 convention at the urging of the Association's Minority Caucus.<sup>10</sup> Designed both to remedy the underrepresentation of minorities in IEA leadership positions and to assure that there would be "a continuing and effective vehicle for consideration of minority information and views" within the IEA,<sup>11</sup> the plan guaranteed members of certain minority groups a minimum percentage of seats both on the union's executive board and in the representative assembly.<sup>12</sup>

The IEA's affirmative action plan was remarkable not only because of its effectiveness, but also by virtue of the fact that it was adopted at all. As one of only a small handful of such plans ever implemented by American labor unions,<sup>13</sup> the IEA's plan served as a model for other unions contemplating such plans. Equally important, its adoption served as a precedent for minority or women's caucuses in other unions seeking to pressure their unions into improving minority and female representation in union leadership positions.<sup>14</sup>

Unfortunately, the IEA's affirmative action plan was struck down by the United States Court of Appeals for the Seventh Circuit in *Donovan v. Illinois Education Association*.<sup>15</sup> In an opinion by Judge Richard A. Posner<sup>16</sup> the court upheld a United States Department of Labor challenge to the plan on the basis that the plan violated the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or Landrum-Griffin Act).<sup>17</sup> Although the court somewhat disingenuously stated that the case did "not involve the legality of affirmative action,"<sup>18</sup> the IEA opinion was the first, and to date the only, appellate decision since the Supreme Court decided *United Steelworkers v. Weber*<sup>19</sup> to find an affirmative action plan violative of federal law.<sup>20</sup>

of *Special Treatment*, 61 Nw. U.L. Rev. 363 (1966); Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534 (1975); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213 (1980).

9. *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638, 642 (7th Cir. 1982).

10. Weaver Affidavit, *supra* note 7, at 3-4.

11. *Id.* at 4.

12. See *infra* text accompanying notes 141-55.

13. See *infra* text accompanying notes 113-28.

14. Although the IEA's affirmative action plan did not authorize any preferential treatment for women, 1978 BYLAWS, *supra* note 1, art. VI, §§ 1, 4, it could easily have been modified to do so had the IEA thought such action necessary. As a teachers' union, the IEA presumably had greater representation of women in leadership positions than unions in less traditionally female occupations, and affirmative action for women was therefore less appropriate. This Article takes the position that when underrepresentation of women in union leadership positions has been a long-standing problem, affirmative action for women in union government is just as appropriate as affirmative action for minority groups. Cf. *La Riviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1982) (voluntary affirmative action plan increasing employment opportunities for women upheld); *Local 35, Int'l Bhd. of Elec. Workers v. City of Hartford*, 625 F.2d 416 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (voluntary affirmative action plan increasing employment opportunities for women upheld); Comment, *Voluntary Affirmative Action Under Title VII: Standards of Permissibility*, 28 U.C.L.A. L. REV. 281, 319-33 (1980).

15. 667 F.2d 638 (7th Cir. 1982).

16. The IEA decision was Judge Posner's first opinion in a civil case after being elevated to the bench from his professorship at the University of Chicago Law School in late 1981.

17. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.). See *infra* note 129.

18. 667 F.2d 638, 640 (7th Cir. 1982).

19. 443 U.S. 193 (1979) (upholding, against a challenge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976), a voluntary affirmative action plan that reserved for blacks 50% of the openings in an in-plant job training program).

20. Among the post-*Weber* cases upholding affirmative action plans are *La Riviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1982); *Schmidt v. Oakland Unified School Dist.*, 662 F.2d 550 (9th Cir. 1981); *Tangren v. Wackenhut Servs. Inc.*,

This Article will examine closely the *IEA* case and the court's conclusion that virtually any affirmative action plan that reserves for minorities a percentage of a union's elective offices violates the Landrum-Griffin Act. It will argue that while some aspects of the Illinois Education Association's affirmative action plan were ill-conceived, the court's conclusion was overbroad, without sound legal foundation, and in direct conflict with the policies underlying the Act. This endeavor is worth pursuing for several reasons. First, other unions, particularly other affiliates of the National Education Association,<sup>21</sup> have adopted affirmative action plans similar to that of the *IEA*, and after the *IEA* decision those plans are in considerable danger of judicial attack. Second, minority and women's caucuses in many unions without affirmative action plans will undoubtedly continue to push for the adoption of such plans. This Article may help them respond when resistant union officials try to cut off debate with "Gee, guys, we'd sure like to help you out, but our lawyers tell us what you're proposing is illegal."<sup>22</sup> Last, in light of Judge Posner's prominence<sup>23</sup> and *IEA*'s unique position as a post-*Weber* case striking down an affirmative action plan, the case is likely to add fuel to the fires of the current anti-affirmative action backlash.<sup>24</sup> By demonstrating the flaws in Judge Posner's opinion and presenting the

658 F.2d 705 (9th Cir. 1981); *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir. 1981); *Parker v. Baltimore & O.R.R.*, 652 F.2d 1012 (D.C. Cir. 1981); *Local 35, Int'l Bhd. of Elec. Workers v. City of Hartford*, 625 F.2d 416 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). *But cf.* *Lehman v. Yellow Freight Sys.*, 651 F.2d 520 (7th Cir. 1981) (upholding the Title VII challenge of a white plaintiff to the preferential hiring of a black pursuant to a terminal manager's ad hoc, informal hiring policy, rather than an organized affirmative action plan); *Associated Gen. Contractors v. San Francisco Unified School Dist.*, 616 F.2d 1381 (9th Cir. 1980) (overturning on the basis of a state statute—and before the Supreme Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980)—a school district requirement that 25% of its construction work be let to minority contractors).

21. The NEA's current bylaws require each state affiliate to "take such steps as are legally permissible to achieve ethnic-minority representation [on its governing bodies] at least proportionate to its ethnic-minority membership." NEA BYLAWS § 8-11, in NEA, NEA HANDBOOK 160 (1981-82).

22. Admittedly, few, if any, rank and file union members read law review articles. However, the arguments raised in this Article may reach them through their lawyers, or through such publications as the *Union Democracy Review*, published by the Association for Union Democracy, *Labor Notes*, published by the Labor Education & Research Project, and *Labor Update*, published by the Labor Committee of the National Lawyers Guild. All three of these publications have widespread circulation among rank and file activists, and they frequently report on controversial legal issues of interest to the rank and file.

23. *See, e.g.*, Margolick, *Ally and Foe Admire Bench Nominee*, N.Y. Times, Nov. 20, 1981, at A14, col. 1. At the University of Chicago, Posner enjoyed a most influential academic career as one of the founders and leading advocates of the conservative law and economics approach to the study of law and legal institutions. In addition to dozens of law review articles which sought to apply a free market economic analysis to an astonishing range of legal issues, Posner has written *Economic Analysis of Law* (2d ed. 1977) and *The Economics of Justice* (1981), and was the founding editor of *The Journal of Legal Studies*, a journal designed "to encourage the application of scientific methods to the study of the legal system," with a principal theme being "the deep relationship between the economic and legal orders." Posner, *Volume One of the Journal of Legal Studies—An Afterword*, 1 J. LEGAL STUD. 437, 438 (1972). Posner has also been a longtime opponent of affirmative action. *See, e.g.*, R. POSNER, ECONOMICS OF JUSTICE 364-407 (1981); Posner, *The Bakke Case and the Future of "Affirmative Action"*, 67 CALIF. L. REV. 171 (1979); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1.

Judge Posner's opinion is worthy of scrutiny for the additional reason that he must be considered a strong candidate for appointment to the Supreme Court. With five justices over the age of 70, President Reagan likely will have an opportunity to make one or more additional appointments before he leaves office, and Richard Posner is young enough, conservative enough, and qualified enough to be a leading contender for such an appointment.

24. For example, the Justice Department recently filed a brief challenging the affirmative action provisions of a Title VII consent decree involving the New Orleans police department. *See* 112 L.R.R.M. (BNA) 110 (Feb. 7, 1983) (News & Background Section). In addition, the Supreme Court's recent grant of certiorari in *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982) (modifying consent decree imposing minority hiring goals to assure that seniority based layoffs do not reduce the proportion of minority fire fighters), *cert. granted sub nom.*, *Firefighters Local Union No. 1784 v. Stotts*, 103 S. Ct. 2451 (1983), raises the fear that the Court may undercut its endorsements of affirmative action in *Weber* and *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

arguments in support of affirmative action in union government, this Article seeks to dampen the force of that backlash.

Before proceeding to an analysis of *IEA*, however, it is first appropriate to review the status of minorities and women in the labor movement and to examine the need for affirmative action to remedy their underrepresentation in the leadership positions of that movement. That review is undertaken in the next part of this Article. The subsequent part will then analyze and criticize the court's opinion in *IEA* and argue that affirmative action plans similar to that of the *IEA* can indeed be squared with Title IV of the LMRDA.

## II. MINORITIES, WOMEN, AND UNION LEADERSHIP

### A. *The Status of Minorities and Women in the Labor Movement*

Until the passage of the Civil Rights Act of 1964,<sup>25</sup> labor unions were under no legal obligation to admit minority or female members into their ranks.<sup>26</sup> Many unions, for example, had formal prohibitions against black membership, and many others relegated black members to auxiliary or segregated locals.<sup>27</sup> Even unions without formal restrictions were able to exclude blacks or members of other minority groups by less formal means, such as requirements that new members be sponsored by present members, or rules allowing proposed new members to be blackballed by the votes of only a handful of present members, or membership policies giving preference to the relatives of present members.<sup>28</sup> Although exclusionary practices were not unknown among industrial unions,<sup>29</sup> they were most prevalent among craft unions, especially in the building trades, where as a general rule the unions controlled access to work.<sup>30</sup> "Undesirables" could easily be barred from the crafts by excluding

25. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

26. See, e.g., *Oliphant v. Brotherhood of Locomotive Firemen & Enginemen*, 262 F.2d 359 (6th Cir. 1958), cert. denied, 359 U.S. 935 (1959). In *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), the Supreme Court had been asked to hold that unions enjoying the statutory status of exclusive bargaining agents be required to admit blacks, but the Court refused to so hold. *Id.* at 204. The Court did agree, however, that such unions have a statutory duty to represent all members of a bargaining unit fairly, whether or not they are members of the union, and that this duty of fair representation precludes "hostile discrimination" against black bargaining unit members. *Id.* For a thoughtful reexamination of *Steele* and its role in the development of both labor law and civil rights law, see Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 185-98 (1982).

27. R. MARSHALL, *THE NEGRO AND ORGANIZED LABOR* 89-105 (1965). In addition to the latter work by Marshall, other leading examinations of blacks and the labor movement include A. BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* (1971); P. FONER, *ORGANIZED LABOR AND THE BLACK WORKER* (2d ed. 1981); W. GOULD, *BLACK WORKERS IN WHITE UNIONS* (1977); I H. HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* (1977); *THE NEGRO AND THE AMERICAN LABOR MOVEMENT* (J. Jacobson, ed. 1968).

28. R. MARSHALL, *supra* note 27, at 109-18.

29. *Id.* at 128. Most industrial unions, however, especially those organized by the Congress of Industrial Organizations during the Depression, tended to accept black members much more freely. In part, this was because industrial unions, unlike many craft unions, do not control hiring, and blacks were often well represented in mass-production industries before unions arrived on the scene. In addition, the organizers of the industrial unions, many of whom were socialists or communists, tended to have more progressive views on race relations than the leaders of the craft unions. See, e.g., P. FONER, *supra* note 27, at 215-37; I H. HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK AND THE LAW* 260-73 (1977); A. MEIER & E. RUDWICK, *BLACK DETROIT AND THE RISE OF THE UAW* (1979). Even in such progressive industrial unions as the United Auto Workers, however, apprenticeships for skilled jobs were often overwhelmingly white. See W. GOULD, *supra* note 27, at 21, 263, 371-72.

30. R. MARSHALL, *supra* note 27, at 128. As the Supreme Court recently put it, "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers v. Weber*, 443 U.S. 193, 198 n.1 (1979).

them from apprenticeship programs, or by rigging journeyman examinations so minority craftsmen would fail, or by simply refusing to dispatch minority journeymen from union-run hiring halls.<sup>31</sup> Similar restrictions were also used to keep women out of much of the labor movement—reinforced, of course, by the psychological and ideological message that many types of work outside the home were not appropriate for women.<sup>32</sup> As late as 1974, twenty-eight national unions reported that they had no female members.<sup>33</sup>

This history of race and sex discrimination has left its mark on the present composition of the labor movement, particularly on the numbers of minorities and women who hold leadership positions in unions. In 1978 labor unions and employee associations recorded about twenty million members in the United States,<sup>34</sup> or about twenty percent of the civilian labor force.<sup>35</sup> Of that number, 23.5 percent were women,<sup>36</sup> and about eighteen percent were minorities.<sup>37</sup> Thus, while minorities, who comprised approximately fifteen percent of the civilian labor force in 1978<sup>38</sup> had become a major presence in the labor movement,<sup>39</sup> women, who comprised close to forty-two percent of the civilian labor force,<sup>40</sup> continued to be underrepresented in unions.

However, both minorities and women are severely underrepresented in leadership positions within the labor movement. The AFL-CIO, for example, has only two blacks and two women on its thirty-five-member executive council.<sup>41</sup> Minority group members hold the presidencies in only three of the 174 national unions in the United

31. R. MARSHALL, *supra* note 27, at 109. For an excellent examination of race discrimination in the construction trades, see W. GOULD, *supra* note 27, at 281-362.

32. See, e.g., V. NIEVA & B. GUTER, *WOMEN AND WORK: A PSYCHOLOGICAL PERSPECTIVE* 8-37 (1981); A. SUMMERS, A. FREEDMAN, M. DUNKLE & F. BLAU, *EXPLOITATION FROM 9 TO 5: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON WOMEN AND EMPLOYMENT* 115-21 (1975); *WOMEN AND THE WORKPLACE* 87-179 (M. Blaxall & B. Reagan, eds. 1976); Baker & Robeson, *Trade Union Reactions to Women Workers and Their Concerns*, 6 *CANADIAN J. OF SOC. 19*, 20-21 (1981). Protective legislation has also played a role in excluding women from many types of work. *Id.* at 22-23.

33. Wertheimer, *Leadership Training for Union Women in the United States: Route to Equal Opportunity*, in *EQUAL EMPLOYMENT POLICY FOR WOMEN* 227 (R. Ratner, ed. 1980).

34. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *DIRECTORY OF NATIONAL UNIONS AND EMPLOYEES ASSOCIATIONS*, 1979, at 55-56 (1980).

35. The total civilian labor force was approximately 102 million, of whom approximately 96 million were employed. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES 1982-83* 376 (1982) [hereinafter cited as 1982-83 *STATISTICAL ABSTRACT*].

36. U.S. COMM'N ON CIVIL RIGHTS, *NONREFERRAL UNIONS AND EQUAL EMPLOYMENT OPPORTUNITY* 1 n.5 (1982) [hereinafter cited as *NONREFERRAL UNIONS*].

37. *Id.* at 2 nn.6-7. Of the minority group members belonging to unions, about three-fourths were black or other racial minorities (e.g., Asian, American Indian) and about one-fourth were Hispanic. *Id.* at n.6.

38. Racial minority groups and Hispanics in the labor force numbered approximately 15.5 million, of whom approximately 13.7 million were employed. 1982-83 *STATISTICAL ABSTRACT*, *supra* note 35, at 376 (1982); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORT NO. 328, PERSONS OF SPANISH ORIGIN IN THE UNITED STATES: MARCH 1978*, at 8.

39. The slight overrepresentation of minorities in the labor movement can probably be explained by the fact that white males in the labor force are overrepresented in nonunion professional and managerial jobs.

40. 1982-83 *STATISTICAL ABSTRACT*, *supra* note 35, at 376.

41. Telephone interview with Rex Hardesty, Assistant Director of Information, AFL-CIO (Oct. 6, 1983). Even these figures overstate the case somewhat since one member of the executive council, Barbara Hutchinson, is a black woman. *Id.*

States,<sup>42</sup> and no women head any of the AFL-CIO's affiliate unions<sup>43</sup> in spite of the fact that women comprise at least half the membership in twenty-one different unions.<sup>44</sup> Indeed, in 1979 women held only 4.7 percent of the 661 national offices in unions affiliated with the AFL-CIO.<sup>45</sup>

A recent study by the United States Commission on Civil Rights of twelve of the largest unions in this country<sup>46</sup> found that their memberships were about fifteen percent minority and about twenty-seven percent female, yet no minorities or women held any of the offices of president, executive vice-president, secretary, secretary-treasurer, or treasurer at the national level.<sup>47</sup> Of the 184 vice-presidencies, eight percent were held by minorities, and seven percent by women.<sup>48</sup> Minorities and women were represented on the unions' executive boards in about the same percentages.<sup>49</sup>

Minorities and women fared somewhat better in local leadership positions examined by the Civil Rights Commission,<sup>50</sup> but they were still underrepresented. Thirty-two percent of the bargaining unit members represented by the union locals studied were members of minority groups, yet only twenty-seven percent of the local offices were held by minorities.<sup>51</sup> Much smaller percentages of local presidencies or vice-presidencies were held by minorities.<sup>52</sup> Similarly, thirty-seven percent of the bargaining unit members were women, yet only twenty-three percent of the local offices were held by women.<sup>53</sup> Again, women held an even smaller percentage of the top local offices.<sup>54</sup> Few unions omitted from the Civil Rights Commission's study

42. These are Cesar Chavez of the United Farm Workers of America, Frederick O'Neal of the Associated Actors and Artistes of America, *id.*, and significantly, Mary Hatwood Futrell, a black woman who was recently elected president of the National Education Association. See Maeroff, *Energetic Leader for Teachers' Union*, N.Y. Times, July 3, 1983, at A14, col. 2.

43. Although the National Education Association is now led by a woman, it is not affiliated with the AFL-CIO.

44. Wertheimer, *supra* note 33, at 227. For example, women constitute 80% of the International Ladies' Garment Workers Union and 61% of the Amalgamated Clothing and Textile Workers' Unions. NONREFERRAL UNIONS, *supra* note 36, at 14.

45. NONREFERRAL UNIONS, *supra* note 36, at 13. A special convention of the Communications Workers of America, which has never had a woman elected to national office even though a majority of its members are women, recently rejected a proposal to create a fourth vice-presidency, with the "hope and expectation" that a woman would be elected to fill the position. Only 26% of the convention's delegates were women. 112 L.R.R.M. (BNA) 281, 283 (1983) (News & Background Section).

46. The study focused on the 12 largest private sector, nonreferral unions. Nonreferral unions are those that have little direct influence on hiring, that is, unions that do not regularly refer members to jobs through union operated hiring halls. With a combined membership of over 10 million in 1978, the unions included in the study were the Teamsters, Auto Workers, Steelworkers, Machinists, Electrical Workers (IBEW), Retail Clerks, Clothing and Textile Workers, Communications Workers, Service Employees, Meat Cutters, Ladies' Garment Workers, and Hotel and Restaurant Employees. NONREFERRAL UNIONS, *supra* note 36, at iv-v. It should be noted that many Teamsters and Electrical Workers locals operate hiring halls.

47. *Id.* at 14-15.

48. *Id.* at 15.

49. *Id.*

50. The Commission's study included an examination of 77 locals, randomly selected from among the locals affiliated with the 12 international unions covered by the study. *Id.* at 8.

51. *Id.* at 18.

52. *Id.* at 23-25. See also Lamm, *Black Union Leaders at the Local Level*, 14 INDUS. REL. 220, 231 (1975) (reporting that blacks were underrepresented among local union leaders in two-thirds of a sampling of local unions with black members in the San Francisco Bay area).

53. NONREFERRAL UNIONS, *supra* note 36, at 18.

54. *Id.* at 23-25.

have a significantly better record in their representation of minorities and women in leadership positions,<sup>55</sup> and many have a much worse record.<sup>56</sup>

### B. *The Need for Increased Representation of Minorities and Women in Union Leadership Positions*

The simple fact that minorities and women are underrepresented in union leadership positions does not by itself explain the need for their increased representation. There are at least five major reasons why many unions might find it advantageous to have greater numbers of minority and female members emerge in leadership roles: 1) to enable unions to better represent their minority and female members; 2) to improve the quality of union leadership; 3) to enhance union performance in organizing minority and women workers; 4) to avoid liability in employment discrimination suits; and 5) to preserve labor peace.

#### 1. *Better Representation of Minorities and Women*

The most important reason for increasing the representation of minorities and women in union leadership positions is also the most obvious: to enable unions to better represent their minority and female members. Although a union's duty of fair representation may not obligate it to seek increased representation of minorities and women in leadership positions,<sup>57</sup> a major purpose of that doctrine—to assure minorities “the right to have their interests considered at the conference table”<sup>58</sup>—would certainly be advanced by such efforts. It is possible, of course, that a union leadership dominated by white males is capable of representing minority and women members. It is more likely, however, that the presence of black and women union leaders would make that task easier and enable the union to carry out its responsibilities more

55. One union that has had an exemplary record of racially integrated leadership is the United Packinghouse Workers, which merged with the Amalgamated Meat Cutters in 1968. See W. GOULD, *supra* note 27, at 400–05; I H. HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 270–73 (1977).

56. Among the worst are many of the building trades unions. See generally UNITED STATES COMM'N ON CIVIL RIGHTS, *THE CHALLENGE AHEAD: EQUAL OPPORTUNITY IN REFERRAL UNIONS* 33–36 (1976); W. GOULD, *supra* note 27, at 281–362.

57. It is well settled, of course, that unions have a statutory duty to represent fairly all the workers for whom they serve as exclusive bargaining agents, including minorities and women. See, e.g., *Conley v. Gibson*, 355 U.S. 41 (1957); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). See generally, Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977). Indeed, with regard to minority workers, this duty became even more significant after the Supreme Court's decision in *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), which limited the right of minority union members to engage in concerted activity on their own in efforts to improve their working conditions and, specifically, to end employment discrimination. See generally, Cantor, *Dissident Worker Action, After The Emporium*, 29 RUTGERS L. REV. 35 (1975).

Unfortunately, this duty of fair representation has proven to be a disappointing vehicle for remedying discrimination by unions, see, e.g., W. GOULD, *supra* note 27, at 37–38; 163–77; I H. HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 162–69 (1977), and it is difficult to argue that the doctrine requires unions to increase minority and female representation in leadership positions. Indeed, the *Steele* case itself, which engendered the fair representation doctrine at the same time it upheld a union's right to exclude blacks from membership, see *supra* note 26, seemed to endorse a model of “fair representation without participation.” Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 190 (1982).

58. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 200 (1944).

effectively.<sup>59</sup> As the United States Commission on Civil Rights has pointed out, "Without increased representation within the union leadership, the problems of women and minorities may be overshadowed by the interests and concerns of the majority."<sup>60</sup>

When a union's contract proposals are formulated in preparation for collective bargaining, the presence of women and minorities among the union's officers could affect both the content of those proposals and their ranking in priority order. "Women's demands," such as employer-provided child care, or "minority demands," such as job training programs, may become high priorities that otherwise might not even have been considered. Another illustration can be found in the negotiation of seniority provisions in collective bargaining agreements. The duty of fair representation doctrine affords unions an extremely wide range of discretion in negotiating seniority systems,<sup>61</sup> and recent decisions under Title VII of the Civil Rights Act even permit unions to negotiate seniority systems that perpetuate the effects of past discrimination.<sup>62</sup> Minorities and women who are shortchanged by such seniority systems, therefore, have no remedy in the courts. Their only hope is to prevail upon their unions to modify those seniority systems so that discriminatory effects are minimized. It may be unrealistic to expect many mostly white or mostly male unions to negotiate seniority provisions that significantly undermine the interests of their white or male members. Nevertheless, adjustments often could be made to improve the seniority of minorities or women without undercutting the positions of large numbers of whites or males.<sup>63</sup> The presence in union leadership positions of minorities and women, who would probably be more sensitive to the needs of the minority and female members of the union and more willing to push for those needs, would in all likelihood increase the prospects of such developments taking place.

Having minorities and women in union office can benefit those constituencies in a wide range of other areas short of contract negotiation. Grievance handling is perhaps the most important. Many collective bargaining agreements, for example, have provisions prohibiting race and sex discrimination.<sup>64</sup> A woman who is a victim of sexual harassment on the job, however, may fear that her grievance will not be taken seriously when the union's leadership lacks women in whom she can confide.

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59. Cf. Rosenbloom & Featherstonhaugh, *Passive and Active Representation in the Federal Service: A Comparison of Blacks and Whites*, 57 Soc. Sci. Q. 873 (1977) (arguing that black public servants are more likely than whites to be able to articulate values and perspectives associated with blacks as a group); Note, *Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. Rev. 413 (1979) (arguing that police departments should be able to hire preferentially because increased numbers of black police officers are necessary to overcome hostility towards police in black communities).

60. NONREFERRAL UNIONS, *supra* note 36, at 26. See also UNITED STATES COMM'N ON CIVIL RIGHTS, THE CHALLENGE AHEAD: EQUAL OPPORTUNITY IN REFERRAL UNIONS 31 (1976); W. GOULD, *supra* note 27, at 130.

61. See, e.g., *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

62. See *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

63. See Newman & Wilson, *The Union Role in Affirmative Action*, 32 LAB. L.J. 323, 328 (1981) (reporting such steps taken by the International Union of Electrical, Radio & Machine Workers); W. GOULD, *supra* note 27, at 384-87 (describing an inverse seniority system proposed by the United Auto Workers).

64. One survey found that approximately 84% of a sampling of 400 representative collective bargaining agreements contained such provisions. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 111 (9th ed. 1979).



Similarly, one study has shown that black workers tend to seek out black officials to handle their grievances even when the grievances are not race related.<sup>65</sup>

Minority and female union officials can also help improve employment opportunities for workers of their race or gender. In unions that regularly refer members to employers "the potential for [discrimination against blacks] is limited when blacks are aware of employment opportunities because of the elected positions they hold. They can both check possible abuses by the white leadership and suggest blacks as qualified applicants."<sup>66</sup> Even in nonreferral industries minority union leaders can often use their positions to assist others in getting jobs.<sup>67</sup> In addition, they can help uncover and remedy any discriminatory employment practices their members may face on the job.<sup>68</sup> Closer to home, employment opportunities for minorities and women within the union itself are probably enhanced when minorities and women are among the union's elected leadership.<sup>69</sup>

## 2. Improved Quality of Union Leadership

Many unions may wish to see increased numbers of minority and women officers because it benefits not only the unions' minority and female membership, but also the rest of their membership by improving the quality of union leadership as a whole. In cases where long patterns of underrepresentation have resulted from the prejudiced voting practices of white, male majorities, or from other institutional forces,<sup>70</sup> the union's pool of leadership talent has been artificially reduced, to the detriment of the entire membership.<sup>71</sup>

Moreover, a union's minority or female membership may actually be more qualified for union leadership than its white male members. For example, one study suggests that at least in unions that represent low pay, low status workers, minority members on the average often have better character, reliability, intelligence, and other leadership qualities than white workers. This is a result of employment discrimination: "[T]he same jobs which select the pick of the Negro workforce [because they have difficulty finding better jobs] . . . are likely to select marginal members of the white workforce [since better whites can get better jobs]."<sup>72</sup>

65. See Lamm, *supra* note 52, at 229. Cf. Rosenbloom & Featherstonhaugh, *Passive and Active Representation in the Federal Service: A Comparison of Blacks and Whites*, 57 Soc. Sci. Q. 873 (1977); Note, *Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. Rev. 413 (1979).

66. W. GOULD, *supra* note 27, at 133.

67. According to one study:

Increasing employment opportunity for blacks has been a major side activity of black union leaders. . . . One autoworker commented, 'I use my rapport with the establishment to get employment and promotions for others. . . .' In the steelworkers' plant the black co-chairman of the grievance committee not only made demands for black foremen but brought to the attention of top management that the front office's clerical pool should be integrated. One black business representative, with a good perspective of the entire organization, tried to guide blacks to those jobs offering the greatest promotion possibilities.

Lamm, *supra* note 52, at 229-30.

68. See *infra* text accompanying notes 82-93.

69. See S. GREER, *LAST MAN IN: RACIAL ACCESS TO UNION POWER* 65 (1959).

70. See *infra* text accompanying notes 98-112.

71. See Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 528 (1982); Ginger, *Who Needs Affirmative Action?*, 14 HARV. C.R.-C.L. L. REV. 265, 270-75 (1979).

72. S. GREER, *LAST MAN IN: RACIAL ACCESS TO UNION POWER* 51 (1959).

### 3. *Enhanced Performance in Organizing Minority and Women Workers*

In recent years union memberships in this country have been declining in both absolute and relative terms.<sup>73</sup> Whereas in 1960 23.6 percent of the workforce was unionized, by 1980 the figure had dropped to 20.8 percent.<sup>74</sup> Moreover, unions won only 45.7 percent of the representation elections conducted by the National Labor Relations Board in 1980, compared to sixty-one percent in 1966.<sup>75</sup> The labor movement is under tremendous pressure, therefore, to improve the effectiveness of its efforts at organizing the unorganized. For many unions one step in that direction would be to increase the numbers of minorities and women in union leadership positions.

Women, for example, comprise an unusually high percentage of the employees in such traditionally nonunion industries as banking, insurance, and hospital and health care, which have only recently become the targets of extensive union organizing efforts.<sup>76</sup> Clerical and secretarial jobs of all types are overwhelmingly held by women, and recent efforts to organize such workers have been heavily influenced by the women's movement.<sup>77</sup> Unions attempting to organize women in these traditionally female, nonunion occupations have to persuade these employees that the unions are changing with the times and are capable of responding to the special needs of women workers. Unions with relatively high percentages of women in leadership positions will obviously be more effective at winning the confidence of women workers than unions dominated by the stereotypical cigar-chomping white male.

Similarly, unions seeking to organize industries with high percentages of minorities in the workforce will probably meet with greater success if significant numbers of minorities hold union office.<sup>78</sup> This was a concern of the Illinois Education Association, for example, when it adopted its affirmative action plan. As a spokesman for the Association stated, "[M]inority representation in governance and leadership was essential for organizing the potential membership of the state association among communities served by minority teachers or containing a large minority school population."<sup>79</sup>

These factors may be particularly important when two or more rival unions are competing for the loyalties of the same workers. When large numbers of women or minorities are in the work force targeted for organizing, the union with more women or minorities among its leaders is likely to have an advantage. Actions may speak louder than words when it comes to persuading female or minority employees that

73. See BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS YEARBOOK 1981, at 253 (1982).

74. See *id.*; BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS YEARBOOK 1979, at 237 (1980).

75. See BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS YEARBOOK 1981, at 262 (1982); BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS YEARBOOK 1967, at 414 (1968).

76. See Wertheimer, *supra* note 33, at 227-28.

77. See Koziara & Insley, *Organizing Low Income Women in New Ways: Who, Where, and Why*, in INDUSTRIAL RELATIONS RESEARCH ASS'N, PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 381, 386 (1981).

78. Cf. Rosenbloom & Featherstonhaugh, *Passive and Active Representation in the Federal Service: A Comparison of Blacks and Whites*, 57 Soc. Sci. Q. 873 (1977); Note, *Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. Rev. 413 (1979).

79. Weaver Affidavit, *supra* note 7, at 4.

one union will be more responsive to their needs than another.<sup>80</sup> Indeed, this was perhaps a factor in the decision of the Illinois Education Association to adopt its affirmative action plan since its chief rival, the American Federation of Teachers, may have alienated many potential minority members by vigorously opposing community control of schools, which in urban areas often means minority control, and affirmative action.<sup>81</sup>

#### 4. Avoiding Liability in Employment Discrimination Suits

As the partners of employers in collective bargaining, unions are often held jointly liable with employers for negotiating contract provisions that have a discriminatory purpose or effect.<sup>82</sup> The very enactment of Title VII of the Civil Rights Act of 1964<sup>83</sup> reflected on the part of Congress "a profound distrust of events taking place across the bargaining table."<sup>84</sup> The duty not to discriminate that Title VII places on unions is a strict one, and some courts have imposed liability on unions for failing to negotiate actively at the bargaining table for the elimination of an employer's discriminatory practices.<sup>85</sup>

Unions can reduce or eliminate potential Title VII liability, however, by taking good faith steps to eliminate employment discrimination.<sup>86</sup> Unions that wish to pursue this course are usually in an excellent position to do so. Union members "have intimate, firsthand knowledge of plant practices,"<sup>87</sup> and both the NLRB and the courts have upheld the right of unions to obtain information from employers on hiring, promotion, and job classification broken down by race, sex, and national origin.<sup>88</sup> When unions are unable to obtain the results they seek at the bargaining table, they can combine this information with their legal expertise and financial resources to assist employees in bringing their own Title VII actions.<sup>89</sup>

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80. Although inflammatory appeals to racial prejudice have no place in a representation election campaign, it is perfectly appropriate for unions to discuss their positions on racial matters. *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962).

81. In 1968, for example, the American Federation of Teachers' New York City affiliate waged a bitter and racially divisive strike in which a key issue was the union's opposition to community control. See Zeluck, *The UFT Strike: A Blow Against Teacher Unionism*; and Shanker & Hill, *Black Protest, Union Democracy and the UFT*, in *AUTOCRACY AND INSURGENCY IN ORGANIZED LABOR* 201, 218 (B. Hall, ed. 1972). The AFT also filed an amicus brief opposing affirmative action in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978). The NEA, in contrast, has repeatedly reaffirmed its support for affirmative action. See Maeroff, *N.E.A. in Support of Minority Hiring*, N.Y. Times, July 6, 1983, at A13, col. 1. The NEA's progressive stand on affirmative action can be explained in part by its merger in 1966 with the American Teachers Organization, a smaller, predominantly black group. Brief for Appellant at 24, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

82. See, e.g., *Russell v. American Tobacco Co.*, 528 F.2d 357, 365-66 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381-82 (5th Cir. 1974).

83. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

84. W. GOULD, *supra* note 27, at 262.

85. See, e.g., *Gray v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976); *Macklin v. Spector Freight Sys.*, 478 F.2d 979 (D.C. Cir. 1973). But see *Thornton v. East Tex. Motor Freight*, 497 F.2d 416 (6th Cir. 1974). See generally Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702 (1980); Comment, *The Union as Title VII Plaintiff: Affirmative Obligation to Litigate?*, 126 U. PA. L. REV. 1388 (1978).

86. See, e.g., *Burwell v. Eastern Air Lines*, 458 F. Supp. 474, 502-03 (E.D. Va. 1978), *aff'd in part, rev'd in part on other grounds*, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981).

87. AFFIRMATIVE ACTION IN THE 1980s, *supra* note 8, at 33.

88. *Westinghouse Elec. Corp.*, 239 N.L.R.B. 106 (1978), *enf'd*, 648 F.2d 18 (D.C. Cir. 1980).

89. See generally Newman & Wilson, *The Union Role in Affirmative Action*, 32 LAB. L.J. 323 (1981).

This program is more likely to be followed when minorities and women are well represented in union leadership, for the same reasons that unions with minorities and women in their leadership are generally more responsive to the needs of those constituencies.<sup>90</sup> Indeed, the first recommendation to labor unions in a recent Civil Rights Commission report was to “establish procedures to increase the representation of minorities and women in union leadership positions,” for without such increased representation “discrimination by an employer may continue largely unchallenged.”<sup>91</sup> Moreover, when particular unions or their industries have had an historical record of discrimination, it will be more difficult for unions to free themselves of potential Title VII liability. An important factor in doing so, however, may be

the existence of proof that it is integrating, or making substantial efforts toward integrating, its own leadership positions at both the international and local levels. Where blacks constitute a particularly significant percentage of a union’s membership, this aspect of the union’s record ought to be scrutinized with the greatest of care if there are few or no blacks at leadership level. The leadership’s activities are critical here since, despite the protestations about the democratic nature of unions and the fact that the rank and file ultimately determine the vote, it is normally the “slate” sponsored by the leadership, on either a formal or an informal basis, which emerges successful from the electoral process.<sup>92</sup>

The presence of women and minorities in union leadership positions can protect unions from liability for employment discrimination in still another way. An employee seeking to remedy discrimination has the choice of suing both the employer and the union together, or one or the other alone. Where only the employer is sued, a recent Supreme Court decision precludes the employer from forcing the union to contribute toward any back pay award.<sup>93</sup> A minority or female employee is more likely to sue the employer alone, leaving the union immune from liability, where he or she more closely identifies with the union because of the women and minorities who hold office within the union.

### 5. *Preserving Labor Peace*

Finally, the increased presence of minorities and women in union leadership positions can help promote one of the fundamental objectives of federal labor policy—the preservation of labor peace.<sup>94</sup> During the late 1960s and early 1970s, for example, the auto industry was rocked by waves of wildcat strikes, many of which began as protests by black workers against employment discrimination.<sup>95</sup> If blacks

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90. See *supra* text accompanying notes 57–69.

91. NONREFERRAL UNIONS, *supra* note 36, at 93.

92. W. GOULD, *supra* note 27, at 263.

93. *Northwest Airlines v. Transportation Workers Union*, 451 U.S. 77 (1981).

94. See, e.g., 29 U.S.C. §§ 141, 151 (1976).

95. See W. GOULD, *supra* note 27, at 388–95; C. DENBY, *INDIGNANT HEART: A BLACK WORKER'S JOURNAL* 262–81 (1978). Wildcat strikes led by black caucuses occurred in other unions as well, such as the Amalgamated Transit Union. See W. GOULD, *supra* note 27, at 422. In addition, protests by black workers' organizations against discrimination by building trades unions shut down construction sites in several cities. *Id.* at 303, 308, 338–40, 350.

had been better represented in the leadership of the United Auto Workers at that time,<sup>96</sup> the union might have been more aware of the growing discontent of its black members and more inclined to explore efforts to resolve their grievances before tensions reached the breaking point. Moreover, a union leadership containing more blacks would probably have been more successful at keeping the strikes short and inhibiting their spread.<sup>97</sup>

*C. The Need for Affirmative Action to Bring About Increased Representation of Minorities and Women in Union Leadership Positions*

It is one thing for a union to recognize the advantages of greater representation of minorities and women in the union's leadership and quite another to achieve that goal. A variety of obstacles impede the election of more minorities and women to union office, and in many cases, they can be overcome only with the help of affirmative action. One of the most basic obstacles is old-fashioned bigotry and prejudice on the part of white, male majorities. It is probably true, on the one hand, that the achievements of the civil rights and women's movements in the last two decades have lessened to some degree overt racism and sexism. On the other hand, the sheer number of day-to-day occurrences of racially or sexually motivated harassment, hostility, and even brutality makes it impossible to pretend that bigotry and prejudice do not influence some proportion of the votes cast in the elections of union officers.<sup>98</sup> This prejudice, however, tends to be less prevalent among union leaders than among the rank and file.<sup>99</sup> In many unions, therefore, it might be possible for a relatively progressive union leadership to shepherd through a state or national convention constitutional changes guaranteeing minority group members and women more representation in elective office, whereas without these guarantees, a less progressive rank and file would fail to vote minorities and women into office in the same numbers.<sup>100</sup>

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96. Blacks comprise 25 to 30% of the UAW's membership, but in 1968 blacks were employed in only 7.5% of the union's staff positions. W. GOULD, *supra* note 27, at 391. As late as 1979, minorities comprised 42% of the membership of UAW locals examined by the Civil Rights Commission, but held only 29% of the locals' top offices. NONREFERRAL UNIONS, *supra* note 36, at 23.

97. Cf. Note, *Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. REV. 413 (1979). It is not suggested, on the other hand, that the mere presence of blacks in union office, without more, will eliminate the conditions which have led to wildcat strikes in the past. See W. GOULD, *supra* note 27, at 394.

98. Cf. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 166 (1977) ("[V]oting for or against a candidate because of his race is an unfortunate practice. But it is not rare . . .")

99. See D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 134 (1970).

100. This scenario is plausible because in most unions a very high percentage of delegates to state and national conventions are union officials and staff, often loyal to, or subject to political pressure from, the statewide or national leadership. Thus, a union's leadership may be able to win approval of an affirmative action plan at a convention, when such approval might not be possible through a referendum vote of the rank and file. Of course, the greater the gap between the leadership and the rank and file in their views on minorities and women holding union office, the less likely it will be that union leaders will jeopardize their own elected positions to push through an unpopular affirmative action plan. Cf. *id.* Where that gap is not overwhelming, on the other hand, the leadership's own position would probably not be at risk even if they did advocate reforms beyond those the rank and file would adopt. In part, this may be because they are performing to the satisfaction of the rank and file in other areas of concern, and in part, it may be a simple result of the advantages of incumbency, which make it exceedingly difficult for the rank and file to turn out of office national, and to a lesser degree, state union officials. See generally James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 HARV. C.R.-C.L. L. REV. 247 (1978).

Even when overt hostility toward minority or female candidates for office is not a major problem, many more subtle or institutionalized factors may place those candidates at a competitive disadvantage.<sup>101</sup> Several studies have found, for example, that the elected officers of union locals tend to have three things in common: they were generally among the higher paid and more skilled workers represented by the local; they usually had more seniority, both within the plant and within the union than other workers; and they frequently had jobs that enabled them to move around the plant and talk to other workers—high status jobs that tend to go to more senior and more skilled workers.<sup>102</sup> Because of past and continuing discrimination in employment and in job training opportunities, both minorities and women tend to be underrepresented in better paying, skilled jobs. Moreover, when they do hold these positions, they tend to be more recent hires with less seniority.<sup>103</sup> In addition, women who interrupt their careers to have children are even less likely to acquire substantial seniority.<sup>104</sup>

Beyond these structural obstacles potential minority and women candidates for union office face a number of psychological barriers to winning office. For example, in unions in which few minorities or women have held office before, both minorities and women often lack the self-confidence needed to break new ground. As one study found:

The median number of years of education for black union leaders today is above what white union leaders have traditionally had. . . . Despite their education, blacks frequently displayed little self-confidence. Many applicants for the union leadership training program already had the qualifications needed for union leadership. These applicants, however, often commented that they had not sought office because they did not have "enough experience." Most of the shortcomings cited were skills most incumbents learn while in office, such as knowledge of labor law or negotiation tactics. To become a steward in most locals takes no more than a desire to serve, yet one respondent commented, "I'm not yet qualified to run. When I do, I'll run for steward. The members prefer older experienced men, and they are all white." The general lack of self-confidence is part of a black's belief that to succeed he must not be just equally qualified but overqualified.<sup>105</sup>

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101. As the U.S. Commission on Civil Rights has found:

Race, sex and national origin discrimination are not relics of the past existing solely as isolated acts of prejudice in an almost colorblind and gender-neutral society. The discrimination that minorities and women experience is far more pervasive, entrenched, and varied than many of the critics of affirmative action assume. Such discrimination will not yield to remedies that are premised on ignoring its existence.

AFFIRMATIVE ACTION IN THE 1980s, *supra* note 8, at 5.

102. See L. SAYLES & G. STRAUSS, *THE LOCAL UNION* 80-81 (rev. ed. 1967); S. GREER, *LAST MAN IN: RACIAL ACCESS TO UNION POWER* 59 (1965); Koziara & Pierson, *Barriers to Women Becoming Union Leaders*, in *INDUSTRIAL RELATIONS RESEARCH ASS'N, PROCEEDINGS OF THE THIRTY-THIRD ANNUAL MEETING* 48, 52 (1980).

103. This point is illustrated by the fact that in times of economic recession women and minority workers are laid off with greater frequency than their white male counterparts. See, e.g., *Arthur v. Nyquist*, 712 F.2d 816 (2d Cir. 1983); *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982), *cert. granted sub nom.*, *Firefighters Local Union No. 1784 v. Stotts*, 103 S. Ct. 2451 (1983); see generally U.S. COMM'N ON CIVIL RIGHTS, *LAST HIRED, FIRST FIRED: LAYOFFS AND CIVIL RIGHTS* (1977).

104. See Koziara & Pierson, *supra* note 102, at 48, 52. Working mothers with substantial responsibilities in the home often lack the time necessary to participate actively in union affairs and are often further discouraged from doing so because of the lack of child care at most union meetings. Baker & Robeson, *Trade Union Reactions to Women Workers and Their Concerns*, 6 *CANADIAN J. OF SOC.* 19, 28 (1981).

105. Lamm, *supra* note 52, at 225-26.

The same lack of confidence can affect potential women candidates to an even greater extent since union office is traditionally perceived as a "male" job, and "people typically have less confidence performing tasks generally associated with the opposite sex."<sup>106</sup>

Psychological factors also affect the voting patterns of the electorate. Many union members who are not consciously hostile to minority or female candidates may perceive these candidates in terms of stereotypes associated with race or gender. For example, women tend to be stereotyped as less aggressive, competitive, and intelligent than men.<sup>107</sup> Since these characteristics are commonly associated with negotiating skill, union members who do not see beyond these stereotypes will tend to prefer male candidates for union office.<sup>108</sup> In small locals, particularly those confined to a single workplace, group stereotypes may play a lesser role in union elections since a large percentage of the electorate will know the candidates personally and be able to judge them on their individual qualities rather than on group stereotypes. In large, diversified locals, however, and in elections conducted on a regional, state, or nationwide basis, a much smaller percentage of the electorate will know the candidates personally. The votes of many will all too often be influenced by stereotypes.<sup>109</sup> Moreover, even union members who do not themselves accept the traditional stereotypes of minorities and women may discriminate against them because they believe such candidates will not be treated as equals by management personnel who are predominantly white and male.<sup>110</sup>

The experience of several United Auto Workers locals in Detroit suggests that in order for minority and female candidates to overcome these obstacles, minorities or women would often have to comprise as much as forty-five percent of a union's membership.<sup>111</sup> Moreover, in unions in which historically minorities and women have been underrepresented in office those candidates will usually be outsiders challenging incumbent officeholders and will be confronted with all the additional—and usually quite substantial—obstacles challengers often face in union elections.<sup>112</sup> Without some form of institutionalized affirmative action program to help minority and women candidates overcome these barriers, these groups will undoubtedly remain underrepresented in most unions for a long time to come.

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106. Koziara & Pierson, *supra* note 102, at 51.

107. *Id.* at 50.

108. *Id.* Cf. Feldman-Summers, Montano, Kasprzyk & Wagner, *Influence Attempts When Competing Views Are Gender-Related: Sex as Credibility*, 5 *PSYCHOLOGY OF WOMEN Q.* 311 (1980).

109. Koziara & Pierson, *supra* note 102, at 50. See Lamm, *supra* note 52, at 223.

110. Koziara & Pierson, *supra* note 102, at 50.

111. See W. GOULD, *supra* note 27, at 394.

112. See generally James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 *HARV. C.R.-C.L. L. REV.* 247 (1978). Even when a particular incumbent is not running for reelection, entrenched political machines within unions often select the members of the winning slate. See W. GOULD, *supra* note 27, at 263; Lamm, *supra* note 52, at 223. Of course, where the incumbent leadership chooses to include minority or female candidates on their slate, those candidates would ordinarily be at a distinct advantage. *But see* W. GOULD, *supra* note 27, at 399 (black candidates endorsed by white leadership may be rejected by black voters as "Uncle Toms").

D. IEA's Antecedents: Prior Efforts to Remedy Minority and Female Underrepresentation in Union Office

When even top officials of a union with one of the best records in fighting race and sex discrimination refer to goals, quotas, and preferential treatment as "anathema to the industrial relations world,"<sup>113</sup> it is not surprising that few unions have adopted affirmative action plans to remedy the underrepresentation of minorities and women in union office. Nevertheless, the Illinois Education Association's decision to adopt such a plan in 1974 was not without precedent. Moreover, in light of the growing presence of minority and women's caucuses in many unions, symbolized at the national level by the Coalition of Black Trade Unionists<sup>114</sup> and the Coalition of Labor Union Women,<sup>115</sup> other unions may well join the IEA's ranks if not deterred by the IEA decision.

The union with the longest and best record of assuring minorities significant representation in union leadership positions is the United Packinghouse Workers of America (UPWA), which merged with the Amalgamated Meat Cutters in 1968. As far back as the 1940's the UPWA leadership explicitly demanded that blacks be proportionately represented on the union's executive board, which resulted in blacks holding four of thirteen seats on the board. The national leadership also encouraged, and when necessary required, UPWA locals to include minorities in their leadership. In 1948, for example, eighty-three percent of the UPWA's locals had blacks in key positions. Not coincidentally, the UPWA had one of the best records of any union in fighting for equal employment opportunities for minorities.<sup>116</sup> Indeed, one of its first collective bargaining agreements with a major Chicago meat packing company required the company to hire blacks in proportion to their numbers in Chicago's population.<sup>117</sup>

Another union that guarantees blacks representation in its national leadership is the United Furniture Workers of America (UFWA), whose membership is thirty percent minority. In a constitutional amendment strikingly like that adopted by the Illinois Education Association in 1974,<sup>118</sup> the UFWA's 1970 convention enlarged the union's executive board from twenty-seven to thirty-one members by adding four vice-presidents, who were expected to be black.<sup>119</sup> As one UFWA vice-president remarked, "We can't permit racism to parade under the banner of democracy."<sup>120</sup>

Information about efforts to increase minority or female representation in union leadership at the local level is sparse, but at least two studies have identified locals that require proportional representation of minorities on committees or on the local's

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113. Newman & Wilson, *The Union Role in Affirmative Action*, 32 LAB. L.J. 323, 325 (1981). The authors were General Counsel and Associate General Counsel of the International Union of Electrical, Radio, and Machine Workers.

114. See P. FONER, *supra* note 27, at 431-33; W. GOULD, *supra* note 27, at 364-65.

115. See 2 P. FONER, *WOMEN AND THE AMERICAN LABOR MOVEMENT* 514-36 (1980); Wertheimer, *supra* note 33, at 237-38.

116. See W. GOULD, *supra* note 27, at 402.

117. D. BRODY, *WORKERS IN INDUSTRIAL AMERICA* 98 (1980).

118. See *infra* note 141.

119. See W. GOULD, *supra* note 27, at 407.

120. Quoted in *id.*



full-time staff.<sup>121</sup> In general, unions seem somewhat more receptive to affirmative action when it affects staff positions rather than elective offices.<sup>122</sup> Within the AFL-CIO the head of the Industrial Union Department recently pledged that at least half of all new organizers hired by the Department would be women.<sup>123</sup> The AFL-CIO also had to resort to preferential treatment to provide women with their first representative on the AFL-CIO's Executive Council—Joyce Miller, a vice-president of the Amalgamated Clothing and Textile Workers and president of the Coalition of Labor Union Women. In order to elect Miller the Council had to waive its rules that a member be a chief officer of a union and that there be no more than one representative from a single union on the Council.<sup>124</sup>

Until the *IEA* case the courts had generally not been involved, one way or the other, with union efforts to increase the numbers of minorities or women holding union office. A major exception, however, was a line of cases dealing with the mergers of union locals previously segregated by race. In a number of these cases the courts approved temporary, transitional agreements under which the members of each local covered by the merger were to receive a proportional allocation of executive board seats and convention delegate positions to prevent the numerically smaller racial group from being excluded from office.<sup>125</sup> Unfortunately, after the expiration of the transitional agreements, minority officeholders were often voted out by the white majority and replaced with whites.<sup>126</sup>

One case, however, struck down a merger agreement that permanently allocated all of the defendant union's offices on racial grounds. In that decision, *Schultz v.*

121. *S. GREER, LAST MAN IN: RACIAL ACCESS TO UNION POWER* 64 (1959); Lamm, *supra* note 52, at 230.

122. Preferential appointment of minorities or women to union staff positions is easier to accomplish than the adoption of affirmative action plans guaranteeing minorities and women greater representation in elective office because it usually does not necessitate amendments to union constitutions or bylaws. Moreover, this kind of affirmative action is less threatening to incumbent elected officials because they obviously have greater control over who is selected for appointive office. Efforts on the part of elected officials to appoint more minorities and women to staff jobs should be encouraged for all the reasons more minorities and women are needed in elective office. *See supra* text accompanying notes 57–97. Such appointments are not subject to challenge under Title IV of the Landrum-Griffin Act, which regulates the selection of elected officials only. If accomplished by means consistent with *United Steelworkers v. Weber*, 443 U.S. 193 (1979), affirmative action in appointments should survive any challenges brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976). *See infra* text accompanying notes 274–95. However, affirmative action in staff appointments can never be a complete substitute for affirmative action in elective office when conditions warrant it. After all, true power and policy making authority are vested in a union's elected leadership, not the appointed staff. Moreover, appointed staff serve only at the pleasure of the officers who appoint them, and as a practical matter they generally have little freedom to disagree with the decisions and policies of those officers without jeopardizing their jobs. *See, e.g., Finnegan v. Leu*, 456 U.S. 431 (1982). *See generally* Levy, *Legal Responses to Rank-and-File Dissent: Restrictions on Union Officer Autonomy*, 30 BUFFALO L. REV. 663, 679–705 (1981).

123. *See* 2 P. FONER, *WOMEN AND THE AMERICAN LABOR MOVEMENT* 569 (1979).

124. *Developments in Industrial Relations: First Woman on AFL-CIO Executive Council*, MONTHLY LAB. REV., Oct. 1980, at 53.

125. *See, e.g., Fluker v. Locals 265 and 940, United Papermakers*, 6 Fair Empl. Prac. Cas. (BNA) 92 (S.D. Ala. 1972); *English v. Seaboard Coast Line R.R.*, 4 Fair Empl. Prac. Cas. (BNA) 904 (S.D. Ga.), *aff'd as modified*, 465 F.2d 43 (5th Cir. 1972); *United States v. Chesapeake & Ohio Ry.*, 4 Fair Empl. Prac. Dec. (CCH) ¶ 7637 (E.D. Va. 1971), *vacated in part on other grounds*, 471 F.2d 582 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); *Hicks v. Crown Zellerbach Corp.*, 310 F. Supp. 536 (E.D. La. 1970). *See also* *Long v. Georgia Kraft Co.*, 455 F.2d 331 (5th Cir. 1972) (holding that transitional measures were not warranted by facts before the court, but recognizing they may be a "useful tool" in other cases). *See generally* W. GOULD, *supra* note 27, at 129–35, 416–19.

126. *See* W. GOULD, *supra* note 27, at 130.

*Local 1291, International Longshoremen's Association*,<sup>127</sup> the court invoked the same provisions of the Landrum-Griffin Act as were relied on by the Seventh Circuit in *IEA*, and not surprisingly the *Longshoremen* case was favorably cited by Judge Posner in his *IEA* opinion.<sup>128</sup> The next part of this Article will argue that the *IEA* court's reliance on *Longshoremen* was misplaced and that it is possible to design an affirmative action plan promoting increased representation of minorities and women in union government that will not violate the Landrum-Griffin Act.

### III. THE *IEA* DECISION AND TITLE IV OF THE LANDRUM-GRIFFIN ACT: HALF RIGHT FOR THE WRONG REASONS

#### A. *The District Court Proceedings*

The *IEA* case did not begin as a challenge to the Illinois Education Association's affirmative action plan. Instead, it began in 1977 when a member of the Association complained to the United States Department of Labor that the Association had violated Title IV of the Labor-Management Reporting and Disclosure Act<sup>129</sup> by appointing, rather than electing, the Association's secretary-treasurer.<sup>130</sup> The litigation that followed<sup>131</sup> ultimately resulted in April 1980 in a stipulation providing that an elec-

127. 338 F. Supp. 1204 (E.D. Pa.), *aff'd per curiam sub nom. Hodgson v. Local 1291, Int'l Longshoremen's Ass'n*, 461 F.2d 1262 (3d Cir. 1972). *Longshoremen* will be discussed in greater detail *infra* at text accompanying notes 263-72.

128. 667 F.2d 638, 642 (7th Cir. 1982).

129. 29 U.S.C. §§ 481-83 (1976). The LMRDA was enacted in 1959 following two years of widely publicized hearings on union corruption conducted by the Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee). The Act was at the time of its passage, and remains today, the principal federal legislation regulating internal union affairs. The aim of the Act's five substantive titles was to eliminate or reduce union corruption through the promotion of union democracy. *See infra* text accompanying notes 212-20.

Title I of the Act, 29 U.S.C. §§ 411-15 (1976)—the "Bill of Rights of Members of Labor Organizations"—protects union members' civil liberties within unions, such as the right to equal treatment, freedom of speech and assembly, and protection against improper disciplinary action. Title II of the Act, *id.* §§ 431-41, imposes reporting and disclosure requirements on unions and union officers, and Title III, *id.* §§ 461-66, establishes limits on the power of national or international labor organizations to impose trusteeships on their affiliates. Title IV of the LMRDA, *id.* §§ 481-83, upon which the *IEA* case was based, regulates the conduct of elections of union officers, and Title V of the Act, *id.* §§ 501-04, defines and provides for the enforcement of the fiduciary responsibilities of union officers. The remaining two titles of the LMRDA contain miscellaneous provisions relating to the administration and enforcement of the act, *id.* §§ 521-31, and amendments to the National Labor Relations Act, codified in scattered sections of Title 29 of the United States Code. *See generally* J. BELLACE & A. BERKOWITZ, *THE LANDRUM-GRIFFIN ACT: TWENTY YEARS OF FEDERAL PROTECTION OF UNION MEMBERS' RIGHTS* (1979); COX, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960); SUMMERS, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273 (1962). For an excellent introduction to the LMRDA written for laymen, see H. BENSON, *DEMOCRATIC RIGHTS FOR UNION MEMBERS* (1979).

130. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 145 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982). The section of the Act allegedly violated was 401(d), 29 U.S.C. § 481(d) (1976), which requires "intermediate" labor organizations, including statewide organizations such as the *IEA*—as opposed to local organizations, on the one hand, or national and international organizations, on the other—to elect their officers not less than every four years. A key issue in the case was whether the secretary-treasurer was an "officer" for purposes of section 401(d). On October 10, 1978, in an unpublished opinion the district court ruled that it was. *See Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 145 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982). Another key issue was whether the *IEA* was a labor organization in fact covered by the Act. The *IEA* eventually conceded it was. *See id.*

131. A complaint was filed in the name of the Secretary of Labor on September 30, 1977, in the United States District Court for the Central District of Illinois. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 145 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982). With the exception of certain types of

tion for secretary-treasurer was to be held under the supervision of the Department of Labor.<sup>132</sup>

Unfortunately, the parties were unable to agree on the terms of the stipulated election.<sup>133</sup> Ordinarily, union elections supervised by the Department are to be, "so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization."<sup>134</sup> The Department, however, contended that certain provisions of the IEA bylaws affecting the election were unlawful and should therefore be disregarded in the election.<sup>135</sup> Those provisions involved the IEA's affirmative action plan. The parties agreed in their stipulation to submit to the district court, on briefs and affidavits, the question of the bylaws' validity, and hence, the validity of the affirmative action plan.<sup>136</sup>

According to the IEA's bylaws, the Association's executive officers, who by 1980 were deemed to include the secretary-treasurer,<sup>137</sup> were to be elected "by a majority vote of the delegates to the Annual Meeting of the Representative Assembly."<sup>138</sup> The representative assembly, comprised of delegates to the IEA's annual convention, is "the policy-forming body of the Association"<sup>139</sup> in which, along with the organization's board of directors, "[t]he governance of the Association is vested."<sup>140</sup>

The Department of Labor's objections to the IEA's bylaws focused on the affirmative action plan, which guaranteed members of four minority groups at least eight percent of the seats in the IEA's representative assembly and on its board of directors.<sup>141</sup> The Department contended that this plan violated section 401(e) of the

preelection suits not relevant to the *IEA* litigation, enforcement of the LMRDA's election provisions lies exclusively in the hands of the Department of Labor, pursuant to § 402 of the Act, 29 U.S.C. § 482 (1976). See *Calhoun v. Harvey*, 379 U.S. 134, 140 (1964). Complaining union members do, however, have the right to intervene in litigation filed by the Department as a result of their complaints. *Trbovich v. UMW*, 404 U.S. 528 (1972). In *IEA* the original complainant did not intervene.

132. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 145-46 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

133. *Id.* at 146.

134. LMRDA § 402(c), 29 U.S.C. § 482(c) (1976).

135. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 146 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

136. *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638, 640 (7th Cir. 1982).

137. The bylaws in effect when *IEA* was decided provided for only two executive officers, a president and a vice-president. 1978 BYLAWS, *supra* note 1, art. IV. Pursuant to the district court's 1978 ruling, see *supra* note 130, and the parties' stipulation, however, the secretary-treasurer position was also considered an executive office. The IEA's current bylaws expressly designate the secretary-treasurer as an executive officer. IEA BYLAWS art. V, in IEA, BYLAWS, RESOLUTIONS, AND NEW BUSINESS 1982-83 (1982). The secretary-treasurer's duties include acting as secretary to the representative assembly, board of directors, and executive committee, and serving as the Association's chief fiscal officer. *Id.*

138. 1978 BYLAWS, *supra* note 1, art. IV, § 2(C).

139. *Id.* art. VI, § 3.

140. *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638, 639 (7th Cir. 1982). Between meetings of the representative assembly, governance of the Association rests with the organization's executive officers, board of directors, and executive committee. 1978 BYLAWS, *supra* note 1, arts. IV, § 5; VII, § 5; VIII, § 5.

141. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 146 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982). The four groups were blacks, Asians, hispanics, and American Indians. 1978 BYLAWS, *supra* note 1, art. VI, §§ 1, 4. The IEA's affirmative action plan did not authorize any preferential treatment for women. The original version of the plan, which was drafted by the IEA's Minority Caucus, sought to guarantee for minorities 20% of the seats in the representative assembly. Weaver Affidavit, *supra* note 7, at 3-4. That figure was

LMRDA, which requires that "every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed)." <sup>142</sup> If the composition of the representative assembly were flawed because

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borrowed from the then existing bylaws of the NEA. *Id.* The NEA's current bylaws require each state affiliate to "take such steps as are legally permissible to achieve ethnic-minority representation [on its governing bodies] at least proportionate to its ethnic-minority membership." NEA BYLAWS, § 8-11, in NEA, NEA HANDBOOK 160 (1981-82).

Article VI of the IEA's 1978 bylaws, which dealt with the representative assembly, provided in part as follows:

#### ARTICLE VI—REPRESENTATIVE ASSEMBLY

##### *Section 1—Composition*

A. Delegates—The delegates to the Representative Assembly shall be:

1. Regional Delegates
2. Board of Directors Members
3. Student Member Delegates
4. One delegate selected by each state affiliate
6. [*sic*] At Large Ethnic/Minority Delegates

B. Non-Voting Participants—Non-voting participants are members of committee, as determined by the Board of Directors, who shall be restricted to making motions and speaking to issues pertaining to the purpose of the committee.

....

##### *Section 4—Regional Allocation and Election*

....

E. Election of Delegates

1. The membership of each chartered local education association shall elect their allotted Representative Assembly delegates and alternates by secret ballot.

2. The Representative Assembly shall contain no less than 8% Ethnic/Minority delegates. In the event a minimum of 8% Ethnic/Minority delegates are not elected from chartered local education associations, the Board of Directors and the Ethnic/Minority Caucus shall develop a plan to ensure 8% representation. Ethnic/Minority shall mean those persons designated as Ethnic/Minority by statistics published by the United States Bureau of the Census. This designation shall specifically include Blacks, Mexican-American (Chicano), other Latino-culture groups, Orientals, and Indians.

1978 BYLAWS, *supra* note 1, art. VI.

Article VII of the bylaws, which deals with the IEA's board of directors, provided in part as follows:

#### ARTICLE VII—BOARD OF DIRECTORS

##### *Section 1—Composition*

The Board of Directors shall be composed of:

A. The President and Vice-President of the Association.

B. The chairperson of each Regional Council and in case of absence the Vice-Chairperson of each Regional Council.

C. The N.E.A. Directors.

D. A representative of S.I.E.A. except that seat shall be without portfolio if membership in S.I.E.A. is determined by the Board to have fallen below 1000 members.

E. For the purpose of Ethnic/Minority representation, the state shall be divided into four geographical sections established by the Board of Directors. The members within each section shall elect by open nomination and secret ballot one Ethnic/Minority representative and alternate.

These elections shall be conducted at a time and in a manner prescribed by the Board of Directors.

*Id.*, art. VII.

142. Section 401(e) provides in relevant part:

In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof.

29 U.S.C. § 481(e) (1976). Section 504 of the LMRDA prohibits Communists and persons who have been convicted of certain crimes from holding union office for five years after leaving the Communist Party or after conviction or completion of imprisonment for the designated crimes. *Id.* § 504(a). (The restrictions on Communists holding union office were declared unconstitutional in *U.S. v. Brown*, 381 U.S. 437 (1965)).

of the operation of the allegedly unlawful affirmative action plan, it would follow, according to the Department's argument, that the election of a secretary-treasurer by this improperly composed representative assembly would itself be unlawful.<sup>143</sup>

The issue squarely presented to the district court, therefore, was whether the affirmative action plan incorporated into the IEA's bylaws violated section 401(e) of the Landrum-Griffin Act.<sup>144</sup> More specifically, the question was whether the Association's setting aside of positions for minorities on the representative assembly and board of directors imposed unreasonable limitations on the rights of other union members to be candidates for those positions pursuant to section 401(e) of the Act. The district court held that it did not.<sup>145</sup>

Before reaching that decision, however, the court reviewed the background of the IEA's adoption of the plan in 1974—particularly the underrepresentation of minorities in union office at that time<sup>146</sup>—and described the plan's operation.<sup>147</sup> According to Article VI of the IEA's 1978 bylaws,<sup>148</sup> delegates to the representative assembly are initially elected in the traditional manner with no special procedures to assure the election of minority delegates.<sup>149</sup> If minority group members win eight percent or more of the seats in the assembly, no further steps are taken. On the other hand, if fewer than eight percent of the delegates elected in this fashion are minorities, the bylaws provide that "the Board of Directors and the Ethnic/Minority Caucus shall develop a plan to ensure 8% representation."<sup>150</sup> The plan adopted for that purpose calls for the representative assembly to be expanded in size by adding as many "ethnic-minority add-on delegates" as necessary to bring the percentage of minority delegates up to the required eight percent.<sup>151</sup> These "add-on" delegates would be nominated and voted on by the board of directors.<sup>152</sup>

The IEA's affirmative action plan also guaranteed minority groups at least eight percent of the seats on the IEA's board of directors.<sup>153</sup> The amendment added four new positions to the board, each to be filled by a minority group member elected by the IEA members in one of four geographical regions into which the IEA divided the state.<sup>154</sup> These four minority positions were in addition to any positions on the board that minority group members might obtain in the normal fashion.<sup>155</sup> The legality of this part of the IEA's affirmative action plan, however, was not explicitly addressed

143. See *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638, 640 (7th Cir. 1982).

144. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 146 (C.D. Ill. 1981).

145. *Id.* at 148-49. The district court judge was J. Waldo Ackerman.

146. *Id.* at 148. See *supra* text accompanying notes 1-6.

147. 511 F. Supp. 144, 148 (C.D. Ill. 1981).

148. See *supra* note 141.

149. 511 F. Supp. 144, 148 (C.D. Ill. 1981). Most of the approximately 600 delegates are elected by the membership of the IEA's various regional and local affiliates. About 50 of the delegates are members of the IEA's board of directors, who for the most part are also elected by the IEA's membership. See *supra* note 141.

150. 1978 BYLAWS, *supra* note 1, art. VI, § 4(E)(2). See *supra* note 141.

151. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 148 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

152. *Id.*

153. *Id.*

154. 1978 BYLAWS, *supra* note 1, art. VII, § 1(E). See *supra* note 141.

155. *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638, 639 (7th Cir. 1982).

by the district court since the board of directors had no direct role in selecting the secretary-treasurer.<sup>156</sup>

In reaching the merits the district court recognized that nonminority members of the IEA were not eligible to become add-on delegates to the representative assembly.<sup>157</sup> Nevertheless, the court held that the plan satisfied the "reasonable qualifications" exception to the LMRDA's requirement that all union members be eligible to run for and hold union office.<sup>158</sup> According to the court, the plan was "not unduly restrictive" in the sense that "large numbers of union members are unable to run for union office."<sup>159</sup> Moreover, the plan did "not result in the abuses of entrenched leadership" at which the LMRDA was aimed. On the contrary, the plan "beneficially effect[ed] the free and democratic processes of union government in making the union more responsive to its membership."<sup>160</sup> The affirmative action plan served a legitimate purpose, which, the court remarked, "might not be attained in any manner less destructive of other legally protected interests."<sup>161</sup> Finally, the court noted that, as a voluntary affirmative action plan that was temporary in nature,<sup>162</sup> the union's plan was consistent with the Supreme Court's decision in *United Steelworkers v. Weber*.<sup>163</sup> The district court then ordered the Department of Labor to apply the IEA's bylaws, as amended in 1974, to the stipulated election of the IEA's secretary-treasurer.<sup>164</sup>

#### B. *The Seventh Circuit's Decision*

The Department of Labor appealed the district court's order, and a unanimous panel of the Seventh Circuit in an opinion by Judge Posner reversed the district court on January 4, 1982.<sup>165</sup> After resolving an IEA procedural objection to the Department of Labor's position,<sup>166</sup> the court held that the IEA's affirmative action plan

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156. *But see infra* note 166 (last paragraph).

157. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 148 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

158. *Id.* at 148-49. *See supra* note 142.

159. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 148 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

160. *Id.*

161. *Id.* at 148-49.

162. No add-on delegates would be necessary once the ordinary election process resulted in the election of enough minority delegates to satisfy the eight percent goal. *Id.* at 149. *See supra* text accompanying note 149.

163. 443 U.S. 193 (1979). *See supra* note 19.

164. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 149 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

165. *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982). Also on the panel were Chief Judge Walter J. Cummings and Judge Robert A. Sprecher.

166. The IEA argued that the government's challenge to its affirmative action plan was not appropriate because the Department of Labor had failed to satisfy the prerequisites that are an integral part of Title IV's enforcement scheme. Section 402 of the Act, 29 U.S.C. § 482 (1976), provides that the principal remedies for violations of § 401 are a declaration that the election is void and an order directing that a new election be conducted under the supervision of the Department of Labor. However, to spare unnecessary expense and to avoid undue governmental interference with internal union affairs, *see infra* text accompanying notes 227-28, those remedies may be imposed only if the alleged violation of § 401 "may have affected the outcome of an election." LMRDA § 402(c)(2), 29 U.S.C. § 482(c)(2) (1976). (The principal exceptions to this rule, regarding access to and fair use of unions' membership lists for campaign purposes, *id.* § 401(c), 29 U.S.C. § 481(c), and challenges to discriminatory applications of union election rules, were not relevant to the

violated the requirement of section 401(e) that all union members be eligible to run for union office.<sup>167</sup> The opinion emphasized that the reasonable qualifications exception, relied on by the district court,<sup>168</sup> should be narrowly construed,<sup>169</sup> and pointed out that no recent decisions interpreting the provision had upheld qualifications for office that prevented a majority of the union's membership from running for office.<sup>170</sup> Since in the court's view the IEA's affirmative action plan precluded at least eighty-five percent<sup>171</sup> of the membership from running "for any of the posi-

IEA litigation. See, e.g., *Crowley v. Local 82, International Bhd. of Teamsters*, 679 F.2d 978 (1st Cir. 1982), cert. granted, 103 S. Ct. 813 (1983)).

In this case, according to the IEA's argument, not only had the stipulated election for secretary-treasurer not yet taken place, but it was sheer speculation for the Department of Labor or the court to conclude that the allegedly improper affirmative action plan would have affected the outcome of the election. Brief for Appellee at 43-46, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982). For example, if minority add-on delegates comprised four percent of the representative assembly, and the winning candidate for secretary-treasurer won by a 20% margin, it would be difficult to conclude that the presence of the add-on delegates affected the outcome of the election. Indeed, the Department of Labor had been asked by its original complainant in IEA to challenge the IEA's 1977 presidential and vice-presidential elections, but it declined to do so because "the number of minority [add-on] delegates who voted at the 1977 convention . . . were not sufficient to have affected the outcome." *Id.* at 45 n.27. If the Department could not mount a direct assault on the IEA's affirmative action plan in its initial complaint, argued the Association, it should not be permitted to succeed in an indirect assault through its supervision of the stipulated election. *Id.* at 45.

At least for purposes of the Department's challenge to the composition of the representative assembly, the court correctly rejected this procedural argument. As Judge Posner's opinion points out, 667 F.2d 638, 640 (7th Cir. 1982), the Act explicitly provides that union elections conducted under the Department's supervision must be "in accordance with the provisions of this title," LMRDA § 402(b), 29 U.S.C. § 482(b) (1976), and shall be held in conformity with the union's own bylaws only "so far as lawful and practicable." *Id.* at § 402(c), 29 U.S.C. § 482(c). It would be anomalous, and certainly wasteful, to construe Title IV's remedial provisions in such a way that the Department of Labor would have to supervise an election with full knowledge that the procedures being followed were unlawful, when upon completion, that election itself would be subject to challenge in a whole new set of Title IV enforcement proceedings. See *Trbovich v. UMW*, 404 U.S. 528, 537 n.8 (1972); *Millwrights Local 1914 v. Carroll*, 654 F.2d 548 (9th Cir. 1981); *Brennan v. Local 639, Int'l Bhd. of Teamsters*, 494 F.2d 1092, 1098-1100 (D.C. Cir. 1974). Commentators on the LMRDA have long contended that as it is, Title IV's enforcement procedures are too cumbersome and the Department of Labor is too passive in its enforcement efforts. E.g., J. BELLACE & A. BERKOWITZ, *THE LANDRUM-GRIFFIN ACT: TWENTY YEARS OF FEDERAL PROTECTION OF UNION MEMBERS' RIGHTS* 280-82 (1979); H. BENSON, *DEMOCRATIC RIGHTS FOR UNION MEMBERS* 91-122 (1979); D. McLAUGHLIN & A. SCHOOMAKER, *THE LANDRUM-GRIFFIN ACT AND UNION DEMOCRACY* 43-73 (1979); Hall, *Meanwhile, Back at the Labor Department, in AUTOCRACY AND INSURGENCY IN ORGANIZED LABOR* 267 (B. Hall, ed. 1972); James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 HARV. C.R.-C.L. L. REV. 247, 293-325 (1978); Rauh, *LMRDA—Enforce It or Repeal It*, 5 GA. L. REV. 673 (1971); Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 YALE L.J. 407, 489-544, 567-68 (1972); Note, *The Election Labyrinth: An Inquiry into Title IV of the LMRDA*, 43 N.Y.U. L. REV. 336, 380-86 (1968). A ruling on procedural grounds that avoided the merits of the Department's argument regarding the minority add-on delegates to the representative assembly would have been a serious setback for the effective enforcement of Title IV.

On the other hand, the court of appeals acknowledged that "[t]he question is somewhat less clear with regard to [the Department's challenge concerning] membership on the Board of Directors." *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638, 640 (7th Cir. 1982). Nevertheless, the court entertained that challenge since the candidates for secretary-treasurer were to be "nominated by a Nominating Committee composed of members of the Board of Directors. . . . [I]f the Board's composition is tainted by an unlawful by-law the election could be tainted as well." *Id.* Even if the board's composition were in fact tainted, arguably the court should not have reached the merits of the Department's challenge to Article VII of the IEA's bylaws, given the remoteness of any effect on the election for secretary-treasurer (the board members holding the positions reserved for minorities might not even be on the nominating committee).

167. 667 F.2d 638, 641, 642 (7th Cir. 1982). See *supra* note 142.

168. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 148-49 (C.D. Ill. 1981). See *supra* text accompanying notes 157-61.

169. 667 F.2d 638, 641 (citing *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305, 309 (1977), and *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 499 (1968)).

170. *Id.*

171. The IEA did not have accurate records of its overall racial composition. It was the largest teachers' organization in the state, however, and statistics kept by the state indicated that 15% of all Illinois teachers were minorities. See *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 148 (C.D. Ill. 1981), *rev'd sub nom.*, *Donovan v. Illinois Educ.*

tions . . . reserved for members of [minority] groups," it followed that the plan violated section 401(e).<sup>172</sup>

A second problem with the IEA's affirmative action plan was discussed only in dictum—the manner in which the minority add-on delegates to the representative assembly were chosen when these delegates were needed to reach the eight percent goal.<sup>173</sup> Under the IEA's plan, the add-on delegates were nominated and elected by the Association's board of directors.<sup>174</sup> By permitting the board of directors to name up to eight percent of the delegates to the representative assembly, which in turn elects some members of the board, including the IEA's executive officers, the plan "presents one of the specific dangers, that of self-perpetuating incumbency, which the election provisions of the LMRDA were designed to cure."<sup>175</sup>

Finally, after noting that the court "did not assume that there is no set of facts that could possibly justify" an affirmative action plan similar to the IEA's,<sup>176</sup> Judge Posner's opinion outlined additional problems with the plan and the arguments advanced in its support. For example, Judge Posner complained, "[a]part from two perfunctory affidavits" containing only "vague generalities," no evidence was introduced to show how the Association had benefited from the restrictions.<sup>177</sup> Nor was there any evidence of past discrimination against minority teachers by the IEA for which the affirmative action plan would be "mak[ing] amends or head[ing] off complaints."<sup>178</sup> The court also questioned the basis for including Asians and American Indians as beneficiaries of the affirmative action plan and excluding "other groups that might be equally plausible candidates for favor."<sup>179</sup> And in concluding, the opinion declared irrelevant the fact that the IEA's affirmative action plan had been adopted by an "overwhelmingly white" membership.<sup>180</sup>

Stripped of its dicta, Judge Posner's opinion for the Seventh Circuit held that both aspects of the IEA's affirmative action plan—the use of add-on delegates in the representative assembly and the addition of four special minority seats to the board of directors—violated section 401(e) of the Landrum-Griffin Act because they unreasonably denied a majority of union members the right to run for those positions. Further analysis reveals that Judge Posner's opinion was half-right—with respect to the illegality of the appointment of add-on delegates to the representative assembly—

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Ass'n, 667 F.2d 638 (7th Cir. 1982). Although Judge Posner's opinion suggests that the minority composition of the IEA might have been far less than 15%, 667 F.2d 638, 642 (7th Cir. 1982), the Department of Labor itself came close to conceding the reasonableness of the figure. Brief for Appellant at 9 n.5, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

172. 667 F.2d 638, 641 (7th Cir. 1982).

173. *Id.*

174. *See supra* text accompanying note 152.

175. 667 F.2d 638, 641 (7th Cir. 1982) (citing *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 499 (1968)). The opinion noted that this particular danger was not present in the bylaws providing for the addition of four minority positions on the board of directors, since candidates for those positions were elected by the membership of the union. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 640.

179. *Id.* at 642.

180. *Id.*



but for the wrong reasons. In fact, the plan violated section 401(d) of the LMRDA, not section 401(e).

### C. Section 401(d) and the Appointment of Add-On Delegates

Section 401(d) of the Landrum-Griffin Act is the same provision upon which the Department of Labor originally based its complaint in the district court proceedings.<sup>181</sup> It requires "intermediate" labor organizations<sup>182</sup> to elect their officers at least every four years "by secret ballot among the members . . . or by labor organization officers representative of such members who have been elected by secret ballot."<sup>183</sup>

Although the Department's complaint originally invoked section 401(d) in order to compel the IEA to elect rather than appoint its secretary-treasurer,<sup>184</sup> the provision is equally applicable to the selection of representative assembly delegates. The provision's application in this context derives from its application to the selection of executive officers such as secretary-treasurer. Since one of the duties of the representative assembly is to elect the IEA's executive officers,<sup>185</sup> delegates to the assembly must be "elected by secret ballot" under the terms of the section.<sup>186</sup> This language has been construed to mean secret ballot vote of the members.<sup>187</sup> Thus, the selection of minority add-on delegates by the board of directors, rather than by secret ballot of the membership, was a clear violation of section 401(d) which the court of appeals did not rely upon in its decision.<sup>188</sup> Indeed, it would seem that the IEA's procedures for electing its executive officers would have been open to challenge on 401(d) grounds even if there had been no affirmative action plan and no minority add-on

181. See *supra* note 130.

182. The IEA is an intermediate body for purposes of § 401(d) in the sense that it falls between the national or international level, at which elections of officers must be held at least every five years, LMRDA § 401(a), 29 U.S.C. § 481(a) (1976), and the local level, at which elections of officers must be held at least every three years. *Id.* § 401(b), 29 U.S.C. § 481(b).

183. Section 401(d) provides:

Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

29 U.S.C. § 481(d) (1976).

184. See *supra* text accompanying note 130.

185. See *supra* text accompanying note 138.

186. LMRDA § 401(d), 29 U.S.C. § 481(d) (1976).

187. Although if read literally, the words of section 401(d) could arguably be construed to permit the secret ballot election of delegates by the board of directors, rather than by the membership itself, Department of Labor regulations construe the provision to require the election of such delegates by "the members . . . of the labor organization." 29 C.F.R. § 452.22 (1983) (emphasis added). See also *Donovan v. District Council 35, Int'l Bhd. of Painters*, 702 F.2d 25 (1st Cir. 1983). Any other interpretation would undercut one of the purposes of Title IV, which is "to leave the choice of leaders to the membership." *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305, 312 (1977). Members of the board of directors already serve as delegates to the representative assembly, and the representative assembly already elects a good portion of the board of directors (in addition to the executive officers, the NEA Directors). See 1978 BYLAWS, *supra* note 1, art. V, § 1; art. VI, § 1. To allow the board of directors to elect other delegates to the assembly would further close the circle, leaving the membership on the outside.

188. The Department of Labor had mentioned this argument in its brief, but it did not stress it. Brief for Appellant at 21 n.13, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982). Judge Posner's opinion invoked the policies behind the § 401(d) argument when it pointed out the dangers of "self-perpetuating incumbency" posed by the IEA's plan, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638, 641 (7th Cir. 1982), but the opinion never mentioned § 401(d) in this context, much less relied on it.

delegates since other members of the representative assembly, such as the executive officers and the NEA directors, were elected by the board of directors rather than by the membership directly.<sup>189</sup>

Thus, to the extent the IEA's affirmative action plan depended on the appointment of add-on delegates to the representative assembly by the board of directors, it ran afoul of section 401(d). However, if the IEA had amended its bylaws to provide for the election of the add-on delegates by the membership, those bylaws would not have violated that section. In the alternative, add-on delegates or other delegates appointed by the board of directors could have been granted full voting rights in the representative assembly for all purposes except the election of executive officers.<sup>190</sup> On the other hand, because the IEA's bylaws concerning the board of directors already provided for the four additional minority members of the board of directors to be elected directly by the membership,<sup>191</sup> that aspect of the IEA's affirmative action plan did not violate section 401(d). Whether either phase of the plan violated section 401(e), as the circuit court held, is, however, another question entirely.

#### D. Section 401(e) and the "Reasonable Qualifications" Exception

The heart of Judge Posner's opinion in *IEA* is its conclusion, based on section 401(e) of the Act,<sup>192</sup> that the IEA's affirmative action plan imposed unreasonable and unduly restrictive limitations on the right of nonminority IEA members to run for the positions set aside for minorities under the affirmative action plan.<sup>193</sup> The actual language of the provision offers little guidance for evaluating the court's construction of section 401(e) since the key words, "reasonable qualifications," are nowhere defined in either the statute or its legislative history. Moreover, the Supreme Court has long "cautioned against a literal reading of congressional labor legislation" and emphasized the need in statutory construction to examine "the general objectives Congress sought to achieve."<sup>194</sup> Unfortunately, the court's opinion fails to utilize the

189. See *supra* note 187.

190. With the arguable exception of § 101(a)(3)(B), 29 U.S.C. § 411(a)(3)(B) (1976), dealing with the power of convention delegates to raise dues, nothing in the LMRDA requires convention delegates to be directly elected by a union's membership for any purposes other than the election of officers. This alternative, of course, would have undercut to some extent the effectiveness of the affirmative action plan.

191. See 1978 BYLAWS, *supra* note 1, art. VII, § 1(E). See *supra* note 141.

192. See *supra* note 142.

193. See *supra* text accompanying notes 167-72. A threshold question not explicitly addressed by either the district court or the court of appeals was whether the positions set aside for minorities in the representative assembly were even subject to the requirements of § 401(e), whatever they might be. As the IEA had argued, Brief for Appellee at 25 n.10, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982), members of the representative assembly—essentially convention delegates—do not seem to fit the definition of "officer" provided in § 3(n) of the Act: "'Officer' means any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions . . . , and any member of [the] executive board or similar governing body." 29 U.S.C. § 402(n) (1976). However, § 401(e) does not apply only to the election of union officers. It applies to "any election required by this section which is to be held by secret ballot." *Id.* § 481(e) (emphasis added). And since § 401(d) requires election by secret ballot of any convention delegates who elect the officers of intermediate labor organizations such as the IEA, the requirements of § 401(e) were properly invoked. See 29 C.F.R. § 452.22 (1983); *Donovan v. District Council 35, Int'l Bhd. of Painters*, 702 F.2d 25 (1st Cir. 1983).

194. *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968). This is especially true of the Landrum-Griffin Act:

"The legislation contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House . . . and because many sections contain calculated ambiguities or

LMRDA's legislative history as an aid in determining the congressional objectives behind section 401(e).<sup>195</sup> Instead, the opinion applies the reasoning of several Supreme Court precedents in a mechanical, formalistic manner that reveals fundamental misunderstanding of both those cases and the actual operation of the IEA's affirmative action plan.

### 1. *The Court's Reliance on Hotel Employees and Steelworkers*

The principal cases relied on by the Seventh Circuit in *IEA* were *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*<sup>196</sup> and *Local 3489, United Steelworkers v. Usery*.<sup>197</sup> In both cases the Supreme Court was called upon to construe the reasonable qualifications exception to section 401(e). In *Hotel Employees* the union required candidates for major union office to have previously held elective office within the union. Operationally, the requirement made ninety-three percent of the union's membership ineligible to run for the offices in question.<sup>198</sup> In *Steelworkers* the union required candidates for local union office to have attended at least half of the local's meetings over the preceding three years. The requirement had the effect of barring 96.5 percent of the local's membership from running for office.<sup>199</sup> The Supreme Court held the qualifications in each case to be unreasonable restrictions on the rights of union members to run for office.<sup>200</sup>

As the leading cases construing the reasonable qualifications exception,<sup>201</sup> *Hotel Employees* and *Steelworkers* were obviously appropriate sources of authority.

political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words."

*Id.* at 468 n.6 (quoting Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 852 (1960)). Although in some statutory areas the Court has tended in recent years to emphasize the literal words of statutes at the expense of more general indications of legislative purpose, see Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982), when construing the Landrum-Griffin Act, the Court has continued to avoid undue reliance on the text of the Act and to stress the need to "look to the objectives Congress sought to achieve." *United Steelworkers v. Sadlowski*, 457 U.S. 102, 111 (1982). This approach was endorsed by the Seventh Circuit only a few weeks before the *IEA* decision was issued: "Where . . . a situation occurs which Congress did not contemplate in enacting the LMRDA, the statute is to be construed in light of the objectives Congress sought to achieve." *Marshall v. Local 1010, United Steelworkers*, 664 F.2d 144, 150 (7th Cir. 1981).

195. The opinion's only direct reference to the LMRDA's legislative history cites remarks by Representative Landrum, one of the Act's sponsors, to the effect that "Congress did not want to legislate with respect to the racial practices . . . of unions." *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638, 640 (7th Cir. 1982) (citing 105 CONG. REC. 15826 (1959)). Representative Landrum's statement responded to the fears of some southern congressmen that the LMRDA might require unions to admit blacks. That requirement was not imposed on unions by federal law until the passage of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c) (1976). Indeed, if the passage quoted has any relevance to the *IEA* dispute at all, it would seem to cut against the court's repudiation of the IEA's affirmative action plan, which could be characterized as a "racial practice" of the union.

196. 391 U.S. 492 (1968).

197. 429 U.S. 305 (1977).

198. 391 U.S. 492, 502 (1968).

199. 429 U.S. 305, 310 (1977). In most unions, only 1 to 10% of the membership regularly attend membership meetings. Attendance is much higher, of course, at meetings held to ratify proposed contracts, elect officers, call strikes, and so forth. See W. LEISERSON, *AMERICAN TRADE UNION DEMOCRACY* 285-86 (1959); L. SAYLES & G. STRAUSS, *THE LOCAL UNION* 97-98 (rev. ed. 1967).

200. 391 U.S. 492, 505 (1968); 429 U.S. 305, 312-13 (1977).

201. Besides *Hotel Employees* and *Steelworkers*, the only cases dealing with qualifications for union office to reach the Supreme Court were *Hodgson v. Local 6799, United Steelworkers*, 403 U.S. 333 (1971), and *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463 (1968), which involved meeting attendance requirements similar to that struck

However, the court's opinion virtually ignored their discussions of section 401(e)'s legislative purpose<sup>202</sup> and instead concentrated on their facts. In *Hotel Employees* and *Steelworkers* the central, and possibly controlling,<sup>203</sup> factor was that the union rules in question "substantially deplete[d] the ranks of those who might run in opposition to incumbents."<sup>204</sup> Indeed, according to Justice Powell, the Court in *Steelworkers* came close to establishing a per se rule prohibiting any eligibility requirement that had the effect of disqualifying "all but a small percentage of the union's membership."<sup>205</sup> Judge Posner's approach in *IEA* was to characterize the operation of the IEA's affirmative action plan so that it seemed to fall within the per se rule described by Justice Powell.

The critical flaw in Judge Posner's reasoning was to consider the positions reserved for minorities as delegates to the representative assembly and as members of the board of directors to be offices separate and distinct from the remaining positions in the assembly or on the board. From this perspective, it would seem to follow that "the vast majority" of the IEA's members, as in *Hotel Employees* and *Steelworkers*, were prevented from running for offices covered by section 401.<sup>206</sup> But in fact, the eight percent of the positions reserved for minorities under the IEA's bylaws were identical in every way, except for their manner of selection, with the remaining ninety-two percent of the positions.<sup>207</sup> Thus, the IEA's plan barred absolutely no nonminority members from running for any of the roughly 600 preexisting positions in the representative assembly or fifty preexisting positions on the board of directors.<sup>208</sup> While the creation of new minority positions may have diluted slightly the

down in *Steelworkers*. In *Local 6799*, however, the issue before the court concerned the exhaustion of internal union remedies, and in *Glass Bottle Blowers* the issue was whether the particular dispute was then moot. In neither case did the Court reach the merits of the challenged eligibility requirement. Among the more significant cases in the courts of appeals dealing with the reasonable qualifications exceptions are *Colpo v. Local 326, Int'l Bhd. of Teamsters*, 659 F.2d 399 (3d Cir. 1981) (union's disqualification of candidate for failing to pay dues continuously for 24 months held unreasonable where problem was caused by employer's failure to comply with dues check-off agreement); *Usery v. District 22, UMW*, 543 F.2d 744 (10th Cir. 1976) (requirement that candidates for district office be nominated by at least five different locals in the district held unreasonable); *Brennan v. Independent Lift Truck Builders Union*, 490 F.2d 213 (7th Cir. 1974) (until propriety of employee's discharge is resolved, union member who is actively contesting his discharge cannot be barred from candidacy on the grounds that he is not working in the trade); *Hodgson v. Local 18, Int'l Union of Operating Eng'rs*, 440 F.2d 485 (6th Cir.), cert. denied, 404 U.S. 852 (1971) (requirement that union member transfer to parent local and pay transfer fee as prerequisite to candidacy held unreasonable where rule makes over 60% of membership ineligible to run for office).

202. See *infra* text accompanying notes 212-18.

203. See *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305, 315 (1977) (Powell, J., dissenting).

204. 391 U.S. 492, 499 (1968). See also *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305, 310 (1977): Like the bylaw in *Hotel Employees*, an attendance requirement that results in the exclusion of 96.5% of the members of candidacy for union office hardly seems to be a "reasonable qualification" consistent with the goal of free and democratic elections. A requirement having that result obviously severely restricts the free choice of the membership in selecting its leaders.

205. *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305, 315 (1977) (Powell, J., dissenting).

206. *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638, 641 (7th Cir. 1982).

207. The IEA's bylaws treat minority add-on delegates to the representative assembly and minority members of the board of directors the same as nonminority delegates and board members with regard to powers, duties, voting rights, and so forth. See 1978 BYLAWS, *supra* note 1, arts. VI, VII; and *supra* note 141.

208. In fact, the addition of four minority seats to the board of directors could actually increase nonminority group members' chances of being elected to the board since some potential minority group candidates may choose to run for the minority seats, when otherwise they might have competed for the same seats as nonminority candidates. This result is not

value of each nonminority delegate's or board member's vote, that is far from Judge Posner's conclusion that the IEA's plan prevented a majority of the union's membership from running for office.<sup>209</sup>

## 2. Title IV's Legislative Purpose

To argue that the IEA's affirmative action plan does not violate the per se rule of *Steelworkers*, of course, does not end the inquiry. It cannot be denied that, at least for a small number of delegate and board member positions, a majority of union members is barred from candidacy. The initial question, therefore, remains to be answered: Are these restrictions on the rights of nonminority IEA members to be candidates for the positions reserved for minorities reasonable within the meaning of section 401(e)? Since Congress nowhere defined "reasonable qualifications," the meaning of those words must be derived from Congress' intent in enacting section 401(e).<sup>210</sup> That question, as Justice White recently stated, "is best answered by identifying the problem that Congress intended to solve by adopting the provision."<sup>211</sup>

The LMRDA was enacted to help alleviate two serious and related problems within the labor movement:<sup>212</sup> the corruption and racketeering that had been exposed by the McClellan Committee hearings,<sup>213</sup> and the autocracy and lack of democracy

as paradoxical as it may seem. Dean Derrick Bell has argued that many remedies for racial discrimination have benefited whites as much, if not more, than minorities:

[United *Steelworkers v. Weber*, 443 U.S. 193 (1979)] is a prime example of the often overlooked benefit to whites of affirmative action programs. Remember that the Kaiser Aluminum Company had steadfastly refused union pressures in the collective bargaining process for the initiation of a training program for unskilled workers. Kaiser initiated such a program under the threat of litigation by the civil rights agencies. When they did establish a program, it was 50% black and 50% white. But whites ignored the benefits for which Blacks had worked and focused on the asserted violation of seniority rules that were necessary to enable black workers to meaningfully participate in the program.

Freeman, Bell & McGee, *Race, Class and the Contradictions of Affirmative Action*, 7 BLACK L.J. 270, 275 (1982). See also Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 14-16 (1979); cf. U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980s, *supra* note 8, at 36.

209. 667 F.2d 638, 641 (7th Cir. 1982). Indeed, as Justice Powell stated in an analogous context, "[T]he effect of the set-aside is limited and so widely disbursed that its use is consistent with fundamental fairness." *Fullilove v. Klutznick*, 448 U.S. 448, 515 (1980) (Powell, J., concurring) (upholding a federal program setting aside for minority contractors 10% of the contracts in local public works projects financed with federal monies).

210. See *supra* text accompanying note 194.

211. *United Steelworkers v. Sadlowski*, 457 U.S. 102, 121-22 (1982) (White, J., dissenting).

212. See Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 820 (1960). Professor Cox also mentions a third source of pressure leading to the passage of the LMRDA: organizations representing employers "whose primary object appears to have been to use the outcry against corruption within labor unions as an occasion for revising labor-management relations laws in a manner which would weaken the unions." *Id.* at 820-21. While this pressure may have affected the language of Title IV, it was more specifically directed at Title VII of the LMRDA, which amended the National Labor Relations Act to curb secondary boycotts and certain types of recognition picketing. LMRDA § 704, 29 U.S.C. § 158(b)(4), (7) (1976).

213. The McClellan Committee, formally known as the Senate Select Committee on Improper Activities in the Labor or Management Field, held extensive hearings during 1957 and 1958 investigating corrupt practices in a number of unions, but with a distinct emphasis on Jimmy Hoffa's Teamsters, the largest union in the country. See J. BELLACE & A. BERKOWITZ, *THE LANDRUM-GRIFFIN ACT: TWENTY YEARS OF FEDERAL PROTECTION OF UNION MEMBERS' RIGHTS 2-4* (1979). The record of the Committee's proceedings filled 58 volumes, and the Committee published interim reports of its findings and recommendations in 1958 and 1959, and a final report in 1960. The 1958 Interim Report recommended that Congress enact legislation that would, among other things, regulate union funds and ensure union democracy, S. REP.

that characterized the operation of many unions.<sup>214</sup> Title IV's provisions safeguarding "free and periodic elections"<sup>215</sup> of union officers were crucial to the accomplishment of these purposes because autocratic and entrenched union officers often become corrupt.<sup>216</sup> Thus, Title IV's goal was "the ending of autocratic rule by placing the ultimate power in the hands of the members, where it rightfully belongs, so that they may . . . bring about a regeneration of union leadership"<sup>217</sup> which would be "responsive to the desires of the men and women whom they represent."<sup>218</sup>

Judge Posner was quite correct, then, in noting that "self-perpetuating incumbency" was one of the "specific dangers . . . the election provisions of the LMRDA were designed to cure."<sup>219</sup> Indeed, the Court in *Hotel Employees* stressed that "[c]ontrol by incumbents . . . is precisely what Congress legislated against in the LMRDA."<sup>220</sup> Unfortunately, the court's opinion did not evaluate the IEA's affirmative action plan in light of this congressional intent.<sup>221</sup> An evaluation of this

No. 1417, 85th Cong., 2d Sess. 450 (1958). The legislative history of the LMRDA indicates that the Act was passed in direct response to the McClellan Committee's recommendations. See, e.g., S. REP. NO. 187, 86th Cong., 1st Sess. 2 (1959) [hereinafter cited as SENATE REPORT], reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 398 (1959) [hereinafter cited as LEGISLATIVE HISTORY]; H. REP. NO. 741, 86th Cong., 1st Sess. 1-2 (1959), reprinted in 1 LEGISLATIVE HISTORY, supra, at 759-60. See generally Comment, *The Problem of Union Corruption and the Labor-Management Reporting and Disclosure Act of 1959*, 38 TEX. L. REV. 468 (1960). For more general discussions of union corruption, see Hutchinson, *The Anatomy of Corruption in Trade Unions*, 8 INDUS. REL. 135 (1969); Weinstein, *Racketeering and Labor: An Economic Analysis*, 19 INDUS. & LAB. REL. REV. 402 (1966).

214. Organizations like the ACLU, and a number of scholars, most notably Clyde Summers, now of the University of Pennsylvania Law School, had long been writing about the lack of democracy in the labor movement and the need for legislation insuring union democracy. See, e.g., ACLU, *DEMOCRACY IN TRADE UNIONS* (1943); P. TAFT, *THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS* (1944); Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs*, 44 ILL. L. REV. 425, 431 (1949); Summers, *The Public Interest in Union Democracy*, 53 NW. U.L. REV. 610 (1958); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951). However, it was the McClellan Committee's documentation of the relationship between union corruption and undemocratic practices in unions that provided the final impetus for the union democracy provisions of the LMRDA. See J. BELLACE & A. BERKOWITZ, *THE LANDRUM-GRIFFIN ACT: TWENTY YEARS OF FEDERAL PROTECTION OF UNION MEMBERS' RIGHTS* 2 (1979). As Senator McClellan stated during the debates over the LMRDA:

I do not believe that racketeering, corruption, abuse of power, and other improper practices on the part of some labor organizations can be, or will ever be, prevented until and unless the Congress of the United States has the wisdom and the courage to enact laws prescribing minimum standards of democratic process and conduct for the administration of internal union affairs.

105 CONG. REC. 6471 (1959), reprinted in 2 LEGISLATIVE HISTORY, supra note 213, at 1098.

215. SENATE REPORT, supra note 213, at 6.

216. Some trade unions have acquired bureaucratic tendencies and characteristics. The relationship of the leaders of such unions to their members have in some instances become impersonal and autocratic. In some cases men who have acquired positions of power and responsibility within unions have abused their power and forsaken their responsibilities to the membership and to the public. The power and control of a trade union by leaders who abuse their power and forsake their responsibilities inevitably leads to the elimination of the efficient, honest and democratic practices within the union, and often results in irresponsible actions which are detrimental to the public interest.

H. REP. NO. 741, 86th Cong., 1st Sess. 1-2 (1959), reprinted in 1 LEGISLATIVE HISTORY, supra note 213, at 759-60.

217. 105 CONG. REC. 6472 (1959) (statement of Sen. McClellan), reprinted in 2 LEGISLATIVE HISTORY, supra note 213, at 1099.

218. SENATE REPORT, supra note 213, at 20. See *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305, 309 (1977); *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 497 (1968).

219. 667 F.2d 638, 641 (7th Cir. 1982).

220. 391 U.S. 492, 505 (1968) (emphasis added). See also *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305, 309 (1977) ("Congress chose the goal of 'free and democratic' union elections as a preventive measure 'to curb the possibility of abuse by benevolent as well as malevolent entrenched leadership.'") (quoting *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 503 (1968)).

221. See supra note 195.

kind should have led to the conclusion that the IEA's plan was entirely consistent with Title IV's legislative purpose because the plan did not encourage the development of an entrenched incumbency. One hundred percent of the IEA's otherwise qualified membership was still eligible to run for ninety-two percent of the offices in question, in great contrast to eligibility rules like those struck down in *Hotel Employees* and *Steelworkers*, which allowed less than ten percent of the unions' memberships to run for 100 percent of the offices in question.<sup>222</sup> Moreover, by reserving a small number of offices for members of groups that had previously been underrepresented in the IEA's governing bodies,<sup>223</sup> the actual effect of the plan was to increase, rather than decrease, the pool of candidates for union office, and to increase, rather than decrease, the degree to which the union leadership is responsive to the concerns of all the union's membership. True, nonminority members of the union could not seek a small number of the union's offices, but as the Court stated in *Steelworkers*, "Title IV is not designed merely to protect the right of a union member to run for a particular office in a particular election. 'Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union members.'"<sup>224</sup>

### 3. The Reasonable Qualifications Exception Balancing Test

It is ironic that Judge Posner, who is often critical of governmental regulation of the private sector,<sup>225</sup> gave so little weight to the IEA's own interest in adopting its affirmative action plan.<sup>226</sup> After all, in enacting the LMRDA Congress was guided by

222. See *supra* text accompanying notes 198-99. However, to the extent the minority add-on delegates to the representative assembly are selected by the IEA's board of directors, rather than by the IEA's membership directly, the plan does to some degree increase the ability of incumbent board members to keep themselves in office, thereby violating both Title IV's legislative purpose and the letter of § 401(d). See *supra* text accompanying notes 181-91.

223. See *supra* text accompanying notes 1-6.

224. 429 U.S. 305, 309 (1977) (quoting *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 475 (1968)). The *Steelworkers* court went on to point out that the "'free and democratic' union elections" guaranteed by Title IV were "modeled on 'political elections in this country.'" *Id.* at 309 (quoting *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 504 (1968)). Cf. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198, 202 (1944) (likening the functions and duties of unions to those of legislatures). Further support for union affirmative action plans like that of the IEA may therefore be derived from recent voting rights cases permitting states to use race as a factor in redistricting and reapportionment. See, e.g., *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977). See generally Note, *Affirmative Action and Electoral Reform*, 90 YALE L.J. 1811 (1981). But see Note, *Affirmative Action in the Electoral Process: The Constitutionality of the Democratic Party's Equal Division Rule*, 15 U. MICH. J.L. REF. 309 (1982).

225. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 271-84, 328-36 (2d ed. 1977).

226. One might speculate that Judge Posner was relatively quick to interfere with the IEA's election procedures because he views the conduct of labor unions as state action. See *id.* at 248, 532. In Judge Posner's view, therefore, it might not have been strictly the private sector with which the court was interfering. Although Judge Posner is not alone in arguing that union conduct should be treated as state action, especially in relation to discrimination, see, e.g., *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 232 (1956); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring); *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir.), cert. denied, 404 U.S. 872 (1971); Lang, *Toward a Right to Union Membership*, 12 HARV. C.R.-C.L. L. REV. 31, 40-49 (1977), the Supreme Court has expressly rejected this argument in recent cases. E.g., *United Bhd. of Carpenters, Local 610 v. Scott*, 103 S. Ct. 3352 (1983); *United Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1982); *United Steelworkers v. Weber*, 443 U.S. 193, 200 (1979). For a critical reexamination of the state action doctrine in the labor law context, see Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982). In any event, this explanation of Judge Posner's opinion fails because Posner concedes that the fourteenth amendment is not applicable to the case, 667 F.2d 638, 640 (7th Cir. 1982), and even if it were, it is likely the IEA's affirmative action plan would survive fourteenth amendment scrutiny. Cf. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

the general principles that “unions should be left free to ‘operate their own affairs, as far as possible,’” and that union members “‘are fully competent to regulate union affairs’”<sup>227</sup> with only “‘minimum interference by Government.’”<sup>228</sup> Judge Posner gave particularly short shrift to the fact that the IEA’s affirmative action plan was adopted by a large majority of the “‘overwhelmingly white’” representative assembly.<sup>229</sup> While the LMRDA does not exclude from its prohibitions otherwise unlawful practices that are adopted by majority vote,<sup>230</sup> the adoption of a practice by a large majority may nevertheless be relevant in determining whether the practice is in fact unlawful, at least when, as here, that majority was comprised largely of the purported victims of the unlawful practice.<sup>231</sup>

In the final analysis, determination of whether the IEA’s affirmative action plan violated section 401(e) of the LMRDA should have turned on the balancing<sup>232</sup> of the union’s purposes in adopting the plan, considered in light of the congressional policy against undue interference with the internal affairs of unions, against the extent to which the plan actually limited union members’ rights to run for office, thereby increasing the dangers of an entrenched leadership.<sup>233</sup> This was precisely the type of balancing used by the district court when it upheld the IEA’s plan.<sup>234</sup> Unfortunately, Judge Posner’s mistaken application of the per se rule of *Steelworkers* to the IEA’s plan<sup>235</sup> resulted in reversal of the district court’s ruling without an adequate demonstration that the results of the lower court’s balancing were erroneous.

227. *United Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1982) (quoting S. REP. NO. 1684, 85th Cong., 2d Sess. 4-5 (1958)). See also SENATE REPORT, *supra* note 213, at 7.

228. SENATE REPORT, *supra* note 213, at 7. The Supreme Court has emphasized the “‘long-standing policy against unnecessary governmental intrusion into internal union affairs,’” and the “‘general congressional policy to allow unions great latitude in resolving their own internal controversies.’” *Wirtz v. Local 153, Glass Bottle Blowers Ass’n*, 389 U.S. 463, 471 (1968) (quoting *Calhoun v. Harvey*, 379 U.S. 134, 140 (1964)).

229. 667 F.2d 638, 642 (7th Cir. 1982). See *supra* text accompanying note 180.

230. See, e.g., LMRDA § 501(a), 29 U.S.C. § 501(a) (“a general exculpatory resolution of a governing body purporting to relieve a union officer of liability for breach of the [fiduciary] duties declared by this section shall be void as against public policy”).

231. Cf. *Ely*, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); *Wright, Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213 (1980) (both arguing that it is not “suspect” for a majority to discriminate against itself by enacting affirmative action plans benefiting members of minority groups). In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), in which the Court struck down a medical school affirmative action plan that set aside a certain number of positions in each class for minorities while indicating approval of university affirmative action plans that take race into account as an admissions criterion, Justice Powell’s opinion implicitly rejected the *Ely* and *Wright* approach, *id.* at 290-94, but Justice Brennan’s opinion seemed receptive to it. *Id.* at 357 (Brennan, J., concurring in part and dissenting in part). See also *United Jewish Orgs. v. Carey*, 430 U.S. 144, 178 (1977) (Brennan, J., concurring).

232. See *Marshall v. Illinois Educ. Ass’n*, 511 F. Supp. 144, 147 (C.D. Ill. 1981), *rev’d sub nom.*, *Donovan v. Illinois Educ. Ass’n*, 667 F.2d 638 (7th Cir. 1982); Note, *The Election Labyrinth: An Inquiry into Title IV of the LMRDA*, 43 N.Y.U. L. REV. 336, 346 (1968).

233. A Department of Labor regulation interpreting Title IV of the LMRDA provides:

[R]estrictions placed on the right of members to be candidates must be closely scrutinized to determine whether they serve union purposes of such importance, in terms of protecting the union as an institution, as to justify subordinating the right of the individual member to seek office and the interest of the membership in a free, democratic choice of leaders.

29 C.F.R. § 452.35 (1983).

234. See *Marshall v. Illinois Educ. Ass’n*, 511 F. Supp. 144, 148 (C.D. Ill. 1981), *rev’d sub nom.*, *Donovan v. Illinois Educ. Ass’n*, 667 F.2d 638 (7th Cir. 1982); *supra* text accompanying notes 157-64.

235. See *supra* text accompanying notes 205-09. When properly applied, the *Steelworkers* per se rule is not inconsistent with a more general balancing test for determining whether eligibility requirements for union office violate § 401(e). The per se rule applies when a union eligibility rule prevents so many members from running for office—in *Steelworkers* 96.5 percent of the membership—that no union purpose behind the rule, no matter how laudable, could outweigh the resulting interference with the membership’s right to choose freely its own leaders.



In dicta the court of appeals did offer one plausible justification for reversing the district court: it asserted that the IEA failed to produce sufficient evidence on a number of important matters such as the benefits to the Association from its affirmative action plan, the justification for the eight percent figure of minority positions, and the reasons for including Asians and American Indians as beneficiaries of the plan.<sup>236</sup> The significance of these evidentiary problems, however, depends in large part on whether the IEA was facing a relatively high or a relatively low "burden of justification."<sup>237</sup> Certainly, as the plaintiff in the litigation, the Department of Labor had the initial burden of proving a prima facie case. This the Department accomplished by demonstrating that nonminority members were barred from running for the positions reserved for minorities. At that point, the burden shifted to the IEA to prove what is essentially an affirmative defense—that the restrictions in question fell within the reasonable qualifications exception. But since it was a balancing test that should have been used to determine whether the restrictions were reasonable, the IEA should have had to produce only enough evidence justifying the restrictions to outweigh the plan's restrictive impact. And since the IEA's eligibility requirements had a relatively small restrictive impact, especially in comparison to the restrictions in *Hotel Employees* and *Steelworkers*,<sup>238</sup> the IEA's "burden of justification" should have been relatively low. Because the court mistakenly equated the restrictions in *IEA* with those in *Hotel Employees* and *Steelworkers*, however, it apparently judged the IEA's evidence against a relatively high burden. It is entirely possible that, had the Seventh Circuit not confused the facts in *IEA* with those in *Hotel Employees* and *Steelworkers*, it, like the district court, would have found the IEA's evidence justifying the affirmative action plan to be sufficient.<sup>239</sup>

#### 4. *The Department of Labor Regulations*

A further difficulty with the court's opinion in *IEA* is its failure to utilize the Department of Labor's own interpretive guidelines in construing the reasonable qualifications exception. While the Department's regulations are not binding on the courts, they are entitled to great deference,<sup>240</sup> and Judge Posner's disregard of them is surprising since they were explicitly relied upon by both the district court<sup>241</sup> and the IEA.<sup>242</sup>

236. 667 F.2d 638, 641-42 (7th Cir. 1982).

237. *Id.* at 641.

238. See *supra* text accompanying notes 205-09.

239. Furthermore, regardless of whether the IEA's evidence should have been measured against a high or a low standard, it is significant that the dispute over the IEA's affirmative action plan arose as an interlocutory matter decided on briefs and affidavits only, without the benefit of an evidentiary hearing. 667 F.2d 638, 640 (7th Cir. 1982). If the Seventh Circuit felt the IEA's "two perfunctory affidavits" were insufficient, *id.* at 641, it would have been more appropriate, especially since this was a case of first impression, for the court to remand the matter to the district court for further fact finding, rather than to decide the merits of the dispute on an inadequate record. See, e.g., *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 277 (1965); *Kristinus v. H. Stern Co.*, 615 F.2d 67 (2d Cir. 1980); *Youngstown Sheet & Tube Co. v. Lucy Prods. Co.*, 403 F.2d 135 (5th Cir. 1968).

240. See *Marshall v. Local Lodge 1784, Int'l Ass'n of Machinists*, 509 F. Supp. 90, 95 (D. Md. 1981). Cf. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980); *Marshall v. N. L. Indus.*, 618 F.2d 1220, 1224 (7th Cir. 1980).

241. *Marshall v. Illinois Educ. Ass'n*, 511 F. Supp. 144, 147-58 (C.D. Ill. 1981).

242. Brief for Appellee at 38-43, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982). The IEA argued not only that its affirmative action plan was consistent with the Department of Labor interpretive guidelines, but also that the Department's challenge to the plan, in the face of guidelines seemingly permitting the plan, was arbitrary. *Id.* at 38.

The regulations begin by acknowledging that "whether a qualification is reasonable is a matter which is not susceptible of precise definition, and will ordinarily turn on the facts in each case."<sup>243</sup> The guidelines do, however, identify a number of general factors that the courts can consider in resolving this question. One is "[t]he relationship of the qualification to the legitimate needs and interests of the union."<sup>244</sup> The IEA adopted its affirmative action plan for several reasons, among which were (1) to provide "a continuing and effective vehicle for consideration of minority information and views in its policies and programs;"<sup>245</sup> (2) to enable the IEA to organize more effectively potential members "among communities served by minority teachers or containing a large minority school population;"<sup>246</sup> (3) "to encourage and keep minority members active in leadership positions;"<sup>247</sup> and (4) to help the IEA "become a body that was representative of all its members and of greater service to minority students."<sup>248</sup> While reasonable persons may differ on whether the IEA's affirmative action plan was the most appropriate means of achieving these goals, most would probably agree that these are legitimate union goals, and that the affirmative action plan was indeed a closely related means of achieving them.<sup>249</sup>

Another consideration mentioned in the Department's regulations interpreting the reasonable qualifications exception is "[t]he relationship of the qualification to the demands of union office."<sup>250</sup> Since representing the interests of minorities is only a small part of the duties of delegates to the representative assembly or members of the board of directors, it would be inappropriate—and illegal—to require *all* such positions to be held by members of minority groups. However, since the eight percent of these positions set aside for minorities was designed at least in part to help carry out the four purposes identified above, a close relationship exists between those duties and the requirement that the officials be members of the designated minority groups.<sup>251</sup>

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Indeed, it is somewhat curious that the Department of Labor under the Carter administration, which was generally favorably disposed towards affirmative action, undertook this challenge to the IEA's affirmative action plan in the first place. Apparently, the decision to proceed was made within the Department's Labor Management Services Administration without consultation with the Civil Rights Division of the Justice Department. However, when during the early days of the Reagan administration, the decision to appeal the district court's decision was made, holdovers from the Carter administration in the Civil Rights Division learned of the case and argued strenuously against the appeal. Although they lost that argument, they may have succeeded in preventing the case from being used as a vehicle for the type of broad-based attacks on affirmative action later brought by the Reagan administration. *See supra* note 24. Telephone interview with Department of Labor attorney who asked not to be identified (Oct. 6, 1983).

243. 29 C.F.R. § 452.36(a) (1983).

244. *Id.* § 452.36(b)(1).

245. Weaver Affidavit, *supra* note 7, at 4. As another IEA official put it, the affirmative action plan was designed to enable "the minority point of view . . . to be stated within the IEA by minority teachers and members themselves." Affidavit of Antoinette Minuzzo at 2, *reprinted in* Brief for Appellee, Appendix, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

246. Weaver Affidavit, *supra* note 7, at 4. This purpose of the plan may have particular significance since the National Education Association's chief rival, the American Federation of Teachers, has taken a public stand against affirmative action. *See supra* note 81.

247. Affidavit of Antoinette Minuzzo at 2, *reprinted in* Brief for Appellee, Appendix, *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982).

248. *Id.*

249. *See supra* text accompanying notes 57–112.

250. 29 C.F.R. § 452.36(b)(2) (1983).

251. This is not to suggest that no white officials could fully and fairly represent the IEA's minority members, or that all minorities could do so. It is simply that minority officials are more likely to represent the interests of minorities within the IEA more effectively than white officials. *See supra* text accompanying notes 57–69.

A third consideration identified in the guidelines is “[t]he impact of the qualification, in light of the Congressional purpose of fostering the broadest possible participation in union affairs.”<sup>252</sup> The IEA’s affirmative action plan fully meets this consideration. The plan in no way restricted the rights of nonminorities to run for the same offices for which they were eligible before the plan was implemented, and it enabled previously underrepresented groups within the IEA to participate more fully than before in the union’s government.<sup>253</sup>

In addition to the general considerations just discussed,<sup>254</sup> the Department’s regulations include several more specific provisions that have some bearing on the IEA case. For example, the interpretive guidelines provide that a union “may not limit eligibility for office to particular branches or segments of the union where such restriction has the effect of depriving those members who are not in such branch or segment of the right to become officers of the union.”<sup>255</sup> This provision would seem to mean that a union *may* limit eligibility for some offices to particular segments of the union if members not in those segments can also become officers.<sup>256</sup> That is precisely how the IEA’s affirmative action plan operates: only minorities can run for

252. 29 C.F.R. § 452.36(b)(3) (1983).

253. See *supra* text accompanying notes 1–7.

254. The interpretive guidelines mention two more general considerations that are less directly relevant to the IEA’s affirmative action plan. One calls for “[a] comparison of the particular qualification with the requirements for holding office generally prescribed by other labor organizations.” 29 C.F.R. § 452.36(b)(4) (1983). The IEA’s plan fails this test because very few other unions have reserved elective positions for members of minority groups. See *supra* text accompanying notes 113–28. This consideration should be given little weight, however. The LMRDA was not enacted to canonize some union practices just because they are popular, or to prohibit others just because they are unusual. Each union practice should be evaluated on its own merits in light of the LMRDA’s purposes, and unions should be free to experiment with new approaches to their own self-government so long as they do not undermine those purposes. As the Senate Committee report on the LMRDA stated:

[I]n establishing and enforcing statutory standards great care should be taken not to undermine union self-government. . . . The Committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence.

SENATE REPORT, *supra* note 213, at 7.

The last general consideration included in the Department of Labor guidelines is “[t]he degree of difficulty in meeting a qualification by union members.” 29 C.F.R. § 452.36(b)(5) (1983). Minority members of the IEA, of course, had no difficulty meeting the eligibility requirements for the positions reserved for minorities, while nonminority members of the IEA by definition found it impossible to meet those requirements. However, since nonminority members were still eligible to run for the 92% of the positions not set aside for minorities, and since the positions for which they were eligible were in all respects, other than the means of selection, identical to the remaining eight percent, see *supra* text accompanying note 207, this consideration does not appear to require the court’s result in IEA.

255. 29 C.F.R. § 452.42 (1983).

256. Indeed, this seems to be the position of the court in a case cited in the regulation itself. In *Hodgson v. Local 610, United Elec. Workers*, 342 F. Supp. 1344 (W.D. Pa. 1972), the union represented employees in two geographically separated divisions of one company. To guarantee the employees in the much smaller of the two divisions some representation within the union’s elected leadership, the union constitution provided that only employees of the larger division could be president or secretary-treasurer and that only employees of the smaller division could be vice-president or recording secretary. Although it held that this arrangement violated § 401(e) of the LMRDA, the court stated that

[t]he end sought to be achieved by the provision, i.e., the insured representation . . . of a minority group within the membership . . . is laudable . . . . The defendant argues . . . that to insure the fair representation of its members who are employed by [the smaller division] the constitution must mandate the election of certain officers from their number. With this I agree. . . .

The difficulty with the amendment is its inflexibility. There is no apparent need to prescribe the precise offices for which those of each of the groups of the defendant’s members are eligible. The end sought could be as easily and as effectively achieved by providing simply, for instance, that the president and vice-president may not be from the same group.

*Id.* at 1347–48 (emphasis added).

some of the representative assembly and board of director positions, but nonminorities are still eligible to hold the rest.<sup>257</sup>

The final interpretive guideline relevant to the IEA's affirmative action plan states that "[w]here personal characteristics have a direct bearing on fitness for office, a labor organization may establish certain restrictions on the right to be a candidate."<sup>258</sup> As with the Department's general admonition to consider the relationship between the challenged qualification and the demands of the office,<sup>259</sup> a candidate's minority status has a direct bearing on his or her ability to represent the interests of the IEA's minority members, which is one of the reasons these positions were reserved for minorities to begin with.<sup>260</sup> But the regulation contains a key proviso:

A union may not, however, establish such rules if they would be inconsistent with any other Federal law. Thus, it ordinarily may not limit eligibility for office to persons of any particular race, color, religion, sex, or national origin since this would be inconsistent with the Civil Rights Act of 1964.<sup>261</sup>

Although Judge Posner did not cite this provision in his opinion, he apparently had its thrust in mind since he cited as "in accord" with his decision<sup>262</sup> *Schultz v. Local 1291, International Longshoremen's Association*,<sup>263</sup> a 1972 decision cited by the Department of Labor in support of its proviso.<sup>264</sup> Whether the IEA's affirmative action plan is consistent with this proviso depends on whether *Longshoremen* can be distinguished.

### 5. *The Longshoremen Decision*

*Longshoremen* is the only case decided under section 401 of the LMRDA besides *IEA* that directly confronted racially based qualifications for union office. In *Longshoremen* the defendant union's bylaws allocated all union offices on racial grounds. The president, financial secretary, half the business agents and sergeants-at-arms, and two of three trustees were all to be black, and the vice-president, recording secretary, and remaining business agents, sergeants-at-arms, and trustees were all to be white.<sup>265</sup> The union attempted to justify the arrangement as necessary following

257. Similarly, another guideline permits unions to reserve certain offices for representatives "of a unit defined on a geographic, craft, shift, or similar basis," so long as the offices set aside for special groups are not "general officers such as the president, vice-president, recording secretary, financial secretary, and treasurer." 29 C.F.R. § 452.43 (1983) (emphasis added). If special representation along racial or ethnic lines can be considered a "similar basis," the IEA's affirmative action plan seems to fit neatly within this provision. The guideline does add, however, a further proviso: "If eligibility of delegates to a convention which will elect general officers is limited to special categories of members, all such categories within the organization must be represented." *Id.* Since only eight percent of the IEA's delegate positions are reserved for "special categories of members," and all other categories of members are eligible to run for the remaining positions, the proviso does not appear to bar the IEA's plan.

258. *Id.* § 452.46.

259. See *supra* text accompanying notes 250-51.

260. See *supra* text accompanying notes 245-51.

261. 29 C.F.R. § 452.46 (1983).

262. 667 F.2d 638, 642 (7th Cir. 1982).

263. 338 F. Supp. 1204 (E.D. Pa.), *aff'd per curiam sub nom.* *Hodgson v. Local 1291, Int'l Longshoremen's Ass'n*, 461 F.2d 1262 (3d Cir. 1972).

264. See 29 C.F.R. § 452.46 at n.28 (1983).

265. 338 F. Supp. 1204, 1205 (E.D. Pa. 1972).

the merger of two segregated locals to prevent the union, which had a membership half white and half black, from “slip[ping] into a segregated status.”<sup>266</sup> The court rejected this argument and gave several reasons for finding the union’s bylaws in violation of section 401(e). First, the bylaws completely barred members who were neither black nor white, such as Polynesians, from holding union office. Second, the rule was “of infinite duration,” which permanently precluded whites from holding the positions reserved for blacks and vice versa. Third, “the major difficulty” with the rule was the lack of an “objective relationship between the eligibility qualifications and the duties of the office involved.” Last, and most significant for purposes of the Department’s reliance on the case, the union bylaw “amount[ed] to an unlawful employment practice within the meaning of 42 U.S.C. § 2000e-2(c) [Title VII of the Civil Rights Act of 1964].”<sup>267</sup>

None of these reasons is persuasive when applied to the IEA’s affirmative action plan. First, the IEA plan does not bar any otherwise eligible member from running for any elective office.<sup>268</sup> Second, the IEA’s plan—at least that part dealing with the election of minority add-on delegates to the representative assembly—is temporary in nature,<sup>269</sup> and no nonminorities are barred, permanently or otherwise, from holding any of the IEA offices.<sup>270</sup> Third, as argued earlier, a definite relationship exists between the functions of the IEA positions reserved for minorities and the requirement that those positions be held by members of minority groups.<sup>271</sup> Last, the *Longshoremens* interpretation of the Civil Rights Act of 1964 may no longer be good law since both that decision and the proviso based on it predate the Supreme Court’s landmark decision in *United Steelworkers v. Weber*.<sup>272</sup> In *Weber* the Court upheld a voluntary affirmative action plan that reserved for blacks fifty percent of the openings in an in-plant job training program against a challenge under Title VII of the Civil Rights Act.<sup>273</sup> If the IEA’s plan is consistent with the Supreme Court’s decision in *Weber*, it should survive scrutiny under the Department’s proviso.

### 6. The Weber Decision

Perhaps the single most surprising aspect of Judge Posner’s opinion in *IEA* is its complete failure to discuss *Weber* or the other recent Supreme Court cases dealing with affirmative action.<sup>274</sup> This is particularly remarkable because of *IEA*’s status as the first, and to date only, post-*Weber* appellate court decision finding an affirmative

266. *Id.* at 1207.

267. *Id.* at 1206-08.

268. See *supra* text accompanying notes 207-08.

269. See *supra* note 162.

270. *Id.*

271. See *supra* text accompanying notes 250-51.

272. 443 U.S. 193 (1979).

273. See *infra* text accompanying notes 280-83.

274. Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

Given his long-standing opposition to affirmative action, see *supra* note 23, the fact that Judge Posner ignored these recent decisions and “reached back into the . . . past” for the *Longshoremens* precedent would seem to open him up to the same criticism that in another context he leveled at “judicial activists”—judges who, according to Posner, “disregard . . . precedents . . . to change the law to make it conform to their own views of public policy.” Landes & Posner, *Legal Precedents: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 274 (1976).

action plan violative of federal law.<sup>275</sup> Judge Posner may be correct, of course, that “the status of affirmative action under civil rights statutes or the equal protection clause” was not directly involved in the *IEA* litigation.<sup>276</sup> However, the reference to Title VII in the Department of Labor’s regulations construing the reasonable qualifications exception<sup>277</sup> and Judge Posner’s citation of the *Longshoremen* case, which in turn cites Title VII,<sup>278</sup> demonstrate that *Weber* should have been considered. Moreover, a basic principle of statutory construction in labor law is to treat all the federal labor statutes as an integrated whole embodying a comprehensive and coordinated federal labor policy, not as isolated and unrelated sources of law.<sup>279</sup> Therefore, if the policies behind Title VII of the Civil Rights Act permit voluntary affirmative action in the employment context, a court should at least consider those same policies in determining whether the Landrum-Griffin Act permits voluntary affirmative action in the context of union government.

In *Weber* the United Steelworkers and the Kaiser Aluminum and Chemical Corporation had voluntarily negotiated a collective bargaining agreement that included an affirmative action plan aimed at integrating Kaiser’s then “almost exclusively white” force of skilled craftworkers.<sup>280</sup> Pursuant to the plan, on-the-job training programs were set up to enable unskilled production workers to obtain the skills necessary to qualify for craft positions. Applicants were chosen on the basis of seniority, except that fifty percent of the openings in the training programs were reserved for blacks.<sup>281</sup> The plan was challenged in a class action brought under Title VII by a white employee who was denied admission to the training program despite having greater seniority than the black workers chosen.<sup>282</sup> The Supreme Court rejected the claim holding that Title VII “left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalance in traditionally segregated job categories.”<sup>283</sup>

In reaching that conclusion, the Court declined to “define in detail the line of demarcation between permissible and impermissible affirmative action plans.”<sup>284</sup> It did, however, identify a number of features of the defendant’s plan that “mirror[ed] the purposes] of the statute” and thereby placed it “on the permissible side of the line.”<sup>285</sup> For example, both the plan and Title VII “were designed to break down old

275. See *supra* note 20.

276. 667 F.2d 638, 640 (7th Cir. 1982).

277. 29 C.F.R. § 452.46 (1983).

278. 338 F. Supp. 1204, 1207 (E.D. Pa. 1972).

279. See, e.g., *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 250 (1970); *Scotfield v. NLRB*, 394 U.S. 423, 429-30 (1969); *NLRB v. Drivers Local 639*, 362 U.S. 274, 291-92 (1960); *Helton v. NLRB*, 656 F.2d 883, 895-96 (D.C. Cir. 1981); *Local 32, United Bhd. of Carpenters*, 195 N.L.R.B. 1, 2 (1972).

280. 443 U.S. 193, 197-98 (1979). The affirmative action plan was adopted voluntarily in the sense that the parties were subject to no court order or statutory obligation to do so. The parties did argue to the Court, however, that they adopted the plan at least in part because they feared a Title VII suit would be brought against them by black employees if they did not. Nevertheless, for purposes of its decision, the Court treated the plan as completely voluntary. *Id.* at 209 n.9.

281. *Id.* at 198, 199. At the particular plant in question, blacks held only 1.83% of the craftwork jobs, but comprised 39% of the work force in the surrounding area. *Id.* at 198-99.

282. *Id.* at 199.

283. *Id.* at 197.

284. *Id.* at 208.

285. *Id.* See also *La Riviere v. EEOC*, 682 F.2d 1275, 1279-80 (9th Cir. 1982); Comment, *Voluntary Affirmative Action Under Title VII: Standards of Permissibility*, 28 U.C.L.A. L. REV. 281, 298-99 (1980).

patterns of racial segregation and hierarchy [and] to 'open employment opportunities for Negroes in occupations which have traditionally been closed to them.'"<sup>286</sup> Moreover, the plan did not "unnecessarily trammel the interests of the white employees"; it neither required the discharge of white workers nor created "an absolute bar to [their] advancement."<sup>287</sup> Finally, the plan was a temporary measure designed not to guarantee permanent racial balance but to eliminate a present racial imbalance.<sup>288</sup>

Undoubtedly, unions can devise affirmative action plans in the analogous context of union government that satisfy these criteria, and indeed, the Illinois Education Association's plan came very close to doing so. The IEA's plan, for example, was designed to break down old patterns of racial segregation in the union's government and open up leadership opportunities for minorities in offices that had traditionally been closed to them.<sup>289</sup> In addition, by creating new positions for minorities rather than reallocating already existing offices, the IEA's plan did not require the removal from office of any nonminority officials and did not create an absolute bar to their advancement. The plan thereby avoided any unnecessary trammeling of the rights of the union's nonminority members.

Unfortunately, the IEA's plan only partially satisfied *Weber's* third criterion—that it be only a temporary measure. The provisions creating the minority add-on delegates to the representative assembly did meet this requirement since recourse to add-on delegates was necessary only so long as the ordinary election procedures continued to yield a racially imbalanced result.<sup>290</sup> The minority positions on the IEA's board of directors, on the other hand, appear to have been permanent additions which would have remained in place even if the eight percent goal were met without them.<sup>291</sup> To the extent that this permanent arrangement ran afoul of the *Weber* criteria, however, the difficulty could have been avoided by having the minority slots on the board of directors operate like the add-on delegates to the representative assembly. In the alternative, the IEA could have simply placed a reasonable termination date on the plan, at which time the special minority seats would be eliminated unless upon reevaluation it were determined that a racial imbalance remained that required the renewal of the plan for another fixed term.

Two additional aspects of the *Weber* decision have some bearing on the IEA's plan and Judge Posner's opinion in *IEA*. First, the *Weber* Court treated Kaiser's affirmative action plan simply as an attempt to eliminate a manifest racial imbalance in traditionally segregated positions and not necessarily as a plan designed to remedy

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286. 443 U.S. 193, 208 (1979) (quoting 110 CONG. REC. 6548 (1964) (remarks of Senator Humphrey)).

287. *Id.*

288. *Id.* at 208-09.

289. See *supra* text accompanying notes 1-12. Several post-*Weber* decisions have held that while statistical imbalances alone may not necessarily establish unlawful discrimination, they may be relied on to justify affirmative action. E.g., *Tangren v. Wackenhut Servs., Inc.*, 658 F.2d 705 (9th Cir. 1981); *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir. 1981).

290. See *supra* note 162.

291. Indeed, in 1980 the IEA's board of directors was 15% minority. See *supra* text accompanying note 7. The eight percent goal could have been met by filling only one of the four special minority slots, in light of the number of minority group members who obtained seats on the board of directors through ordinary means.

past discrimination by Kaiser or the Steelworkers.<sup>292</sup> Thus, Judge Posner's concern in *IEA* that the record revealed no evidence of past discrimination on the part of the IEA<sup>293</sup> is misguided, particularly in light of the long and well-documented history of racial discrimination in the nation's school systems—discrimination against not only minority students but minority teachers as well.<sup>294</sup> Second, the Court invoked the “familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.”<sup>295</sup> By increasing the opportunities for previously underrepresented union members to hold union office while imposing no significant disadvantages on its other members, the IEA's plan surely comports with the intentions of the LMRDA's makers.<sup>296</sup>

#### IV. CONCLUSION

In summary, the Seventh Circuit's decision in *IEA* was half right, but for the wrong reasons. The court was correct in ruling that the IEA's plan as adopted in 1974 violated the Landrum-Griffin Act, but the court was wrong about the nature of the violation. By relying on section 401(e) of the Act instead of section 401(d) and by following the *Steelworkers* and *Hotel Employees* cases in a too literalistic fashion, the court issued an overbroad opinion that would seem to prohibit virtually any union efforts to assure minority or women members minimal representation in elective union office. The violations actually contained in the IEA's plan could have been remedied with some relatively minor modifications that would have left the heart of the plan intact.<sup>297</sup> Nothing in the Landrum-Griffin Act would prohibit carefully designed affirmative action plans along the lines of that adopted by the IEA. On the contrary, when these plans result in increased opportunities for greater numbers of the rank and file to hold union office, as the IEA's plan did, they actually further the Act's purposes.

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292. 443 U.S. 193, 208, 209 nn.8 & 9 (1979). Justice Blackmun's concurring opinion argued that voluntary affirmative action plans should be permitted under Title VII only when the party adopting the plan had in the past committed an “arguable violation” of the Act which the plan is designed to remedy. *Id.* at 211 (Blackmun, J., concurring). Justice Blackmun conceded, however, that in practice his approach would operate little differently than the majority's. *Id.* at 213. In any event, in the context of union government, the arguable violation approach would often simply not be applicable. Minorities and women may have been excluded from certain types of work in the past because of discrimination by employers which was beyond the control of a particular union. Nevertheless, the continuing effects of that discrimination may result in the underrepresentation of minorities and women in union office. For example, minorities and women would tend to have less seniority or hold lower status positions, making it more difficult for them to get elected to office. *See supra* text accompanying notes 102–03. In such a case, it would obviously be impossible for the guilty employer to remedy within the union these consequences of its own past discrimination. Only the union is in a position to do so, and unless it is permitted to take remedial action, even absent “arguable violations” on its own part, such consequences of past discrimination would be impossible to remedy.

293. 667 F.2d 638, 640 (7th Cir. 1982).

294. *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 231–35 (1969); *Brown v. Board of Educ.*, 349 U.S. 294, 300–01 (1955) (*Brown II*); *Arthur v. Nyquist*, 712 F.2d 816 (2d Cir. 1983); *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). *See generally* Davidson, Davidson & Howard, *The Riffing of Brown: De-Integrating Public School Faculties*, 17 HARV. C.R.-C.L. L. REV. 443 (1982). *See also* Cohen v. Community College, 484 F. Supp. 411, 434 (E.D. Pa. 1980) (“[U]nder *Weber*, . . . affirmative action . . . can be justified by the existence of a history of racial discrimination in the relevant occupation or profession at large.”)

295. 443 U.S. 193, 201 (1979) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)).

296. *See supra* text accompanying notes 210–24.

297. *See supra* text accompanying notes 190 & 291.



This Article, on the other hand, was not intended to suggest that the Landrum-Griffin Act requires unions to adopt affirmative action plans. Given a labor movement that for the most part considers quotas, goals, and preferential treatment as “anathema,”<sup>298</sup> expectations that affirmative action in union government will become the norm rather than the exception are unrealistic. Nevertheless, compelling reasons why many unions might seek to remedy the underrepresentation of minorities and women in union office do exist. A union can better represent its minority and female members and can improve the quality of union leadership in general by increasing the total pool of leadership talent. Having more minority and women officers can also help unions organize minority and women workers more effectively, avoid liability in employment discrimination suits, and preserve labor peace by reducing the likelihood of wildcat strikes. When unions do decide to adopt affirmative action plans providing minorities and women with increased representation in union government, neither the courts nor the Department of Labor should stand in their way because of a misplaced reliance on the *IEA* decision.

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298. See *supra* text accompanying note 109.

