LEGAL PROTECTION AGAINST EXCLUSION FROM UNION ACTIVITIES

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Unions seek job security for their members in many ways. One technique used by some unions is to restrict the number of workers it will admit to membership. A restrictive admission policy may limit the number of qualified workers, thus insuring jobs for members. It may create a labor shortage which may enhance the value of their services. It insures that the existing members will control the collective bargaining policies of the union which represents them. If the union can control the number of men in the labor market and the order in which employment opportunities are distributed, jobs will be distributed to favor the more entrenched members of the union.

Thus, the justification for restricting admission to union membership lies in the economic self-interest of the workers who are already in the unions. This justification is, in the American legal system, entitled to considerable weight. But the legal principles concerning union membership practices which have been developed by the courts and by Congress are inadequate because they were not formulated with an understanding of the present role of the union in our economy.[1] These rules give the union either too much or too little freedom to accomplish its legitimate objectives.

The common law principle allowed the union to exclude any person from membership without judicial restraint.[2] This rule allowed unions to prevent workers from participating in collective bargaining decisions relating to their conditions of employment, often because of their race. And, where the union controls employment oppor-

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1 The legal literature concerning exclusionary practices is voluminous. The classic articles in the field include, Aaron and Komaroff, "Statutory Regulation of Internal Union Affairs," 44 Ill. L. Rev. 425, 631 (1949); Chafee, "The Internal Affairs of Associations Not for Profit," 43 Harv. L. Rev. 993 (1930); Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609 (1959); Hewitt, "The Right to Membership in a Labor Union," 99 U. Pa. L. Rev. 919 (1951); Summers, "The Right to Join a Union," 47 Colum. L. Rev. 33 (1947); Wellington, "Union Democracy and Fair Representation: Federal Responsibility in A Federal System," 67 Yale L.J. 1327 (1958). Useful material concerning union practices includes: First Annual Report, Bureau of Labor-Management Reports (1960); Bromwich, Union Constitutions, A Report to the Fund for the Republic (1959); Leiserson, American Trade Union Democracy (1959).

2 Mayer v. Journeymen Stonecutters' Ass'n, 47 N.J. Eq. 519, 20 Atl. 492 (Ch. 1890); Frank v. National Alliance of Bill Posters, 89 N.J.L. 380, 99 Atl. 134 (Sup. Ct. 1916); 31 Am. Jur. "Labor" § 57 (1958).

tunities, the rule gives the union unlimited power to exclude persons from job opportunities.

The legislative principle adopted by Congress in 1947 fares no better.[3] In attempting to separate union admission policies from the opportunity to secure employment, Congress prevented employees in a large sector of industry organized on the "labor pool" principle from acquiring job security based on length of service within the industry.[4]

Despite the inadequacies of both the common law and the legislative approach to union admission policies, the existing legal framework is sufficiently flexible to permit proper resolution of some of these problems. Other problems result directly from the 1947 legislative principle, which can be undone only by Congress.

To analyze the problems created by union restrictions on admission to membership, we may distinguish between exclusion of employees who are represented by a union and exclusion of other workers.[5]

I.

THE RIGHT OF EMPLOYEES TO PARTICIPATE IN THE COLLECTIVE BARGAINING ACTIVITIES OF THE UNION WHICH REPRESENTS THEM

The common law rule that the union, as a private social and fraternal association, is entitled to select its members in any fashion it wishes, without judicial supervision, was adopted before the union was given statutory power to represent all employees in a bargaining unit.[6] The extension and continued application of this rule to unions has been sharply and accurately criticized.[7]

The basic difference between a social organization and a labor union lies in the control which the union has over the economic oppor-

[3] Labor-Management Relations Act § 8 (a)(3), 61 Stat. 136 (1947), 29 U.S.C. § 158 (1947), as amended, 73 Stat. 525 (1959), discussed fully in Radio Officers v. Labor Board, 347 U.S. 17 (1954).

[4] This point is developed in part II *infra*.

[5] A distinction similar to this has been utilized by the Supreme Court to determine organizational rights of workers. Employees have greater rights to seek to organize themselves than do strangers to the employment relation. NLRB v. Babcock and Wilcox Co., 351 U.S. 105 (1956). This being the case, it should not be surprising to find that the employees who have chosen to organize will be entitled to greater participation in the activities of the union which they selected, than strangers to the employment relation.

[6] The common law rule developed in the last quarter of the nineteenth century and the first quarter of the twentieth century. See *supra* note 2. The union's statutory right to bargain for all employees in the unit was created in the Railway Labor Act of 1926, for the railroad industry, 44 Stat. 577 (1926), 45 U.S.C. § 151 (1958) and the National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1958) for the rest of industry which affects commerce.

[7] See the law review articles cited at *supra* note 1.

tunities of the excluded worker. The private club has no such control although membership may create the opportunity for advantageous personal contacts between members. But this is a matter of chance, depending on all the vagaries of personal choice. One member is under no compulsion to do business with another; if he refuses, the club rules have not been violated and the purposes of the club have not been frustrated.

Not so with the union. Once it has been selected by a majority of employees, the union must "do business" for the worker with his employer. The labor acts require the union to bargain with the employer on behalf of *all* the workers in a bargaining unit, not just its members.[8] A bargaining unit consists of a related group of jobs which may be held by members or non-members. Therefore, union decisions in collective bargaining inevitably affect the economic position of all employees, including those excluded from membership. In contrast to the social club, there is nothing speculative about the economic impact of the union.

This "economic impact" is relevant even under the common law rule. Where the economic function of a "private association" has been clearly demonstrated, the courts protect persons against economic injury resulting from an unjustifiable exclusion from membership in the association.[9] Thus the common law rule that admission policies of private associations are non-justiciable may be based on the speculative nature of the loss to the excluded plaintiff. Where he can show sufficient economic harm, the reason for the rule fails, and it will not be applied. Instead, the courts will fashion a remedy which will protect the excluded person from unjustified economic consequences of his exclusion from the association.

The same point may be made more technically. When admission to an association is sought, the court examines plaintiff's case for legal sufficiency. What is the theory on which admission is sought? Contract? Property? These interests, sometimes protected by equity, are not present. Tort? Equitable relief against tort was and is difficult to obtain, but what tort theory is available? Before the rise of the prima facie tort doctrine, there was no theory. The prima facie tort doctrine

[8] National Labor Relations Act § 8(a)(5), 49 Stat. 449 (1935), 29 U.S.C. § 158 (1958); Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C. § 151 (1958) as amended, 48 Stat. 1186 (1934).

[9] James v. Marinship Corp., 25 Cal. 2d 21, 155 P.2d 329 (1944); Falcone v. Middlesex Co. Medical Soc., 62 N.J. Super. 184, 162 A.2d 324 (L. 1960).

The courts have not yet moved to protect non-economic interests in personal relationships in connection with private associations, see Trautwein v. Harbourt, 40 N.J. 247, 123 A.2d 30 (1956), although they have long been urged to do so. See Chafee, "Internal Affairs of Associations Not for Profit," 43 Harv. L. Rev. 990 (1930).

makes actionable the intentional infliction of temporal (usually economic) harm.[10] But plaintiff, in his suit against the social club, could not show such harm, and could not prevail. If, however, he can establish the element of economic harm with reasonable certainty, the prima facie tort doctrine may be applied.

While the economic role of the union in establishing working conditions has been confirmed by statute, the personal-relation element in union affairs has been diminishing in significance. Union organizational patterns have followed the growth of industry. Where unions have hundreds or even thousands of members in a local consisting of employees whom it represents, the element of personal choice, which was a basis of the common law rule has become less significant.[11]

Thus even under common law principles, it is not clear that the union is free to exclude from membership those employees whom it represents. In any event, these common law principles do not define the duty of a union toward employees whom it represents. This duty is imposed by the federal statutes which give the union its power to negotiate for all employees in the unit, obligate the employer to deal with the union, and determine the scope of the bargaining unit which the union will represent. The statutes require the union to deal fairly with all employees in the negotiation and administration of the labor agreement.[12] Implementation of this principle of "fair representation" requires that all employees be afforded the same opportunities to participate in the process by which the union formulates and presents bargaining demands, and makes decisions in connection with the administration of the collective agreement.

This was suggested by the United States Supreme Court in the *Steele* case in 1945:

> While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts

[10] See Brown, "The Rise and Threatened Demise of the Prima Facie Tort Principle," 54 Nw. U.L. Rev. 563 (1959); Halpern, "Intentional Torts and the Restatement," 7 Buffalo L. Rev. 7 (1957); Comment, "The Prima Facie Tort Doctrine," 52 Colum. L. Rev. 503 (1952).

[11] This point is emphasized by the 1947 amendments permitting the union to enforce, by threat of discharge from employment, only the *financial aspect* of the union member relationship. See National Labor Relations Act §§ 8(a)(3) and 8(b)(2), 49 Stat. 449 (1935), 29 U.S.C. § 158 (1958), as amended, 61 Stat. 140 (1947). Dunlop, "The Public Interest in Internal Affairs of Unions," 1957 Proc. Sec. on Labor Relations Law, A.B.A. 10 (1957).

[12] The Railway Labor Act was so construed in Conley v. Gibson, 355 U.S. 41 (1958) and Steele v. Louisville & N. R.R., 323 U.S. 192 (1944). The National Labor Relations Act was so construed in Syres v. Oil Workers, 350 U.S. 892 (1956) and Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

> with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. *Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action.*[13] (Emphasis added.)

While the Court did not require the union to admit employees whom it represented to all of the incidents of membership, it seemed prepared to afford some opportunity to participate in union activities which relate to the performance of the collective bargaining function. But the elements of notice and hearing are not sufficient to assure fair representation. The opportunity to discuss "union business" and to vote at union meetings,[14] to vote for and hold office in the union, to be a member of a grievance or negotiating committee, should be preserved to the excluded employee, because it is through these activities that unions make decisions relating to collective bargaining. Professor Cox has described the process in another connection:

> When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. This process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. . . .[15]

As long as union decisions are made this way, the opportunity to participate in this political process is essential if employees are to be treated fairly by the union which represents them. Otherwise, the decisions will be reached without taking account of all of the competing claims or viewpoints.[16] Our legal system has long assumed that an equal opportunity to persuade the decision-maker is a sine qua non to a fair decision. While "absence makes the heart grow fonder," "out of sight, out of mind" may more accurately describe the role of the excluded worker in the decisional process of the union. Decisions reached without the opportunity for full participation of all interested workers are not likely to be fair in themselves.

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[13] Steele v. Louisville & N. R.R., *supra* note 12, at 204.

[14] See Givens, "Enfranchisement of Employees Arbitrarily Rejected For Union Membership," 11 Lab. L. Jour. 809 (1960).

[15] Cox, "Rights Under A Labor Agreement," 69 Harv. L. Rev. 601, 626 (1956).

[16] This was the reasoning which underlies the decision in Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946), requiring a union to allow employees whom it represented to participate in collective bargaining activities. Unfortunately, the court applied this reasoning to a federal constitutional duty rather than a statutory duty and therefore the decision has not been followed.

See Greer, Last Man In (1959) for a discussion of the role that racial minorities may play in union activities when they are allowed to do so.

Participation gives the employee a direct opportunity to influence in subtle ways a wide variety of union decisions as well as a forum in which officers may be publicly called to account if they act unfairly. But judicial review of union action, as in the *Steele* case, can only protect against crude forms of misconduct by the union, and can do this only where the employee is in a position to litigate. The opportunity to participate and judicial review are both essential to implement the principle that the union must represent all employees fairly.

We conclude then that all employees who are represented by the union should be entitled to participate in union activities relating to collective bargaining. This conclusion is based on considerations of statutory policy implicit in the *Steele* decision. This statutory right to participate may or may not be the equivalent of union membership, depending on the variety of activities engaged in by the union. We are concerned here with collective bargaining, not with social affairs. The union remains free to restrict participation in those activities which do not relate to collective bargaining.

The most recent federal court decision bearing on this problem is *Oliphant v. Brotherhood of Locomotive Engineers.*[17] The court of appeals for the sixth circuit, without distinguishing between the duties imposed upon the union by statute and those imposed by the federal constitution,[18] refused to allow Negro employees to participate in the collective bargaining activities of the union which represented them. There are three interrelated propositions, on which the *Oliphant* decision was based, which will be the focus of argument in cases concerning the right to participate in union activities. Because these cases are sure to arise, the foundations of the *Oliphant* decision should be explored.

1. Do minorities in the bargaining unit have any rights in connection with the collective bargaining decisions of the union which represents them?

Oliphant suggests that the only right of minority groups or individuals is to participate in the selection of the bargaining representative.[19] Thereafter, they are not entitled to participate in decisions of

[17] 262 F.2d 359 (6th Cir.), *cert. denied,* 359 U.S. 935 (1959), "in view of the abstract context in which the question sought to be raised are presented by this record...."

[18] The court lumps together the employee's contentions concerning his constitutional rights and statutory rights, 262 F.2d at 360, and considers, at 363, that the concept of governmental action is relevant to both contentions.

[19] The court devotes considerable attention to the proposition that minority and individual interests may be subordinated to those of the group, 262 F.2d at 362. Although it does not state that these interests are entitled to no protection against an elective representative, the inference is there.

the union which may affect their employment situation. This proposition is obviously untenable. It flies in the face of the language of the *Steele* decision quoted above. All workers in the bargaining unit are entitled to participate in collective bargaining decisions of the union.

2. Does the failure of Congress to regulate union admission practices preclude the courts from affording employees the opportunity to participate in collective bargaining activities?

Congress has never overtly restricted the power of a union to select its members. In fact, Congress took special pains to make clear that the restraints on unions imposed in 1947 did not permit the National Labor Relations Board to regulate union membership requirements.[20] And, in 1959, the House of Representatives refused to expand the union member's "Bill of Rights" to prohibit exclusion from membership because of race, religion or sex.[21] From this history, the

[20] Section 8(b)(1)(A) adopted in 1947, provides, "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7; *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

[21] The amendment offered by Representative Powell provided: ". . . no labor organization shall discriminate unfairly in its representation of all employees in the negotiation and administration of collective bargaining agreement, or refuse membership, segregate or expel any person on the grounds of race, religion, color, sex or national origin."

It was opposed by the two sponsors of the bill in the house, as follows:

"Mr. Landrum. Mr. Chairman, I rise in opposition to the amendment.

Mr. Chairman, I would like the very careful attention of the membership, if I may have it, because I think this is an extremely important matter. I think the membership should be completely informed as to what we are doing here.

We do not seek *in this legislation,* in no way, no shape, no guise, to tell the labor unions of this country whom they shall admit to their unions. No part of *this legislation* attempts to do that.

I would direct your attention to a careful reading of section 101(a) of the amendment which I have proposed, which says this: Every member of a labor organization shall have equal rights within that organization, and then it enumerates the things: to nominate candidates and to vote in elections or referendums. We do not seek to deny any man in America, a member of a union, the right that he shall enjoy with his fellow union members. This law is not designed to do that. *This law is designed only to say that, if he is a member of a union, he shall have equal rights.* Is there anything wrong with that? I cannot see how the gentleman from New York can take exception to that.

Moreover, there is a provision now in the Taft-Hartley Act, section 8(b)(1)(A), which says this:

Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition and retention of membership therein.

court concluded that the concept of "separation of powers" was applicable. Under these circumstances, to compel admission to membership "would be usurping the legislative function."[22] The argument is not convincing.

The 1947 act provides that the National Labor Relations Board, an *administrative* agency, is not to use either section 8(b)(1) of the National Labor Relations Act or, possibly, any other subsection of section 8(b) as a basis for regulation of union membership. The section does not deal with *judicial* action at all, much less judicial action implementing the duty of fair representation.[23] Congress simply ex-

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We do not *here* seek to repeal that. We do not *here* withdraw or take away from the unions the right to fix their own rules for the acquisition or retention of membership. We simply say that if you bring them into the union, if you charge dues, if you cause him to do this in order to work at his trade, in order to make a living, then within that local he shall have equal rights. I will stand on that anywhere. I can see nothing wrong with that. I stand before the same God that the gentlemen preceding me referred to and say that if we do that, if we require a man to join a union before he can earn a livelihood, and take his dues by way of a checkoff, under the law, then by all that is good and holy he ought to have equal rights. I stand for that.

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Mr. Griffin. Mr. Chairman, this is a very serious matter. Everybody knows why this particular amendment was offered at this time—to kill the legislation. The labor reform legislation before the House at this time is directed at the regulation of the internal affairs of unions. It does not touch or deal in any way with the admission to, or retention of, membership in a union. There is a proviso in the Taft-Hartley Act which union leaders and the union members want preserved. I refer to a proviso to section 8(b) which reserves to unions the right to prescribe rules and regulations for the admission and retention of membership. I personally think that in some instances this privilege has been abused by some unions. However, our committee did not go into that matter in its hearings. *The subject of the amendment is outside of the scope of the legislation and the hearings that were held on labor reform legislation.* Under the circumstances, I urgently plead with the House not to jeopardize this legislation by adopting an amendment which is so obviously designed for the purpose of killing the bill." (Emphasis added.)

The debate is reported in II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1648-51 (1959).

[22] 262 F.2d at 362, quoting the district court opinion in 156 F. Supp. 89, at 93.

[23] That the legislators were concerned only with the narrow question of whether the language of § 8(b) would be construed to restrain union membership policies is demonstrated by the following exchange in the Senate:

"The Acting President pro tempore. The Chair understands that the Senator from Florida has withdrawn his previous amendment, and is now offering another amendment, which will be stated.

The Chief Clerk. It is proposed to amend the so-called Ball amendment by inserting after the figure "7", the following: *Provided,* That this subsection shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

cluded an administrative agency which was specifically charged with other tasks from affecting union membership policies. A broader reading of section 8(b)(1) is not justified.[24]

Mr. Ball: . . . I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions. The amendment of the Senator from Florida makes that perfectly clear. I am willing, on behalf of myself and the other sponsors of the amendment, to accept the amendment offered by the Senator from Florida and, if it is necessary, so to modify and perfect my own amendment.

Mr. Pepper. I request also the attention of the Senator from Ohio. [Mr. Taft]

In discussion yesterday between the Senator from Ohio and myself with respect to another part of the bill, dealing with the closed shop or the union shop, the Senator from Ohio stated what I recall his having stated in the committee, that if a union claimed the advantage or the status of a closed shop or union shop, it would have to have what the Senator called democracy in respect to the admission of members. I understood the Senator to say that that would mean that anyone who presented himself and was qualified in other respects for membership, and who complied with the usual conditions for membership, such as the payment of dues, and so forth, would be entitled to membership.

Mr. Taft: I did not say that. The union could refuse membership; but if the man were an employee of the company with which the union was dealing, the union could not demand that the company fire him. The union could refuse the man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.

Mr. Pepper: Am I correct in assuming that it is the interpretation of the Senator from Ohio and the Senator from Minnesota that there is no provision of the bill which denies a labor union the right to prescribe the qualifications of its members, and that if the union wishes to discriminate in respect to membership, there is no provision in the bill which denies it the privilege of doing so?

Mr. Ball: Absolutely not. If the union expels a member of the union for any other reason than nonpayment of dues, and there is a union-shop contract, the union cannot under that contract require the employer to discharge the man from his job. It can expel him from the union at any time it wishes to do so, and for any reason.

Mr. Pepper: And the union can admit to membership anyone it wishes to admit, and decline to admit anyone it does not wish to accept.

Mr. Ball: That is correct. But the union cannot, by declining membership for any other reason than nonpayment of dues, thereby deprive the individual concerned of the right to continue in his job. In other words, it cannot force the employer to discharge him."

II Legislative History of the Labor-Management Relations Act of 1947, 1141-42 (1948).

[24] A broad reading of the proviso to § 8(b)(1) which would have foreclosed state jurisdiction over expulsions from unions was rejected by the Supreme Court in Int'l Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958). See Wollett, "State Power to Regulate Labor Relations," 33 Wash. L. Rev. 364 (1958).

The principle of fair representation exists wholly apart from section 8(b). It is derived from the statutory concept of the union as the representative of the workers. In 1947 and again in 1959, Congress undertook a full scale review of labor law and did not limit the courts in the development of this doctrine.[25] From this, it may be inferred that Congress did not intend to interfere with the development of the principle of fair representation by the courts, even if this should require that the union allow all employees whom it represents to participate in activities relating to collective bargaining.

Thus the argument from congressional inaction cuts both ways and does not dispose of the question. Therefore, other values must be consulted if we are to resolve the question raised by the fact of congressional inaction. This question requires judgment on several related issues. Among them are the following:

(1) Did the Congress actually pass on the question at all? There is no evidence that the Congress related the issues of union membership and the duty of fair representation.[26]

(2) Does congressional action or inaction reflect a judgment on the merits of the controversy? It is common knowledge that the congressional inaction in this case reflects the balance of political forces rather than any substantive judgment that union membership rules should be immune from legal control.[27]

(3) How important is the value which the judiciary is asked to protect? Here the value is one of the highest known to democratic society; the opportunity to participate in decisions which will affect one's economic future.

(4) How important are the values which are opposed to the proposed judicial action? The union cannot exclude men in order to secure their jobs for others, for this would violate the duty of fair representation.[28] Therefore, economic self-interest is not involved. The desire to exclude because of race or religion, is not entitled to judicial protection.[29] Thus, personal feeling objections remain as a basis for exclusion. But these excluded individuals are thrust into daily contact with union members by the work situation. This fact cannot be altered by their exclusion from the union. Since some personal contact is dictated by the employment, personal

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25 See the statement of Representative Griffin, *supra* note 21, suggesting that Congress chose not to deal with the problem of union membership at all in the 1959 act.

26 In connection with the 1959 legislation, see *supra* note 21. In connection with the 1947 legislation, see *supra* note 23 and *infra* note 39.

27 See the discussion by Representative Griffin in *supra* note 21 and Aaron, "The Labor Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 851, 860-61 (1960).

28 Wallace Corp. v. Labor Board, 323 U.S. 248 (1944), Clark v. Curtis, 297 N.Y. 1014, 80 N.E.2d 536 (1948), Wilson v. Hacker, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950).

29 Steele v. Louisville and N. R.R., *supra* note 12.

objections to such contact should not justify exclusion from those union activities which are themselves related to employment.

(5) Are there reasons related to the differences between the legislative and judicial process which suggest that the court should not act? In this instance, the advantages of the legislative process do not seem significant. The relevant facts can be developed adequately within the judicial process. Notice of impending change in law on this matter has long been outstanding. Union spokesmen have had full opportunity to be heard, and in the judicial forum, will be well represented. A decision to admit employees to the collective bargaining activities of the union can be made prospective in operation through the exercise of traditional equity powers.

Thus the separation of powers concept does not provide a basis for disposing of the claim of the employee. The development of the duty of fair representation is, at this juncture, a judicial function which cannot be properly exercised by a denial of its existence. The problem must be faced on the merits.

3. *Must a court find "governmental action" before it may require the union to admit employees to collective bargaining activities?*

The concept of governmental action (state or federal) determines the reach of the fifth and fourteenth amendments. These amendments clearly apply to official organs of government. By use of the "governmental action" concept, the courts have applied the amendments to acts of entities and persons which are not official organs of government, but nonetheless are performing functions intimately related to governmental activity, such as the conduct of a primary election and the governing of a municipality.[30] The court, in *Oliphant,* decided that union action was not governmental action, and utilized this conclusion as a basis for its decision.

But the concept of governmental action is only relevant when the constitutional provisions are asserted to limit unofficial behavior. It does not limit congressional power to regulate private action by statute. The issue of governmental action is therefore irrelevant to the position taken in this paper. The question arose in *Oliphant* only because of a confusion of constitutional and statutory duties. The *Steele* doctrine of a duty of fair representation is rooted in the statute. The scope of the duty is to be determined by reference to legislative,

[30] See Summers, "The Right to Join a Union," 47 Colum. L. Rev. 33, 56-57; Note, "Discrimination in Union Membership: Denial of Due Process Under Federal Collective Bargaining Legislation," 12 Rutgers L. Rev. 543 (1958).

See Wellington, "The Constitution, The Labor Union, and Governmental Action," 70 Yale L.J. 345 (1961), for a thorough analysis which concludes that the constitutional limitations of the fifth amendment should not, at this time, be imposed upon unions.

not constitutional materials. There is no question but that the duty to represent employees fairly is coextensive with the union's power to do so.

Of course, the existence and scope of the statutory duty may be influenced by policies which are reflected in and by the Constitution. It would be strange indeed if this were not the case. But the construction of a statute in light of such policies should not be confused with the application of the Constitution. Treating the duty of fair representation as an outgrowth of the statute is more appropriate than the attempt to anchor the duty to the "bedrock" of the Constitution. We know that constitutional decisions have been stumbling blocks to development of adequate policy in the area of labor law. The road of history is strewn with the discarded remnants of constitutional doctrine.[31] This attests to the need for legislative freedom to shape the labor policy of the nation. Constitutional decisions have not served well in labor law.

But the infusion of constitutional principle into statutory interpretation is another matter. Here the courts may legitimately effectuate basic policies of government, while at the same time preserving to the legislature the power to change the law, should the need to do so arise, or should the court misconceive national need or national policy.[32]

[31] Coppage v. Kansas, 236 U.S. 1 (1915) and Adair v. United States, 208 U.S. 161 (1908), which invalidated on constitutional grounds legislative attempts to limit employer anti-union conduct, were distinguished and then finally discarded in Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949). Wolff Packing Co., v. Court of Industrial Relations, 262 U.S. 522 (1923) which invalidated a system for compulsory arbitration of labor disputes was also inferred in the *Lincoln* case. Thornhill v. Alabama, 310 U.S. 88 (1940) which envelope peaceful picketing in the protection afforded free speech by the first and fourteenth amendments was seriously modified in International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957). See Rodes, "Due Process and Social Legislation in the Supreme Court—A Post Mortem," 33 Notre Dame Law. 5 (1957).

[32] The development of the duty of fair representation suggested here is consistent with the policy decisions of those state legislatures which have acted upon the matter. They have, in anti-discrimination statutes in 20 states, prohibited unions from discriminating on the basis of race in regard to membership. See "Employment Discrimination," 5 Race Rel. L. Rep. 569 (1960). Such legislation has passed constitutional muster. Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

The case of Boynton v. Virginia, 81 Sup. Ct. 182 (1960) illustrates the predilection of the Supreme Court for deciding potential constitutional questions on statutory grounds. A passenger on an interstate bus line refused to leave the "white" section of a dining room in a bus terminal in Richmond, Virginia, and was convicted of criminal trespass. The Supreme Court reversed on the grounds that the conviction violated the Interstate Commerce Act, despite the fact that petitioner had not raised this question in the state court of last resort, and that the grant of certiorari had been limited to the constitutional questions of due process, equal protection and burden on interstate commerce. The Court stated: "Ordinarily we limit our review to the questions

The duty of fair representation is statutory, and there is consequently no need to raise the question of whether the union action is "governmental" action in order to protect the employee's opportunity to participate in the collective bargaining activities of the union which represents him.

II

EXCLUSION FROM UNION ACTIVITIES OF WORKERS WHO ARE NOT REPRESENTED BY THE UNION

Different considerations are involved when a union excludes men from membership who are not presently represented by it. Since the union does not negotiate and administer the employment conditions of these men, the necessity for their participation in union activities is not as clear as in the case of the employee represented by the union.[33]

However, the union may control job opportunities through a closed shop or hiring hall arrangement.[34] Exclusion from such a union may mean loss of opportunity to work. A union, in the exercise of powers granted by federal statute, should not be able to foreclose employment opportunities by an arbitrary admission policy. In recognition of the employees' interest in seeking employment, the common law rule that the union could exclude arbitrarily has been held inapplicable where the union controlled employment opportunities. In the leading case of *James v. Marinship Corp.*,[35] the California Supreme Court put this choice to a union which had a closed shop agreement and also restricted admission to membership: it could keep the closed shop only if it opened its membership, or retain freedom to determine membership only if it gave up the closed shop.

This choice normally would be exercised in favor of keeping the closed shop, for reasons to be developed shortly. However, this alternative was foreclosed when Congress in 1947 made the closed shop illegal on the theory that unions should not control employment opportunities. Congress intended to permit workers to secure employment without regard to union affiliation.[36] When Congress thus sep-

presented in an application for certiorari. We think there are persuasive reasons, however, why this case should be decided, if it can, on the Interstate Commerce Act contention raised in the Virginia courts. Discrimination because of color is the core of the two broad constitutional questions presented to us by petitioner, just as it is the core of the Interstate Commerce Act question presented to the Virginia courts. Under these circumstances we think it appropriate not to reach the constitutional questions but to proceed at once to the statutory issue."

33 Brotherhood of Ry. Trainmen v. Howard, 343 U.S. 768 (1952) indicates that the union owes some obligation to persons employed outside of the bargaining unit.

34 As, for example, in Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73 (1958).

35 25 Cal. 2d 721, 155 P.2d 329 (1944).

36 Sections 8(a)(3) and 8(b)(2) of the 1947 amendments to the National Labor

arated job rights from union membership, it destroyed the need to regulate union admission policies. If union admission policies did not affect employment opportunities, there seemed no reason to prevent the union from admitting or excluding whomever it chose. Congress, in effect, forced the union to make one of the choices which the common law of the *Marinship* case had left open.

Congress failed to realize when it abolished the closed shop, that union control of employment opportunities was essential if employees were to have job security in that part of industry organized on the "labor pool" principle. Job security based upon length of service has long been a legitimate objective of organized labor. In industries organized around the principle of permanent employment with a single employer, as in the typical manufacturing establishment, this objective is achieved with reasonable adequacy by the seniority system.[37] Seniority protects the worker against layoffs due to economic conditions based on his length of service with the employer. There is no need, under such a system, for the union to control employment opportunities in order to provide job security.

But some sectors of industry are organized around what might be called the "labor pool" principle. Employers draw workers as they are needed from such a pool, rather than retaining them on a permanent basis.[38] In such industry, job security cannot be obtained by seniority with a single employer, since the employer may change from month to month. To obtain job security based on length of service in the industry, the union must control the distribution of employment opportunities as they arise. In industries organized around the "labor pool" principle, then, job security is intimately related to union control over employment opportunities. This union control is normally achieved

Relations Act, 49 Stat. 452 (1935), 29 U.S.C. § 158 (1958), as amended, 61 Stat. 140 (1947). See Radio Officers v. Labor Board, *supra* note 3.

[37] The seniority principle has not fully protected the interest in job security even in industries organized on the permanent employment principle. Present disputes over the scope of the seniority principle can be found in the struggle of unions to prevent subcontracting of work; see United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 342 (1960) and Note, "Employer Subcontracting and the LMRA," 13 Rutgers L. Rev. 631 (1959). For the problem of transferability of seniority in the event of plant removal, *compare* Zdanok v. Glidden, 185 F. Supp. 441 (D.C. N.Y. 1960) *with* Metal Polishers Union v. Viking Equipment Co., 278 F.2d 142 (3d Cir. 1960) and the issue of scope of unions' duty to protect employees against loss of seniority, *e.g.*, Ford Motor Co. v. Huffman, *supra* note 12.

[38] Prime examples of this type of organization are the building construction field and the maritime industry. See Note, "Special Labor Problems in the Construction Industry," 10 Stan. L. Rev. 525 (1958). See Fenton, "Union Hiring Halls under the Taft-Hartley Act," 9 Lab. L. Jour. 505 (1958), Craig, "Hiring Hall Arrangements and Practices," 9 Labor L. Jour. 939 (1958).

through the closed shop requirement that only union members will be employed, and the use of the union hiring hall as the source of needed workers. By abolishing the closed shop and separating job opportunities from union membership, the 1947 legislation destroyed or seriously threatened job security in such industries. Unions in these industries have resisted this result, and with some logic. It is unreasonable to prevent a group of workers from achieving job security because they work in an industry organized on the "labor pool" principle rather than on the "permanent employment" concept.

The 1947 legislation was not intended to prevent workers from achieving job security. It was aimed at a different problem. The abolition of the closed shop was supposed to "liberate" workers from union control over their employment opportunities.[39] Opponents of the closed shop never indicated how job security was to be achieved in industries organized on the labor pool principle if the union does not control employment opportunities. Congress has recognized this difficulty, in part, in the 1959 amendments to the National Labor Relations Act, which allow unions to provide for job security for workers in the building construction industry.[40]

Extension of the principles of the 1959 amendment to other industries and establishments organized on the "labor pool" principle, would not only be more just, but would bring the law closer to the realities of industrial life. For unions and employers in such industries have avoided, wherever possible, the 1947 legislative principle re-

[39] Reasons given in congressional debate, found in II Legislative History of the Labor Management Relations Act of 1947 at the pages indicated were as follows:

Senator Morse suggested that the closed shop perpetuates a single union in power by threatening ouster and discharge of men who wish to change unions. This interferes with the right of employees to freely select a union. *Id.* at 953. The Senator indicated that the closed shop agreement may be entered into where the union does not have a majority and thus coerce the existence of a majority. *Id.* at 960.

Senator Taft would abolish the closed shop because it limited management's power to discipline employees, gives the union power over employees, abolishes the free labor market and interferes with a man's right to work in the industry he wishes. *Id.* at 1010.

Senator Ellander opposed the closed shop because it interfered with the employer's right to select his employees. *Id.* at 1068.

Senator Ball was concerned over the use of the closed shop to cause the discharge of men expelled from the union for opposition to union leaders, for their political ideas, or for working too hard. *Id.* at 1419. He indicated a wish to free workers from the domination of union leaders. *Id.* at 1497.

[40] See Aaron, "The Labor Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 1086, 1121 (1960); Quinn, "Prehire Problems in the Construction Industry," 48 Geo. L.J. 380 (1959). See Appruzzese, "Prehire and the Local Building Contractor," 48 Geo. L.J. 387 (1959); Note, "Special Labor Problems in the Construction Industry," 10 Stan. L. Rev. 525 (1958).

quiring the elimination of union control over job opportunities.[41] When this principle is rejected, either through avoidance by the parties, or by a change in legislation,[42] the union does control employment opportunities. If it also limits admission to membership, it may control employment opportunities of non-members. Thus the problem which the common law faced before 1947 is with us again. The unhappy experience with the 1947 principle applied in industries organized on "labor pool" principles, should now lead us to allow the union to control employment opportunities, but only if it is willing to give up arbitrary power over admission policies.

This does not mean that the union should be forced to admit all who seek membership. Rather it means that restrictions on admission to membership must be reasonable. Practices which have been subject to abuse in the past—the apprentice system intended to deter rather than develop new workers, the excessive initiation fee, the arbitrary refusal of membership based on the "secret vote", and exclusions based on race or religion—would become subject to legal restraint.[43] To meet this requirement, unions must formulate admission policies which can pass judicial or administrative muster, and perhaps conduct hearings to insure that such policies are fairly applied. The union should be willing to pay this price in order to maintain job security for its members. The burden on the union would be no greater than that imposed by the 1959 legislation on disciplinary or expulsion procedures.[44]

III

Union Power and Worker Participation

The problem of union admission policies is often misstated. Sometimes it is viewed as a problem of racial discrimination. At other times, it is viewed as a problem created by selfish union leaders seeking, in their desire for power, to gain a monopoly over employment opportunities. Neither of these characterizations is adequate.

The modern union represents a joining of public and private power. Its activities cannot be carried on without regard to the values

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41 The struggle of the NLRB to enforce this separation, through its "Mountain Pacific" rule prohibiting unions from acting as hiring halls except under carefully spelled out circumstances, and enforcement of this prohibition with the "Brown-Olds" remedy requiring union and employer to refund dues collected under an unlawful union security agreement has brought down the wrath of parts of organized labor and management as well as the skepticism of the courts. See Note, "The Brown-Olds Reimbursement Remedy," 45 Va. L. Rev. 1192 (1959), and material cited in *supra* note 38.

42 As under the new § 8(f) in the building construction industry, *supra* note 40.

43 See Bromwich, Union Constitutions, 5-9 (1959).

44 On the requirements of the 1959 act, see Aaron, "The Labor Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 851 (1960).

of the society which created it. The employee who is excluded from the collective bargaining activities of the union which represents him presents a serious problem regardless of the color of his skin. A society with democratic aspirations cannot allow the majority to determine that the voice of the minority will not be heard. But the union claims this power when it excludes those whom it represents from participation in the bargaining processes.

Union exclusionary policies are not motivated solely by illicit self-interest. These policies are aimed at providing job security for the workers represented by the union, a fully legitimate objective in our society. Union control over employment opportunities may be necessary to achieve job security. In such cases, it should be permitted, but only if the union is deprived of unlimited freedom to exclude workers from membership. The harm which the union may do to nonemployees is to exclude them from job opportunities which they might otherwise obtain within the job security system. The power to exclude arbitrarily is not necessary to protect the interest in job security.

Employees are entitled to participate in the activities of that powerful association, the union, which affects such an important part of their lives. This conclusion is in accord with one broad legislative approach to the problem of centralization of power in the leadership of private groups. In the securities regulation of the 1930's and in the labor legislation of 1959, Congress decided that those directly interested in the affairs of such important private groups must be allowed to participate in the decisional process of the group. The opportunity to participate in these processes gives the individual a type of protection which can be his in no other way. This opportunity appears necessary to limit the power which the group tends to develop over its own constituent units.

The opportunity to participate in the formulation and administration of the collective bargaining policies of labor organizations will not resolve all conflicts between minority and majority groups within the union. The democratic processes do not guarantee that the majority will accord the minority those rights which an impartial tribunal would recognize. Therefore, the more traditional aspects of the duty of fair representation, the duty to represent all employees fairly in negotiation of contracts and the processing of grievances, remain important bulwarks for the individual and minority against unreasonable action by those who control the union.[45] However, the

[45] See Blumrosen, "Legal Protection for Critical Job Interests: Union Management Authority Versus Employee Autonomy," 13 Rutgers L. Rev. 631 (1959); Cox, "Rights

existence of democratic processes provides an opportunity for the accommodation of varying points of view in a manner acceptable to the parties in the traditions of a society committed to principles of self government.

Under A Labor Agreement," 69 Harv. L. Rev. 601 (1956); Hanslowe, "Individual Rights in Collective Labor Relations," 45 Cornell L.Q. 25 (1959).

The complexity of forces bearing on the decisions made by union officials is clearly indicated in Greer, Last Man In (1959). This study makes it clear that providing access to union power does not automatically or necessarily mean that the power will be exercised fairly.