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# UNION DECISIONS ON COLLECTIVE BARGAINING GOALS: A PROPOSAL FOR INTEREST GROUP PARTICIPATION

*Eileen Silverstein\**†

As the statutory representative of workers in a bargaining unit, a labor union has sole authority to represent their interests in negotiations with management over the wages, hours, and terms and conditions of employment.<sup>1</sup> Yet when conflicts of interest arise within the bargaining unit, a union is not required to furnish a forum for debate on the economic choices facing the workers or to convey differences among the workers' views to management during negotiations. "[S]ubject always to complete good faith and honesty of purpose in the exercise of its discretion,"<sup>2</sup> the union may resolve internal disputes over collective bargaining provisions in any way it chooses. As a result, bargaining unit members must either work under the union-negotiated contract, refraining from direct discussion with management over employment conditions, or quit their jobs.<sup>3</sup> This Article assesses the consequences of unions' virtually unrestrained power to set bargaining priorities and to reconcile antagonisms among the workers they represent. It then evaluates the function that economic interest groups within unions might serve if workers were encouraged to form interest groups and these

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1. Labor organizations are also the exclusive representatives for bargaining unit members in disputes with management over alleged breaches of contract. See Labor Management Relations Act, 29 U.S.C. §§ 141-187 (1976) [hereinafter cited as L.M.R.A.] enacted in 1947, Pub. L. No. 80-101, 61 Stat. 136, as an amendment to the National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 [hereinafter cited as N.L.R.A.], and the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976) [hereinafter cited as R.L.A.]. For convenience, statutory references will be limited to the N.L.R.A. unless differences in the R.L.A. are material to the discussion. Although some of the cases cited involve claims under the R.L.A. instead of the N.L.R.A., the standard of review is the same. See notes 28 & 43 *infra*.

2. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

3. See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) (unionized employees who sought to bargain separately with their employer were not protected by § 7 of the N.L.R.A., 29 U.S.C. § 157 (1976), and their employer could discharge them).

groups were recognized as legitimate mechanisms for meeting the diverse needs of a heterogeneous workforce.<sup>4</sup>

### I. THE RULES OF THE GAME

The legal framework in which unions operate is relatively simple. Congress has granted workers the right to organize for mutual aid and protection and to designate a bargaining representative to deal with management on their behalf.<sup>5</sup> The bargaining representative is chosen by a majority of the workers in a bargaining unit<sup>6</sup> and, once selected, becomes the exclusive representative for all workers in the bargaining unit regardless of whether any particular worker wanted the union, and, in the case of new employees, whether the worker had any choice at all.

The exclusivity requirement hinges on two assumptions: (1) a union can deal most effectively with employers if it speaks for a united front of workers;<sup>7</sup> and (2) similarly situated workers, whatever their present differences, share common economic interests over the long run that can be realized most effectively through an association governed by majority choice.<sup>8</sup> Although

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4. Atherton's definition of a group can be used to describe an economic interest group:

The potential membership of our union is to be thought of as divided into several groups called A, B, C, etc. Within any one group, the members share identical preference orderings over all possible values of (*w, h, t, p, e, S, J*). Indeed this is just what we mean, and *all* that we mean, by the word "group." A group's members need not share other characteristics such as skill, seniority, age, sex, race, current wage, or attitudes toward supervision, although as a practical matter they very well might. All that they *must* have in common to constitute a "group" is their preference ordering over wages, etc. — and their common preference ordering must differ from that of every other group.

. . . The real phenomenon which our partition into groups is meant to approximate is the organization divided into several blocs. Members of such blocs are apt to have aims which, while not perhaps identical, are nonetheless similar and markedly distinct from the objectives of members of other blocs. By assuming homogeneity of preferences within the groups of our model, we are putting aside the smaller differences in order to concentrate on the larger ones.

W. ATHERTON, *THEORY OF UNION BARGAINING GOALS* 80-81 (1973) (emphasis in original).

5. N.L.R.A. § 7, 29 U.S.C. § 157 (1976).

6. The N.L.R.A. provides for government-conducted elections. 29 U.S.C. § 159(c) (1976). The judiciary has endorsed selection of the bargaining representative through voluntary recognition by the employer pursuant to a showing of majority authorization by the union, see *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 304 (1974), or through a judicial or Board determination where employer conduct makes the holding of a fair election impossible, see *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1967).

7. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 565-67 (1945).

8. For a historical discussion of the majority principle, see Schreiber, *The Origin of*

the validity of these assumptions is debatable,<sup>9</sup> the National Labor Relations Board (NLRB) and the courts have uncritically accepted them and have made decisions reflecting them. For example, implicit in the assumption of common long-term goals is the belief that the NLRB always designates satisfactory bargaining units. Although the Board considers a number of factors in determining an appropriate unit, it has looked principally to whether members of the proposed unit have a "community of interest" — whether they share common economic goals. Today, however, a community of interest reflects shared interests over time far less than it reflects management's description of present job conditions or union's delineation of the unit it can organize successfully.<sup>10</sup>

Once a union becomes the exclusive representative, the labor laws say little about its obligations to those it represents. Under the 1935 Wagner Act, only employers could commit unfair labor practices.<sup>11</sup> When Congress finally prohibited unfair labor practices by unions, it only imposed obligations to deal fairly with employers and workers that mirrored employers' obligations to deal fairly with unions and employees.<sup>12</sup> Neither employers nor unions may interfere with worker self-organization, neither may penalize workers because of their support for or refusal to support a union, and each must bargain in good faith with the other.<sup>13</sup>

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*the Majority Rule and the Simultaneous Development of Institutions to Protect the Minority: A Chapter in Early American Law*, 25 RUTGERS L. REV. 237 (1971). Cf. McConnell, *Historical Traits and Union Democracy*, 81 MONTHLY LAB. REV. 603, 603 (1958) ("The democratic tradition which unions have followed . . . is founded primarily, if not exclusively, on the concept of majority rule.").

9. See Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975). See also the dissenting opinion of Justice Douglas in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 73 (1975).

10. See Schatzki, *supra* note 9, at 897-98 nn.3-4.

11. 49 Stat. 449 (1935).

12. See 29 U.S.C. § 158(b)(1)(A) (1976); J. ATLESON, R. RABIN, G. SCHATZKI, H. SHERMAN, JR., & E. SILVERSTEIN, *LABOR RELATIONS AND SOCIAL PROBLEMS: COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT* 84-86 (1978).

13. Congress did amend the proviso to § 9(a) of the Act, 29 U.S.C. § 159(a) (1976), in a manner designed to strengthen the rights of workers against their employers. The proviso originally read:

That any individual or a group of employees shall have the right at any time to present grievances to their employer.

Pub. L. No. 74-198, 49 Stat. 449, 453. The amendment added:

and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That

Just as the legislation does not regulate the terms and conditions of employment that management may establish for nonunionized employees, it does not obligate a union to reach a bargain that maximizes the interests of its members. Congress probably imposed no greater duty of unions toward members than that of employers toward employees because of some mystical faith in the marketplace. Theoretically, competition among employers will shape management's policies, and competition among unions will force the representatives to be accountable to their workers.<sup>14</sup>

Congress recognized that the marketplace theory may be

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the bargaining representative has been given the opportunity to be present at such adjustment.

Pub. L. No. 80-101, 61 Stat. 136. This amendment appeared to strengthen the unionized workers' right to pursue their individual claims against the employer; however, in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), the Supreme Court implied that the proviso of § 9(a) does no more than shield an employer from unfair labor practice charges if that employer meets with unionized employees over a grievance. That interpretation has blunted whatever potential the amendment had. For an excellent analysis of the legislative purpose in amending the proviso of § 9(a), see Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History*, 50 IND. L.J. 720 (1975).

14. The majoritarian selection of an exclusive representative disposes of decertification as a possible safeguard for dissident union minorities. See Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1337-38 (1958) [hereinafter cited as *Union Democracy*]. Cf. Jones, *Disestablishment of Labor Unions for Engaging in Racial Discrimination—A New Use for an Old Remedy*, 1972 WIS. L. REV. 351, 355 (which proposes disestablishment for racially discriminatory unions instead of decertification, which is ineffective). In addition, the NLRB has held that a union may expel from membership a member who files a decertification petition, because the member was attacking "the very existence of the union," *Tawas Tube Prods. Inc.*, 151 N.L.R.B. 46, 48 (1965); but a union may not fine a member who files a decertification petition, *International Molders, Local 125*, 178 N.L.R.B. 208 (1969), *enforced*, 442 F.2d 92 (7th Cir. 1971). These cases are discussed in Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1026-28 (1976) [hereinafter cited as *Union Fines*]. Wellington correctly concludes:

In view of the important public policies favoring union democracy, the N.L.R.B. should prohibit any form of discipline of dissidents who seek to unseat an incumbent union by means that Congress has sanctioned. The threat such dissidents pose to the union's ability to defend its certification is, at best, overstated. The greater danger is that the dissidents' fear of expulsion will perpetuate representation that is no longer responsive to the will of the membership.

*Id.* at 1027-28 (footnote omitted).

Elections for union officials offer dissident members no greater hope. In a study of local unions in Ohio between 1962 and 1967, Applebaum and Blaine found that local officers exchange positions but that turnover occurs within a single group. Applebaum & Blaine, *The "Iron Law" Revisited: Oligarchy in Trade Union Locals*, 26 LAB. L.J. 597 (1975). See also J. SEIDMAN, *DEMOCRACY IN THE LABOR MOVEMENT* 3 (2d ed. 1969). This finding parallels that of the classic studies finding minimal turnover in national and international officers. See Barnett, *The Dominance of the National Union in American Labor Organization*, 27 Q.J. ECON. 455 (1913); Taft, *Opposition to Union Officers in*

flawed when it enacted Title VII of the 1964 Civil Rights Act,<sup>15</sup> which prohibits the use of certain irrelevant criteria, including race, sex, and national origin, by unions or employers in making employment decisions. Unions had not secured equitable employment conditions for all of the workers they represented, and the failure was particularly conspicuous with women, blacks, and certain ethnic groups. Although Congress may have envisioned that labor organizations would reformulate any policies and practices that had limited the employment opportunities of persons protected by Title VII, the Act does not authorize disenfranchised minority workers to band together to influence collective bargaining goals (even for the limited purpose of eliminating employment discrimination).<sup>16</sup> Title VII may affect some collective bargaining choices, but Congress reaffirmed the exclusivity principle by leaving the protected classes out of union-management negotiations, thus preserving unions' monopoly power to pick and choose among their members' competing interests.

The 1959 Labor-Management Reporting and Disclosure Act (Landrum-Griffin)<sup>17</sup> stands unsteadily as the single exception to the legislative hands-off policy. The Supreme Court has described it as a "code of fairness to assure democratic conduct of union affairs."<sup>18</sup> The Act includes a catalogue of due process rights mandating regularity in the political and administrative processes of unions: hearings for disciplinary action against union members,<sup>19</sup> limitations on the length of trusteeships,<sup>20</sup> regulations on reporting payments to and from officers and employees of

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*Elections*, 58 Q.J. ECON. 246 (1944). See also *Tenure of Union Officers*, MONTHLY LAB. REV., Feb. 1971, at 62; J. STIEBER, PUBLIC EMPLOYEE UNIONISM: STRUCTURE, GROWTH, POLICY 31-32 (1973). Whether at the local level where grievance resolution is significant or at the national or international level where bargaining choices matter most, these studies suggest that economic interests held by a minority of workers may not be represented over time.

15. 42 U.S.C. § 2000(e) (1976). See also Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1976), amended by the Age Discrimination in Employment Act of 1978, Pub. L. 95-256, 92 Stat. 189.

16. It would perhaps have been anomalous if Congress had developed a structure that recognized these groups as separate from their unions, since each group's membership would be based on suspect, employment-irrelevant characteristics. On the other hand, the employment conditions associated with being black or being female do constitute easily identifiable and relevant interests, and the ability of groups of blacks and women suitably to represent those interests may logically follow from such conditions.

17. 29 U.S.C. §§ 401-531 (1976).

18. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967).

19. 29 U.S.C. § 411(a)(5) (1976).

20. 29 U.S.C. §§ 461-466 (1976).

labor organizations,<sup>21</sup> and requirements for timely elections of union officers.<sup>22</sup> However, the affirmative obligations to give members an equal voice in elections and to respect members' free speech and assembly rights are subject to "reasonable rules and regulations in [a labor] organization's constitution and by-laws"<sup>23</sup> and to "the organization's established and reasonable rules . . . as to the responsibility of every member toward the organization as an institution."<sup>24</sup> Thus, the provisions of each union's constitution qualify key participatory safeguards of Landrum-Griffin. If a union constitution calls for referenda on policy decisions, or ratification of collective bargaining agreements, or rank-and-file elections of union officials, then the equal rights and free speech provisions of the Act guarantee all members access to these processes.<sup>25</sup> But the Act does not require unions to include members directly in policy making, either through referenda or through contract ratification.

## II. AN ARGUMENT FOR REQUIRING MORE FROM THE EXCLUSIVE REPRESENTATIVE

Congressional acceptance of the ways unions reconcile the competing interests of their members is understandable. Majority rule is central to labor relations theory.<sup>26</sup> And except for the thorny problems of racism, ageism, and sexism (problems that are scarcely confined to the functions of unions), most unions appear to meet the minimal demands of most of their constituents. However, because a union is a coalition of many diverse economic interest groups, its responsibilities should not automatically be defined by such a simplistic standard. Sufficient indicators of dissatisfaction with union policies exist to merit a reevaluation of the role of economic interest groups in unions. This

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21. 29 U.S.C. §§ 431-440 (1976).

22. 29 U.S.C. §§ 481-483 (1976). 29 U.S.C. §§ 501-504 (1976) impose fiduciary obligations on union officials. See Leslie, *Federal Courts and Union Fiduciaries*, 76 COLUM. L. REV. 1314 (1976).

23. 29 U.S.C. § 411(a)(1) (1976).

24. 29 U.S.C. § 411(a)(2) (1976).

25. Overly restrictive judicial interpretations have blunted the effectiveness of the equal rights and free speech provisions of Landrum-Griffin. See text at notes 51-55 *infra*.

26. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975). When using the term "majority rule," I am referring to decisions made by an already unionized workforce. Nothing I say is intended to be applied to the requirement that a majority of bargaining unit members must favor union representation for a union to secure or retain representation rights.

Section discusses the evidence of this dissatisfaction, which derives from the complaints of workers represented by unions and from scholarly discussions.<sup>27</sup> It then evaluates the competing consideration — majority rule.

A. *Evidence of Dissatisfaction Among Unionized Workers*

A major sign of the inadequacy of union policies comes from the members themselves. Expressions of discontent by workers in unions is especially credible because the workers involved are not seeking to eliminate unions from the workplace. Rather, their discontent reflects a desire to improve and strengthen unions, and takes many forms, from assaults on union-negotiated contracts to campaigns to influence union policies.

The most persuasive indicator of workers' dissatisfaction with unions may be their persistence in suing to reform collective bargaining agreements on the ground of union dereliction of duty despite the almost certain failure of such suits. The Supreme Court has made that failure likely by interpreting a union's duty of fair representation to include a presumption favoring the union leadership when members test a union's resolution of interest group conflicts.<sup>28</sup> In *Ford Motor Co. v. Huffman*,<sup>29</sup> the Supreme Court emphasized that a labor organization's negotiators enjoy a "wide range of reasonableness" in exercising their "discretion to make such concessions and accept such advantages as, in the

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27. For a different approach to the same issue, see Schatzki, *supra* note 9, at 898-918.

28. Courts once looked more favorably upon workers challenging the performance of an exclusive representative. In *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), the Supreme Court acknowledged an implicit statutory limitation on an exclusive representative's capacity to compromise its members' interests. The Court determined that, in collective bargaining, a union must "represent non-union or minority union members . . . without hostile discrimination, fairly, impartially, and in good faith." 323 U.S. at 204. Under this formulation, courts could have required unions to justify their acceptance of challenged contract terms by demonstrating that the terms benefited the bargaining unit as a whole and that the means chosen was the least destructive to worker expectations. Instead, the Supreme Court later chose the deferential path drawn in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), and *Humphrey v. Moore*, 375 U.S. 335 (1964). See text at notes 29-42 *infra*.

Although *Steele* was a suit brought under the Railway Labor Act, later that term the Court extended its holding — that the grant of exclusivity under the R.L.A. imposed a duty of fair representation on the union — to exclusive bargaining representatives under the broader National Labor Relations Act in *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944). Cf. *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952) (duty exists even in absence of certification as bargaining representative).

29. 345 U.S. 330 (1953).



light of all relevant considerations, they believe will best serve the interests of the parties represented."<sup>30</sup> In *Huffman*, the union agreed to a contract emendation that benefited only one group of World War II veteran-employees by granting them fictionalized seniority. Although alternative formulae might have achieved the parties' purpose of rewarding one class of veterans for military service, the Court found that, in accepting provisions that disadvantaged other veteran-employees and all nonveteran-employees, the workers' bargaining representative met its duty "to make an honest effort to serve the interest of all of [its] members, without hostility to any."<sup>31</sup>

The Court extended the *Huffman* rationale to the grievance-presentation phase of representation in *Humphrey v. Moore*,<sup>32</sup> stating that a union does not breach its duty of fair representation by taking a position adverse to one group of workers. In *Humphrey*, the union represented two antagonistic factions of employees in a seniority dispute resolved by a joint union-management committee. The Court recognized the inherent conflict between employees represented by the same union, but in the absence of "substantial evidence of fraud, deceitful action or dishonest conduct,"<sup>33</sup> refused "to remove or gag" the union, since that "would surely weaken the collective bargaining and grievance processes."<sup>34</sup>

As long as considerations of race and membership status are not the basis for allowing contractual benefits, the *Huffman-Humphrey* rationale effectively shields a union's collective bargaining decisions from judicial review.<sup>35</sup> Yet bargaining unit

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30. 345 U.S. at 338, 337-38.

31. 345 U.S. at 337.

32. 375 U.S. 335 (1964).

33. 375 U.S. at 348.

34. 375 U.S. at 350. *But see* *Truck Drivers Local 568 v. NLRB*, 379 F.2d 137, 142-43, 143 n.10 (D.C. Cir. 1967) (discusses various approaches to reviewing union decisions adjusting seniority rights).

35. Prevailing doctrine states that § 301 of the L.M.R.A., 29 U.S.C. § 185 (1976), does not establish an action for workers against unions in the absence of a contract dispute with management. Only when workers allege that the union violated its duty of fair representation in connection with an employer's breach of contract can the courts assert jurisdiction. The workers may then sue the union alone or the employer and union jointly. In either circumstance, the disgruntled employee must prove both the employer's breach of contract and the union's violation of the fair representation duty to establish joint or union liability. *Vaca v. Sipes*, 386 U.S. 171 (1967). Since any challenge to a union's support of one group of workers over another in forming bargaining goals does not implicate the employer, the *Vaca* requirements probably make a § 301 suit unavailable. Workers can

members continue to file duty-of-fair-representation suits, alleging that a union's performance is "arbitrary," rooted in "hostility," or lacking in "good faith" and "honesty of purpose."<sup>36</sup> For example, when a union negotiates adjustments in seniority rights following changes in a bargaining unit's membership, workers are not untoward to expect the union to have a sound basis for favoring one group of employees over another. However, as *Keane v. Eastern Freightways, Inc.*<sup>37</sup> demonstrates, worker expectations may be sorely disappointed. In *Keane*, the union's Joint Area Committee determined that endtailing rather than dovetailing<sup>38</sup> appropriately resolved a seniority dispute following a corporate takeover. The union representing the employees of the surviving corporation successfully argued that the takeover was an acquisition and not a merger. Not surprisingly, the employees who were endtailed were represented by a defunct union and had not voted for the leaders of the remaining union. The court in *Keane* stated:

The plaintiffs were newcomers to [Local] 560 from [Local] 478. There can be no doubt that union politics were not wholly absent from the decision made by 560 to support its older members against the Associated workers. But mere partisan influence in the decision-making process is not itself grounds for relief.<sup>39</sup>

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challenge a union decision by filing an unfair labor practice charge alleging violation of § 8(b)(1)(A) of the L.M.R.A., 29 U.S.C. § 158(b)(1)(A) (1976). See *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); *Local 12, United Rubber Workers*, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

36. Labeling the union's violation of its duty of fair representation is not the least of plaintiffs' burdens. In *Huffman* and *Humphrey*, the major decisions dealing with union resolution of internal conflicts, the Supreme Court did not use the word "arbitrary" to describe unlawful union conduct. "Arbitrary" first appeared in duty of fair representation jurisprudence in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), a case involving a union's refusal to take a grievance to arbitration. In *Vaca*, the Supreme Court stated that a breach of the duty "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith," citing *Humphrey* and *Huffman*. These citations may justify including the term "arbitrary" in the catalogue of characterizations for determining the legality of union conduct in collective bargaining. For a summary of the terms used by the Supreme Court to define the duty of fair representation, see Aaron, *The Duty of Fair Representation: An Overview*, in *THE DUTY OF FAIR REPRESENTATION* 8, 18-21 (J.T. McKelvey ed. 1977) [hereinafter cited as *THE DUTY OF FAIR REPRESENTATION*].

37. 92 L.R.R.M. 3092 (D.N.J. 1976).

38. When seniority lists are endtailed, one group of employees receives priority over another group and no attempt is made to integrate the lists on the basis of a controlling principle such as length of employment. Dovetailing requires the integration of previously separate seniority lists on some basis — *e.g.*, by length of service, by ratio, by rank. See Kahn, *Seniority Problems in Business Mergers*, 8 *IND. LAB. REL. REV.* 361 (1955).

39. 92 L.R.R.M. at 3097.

The NLRB appears to agree that "mere partisan influence" is not the kind of arbitrary or hostile conduct Congress contemplated in imposing the duty of fair representation.<sup>40</sup> In a 1977 memorandum, the General Counsel's office advised that the NLRB would not question a union's choice among competing interests unless that choice was wholly without objective justification and was based exclusively upon political considerations.<sup>41</sup> However, since practically all partisan union decisions can be rationalized at least in part by objective factors, the Board's standard provides no genuine check on union discretion. The union need only reject the employees' version of the facts to "act 'responsible' and wear the face of fairness"<sup>42</sup> while using its control over the collective bargaining process to reward its political supporters.

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40. The NLRB has heard complaints that a union has violated its duty of fair representation, finding jurisdiction under § 8(b)(1)(A) of the N.L.R.A., 29 U.S.C. § 158(b)(1)(A) (1976), which makes it an unlawful employment practice for a labor organization "to restrain or coerce . . . employees in the exercise of rights guaranteed in section 7." The Supreme Court has assumed, without holding, that the Board has authority to remedy duty-of-fair-representation violations. See *Vaca v. Sipes*, 386 U.S. 171, 182-83, 186 (1967).

41. *Strick Corp.* (UAW Local 644), 95 L.R.R.M. 1526 (Advice Memo 1977). The memorandum purported to explain the decision in *Barton Brands, Ltd.*, 213 N.L.R.B. 640 (1974), *enforcement denied and remanded*, 529 F.2d 793 (7th Cir. 1976). In *Barton*, the Board found that a union had violated § 8(b)(1)(A) by resolving a seniority issue solely to satisfy the interests of the numerical majority in the bargaining unit. The Board's decision in *Barton* was simplified by the union's initial acceptance of a seniority provision requiring dovetailing that only wavered after proposed layoffs threatened the union's original, and numerically greater, constituency. The Board's retreat from *Barton Brands* appears to be complete. See *Steelworkers Local 7748 (Eaton Corp.)*, 246 N.L.R.B. No. 6, 102 L.R.R.M. 1411 (1979). Cf. *Truck Drivers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967) (politically motivated opposition to seniority dovetailing violated § 8(b)(1)(A)); *Ferro v. Railway Express Agency, Inc.*, 296 F.2d 847 (2d Cir. 1961) (the discrimination claim of members of a weaker union following transfers from a defunct railroad line is an issue of fact and should go to trial).

42. Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362, 393 (1962) [hereinafter cited as *Individual Rights*]. Summers has argued elsewhere that a union's support for one employee group's position is fundamentally fair so long as the union obeys the collective bargaining agreement; that is the mechanism by which the union — and through it, the employees — agreed to conduct their affairs during the term of the agreement. He reaches the same conclusion when the agreement provides no express direction but an established past practice is evidence. Summers, *The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation?*, in *THE DUTY OF FAIR REPRESENTATION*, *supra* note 36, at 60 [hereinafter cited as *What Constitutes Fair Representation?*]. Summers still maintains, however, that an individual worker is entitled to nondiscriminatory and consistent application of the agreement's provisions, free from "personal hostility, political oppression, or racial prejudice." *Id.* at 82.

The point is made brutally clear in *Deboles v. Trans World Airlines, Inc.*<sup>43</sup> The International Association of Machinists and Aerospace Workers (IAM) represented all of TWA's aircraft maintenance employees across the country, including those at the Kennedy Space Center, where TWA had a contract with NASA. Under the 1964 national IAM-TWA contract, employees accrued seniority in their job classifications based on length of time in that classification, regardless of the TWA location at which they worked. TWA used this national seniority ranking to permit employees to bid into other jobs within a classification and to bump less senior employees during layoffs. But those IAM-represented employees who worked at the Space Center were not included in the national seniority system until 1970, and even then were not given retroactive seniority for time in their classification at the Space Center before 1970. Thus, a TWA employee at the Space Center had considerably less job security than any other TWA employee. Citing the testimony of TWA negotiators and petitions from workers who opposed equalizing seniority, the Space Center employees charged that IAM negotiated the separate seniority provisions "to protect its own members elsewhere in the system from the risk of being bumped from their positions in the event of termination of TWA's contract with NASA at the Space Center."<sup>44</sup> The court of appeals, however, upheld the trial court's finding that TWA's interest in a stable workforce at the Space Center was a "relevant consideration" justifying union acceptance of the restrictive seniority system.

In light of the facts in *Deboles*, the appellate court's reliance upon that consideration seems misplaced. The so-called relevant consideration appears to have been of minimal relevance to both management and union; the court acknowledged that IAM officials withdrew one proposal that would have given retroactive seniority to Space Center employees, in response not to TWA's

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43. 552 F.2d 1005 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977). Throughout *Deboles*, the court discusses similar cases. See also *Duggan v. IAM*, 510 F.2d 1086 (9th Cir. 1975). In *Duggan*, the unions negotiated an industry-wide contract that cost the plaintiff flight engineers their jobs. The Ninth Circuit agreed that the Supreme Court's use of the term "arbitrary" in setting the standard for duty-of-fair-representation violations broadened the scope of the union's duty; nevertheless, the court assumed that the union did not breach the duty of fair representation, even though some flight engineers terminated under the agreement received substantial severance pay while others did not. See also *Hartley v. Brotherhood of Ry. Clerks*, 283 Mich. 201, 277 N.W. 885 (1938) (union justified in destroying the seniority rights of women to keep men employed).

44. 552 F.2d at 1010.

insistence on the need for a stable workforce but rather to pressure from IAM's members elsewhere. Workforce stability was but a smokescreen to obscure IAM's concessions to non-Space Center employees. Moreover, to gain ratification IAM officials made admittedly false statements to Space Center employees, saying that IAM had done "everything in its power to obtain retroactive system seniority, but that TWA had attached unacceptable conditions."<sup>45</sup> Yet the court found no breach of the duty of fair representation. The court also declined to address the argument that the goal of a stable workforce could have been achieved by restricting transfer rights into and out of the Space Center facility, instead of absolutely denying Space Center employees the opportunity to accrue seniority in the national ranking system. IAM's ploy in *Deboles* was not unique. Unions can easily justify partisan decisions by alleging employer intransigence, and courts accept these arguments uncritically, under the impression that the duty of fair representation does not require judges to examine a union's search for alternative solutions less disadvantageous to dissident groups in the bargaining unit.<sup>46</sup>

Union members who assert a right to influence decisions on union policy are no more likely to succeed than members who challenge a bargain their union has made on their behalf. It is well settled that unions are not required to give rank-and-file members the opportunity to ratify collective bargaining agreements.<sup>47</sup> Where union constitutions provide for worker approval, however, one might expect that members could cast a meaningful vote on the terms and conditions under which they will work. But, as *Davey v. Fitzsimmons*<sup>48</sup> illustrates, unions are allowed much leeway in designing their ratification procedures. In *Davey*, members of various Teamsters locals sought to enjoin the national Teamsters leadership from enforcing its ratification plan for a national agreement that included thirty-two supplemental area contracts. Under the leadership plan, the entire package was to be submitted to the national membership for majority ratification. The plaintiffs argued that the union constitutional provision

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45. 552 F.2d at 1013.

46. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). See also *Strick Corp. (UAW Local 644)*, 95 L.R.R.M. 1526 (Advice Memo 1977).

47. *Confederated Indep. Unions Local 1 v. Rockwell-Standard Co.*, 465 F.2d 1137, 1140 (3d Cir. 1972); *Davis v. Brotherhood of Ry. Clerks*, 97 L.R.R.M. 3141, 3143 (W.D. Va. 1977) (ratification by union members not required as long as union constitution permits union to act without members' authorization or consent).

48. 413 F. Supp. 670 (D.D.C. 1976).

for submission "to the membership covered by the contract" required that all workers vote on the national contract but that only those workers affected by an area supplemental agreement vote on the provisions for their area. Such a construction would have maximized the value of ratification by requiring every enforceable provision to be approved by a majority of those whose lives it affected. Judge Bryant, in dismissing an allegation that the single national vote violated the Landrum-Griffin's guarantee of equal voting rights,<sup>49</sup> interpreted the constitutional provision to allow submission of all employment terms in a single referendum to the entire membership. The court felt that binding locals to area supplements through a national vote was a permissible tradeoff for the overall benefits of national negotiations.<sup>50</sup>

Workers attempting to influence union decisions before collective bargaining begins may also find that unions can limit effective opposition to leadership recommendations. In *Newman v. Local 1101, Communications Workers of America (CWA)*,<sup>51</sup> a job steward, who was a member of a group within his local called "United Action," fought the union leadership's tactics and programs for upcoming contract negotiations. Reversing the grant of a preliminary injunction, the Second Circuit held that the union leaders could remove the dissident without violating the free speech and antidisciplinary provisions of Landrum-Griffin.<sup>52</sup> Although it acknowledged that a union member could not be expelled in reprisal for exercising free speech rights, the court nevertheless upheld the union's action:

[O]nce he accepts a union position obligating him fairly to explain or carry out the union's policies or programs, he may not engage in conduct inconsistent with these duties without risking removal as an official or employee (but not as a union member) on the ground that his conduct precludes his effective representa-

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49. 29 U.S.C. § 411(a)(1) (1976).

50. Judge Bryant stated:

While package ratification may not represent the most desirable mode of ratification from the point of view of all union members [and] [w]hile plaintiffs object to being bound by the area supplement applicable to them merely because a majority of members nationally approve of the package as a whole, this is simply a result of the tradeoff that the union, in conformity with its own rules and procedures, has determined to be an acceptable price to be paid in return for the overall benefits of the national negotiating process. And the Court cannot say, as a matter of law, that the union may not make such a choice.

413 F. Supp. at 677.

51. 570 F.2d 439 (2d Cir. 1978).

52. 29 U.S.C. §§ 411(a)(2), 529 (1976).

tion of the union. Unless the management of a union, *like that of any other going enterprise*, could command a reasonable degree of loyalty and support from its representatives, it could not effectively function very long.<sup>53</sup>

The court of appeals found no chilling of free speech rights since “despite a prior decertification as a job steward and the union leadership’s prior refusal to certify him after election to that office, Newman continued to exercise his free speech rights as a union member, conducting vigorous campaigns for greater democratization in opposition to [the local’s] incumbent leadership.”<sup>54</sup>

In the same way that union members expect that officers as well as members will have the right to speak out about union policies, they might expect the opportunity to communicate with their coworkers about issues facing the union. But some union leaderships — with judicial approval — have effectively limited members’ rights to address one another. In *Murphy v. Local 18, International Union of Operating Engineers*,<sup>55</sup> Local 18, which has jurisdiction over districts in eighty-nine Ohio and Kentucky counties, called district meetings to solicit members’ views on bargaining proposals, but a union official refused to let dissident members address district meetings other than their own. The dissidents believed that informative discussion of the contract proposals would include presentations by supporters and opponents, regardless of the districts in which they worked. That belief seemed reasonable, since the leadership could move from district to district explaining its position. However, the dissident members were disappointed to learn that, because the union constitution and bylaws provided for separate district meetings, the leadership’s denial of access to other locals was not a violation of section 101(a)(1) of Landrum-Griffin.

These examples of worker dissatisfaction with the exclusive representative are not isolated. They exist throughout the representation process from the election of union leadership to the formulation of collective bargaining proposals and contract ratification. And they are symptoms of a flaw in the framework of union-member relations.

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53. 570 F.2d at 445 (emphasis added).

54. 570 F.2d at 448. Before passage of Landrum-Griffin, Joel Seidman condemned the power of union officials and those union constitutional provisions that could be used to discipline members. See J. SEIDMAN, *supra* note 14, at 13-17, 40-41; compare *id.* at 60-70.

55. 99 L.R.R.M. 2074 (N.D. Ohio 1978).

B. *Evidence That Scholars Recognize a Need to Regulate the Exclusive Representative*

Soon after the consolidation of union power, scholarly commentators expressed concern that unions might disregard or suppress the interests of some members.<sup>56</sup> During the last twenty years, however, only limited discussion has appeared concerning the problems of interest groups within unions. This Section analyzes the most significant contributions that scholars have made to the analysis of this important issue.

As early as 1958, Harry Wellington responded to proposals for federal legislation to democratize unions<sup>57</sup> by suggesting that Congress explicitly give the NLRB jurisdiction to review union compliance with the duty of fair representation.<sup>58</sup> Under his proposal, the Board would apply a standard of employee-community expectations when evaluating a challenged union decision. He did not elaborate this review standard beyond indicating that the Board would consider the nature of the employees' claim, the reasonableness of the employees' expectation, the relevant industrial practice, and other pertinent factors. According to Wellington, the Board was the appropriate reviewing body because it had the expertise in labor relations necessary for an informed judgment — an expertise that cultivates sensitivity to employee-community expectations.<sup>59</sup>

When Wellington made his proposal, an assumption of

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56. A representative sample would include: Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39 (1961); Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority v. Employer Autonomy*, 13 RUTGERS L. REV. 631 (1959); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435 (1963); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731 (1950); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962); Wellington, *Union Democracy*, *supra* note 14.

57. Wellington, *Union Democracy*, *supra* note 14, at 1357-61. Wellington particularly opposed federal legislation regulating union admission, disciplinary, and election decisions. He rejected such federal legislation as unnecessary and unwise, in light of *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944), *see* note 28 *supra*, and considerations of federalism. His view did not prevail, and Congress enacted Landrum-Griffin. Compare Wellington's evaluation of that Act, as enforced, in *Union Fines*, *supra* note 14.

58. When that article appeared, no case clearly held that the NLRB had jurisdiction to hear duty-of-fair-representation claims. *See* note 40 *supra*.

59. Wellington did not say whether a distinction should be drawn between contract administration and negotiation, but the tenor of the article suggests that, since the duty of fair representation is applicable to both phases, his model for review would also apply to both.



NLRB expertise prevailed.<sup>60</sup> Contemporary research has shown, however, that Board evaluations of worker attitudes are often intuitive at best.<sup>61</sup> Moreover, even in 1958 it may have been too much to expect an agency to determine employee and community expectations existing at the time an issue was originally resolved. The only relevant expectations would be those at the instant time of the union decision, not during the period of NLRB review. Yet the effects of a union decision that are known only by hindsight would certainly color the measurable expectations of the affected employees and community.<sup>62</sup> And even if one ignores the corrosive effects of time, one cannot ignore the costs of the detailed factual investigations and hearings that review under such a standard would necessitate. Simple polling could never suffice when the credibility of each individual respondent would be such an important factor in computing an aggregate "expectation."

Postdecision review can also threaten industrial stability by unsettling the expectations of the union, the workers, and the management about the completed agreement. Even if not abused, it could interpose long delays between the signing of an agreement and the day it takes full effect. These delays could hamper the union's ability to bargain successfully with management. Although management might be no less willing to enter collective bargaining agreements, its fears that the settlement could come undone might skew the bargain it is willing to strike.<sup>63</sup>

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60. In a series of cases between 1957 and 1960, the Supreme Court repeatedly refused to review the merits of arbitration award decisions, see *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

61. See J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976).

62. See *NLRB v. Local 315, Intl. Bhd. of Teamsters*, 545 F.2d 1173 (9th Cir. 1976), where the union's executive board and the court of appeals agreed that an election to determine the members' seniority rights was invalid "because a vote was taken after the fact that an operation was being eliminated and that a fair vote could not be taken at this time." 545 F.2d at 1175. The court held further, "[T]o base its decision as to whether the bumping principle should in general be applied to this Employer upon an expression from the employees so limited in scope and focus constituted arbitrary Union action without rational basis . . ." 545 F.2d at 1176. It is suggested, however, that a membership vote on policy would be acceptable if it were taken before the effect of a particular management decision was known. 545 F.2d at 1176.

63. While the concern for stability does weigh against an increase in participation rights for interest groups, I will argue that controlling the nature and frequency of postde-

The Wellington proposal poses two additional problems. First, Board review of union decisions may be an empty gesture. In light of the deference usually shown union actions toward workers,<sup>64</sup> the Board might translate the employee-community expectation test into a copy of the lenient duty of fair representation. The broad rubber stamp would have been passed from the courts<sup>65</sup> to the Board. Second, resort to the Board may offer the aggrieved employees no significant savings of time or money over court litigation. Even though workers discharged in a merger would not need an attorney before the Board, they would still need wages while they awaited a decision.<sup>66</sup> Although the unhappy workers might successfully force their union to arbitrate with management by filing a charge before the NLRB, they would still be represented by an indifferent — even hostile — agent. Nonetheless, the Board would be hesitant to look behind the arbitration to assess the adequacy of the union's representation,<sup>67</sup> given the availability of courts and duty-of-fair-representation suits to perform that task after the arbitrator renders a decision.<sup>68</sup> Thus, Board review would only complicate the workers' challenge to the actions of their exclusive representative.<sup>69</sup>

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cision review will minimize instability and notify management of the likelihood of the final agreement's approval. See Section III of this Article *infra*. The Wellington suggestion does not offer any controls on the frequency of postdecision review.

64. See text at notes 29-50 *supra*.

65. Courts may also reduce employee expectations through their recurring emphasis upon stable collective bargaining and the need for industrial peace through bargaining. Wellington, however, did not consider the effect of Board review on the bargaining relationship.

66. Additionally, the *Collyer* doctrine of Board prearbitral deferral would, in some instances, foreclose de novo Board review. See *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); *National Radio Co.*, 198 N.L.R.B. 527 (1972). *National Radio Co.* was overruled in 1977 because of a change in Board membership. *General Am. Transp. Corp.*, 228 N.L.R.B. 808 (1977) (3-2 decision). While, at present, the Board probably will not defer discharge disputes and other individual statutory rights cases under *Collyer*, there is no guarantee that *Collyer's* philosophy will not once again be extended to cases of discharge and § 7 rights under the N.L.R.A., 29 U.S.C. § 157 (1976).

67. As an initial matter, grievants seeking a Board hearing would need to be sufficiently sophisticated to be aware that their unfair labor practice charge might cause a union decision in favor of arbitration; they would then need evidence that the union evidenced bad faith in initially refusing to take the case to arbitration.

68. Cf. *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977), *overruling* *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138, 146-48 (1974) (where the dissenters argued that review of a union's certification, requested by minority workers, should be made only after the certification and the alleged violation of the duty of fair representation).

69. This consequence could be avoided if the Board's jurisdiction to determine the merits of interest group disputes were not tied completely to its authority to hear and remedy duty-of-fair-representation cases.

George Schatzki unleashed perhaps the most scathing indictment of the quality of union representation in a 1975 article questioning the continuing viability of the exclusivity principle.<sup>70</sup> He argued that exclusivity based on majority choice subjects individual workers to representatives they do not want.<sup>71</sup> He contends that a representative controlled by a simple majority may be unresponsive to the needs of individual members and may promote grievances only selectively, thereby fostering both worker apathy concerning union affairs and worker dissatisfaction with employment conditions. Ultimately, this may cause wildcat strikes.<sup>72</sup> According to Schatzki, a system of union representation that jettisons exclusivity and allows individualized representation is feasible:

The keystone of a model of collective bargaining which did not allow majority rule to determine the bargaining agent would be the principle that every employee could select his or her own representative, if any. No one would be represented by a labor organization unless it was actually selected by that individual. Second, the employer would be obligated to engage in good faith collective bargaining with each of the collective bargaining agents authorized by that employer's employees. Third, the unions could engage in coalition or cartel bargaining, and the employer would be required to bargain on that basis.<sup>73</sup>

Schatzki's proposal suffers from two polar problems. One difficulty, which he addresses but never quite dispels, is the possible return to individualized bargaining and the attendant crippling of the worker's bargaining position. Schatzki questions the

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70. Schatzki, *supra* note 9. Schatzki's primary concerns are that individual workers have the opportunity to choose their own representative and control the handling of their grievances.

71. *Id.* at 898.

72. *Id.* at 915-18.

73. *Id.* at 919 (footnote omitted). Schatzki acknowledges a number of objections to his suggestions; he always responds with the caveat that his predictions are speculative, *id.* at 920. His caveat makes it impossible to criticize his various defenses or to challenge his conclusion:

On balance, it is not clear to me that the possible drawbacks of abandoning the exclusive representation model for collective bargaining in our country would outweigh the benefits which would result. The proposal would give individual workers considerably more protection to vindicate their own interests. In the process, it is possible — perhaps likely — that unions would be more democratic, collective bargaining would at least deal with more of the employees' problems and desires, unions would be more responsive to individuals' grievances . . . . Hopefully, this Article has at least made the idea of nonexclusive collective bargaining something reasonable and worthy of further exploration.

*Id.* at 938.

likelihood of such an occurrence, but he concedes the possibility.<sup>74</sup> If Schatzki is right, and labor would not in fact be weakened, a competing concern becomes troublesome. If labor retains its bargaining strength under multiple representation, the real burden of nonexclusive representation must fall on the employer.<sup>75</sup> While it may in some sense be just for unions that have failed to represent all their members adequately to bear the consequences of competition for worker affiliations and affections, no equity justifies punishing the employer. Nonetheless, Schatzki's proposal could force management to face multiple, perhaps irreconcilable, demands from several unions representing workers doing the same jobs, and to risk seriatim strikes each time a contract is renewed. Why penalize employers for the historical shortcomings of an exclusive representative?

While Wellington and Schatzki want to change the legal framework in which unions operate, others have suggested less drastic methods of encouraging pluralistic influences in union decisions. One solution is for union leaders to accept political opposition within their ranks. Lipset, Trow, and Coleman are the foremost proponents of the argument that unions can effectively serve their members by offering rival slates of candidates during elections of union officers.<sup>76</sup> Ideally, Lipset would like all unions to replicate the two-party political structure of the International Typographical Union (ITU). But the conditions preserving the ITU's two-party system<sup>77</sup> appear, even to Lipset, to be unique to

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74. *Id.* at 930-32. Schatzki feels that any loss of economic strength that labor might suffer would be outweighed by increased responsiveness of the workers' representatives. *Id.* at 932. While I share Schatzki's desire for responsive representation, I believe it can be obtained without a substantial sacrifice of economic power. See Sections III and IV *infra*.

75. Schatzki suggests that, for several reasons, collective bargaining with nonexclusive representatives will not disadvantage employers: (1) an employer may be able to settle first with a weak union, thereby establishing the wage rates and working conditions for all employees, *id.* at 929, *but see id.* at 936; (2) an employer simply may not be any worse off bargaining with many, rather than a single or a few unions, *id.* at 937; (3) since employees will be more satisfied with more responsive representatives, reduced wildcat activity will offset the cost of multiple negotiations, *id.* Because I am skeptical about the advisability of completely abandoning exclusivity, I look to another solution to the problem of inadequate union representation. See Section III *infra*.

76. S. LIPSET, M. TROW, & J. COLEMAN, *UNION DEMOCRACY: THE INSIDE POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* (1956) [hereinafter cited as LIPSET]. See J. SEIDMAN, *supra* note 14, where the author argues that a "loyal opposition" of union members is required to insure democracy within unions. Seidman would accept either a political party or a faction as the "loyal opposition." *Id.* at 38.

77. Among the more significant conditions cited by Lipset are the homogeneous population of the ITU, LIPSET, *supra* note 76, at 414-17, the lack of serious wage differen-

that union.<sup>78</sup> Perhaps for that reason, perhaps because the benefits of autocracy are hard to relinquish, no other union leadership has tried to institutionalize a loyal opposition. Either way, the failure of union leaders to embrace a two-party system suggests that leadership accountability to union members cannot be achieved through voluntary imitations of the ITU political structure. Moreover, the two-party system may not be the best insurance that union leaders will bargain effectively for the members. For example, Lipset points out one deleterious effect of the ITU's two-party system: "During all contract negotiations the opposition party carefully prepares the way for the next election. It puts forward greater demands than the administration believes it can gain from the employer. The opposition also criticizes the administration's handling of various grievance cases."<sup>79</sup> That approach may enhance the standing of the opposition, but it may not improve the terms of the collective bargaining agreement negotiated by the incumbents.<sup>80</sup>

The arguments of Wellington, Schatzki, and Lipset demonstrate that the modern scholarly debate about how unions operate seeks not to undermine unions as an institution, but to expand the rights of workers within their unions. More modest proposals demonstrate the same positive concern. For instance, some suggest requiring unions to submit all contract proposals and modifications to the membership for ratification before the union leaders negotiate with management.<sup>81</sup> However, like the more complicated proposals, this option offers little solace to interest groups, because it still pits small group interests against the general membership. Furthermore, unless interest groups have the opportunity and the ability to express their views to the membership,

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tials among the workers, *id.* at 162, the high prestige of the profession (which means that by being a union official one does not significantly raise one's prestige above that of other union members), *id.* at 243, and the union structure which limits competition between printers in different cities and puts greater emphasis on officials for small units of printers, *id.* at 411-13.

78. *Id.* at 462.

79. *Id.* at 332.

80. In addition, public bickering between the parties could allow management to manipulate the bargaining process by rejecting the incumbent's demands on the ground that an opposition victory at the polls will subject the employer to contradictory, and thus very expensive, bargaining demands during the next contract negotiations.

81. See Simkin, *Refusals to Ratify Contracts*, in *TRADE UNION GOVERNMENT AND COLLECTIVE BARGAINING* 107 (J. Seidman ed. 1970) [hereinafter cited as *TRADE UNION GOVERNMENT*]; Lahne, *Union Constitutions and Collective Bargaining Procedures*, *id.* at 167-97.

ratification would be little more than an echo of the leadership's position.<sup>82</sup> Even if a faction temporarily blocks ratification, its interest may not gain recognition on the final agreement.<sup>83</sup> For example, the 1978 United Mineworkers contract, which was finally approved by membership vote after two abortive attempts, did not materially improve the position of older retirees, even though those former workers enjoyed substantial rank and file support.<sup>84</sup>

Without a duty to negotiate with the dissenting members, nonratification may not prompt the union leadership to respond to interest group concerns at all. In a seminar on union government, a number of well-known scholars, mediators, and practitioners commented on the effects of nonratification:

- A: The rejection of a tentative agreement recommended by a union official is a rejection of the union officer as a political leader, and as a result he may . . . come to the next meeting and suggest that the company not increase its offer [so that his image will not suffer].
- B: I have had responsible union leaders, after the rank and file have turned down a tentative agreement, tell me that we cannot improve the offer, if we expect them to exercise leadership in the future.
- C: The union professional . . . met privately with the management person and worked out the entire deal, but was afraid the membership would reject it. So the two professionals called in [a] mediator privately and told him of the problem and of the deal they had worked out. They went through the play-acting of negotiations, reached an impasse, called in the mediator officially, and had him come up with the deal which the two principals had worked out privately in advance. [The

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82. The effective ratification requirement would have to provide dissidents with access to the membership prior to the ratification vote. Similarly, a ratification provision would need to guarantee a reasonable time period between announcement of the proposed agreement and the ratification vote to allow dissidents the opportunity to campaign. The UMW constitution, for example, requires a ten-day discussion period.

83. One might argue that, in addition to providing for member ratification of bargaining agreements, the law should further protect economic interest groups by requiring unions to subject all decisions and procedures to the approval of the majority of members. Such a requirement would insure that the leadership has satisfied a majority, no matter what the issue. Of course, the satisfied majority would vary in membership each time a decision was made, depending on the issue involved. It is hard to see, however, how this proposal improves the position of economic interest groups who constitute numerical minorities. Also, Alice Cook has pointed out at least one example where, when a union attempted to operate by majority rule to increase membership participation, the membership's contributions were limited to nonpolicy decisions. A. COOK, *UNION DEMOCRACY: PRACTICE AND IDEAL* 39-77 (1963).

84. *N.Y. Times*, March 25, 1978, at 1, col. 6.

union committee recommended it to the membership who accepted it.]<sup>85</sup>

Moreover, once a majority of workers have rejected an entire contract proposal, management has more influence upon future union decisions. An employer may find that stalling in subsequent negotiations will destroy the union. Alternatively, management may cooperate with the union leadership to reduce worker support for a dissident faction. Employers typically prefer to work with the existing union leadership, who recognize the value of quick compromise and cooperation, rather than bargain with a more demanding, unpredictable, insurgent leadership.

Other commentators have argued that outlawing the union shop would make unions more responsive to their members because of the combined threats of decertification and refusal by nonmembers to support union proposals for concerted action.<sup>86</sup> Financial agreements requiring all bargaining unit members to pay the equivalent of union dues and initiation fees, as provided by the Taft-Hartley Act,<sup>87</sup> could eliminate any "free rider" problem.

Nevertheless, serious drawbacks plague this proposal. First, workers who pay dues but are not required to join the union may

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85. Simkin, *supra* note 81, at 140, 141, 142. Compare the observations of E.A. Ross:

It is interesting to observe how the procedures for rank-and-file participation in the wage bargain have increasingly become tools for the use of the leadership. Originally intended to implement the final authority of the rank and file, they have gradually undergone a subtle metamorphosis, until they have become a means of conditioning the membership, communicating indirectly with the employer, and guarding the flank against rival leadership . . . the procedures originally designed to guarantee control by the rank and file have become devices for control of the rank and file . . . .

The formal rationale of the union is to augment the economic welfare of its members; but a more vital institutional objective — survival and growth of the organization — will take precedence whenever it comes into conflict with the formal purpose.

Ross, *The Trade Union as a Wage-Fixing Institution*, 64 AM. ECON. REV. 582-87 (1974) (emphasis in original).

86. Theoretically, a union-shop clause requires that a worker join the union within a stated time after commencing employment. In fact, the union-shop clause may only condition continued employment on payment of dues and initiation fees. See § 8(b)(1)(A) of the N.L.R.A., 29 U.S.C. § 158(b)(1)(A) (1976). Commentators agree, however, that few workers in union shops are aware of their option to refrain from membership and merely meet those financial obligations. *E.g.*, Wellington, *Union Fines*, *supra* note 14, at 1051-52.

87. Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1976); *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

not feel the same loyalty to their coworkers as do union members. This loyalty is a socially important by-product of union membership in part because it enables the union to use economic weapons more effectively. Second, membership requirements promote participation in union affairs — if one is not a union member there is little incentive to change union policies.<sup>88</sup> Insofar as unions are the accepted vehicle for advancing the diverse interests of workers, an active,<sup>89</sup> broad-based membership is the only insurance against permanent control by a few labor bureaucrats.

All of the scholarly criticism I have discussed so far has related to the union as a representative in contract negotiations. Another side of union life has also fueled attacks on the adequacy of union representation: a union's duty to represent an individual employee who alleges that the employer has breached its contract. Discussion of this issue is particularly noteworthy because many of the more perceptive critics and judges have proposed schemes that improve only the grievance aspect of union representation<sup>90</sup> and have ignored the broader issues of individual and interest group influence on the formation of general union policy. But the distinction between contract negotiation and grievance settlement may be illusory: Each grievance presents an opportunity to refine or expand a contract term, albeit in a more limited fashion than during contract negotiation, and settlements are often tantamount to amendments to the collective bargaining agreement.<sup>91</sup> Although the intensity of institutional and individ-

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88. Employees who do not join a union "would not be entitled to attend union meetings, vote upon ratification of agreements negotiated by the union, or have a voice in the internal affairs of the union." *NLRB v. General Motors Corp.*, 373 U.S. 734, 737 (1963) (comment of union vice president approved by NLRB).

89. Union members are notorious for failing to attend union meetings, but researchers have found that turnout is significantly improved when vital economic decisions are on the agenda. See *TRADE UNION GOVERNMENT*, *supra* note 81, at 20-22; A. COOK, *supra* note 83, at 210-11.

90. See *THE DUTY OF FAIR REPRESENTATION*, *supra* note 36, in which eight contributors discuss the duty of fair representation as if the only significant concerns were the individual grievant's access to representation for grievance and arbitration and the union's diligence before and during arbitration hearings. See also Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 *TEXAS L. REV.* 1119 (1973); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 *CALIF. L. REV.* 663 (1973). Cf. Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 *U. ILL. L.F.* 35, arguing that there is a significant difference between the contract-negotiation and administration obligations, but accepting uncritically the simplistic proposition that the workers' interest in grievance handling is greater, and more deserving of protection, than their concerns about the ongoing economic terms which govern the workplace.

91. See Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Func-*



ual interests may vary between negotiation and implementation, it does not ineluctably follow that representation of group interests and individual interests may be assigned discretely to the contract negotiation and contract administration functions of a union.

A good example of the problems with proposals that see unions through the narrow lens of grievance resolution may be found in Clyde Summers's suggestion that federal law accommodate the postnegotiation needs of individual employees through "direct recognition of the individual's right under the contract."<sup>92</sup> His suggestion grants each employee three rights: the right to invoke contractual grievance-arbitration machinery if the union refuses to do so, the right to participate in the arbitration hearing on an equal footing with the union and management,<sup>93</sup> and the right not to be bound by a grievance settlement without consent.<sup>94</sup> Where an individual worker protests a union decision not to pursue a grievance or not to seek arbitration, or questions the union's ability to present the best case, the Summers model is a good one. The grievance-arbitration machinery would not be flooded by frivolous disputes, because employees must initiate and fund their individual claims. If an employee refuses to accept a union-approved settlement, the refusal would only trigger an additional discussion, higher level grievance negotiations, or perhaps arbitration. Since the employee bears all costs, except where the

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*tions of Industrial Disobedience*, 34 OHIO ST. L.J. 750, 802-04 (1973). On the distinction between a union's duties when negotiating a collective bargaining agreement as compared to administering one, see *Beriault v. Local 40, Super Cargoes & Checkers of the Intl. Longshoremen's Union*, 501 F.2d 258 (9th Cir. 1974). The Railway Labor Act acknowledges these two stages. The R.L.A. provides for resolution of major collective bargaining disputes through federal district court injunctions and through voluntary arbitration before the National Mediation Board, 45 U.S.C. § 155 First (b) (1976). Minor disputes, those involving the meaning or application of a particular contract provision to a specific situation, are resolved by the National Railroad Adjustment Board, which has primary jurisdiction. 45 U.S.C. § 153 First (i) (1976).

92. Summers, *Individual Rights*, *supra* note 42, at 410 n.188.

93. An individual member or group of members may enforce this right by initiating arbitration or by intervening in arbitration between the employer and the union to protect interests directly affected by the outcome.

94. Summers, *Individual Rights*, *supra* note 42, at 398-410. To a certain extent, Summers's insistence on employees' rights to control their own grievances is but another form of Wellington's concern for employee-community expectations. The right to reject or accept settlement of a grievance is tied to the expectations the worker derives from the collective bargaining agreement, the folklore of the workplace, and perhaps most importantly, the support of coworkers and the union. Conversely, the resolution of a particular grievance affects other workers' expectations by interpreting a shared contract. See notes 57-68 *supra* and accompanying text.

worker prevails and the union refused to seek arbitration solely because of doubts about the outcome,<sup>95</sup> employees will not seek arbitration casually. When the union seeks arbitration, intervention by an individual whose interests are directly affected should not require many additional evidentiary presentations. In general, the costs of the Summers approach to settling the grievances of individual workers are minimal.

Unfortunately, Summers mistakenly assumed that his proposal, with minor modifications, could be generalized to permit employee groups with a common interest distinct from the union's to participate in grievance settlements.<sup>96</sup> Under such a plan, a rival union could advance its own dreams of a takeover by offering financial support to grieving dissidents sympathetic to its goals. If the union leadership panicked and began to back every arguable grievance, management would lose its traditional reliance on union judgment to screen spurious complaints. Furthermore, the proposal might backfire. An arbitrator facing honest grievance disputes between a minority interest group, the union leadership, and the employer might accord the union interpretation inordinate weight simply because it represented a sort of middle ground.<sup>97</sup> Even more appalling is the possibility that an arbitrator might choose to maximize personal prospects for future employment by agreeing to the interpretation of the two powerful groups, casting aside the seemingly less significant view of the interest group.<sup>98</sup>

The most ambitious proposal for considering substantive interests during grievance settlements expands judicial review of how unions settle employee grievances.<sup>99</sup> Andrew Levy argues

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95. Summers, *Individual Rights*, *supra* note 42, at 403.

96. See Summers, *What Constitutes Fair Representation?*, *supra* note 42, at 60-83; Summers, *Individual Rights*, *supra* note 42, at 407 n.182.

97. A difficult problem could arise using the Summers approach. If an arbitrator's award on a seniority issue is favorable to the position taken by a dissident employee group, what happens when the group files an unfair labor practice charge, alleging a violation of the duty of fair representation against the union, and seeks recovery of the costs of the arbitration? Cf. *NLRB v. Local 396, Intl. Bhd. of Teamsters*, 509 F.2d 1075 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975) (court upheld Board discretion to award legal fees to workers in a successful suit to force the union to pursue their grievances in arbitration).

98. This outcome would be even more attractive to the arbitrator if the union and the employer agree on the proper interpretation, as frequently occurs when dissidents are denied access to arbitration by their union. See Schatzki, *supra* note 9, at 908 n.28. Summers appears to endorse a union's actions so long as the union's position is based on the contract and the union acts consistently, regardless of the merits of the grievance in question. See Summers, *What Constitutes Fair Representation?*, *supra* note 42, at 72-75.

99. Levy, *The Collective Bargaining Agreement as a Limitation on Union Control of*

that, because plaintiffs find it too difficult to prove bad faith and discriminatory motive in duty-of-fair-representation cases, the courts should subject union settlements to one of two new standards of representation. Under the first standard, courts would evaluate a settlement as they would evaluate an arbitral decision: if the union's decision failed to draw its essence from the language of the collective agreement, the court would order arbitration. Under the second, more complex standard, courts would think like arbitrators: whether or not a settlement is arguably justified by the contract's language, if a court thinks that an arbitrator would deem it unacceptable, then the court would require it to be arbitrated.<sup>100</sup> Levy favors the latter approach, although he admits that the courts might have difficulty making anticipatory determinations of matters traditionally reserved for the arbitrator.<sup>101</sup>

The desire for neutral, third-party review of settlements unsatisfactory to the grievant is understandable, but the difficulties with Levy's proposal suggest the reasons why it has not been adopted. It is far more cumbersome than Summers's elegant and self-executing scheme for giving employees control over their grievances. Moreover, the Levy plan requires the federal courts to screen all claims — whether frivolous or meritorious, whether from individual grievants or from a group. The added burden for court dockets is difficult to justify, particularly since the federal judiciary believes the NLRB and arbitrators more able to evaluate workplace disputes.<sup>102</sup>

Further, any time a judge ordered arbitration pursuant to the Levy plan, the arbitrator would be forced into an insufferable position. How may an arbitrator pretend to be impartial, knowing that a judge had, notwithstanding the opinions of the union and management, found a grievant's complaint legitimate? The effort would be particularly painful for an arbitrator who was familiar with the industry, the tenor of disputes, and the general complexion of settlements. Even where an arbitrator was asked only to mediate, the mediation dialogue might be hamstrung by the arbi-

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*Employee Grievances*, 118 U. PA. L. REV. 1036 (1970).

100. *Id.* at 1056-59.

101. *Id.* at 1058-59.

102. *See* cases cited in note 60 *supra*. Levy believes that since courts developed the duty of fair representation, they should function as a prearbitrator. However, the courts have derived the duty from statutory interpretation. The judicial interpretations, like the statutes themselves, then serve as guides for administrative and arbitral bodies.

trator's knowledge that a federal court had already defined the contours of a reasonable settlement.<sup>103</sup> Unlike arbitrators under the Summers plan, who might know that a settlement agreeable to both union and management had reached arbitration at the insistence of a grievant, Levy's arbitrators would know that the arbitration was forced by a higher authority.<sup>104</sup>

Finally, I question Levy's suggestion that grievance settlements may be consistent with a collective bargaining agreement but unacceptable to an arbitrator. Levy does not cite any areas of labor law in which judicial evaluations of a contract claim differ from arbitral evaluations. And such examples may be difficult to find given the differences in contract language and the relative paucity of judicial and arbitral decisions dealing with similar work issues. In one obvious area where such comparison might be made — adjustment of seniority rights — cursory research reveals that judicial acceptance of union leadership determinations is mirrored in arbitrators' resolutions of such disputes.<sup>105</sup>

This discussion of worker discontent and scholarly concern only pricks the surface of contemporary worries over worker rights within unions. Of course, mere dissatisfaction with unions does not indict the labor movement. Workers and their unions must work together or face employer autocracy. Nevertheless, we should see dissatisfaction as a signal that, within the broad framework of union representation, the law might find better ways to accommodate the desires of all union members.

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103. Cf. *Kesner v. NLRB*, 532 F.2d 1169, 1175 (7th Cir.), *cert. denied*, 429 U.S. 983 (1976): "When one's own representative who has been willing to assume that status proclaims a lack of merit [to the grievant's claim] it is indeed likely to be a *coup de grace* to the claim."

104. A similar criticism may apply to an arbitrator's award made after judicial screening of the settlement proposed by the employer and the union. Knowing that a federal judge has approved a particular resolution in advance, an arbitrator might avoid the very award that seems mandated by the contract. On the other hand, an arbitrator issuing such an award — as compared to mediating a dispute — may feel that as long as a court has predicted that a certain resolution is acceptable there is no reason to pay any attention to the court's feeling that the resolution is unreasonable. This latter instance would yield a curious situation in which an arbitrator determines that an award draws its essence from the contract and, on *postarbitral* review of that award, a federal court is bound to agree. Thus, there is no value in influencing the process *prior* to arbitration.

105. I am not aware of any studies comparing judicial and arbitral evaluations of union resolution of competing economic interests involving similar work issues and contract language.

### C. Majority Rule as a Value in the Workplace

The contours of any accommodation must, however, take into account a pivotal concept in labor law — union decisions by majority rule.<sup>106</sup> Generally, Congress and the courts have proceeded on the utilitarian assumption that majority rule is the system most likely to maximize overall worker welfare.<sup>107</sup> The underlying assumption is that all individual workers should weigh equally in the social balance. This application of the Benthamite justification for liberal democracy is appealing in part because it is familiar in American political life.<sup>108</sup>

But majority rule, like most simple principles, suffers from imperfections if applied absolutely. It ignores intensities of individual worker preferences, and it is precisely the intensity of these preferences which may vary greatly in intensity, as we have seen.<sup>109</sup> For instance, workers with preschool children may have a strong interest in securing day-care facilities as a benefit provision during contract negotiations. Without such facilities, they may be compelled to leave work to care for their children. On the other hand, the majority of workers may not have small children and thus may not derive any benefit at all from a day-care center. If the majority votes its self-interest, it will always defeat the day-care center, even though it may gain only a few cents per hour in higher wages by doing so. The intensity of the minority's preference and the mildness of the majority's preference are not reflected under a simple one person, one vote system.

The theoretical objections are exaggerated in the union context, where members' participatory rights appear more formal than effective. Workers rarely have the right to participate in

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106. For a historical discussion of the majority principle, see Schreiber, *supra* note 8. *But see* McConnell, *supra* note 8.

107. Justice Marshall best expressed this assumption:

Central to the policy of fostering collective bargaining . . . is the principle of majority rule . . . . In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.

*Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975) (citations and footnotes omitted). *See also* *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

108. For a discussion of why majority rule is peculiar to American labor laws, see Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1426-27 (1971).

109. *See* text at notes 27-50 *supra*.

decisions to proceed with or settle grievances they have filed,<sup>110</sup> or even to influence union conduct in arbitration hearings.<sup>111</sup> Increasingly, national staffs of union leaders negotiate nationwide collective bargaining agreements that do not benefit from any membership discussion.<sup>112</sup> Furthermore, workers generally assume that the union leadership would retaliate against any attempts to participate in the manner contemplated by the Landrum-Griffin Act.<sup>113</sup> The law may not be responsible for worker apathy,<sup>114</sup> but at least it should give nonapathetic workers the right to participate in union decisions and effectively protect them from retaliation when they do participate.<sup>115</sup>

Realizing that the outweighed interests of the majority do not always maximize worker welfare, modern collective bargaining embraces several exceptions to the theory that majority rule is a prerequisite to effective union representation. These excep-

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110. Participatory opportunities for affected workers may be lacking when Title VII processes are used as well. See *Cox v. Allied Chem. Corp.*, 538 F.2d 1094 (5th Cir. 1976), *cert. denied*, 434 U.S. 1051 (1978); *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832 (9th Cir. 1976); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 289 (N.D. Cal. 1976), *affd. sub nom. Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978).

111. Cf. *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976) (because a worker relies so heavily on union representation during arbitration, the arbitration decision does not bind the worker if the union breaches its duty of fair representation to that worker). *But see, e.g., NLRB v. Local 396, Intl. Bhd. of Teamsters*, 509 F.2d 1075 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975).

112. See, e.g., *Davey v. Fitzsimmons*, 413 F. Supp. 670 (D.D.C. 1976), discussed in text at notes 48-50 *supra*.

113. The fear of retaliation is not irrational. Wellington noted in 1958 that unions may have good reason to discriminate against dissenters who exercise participatory rights, since those employees represent a threat to the union's political power. Wellington, *Union Democracy*, *supra* note 14, at 1334. See also J. SEIDMAN, *supra* note 14, at 28. As Wellington predicted, the Landrum-Griffin Act has not diminished this potential. See Leslie, *supra* note 22, at 1315. For a distressing example of this point, see *Newman v. CWA*, 97 L.R.R.M. 2606 (2d Cir. 1978), discussed in text at note 51 *supra*.

114. See Summers, *The Usefulness of Law in Achieving Union Democracy*, 48 AM. ECON. REV. 44, 48, 52 (1958). See generally Wellington, *Union Democracy*, *supra* note 14, at 1330. For a generally positive evaluation of Landrum-Griffin's effect, see P. TAFT, *RIGHTS OF UNION MEMBERS AND THE GOVERNMENT* (1975).

115. Cf. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, tit. VII, § 704(a), (codified at 42 U.S.C. § 2000e-3(a) (1976)) (making it an unlawful employment practice for an employer or labor organization to discriminate against any union member or other employee who "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter"). *But see Garret v. Mobil Oil Corp.*, 531 F.2d 892 (8th Cir.), *cert. denied*, 429 U.S. 870 (1976), holding that an employer did not violate § 704(a) in firing a black worker who peacefully presented complaints of discrimination to the employer's manager rather than to her supervisor.

tions also cast doubt on the corollary notion that only through majority rule can a union present the united front that is allegedly necessary for effective negotiation with management. For example, groups of employees sometimes circumvent the preference of the majority by bargaining as isolated "work groups." Often such negotiations convince a supervisor to grant noncontractual privileges to increase productivity. Such factional bargaining, which may also be camouflaged as grievance settlement, "is rarely considered to derogate from union authority. Indeed, the union is normally aware of tacit agreements reached, and these agreements are not normally incorporated into the collective bargaining agreements."<sup>116</sup>

Of course, one might say that because the union leadership knows of, and tacitly approves, work-group negotiations, they are not pure exceptions to majority rule. Yet such reasoning cannot explain the continued presence of union-disapproved "wildcat activity" by bargaining-unit members, nor can it explain the forced presence of minority representatives in contract negotiations concerning employment discrimination. But neither phenomenon has destroyed the unions.

Wildcat activity is clear evidence of intraunion dissension, but the unions have retained their bargaining strength even with a less than united front.<sup>117</sup> Employers expect that their union contracts assure uninterrupted production and that the union will quell any worker dissatisfaction by enforcing its rules against unauthorized activity.<sup>118</sup> But when those employer expectations are disappointed, the number and scope of collective bargaining agreements does not appear to diminish.<sup>119</sup> There is no evidence

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116. Atleson, *supra* note 91, at 792.

117. On the utility and rationality of wildcats, see Atleson, *supra* note 91, at 754-55. Indeed, issues in wildcats may be of little interest to union leaders even though rank-and-file workers take them seriously. In wildcat strikes, employees may be protesting joint employer-union action, *see, e.g.*, *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), or union acquiescence in employer decisions supported by collective bargaining provisions, *see* Atleson, *supra* note 91, at 769.

118. Wildcat action occurs despite the employer's right to retaliate through discharges; and despite contract provisions linking pension fund contributions to productivity. Atleson has suggested that employees represented by weak unions are in a double bind. They will not be well-protected in grievance processing and will be more easily subjected to discharge should they engage in wildcat activity, Atleson, *supra* note 91, at 816.

119. The difficulties in negotiating a 1977 Mine Workers' contract do not diminish this argument. The workers' difficulties were, in part, caused by the mine owners' previous insistence on arbitrating every dispute rather than engaging in informal settlement at the

that wildcat activity influences an employer's decision to accept employee organization. This suggests that effective collective bargaining does not always require a united front of workers.<sup>120</sup>

Divided worker representation<sup>121</sup> in confrontations over employment discrimination furnishes an even more telling exception to the majority principle. Both employers and unions have permitted representatives of protected minority groups to bargain over new contract terms and to appear in arbitration hearings.<sup>122</sup> Such minority group representation has occasionally exposed inconsistent labor positions on certain issues, but it has still allowed satisfactory dispute resolution.<sup>123</sup> Admittedly, the threat of litigation may motivate labor and management to permit multi-interest representation,<sup>124</sup> but the parties' motives for acknowl-

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site and by the UMW leadership's historic inability to control the rank and file. Even after rank-and-file rejection of the bargaining council-recommended contract, mine owners continued to negotiate. Thus, the owners must have perceived that the benefits of a nationwide agreement outweighed dissatisfaction based on the union leadership's inability to control rank-and-file workers. For a discussion of these negotiations see Horvitz, *What's Happening in Collective Bargaining?*, I.R.R.A., PROCEEDINGS OF THE 1978 ANNUAL MEETING 453 (1978).

120. It could, of course, be argued that employers tolerate wildcat activity only to the extent that there is no significant business loss or that unions are liable for damages in connection with employer business loss. The extent of union liability merely defines the boundaries of employer-accepted nonmajority conduct; it does not undermine the conclusion that nonmajority activity can be consistent with collective bargaining. *Cf.* Atleson, *supra* note 91, at 756-58 (wildcats are frequently not intended to alter institutional arrangements, but are grounded in a desire to have work problems taken seriously). *See also* Schatzki, *supra* note 10, at 917 (wildcatting helps weaker factions of employees air their views).

121. The terms "divided worker representation" and "multi-interest representation" mean that union spokespersons do not present the only worker position on disputed issues, and that protected minority groups have separate representation.

122. Minority groups may be represented by selected counsel or by the EEOC, with the EEOC always considering itself as also representing the public interest. Sometimes more than one agency representative of minority groups may be present. *See* Local 189, *United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

123. Frequently, the employer and the union appear to be on one side of the table, with the EEOC and minority groups on the other. In these circumstances, the interests of the employer and union can never be identical, and all parties to the negotiation must consider each opponent's demands from the perspective of self-interest.

124. The threat of litigation or a decree guarantees that the EEOC participant will not be ignored and that the minority interests are represented at the bargaining table and incorporated into the terms of the agreement. At times the attempt to avoid litigation through conciliation may not work, as in *Kaplan v. Local 659, State Employees*, 7 Fair Empl. Prac. Cas. 894 (C.D. Cal. 1973), *affd.*, 525 F.2d 1354 (9th Cir. 1975), where the union had negotiated a conciliation decree with the Department of Justice concerning the



edging diversity in the labor force do not detract from my present point.<sup>125</sup> Effective bargaining and contract enforcement do not depend completely upon a single union bargaining stance dictated by majority choice, and they are not necessarily undermined by the participation of special interest groups in negotiation and arbitration.<sup>126</sup>

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employment of ethnic minorities. Plaintiff, a female, was not covered by the conciliation agreement, but recovered anyway, on the district court's finding of a pattern of discrimination against women. Similarly, in *EEOC v. AT&T*, 365 F. Supp. 1105 (E.D. Pa. 1973), *affd. in part and remanded in part*, 506 F.2d 735 (3d Cir. 1974), the court held that a consent decree mandating remedial action in the areas of wages, goals, timetables, transfers, and promotions, did not insulate the company from private litigation. In *McAleeer v. AT&T*, 416 F. Supp. 435 (D.D.C. 1976), the court held that a consent decree requiring preferential promotions was not a defense to an action for damages by a man who was passed over for a promotion because of his gender. *But see EEOC v. AT&T*, 419 F. Supp. 1022, 1055 n.34 (E.D. Pa. 1976), *affd.*, 556 F.2d 167 (3d Cir. 1977) (Title VII recognizes a narrow but complete immunity for employer conduct undertaken in good faith reliance on a written interpretation by the EEOC, and a consent decree qualifies as such.).

125. In fact, outside the context of employment discrimination, there is support for the view that grievance arbitration proceedings will not be destroyed if the grievant, as well as the union and management, participate in arbitration hearings. Multi-interest arbitration has been ordered in duty-of-fair-representation cases, with the union responsible for paying the fees of the grievant's independent counsel. *See NLRB v. Local 396, Intl. Bhd. of Teamsters*, 509 F.2d 1075 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975); *cf. Scott v. Anchor Motor Freight, Inc.*, 496 F.2d 276 (6th Cir. 1974) (where union was held liable for grievant's legal fees incurred at trial, not during arbitration, when grievant received no relief from his employer and no help from the union despite his good-faith effort to invoke the contract's grievance procedure). Even in the absence of a breach of the duty of fair representation, the grievant has been made a party to arbitration proceedings when the arbitrator has determined that his inclusion would be advantageous as a procedural matter. *See Hotel Employees v. Michelson's Food Servs., Inc.*, 545 F.2d 1248 (9th Cir. 1976). These courts appear to recognize that postarbitration access to separate counsel may come too late. *But see Acuff v. United Papermakers*, 404 F.2d 169 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969); *Laney v. Ford Motor Co.*, 95 L.R.R.M. 2002 (D. Minn. 1977) (employees alleging conspiracy may not have independent representation at contractually required proceedings). Some unions may offer separate representation to the grievants. *See Crenshaw v. Allied Chem. Corp.*, 387 F. Supp. 594, 600 (E.D. Va. 1975). *But see Ensina v. Tony Lama Boot Co.*, 448 F.2d 1264, 1265 (5th Cir. 1971) (union could offer to take case to arbitration on condition employee pays costs).

126. The presence of special interest groups at the bargaining table appears to be gaining acceptance in grievance and arbitration hearings. Following the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (an adverse arbitral decision will not bar a timely Title VII claim but under certain conditions the arbitrator's determination may be given "great weight" by the federal courts), some employers and unions have negotiated collective bargaining procedures for handling employment discrimination grievances. A contractual provision for separate grievance representation was suggested by two of the Court's reasons for finding traditional arbitration proceedings inadequate for final resolution of employment discrimination claims under Title VII. First, the Court was concerned that in an arbitration hearing the grievant would not benefit from the procedures authorized by Congress in Title VII. 415 U.S. at 55-59. A contract provision which replicates the procedural regularity afforded complainants in

Because majority rule has proved an imperfect means of incorporating multifarious worker interests into union decisions, groups of disgruntled workers have turned to the courts to vindicate their interests. In class action litigation, courts have recognized that unions, although they theoretically represent the interests of all workers, may not be the proper class representative for a bargaining unit. In *Banks v. Seaboard Coast Line Railroad*,<sup>127</sup> a class of black workers sued their employer and union (the Brotherhood), seeking to realign seniority rights. The court held that white employees were indispensable parties to the action, even though the black employees were alleging that the defendant union supported the discriminatory seniority provisions to the advantage of white employees. In the court's view, the union had

an equal duty to represent those members comprising the class which plaintiff represents as well as the white employees whose interest would be realigned by any order granting relief to plaintiff. It thus appears that the white employees' interest is not the same as the Brotherhood's, and that the Brotherhood cannot fairly and adequately represent the interest of the class.<sup>128</sup>

The situation is the same when a union has attempted to act as a plaintiff class representative in challenging employment practices. In *Communications Workers of America v. New York Telephone Co.*,<sup>129</sup> the court refused to certify the Communication Workers of America as representative of a class of all nonsupervisory employees in a suit alleging discriminatory disability insurance coverage. It reasoned that the union's interest was not coex-

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federal court would necessarily include the right to separate representation. Second, the Court recognized that in discrimination arbitrations the union's interest might differ from that of the grievant, particularly where the issue is one of contract interpretation. 415 U.S. at 58 n.19. The *Gardner-Denver* decision speaks to the issue of "deferral" particularly when the arbitrator decides a factual issue. 415 U.S. at 60 n.21. Multi-party representation, including independent counsel, for the grievants, would insure a complete airing of the adverse positions. For examples of trilateral arbitration provisions, see *Basic Vegetables Prod., Inc.*, 64 Lab. Arb. 620 (1975) (Gould, Arb.); Hammerman & Rogoff, *The Union Role in Title VII Enforcement*, CIVIL RIGHTS DIG., Spring, 1975, at 22. For an evaluation of the role of arbitration in private employment discrimination cases, see Meltzer, *Labor Arbitration and Discrimination: The Parties' Process and the Public's Purposes*, 43 U. CHI. L. REV. 724 (1976).

127. 51 F.R.D. 304 (N.D. Ga. 1970).

128. 51 F.R.D. at 305 (citing *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944)). See also *Sagers v. Yellow Freight Sys., Inc.*, 58 F.R.D. 54, 61 (N.D. Ga. 1972) (distinguishing *Banks* on the ground that the union in *Sagers* was not "vigorously" representing the white employees' interests).

129. 8 Fair Empl. Prac. Cas. 509 (S.D.N.Y. 1974).

tensive with that of the class, because disability insurance is often a subject of collective bargaining.<sup>130</sup>

The courts have also questioned whether unions seeking to intervene on behalf of a class of workers can adequately represent that class. In *EEOC v. AT&T*,<sup>131</sup> the Communications Workers (CWA) sought to intervene as a party plaintiff after entry of a nationwide consent decree to remedy sex discrimination. In rejecting the union's petition, the Third Circuit observed that the CWA's

position as bargaining representative of all its members, both those aggrieved and the equally large, if not larger, number of those who are not adversely affected by, and indeed may to some degree benefit from, the alleged unlawful employment practices, clearly disqualifies it from acting in this action as a class representative on behalf of the former group.<sup>132</sup>

A union ruled by an unfettered majority cannot adequately represent the interests of all groups within it. The class action cases acknowledge this almost self-evident truth. And neither pure majority rule nor the facade of a united front is necessary

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130. Judge Tyler relied on two arguments. First, the judge cited *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78, 84 n.6 (S.D.N.Y. 1973), in which the court held that even if the potential conflict between the plaintiff union and individual plaintiffs were not so serious, the union could not be the proper class representative of individuals. *See also International Union of Elec. Workers v. Westinghouse Elec. Corp.*, 17 Fair Empl. Prac. Cas. 16 (N.D.W. Va. 1977). Second, Judge Tyler emphasized the "increasing number of Title VII cases in which a class of employees is suing its union as well as the employers." 8 Fair Empl. Prac. Cas. at 513 n.1. *But see International Woodworkers v. Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977), in which the Eighth Circuit refused to hold as a matter of law that a racially mixed union cannot be a class representative for black employees in a Title VII suit challenging employment practices.

131. 506 F.2d 735 (3d Cir. 1974).

132. 506 F.2d at 741. Judge Maris's comments were in response to the union's petition to intervene under FED. R. Civ. P. 24(a)(1); the petition under rule 24(a)(2) was also rejected, since CWA's desire to protect its ability as a bargaining agent seemed more akin to the defendant's interest than to the plaintiffs'. *But see EEOC v. AT&T*, 556 F.2d 167, 173 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978), in which the CWA attacked a consent decree to which it was not a party and was held to have standing to sue as the representative of its members, even though the union might have acted "inconsistently with the best interests of some of the persons whom they represent in the collective bargaining process." The decision does not necessarily represent a retreat from the doctrine that unions cannot adequately represent the interests of all members. CWA was intervening on behalf of white males whose interests would be adversely affected by the consent decree and who had not been represented when its terms were negotiated. At the same time, the original plaintiffs in the massive negotiations leading to the consent decree had adequately represented those union members whose interests were not being protected by the union. For an excellent discussion of the use of intervention in affirmative action litigation, see Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31 (1979).

for effective worker representation. As we have seen, the modern labor world reflects its understanding of that reality by fashioning *de facto* exceptions to the basic principle of majority control. Thus, while that principle remains the cornerstone of union operations, room still remains to modify it whenever it bears too harshly upon the welfare of particular groups of workers.

### III. THE VETO PROPOSAL

If we accept that the evidence of dissatisfaction with unions is substantial, and that majority rule need not absolutely govern union decisions, then a reevaluation of the relationship between economic interest groups and their exclusive representatives is in order.<sup>133</sup> Inspired by Wellington's perception that employee expectations are a legitimate guide for reviewing union decisions<sup>134</sup> and by Lipset's argument for organized internal opposition,<sup>135</sup> I propose that workers having common economic concerns within unions be allowed to form interest groups, that unions be required to deal in good faith with each interest group,<sup>136</sup> and that the NLRB assert its jurisdiction to review disputed union decisions.<sup>137</sup> Additionally, these interest groups should possess a limited right to veto decisions of the majority, to assure that union leadership will heed their concerns.<sup>138</sup> The interest-group-veto system would

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133. I have already explained the reasons for rejecting the Wellington, Lipset, and Schatzki proposals. See notes 56-80 *supra* and accompanying text.

134. Wellington, *Union Democracy*, *supra* note 14. See note 59 *supra* and accompanying text.

135. LIPSET, *supra* note 76.

136. Although the analogy is admittedly crude, it seems to me that, currently, economic interest groups stand in somewhat the same relationship to their unions as labor did to management in 1935, and that these groups require legal intervention to protect their economic interests. Of course, the disputes between union leadership and their constituents, unlike the antagonism between labor and management which stems from conflicting goals, is episodic and arises out of setting priorities for common goals.

137. *H.K. Porter Co., Inc., Disston Div.-Danville Works v. NLRB*, 397 U.S. 99 (1970), is not a barrier. See note 159 *infra*.

138. Interest groups composed of a majority of the membership would also possess the veto power. Although a political majority has access to legal tools and may use the political process to reprimand union leadership for unpopular decisions, practical experience suggests that these workers ought not to be foreclosed from using the veto since they often feel themselves tyrannized by a minority, are unaware of available legal supports, and are timorous of the political process. Moreover, a particularly intransigent minority should not be able to force a contract provision on an unwilling majority group, both of which are concerned about a particular issue. If the majority group were not able to exercise a veto in the initial vote, it would be possible for the minority to ratify the special provision and for a majority of all the voters to ratify the entire contract. Such a result would inequitably subordinate the majority interest to that of the minority.

encourage conflicting interest groups to resolve their differences before the union leadership negotiates with management. It thus would permit the union to maintain a united bargaining front, while enhancing the likelihood that the membership would ratify and adhere to the eventual agreement.<sup>139</sup>

In Subsection A, I offer a brief overview of the veto proposal, sketching its contours but deliberately leaving its texture imprecise. I hope that readers will be able to see quickly the manner in which the different sides of the proposal reflect and reinforce one another. In Subsection B, I share my conception of the proposal's implementation by developing a detailed hypothetical that illustrates many of the advantages that interest group vetoes offer. Readers will thus have an opportunity to discuss the system's inner workings, to criticize, and in searching for replies to their criticisms, to improve the proposal. Finally, in Subsection C, I discuss some of the veto proposal's special implications for NLRB review.

### A. *An Overview of the Veto Proposal*

#### 1. *Local Meetings and Interest Group Certification*

Before negotiating with management, a national union would have to discuss its intended strategy and contract demands with the local membership. It would send representatives to meetings of every union local, long before the beginning of union-management negotiations. At those meetings, members could ask questions and probe the leadership's position on any issue they thought important. Workers sharing a common economic interest who believed the union's position threatened that interest could raise their objections.<sup>140</sup> If the meetings failed to satisfy them, such workers could organize, choose leaders, and ask the national leadership to certify them as an interest group.

A certification request need contain only three things:

- 1) The names of the group leaders,
- 2) The common economic interest defining the group, and
- 3) The contract negotiation issues on which the interest group disagrees with the union leadership position.

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139. Although one might assert that the union already has these incentives, the sources for dissatisfaction discussed in Section II *supra* suggest that the incentives are, at times, inadequate.

140. If a union comprises only a small, homogeneous group of workers, then the veto proposal would probably be superfluous. However, for the same reason, the proposal would probably pose no serious problem to union efficiency in such a circumstance.

Within a fixed time of the application (perhaps two months), the national union leadership would have to decide whether to certify the interest group. If denied certification,<sup>141</sup> the interest groups could petition the NLRB. If the union granted certification, the interest group members would be assured a voice in the formulation of contract demands.<sup>142</sup>

## 2. *Intraunion Discussions and Searches for Compromise*

Interest groups would receive union funds to coordinate their activities. They would send representatives to the local meetings, where they would debate their disagreements with the union leadership. Locals throughout the union would be exposed to different perspectives on the broader goals of the union. The debate would encourage compromise solutions to the early problems and would furnish the leadership with guidelines for their negotiating teams. In the long run, the discussions would promote the twin ideals of leadership accountability and worker participation.

## 3. *Negotiations, Interest Group Closure, and First-Round Vetoes*

After considering what it had learned from the local meet-

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141. One reason to refuse to certify is especially important. It would certainly be appropriate for a union to deny certification to a prospective interest group leader, call her Mary, on the ground that it had already certified her interest group, albeit under other leadership. To ensure that union funds were used most efficiently, the union could legitimately insist that Mary join a pre-existing group that shared her long-term economic interest. If the interest group refused to let Mary join, *see* text at note 144 *infra*, she could then ask the union leadership to decertify that interest group and to certify her as the head of a new interest group; if the union refused, she could appeal to the NLRB. If Mary joined the other interest group and then decided that its leaders were incompetent, she could attempt to replace them through the group's democratic processes.

142. Routinely, the NLRB would not reach a decision on the workers' complaint until some time after the signing of a new contract. A union that is uncertain about a group's certification or veto rights could evaluate its options by refusing to recognize the group and awaiting the Regional Director's disposition of a group member's unfair labor practice charge. The Director's failure to issue a complaint would end the matter; issuing the complaint could be read as informal advice that the interest group should be certified or given its veto rights. If a union continued its refusal even though a complaint issued, the objecting worker could request that the Director seek a § 10(j) injunction. Section 10(j) of the L.M.R.A. (Taft-Hartley Act), 29 U.S.C. § 160(j) (1976), reads, in part:

The Board shall have the power upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

ings, the union leadership would have to negotiate a contract with management.<sup>143</sup> It would then present that contract to the membership for ratification. Before the vote, all members would have to declare with which, if any, interest groups they would like to affiliate.<sup>144</sup> During the ratification vote, any certified interest group could, by a majority vote,<sup>145</sup> veto the entire contract if it failed to meet the objections the group had raised in its initial request for certification. A veto would be a binding rejection of the entire contract; it would force the union to discuss the problem with the interest group and to renegotiate in good faith with management.

#### 4. *Subsequent Limited Vetoes*

After the union leadership and management reached a second accord, it would be submitted to the membership. This time, interest groups would have only a limited veto. Any group that had vetoed the first contract proposal and any group whose interests had been harmed by the changes between the first and second proposals could again veto the proposed contract. However, a two-thirds supermajority in favor of ratification would override any second veto.<sup>146</sup> Such a limited veto power would ensure that interest groups could promote and protect their goals, while safeguarding the union majority from tyranny by the few.<sup>147</sup>

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143. If both union and management consent, the negotiations might involve testimony and suggestions from interest group representatives.

144. The factual determination of whether a particular member shares a group's defining common economic interest would be made by the interest group leaders, subject to appeal to the union leadership and ultimately to review by the NLRB. *See* note 141 *supra*.

145. Interest groups would make all their decisions by majority vote, even decisions on whether to replace their own leaders. Absolute majoritarianism is tolerable in an interest group but not in a union because of the assurances of relative homogeneity found in the former. Furthermore, participation in an interest group is voluntary; as we have seen, representation by a union is not.

146. Of course, there is nothing sacred about the 2/3 figure. A 60% requirement, or a 75% requirement might work just as well to protect the many different interests involved.

147. The limited veto rights also act as a barrier to the formation of fringe and splinter groups. Such groups would have little chance of forestalling contract negotiations and no chance of mustering the supermajority required to avoid contract ratification. Certain groups would recognize this fact without waiting for it to be demonstrated. Skilled workers would understand that they will be more successful together than in competition with each other. If workers abused the opportunity for interest group formation, it would be the union's responsibility to control the situation by refusing to utilize the veto proposal, thereby permitting review by the NLRB. *See* note 142 *supra*.

### 5. *NLRB Review of Union Conduct*

The union bears responsibility for the fair administration of the proposal. Any union action inconsistent with the purpose of the proposal — failure to certify a legitimate interest group, to bargain with management in a manner reflecting in good faith the needs of all interest groups, or to recognize a legitimate veto — could be appealed to the NLRB as a violation of section 8(b)(1)(A) of the Labor Management Relations Act. If the NLRB found a violation, it could order the union to take appropriate remedial action.<sup>148</sup>

#### B. *Application of the Veto Proposal*

To see how the veto proposal might operate, consider the following hypothetical. Bargaining unit members under 35, who constitute 70% of the unit, agitate for a shorter workweek and express their willingness to suffer reduced pay in exchange for increased leisure time. Workers over 50, who form 20% of the bargaining unit, want to maintain existing income levels, in part because they worry about the costs of educating their children and in part because they can retire early only if they continue to build their savings. Workers 36-49, who constitute 10% of the bargaining unit, are indifferent about the workweek issue. Assume further that the workweek proposal is the only union contract issue that provokes a dispute among the bargaining unit members. Although the union leadership prefers the position of the younger workers, it wants most to bargain without a strike and to reach a contract that will be enthusiastically ratified by the membership.

For the union, the optimal resolution of this conflict would be a contract term shortening the 40-hour, 5-day workweek by 5 hours but still ensuring a 40-hours-per-week pay base. All workers would be satisfied with this proposal, but (sad to say) management would not accept it without serious concessions from the workers. Therefore, the leadership concludes that its fallback, or realistic, position should be a 36-hour workweek (4 days of 9 hours each) with a pay base of 36 hours per week. This stance satisfies most workers, but older workers object because the 4-day, 36-hour week would reduce their earnings.

Without a veto system, the union could simply ignore its

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148. See text at notes 171-72 *infra*.



older members, with no obligation to seek a compromise. Ratification would quickly follow management agreement since the dissenting voters constitute only one-fifth of the membership. The majoritarian rules of union elections are often insensitive to intensities of preferences, and thus the minority status of the senior workers would also preclude political reprisal against the leadership.<sup>149</sup> Moreover, these workers would find no greater solace through legal or administrative channels: A duty-of-fair-representation suit would fail since there is no hostile, discriminatory, or arbitrary element in the union's decision.<sup>150</sup>

Under the veto proposal, however, older workers have a voice. They assert their interest before the union negotiates with management, rejecting the shorter-workweek proposal and demanding discussion of compromise alternatives. During prenegotiation local meetings, where leadership-sponsored contract proposals are presented and membership concerns aired, older workers discuss<sup>151</sup> their problems with coworkers and union officials. During the local meetings, individual senior workers clarify their common interests and band together. They contact similarly situated members of other locals and build an informal network of potential pressure groups. Finally, once it is clear that they need formal recognition to press their claim, they apply to the union leadership to be certified as an interest group.

After the union grants certification, the older workers' interest group seeks membership lists and applies for union funds to assist its campaign. The union leadership is obligated to send the general membership a copy of all disputed workweek proposals and to finance mailing the interest group's counter-proposals.<sup>152</sup>

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149. Only in the case of a union marked by many dissatisfied interest groups would nonratification or use of political influence be possible. But in a union so divided, the leadership would most likely avoid alienating a majority of the workers by sidestepping sensitive issues in collective bargaining demands. Alternatively, the leadership might cater to a sufficient number of powerful interest groups to create a voting majority that would support the contract and the leadership.

150. As the court observed in *Retana v. Apartment Operators Local 14*, 453 F.2d 1018, 1025 (9th Cir. 1972), "it will be the *unusual case* in which hostile discrimination, bad faith, dishonesty, or arbitrary conduct can be alleged" (emphasis added).

151. The term "discuss" emphasizes that internal union consultations over proposed bargaining demands should precede informal union-management contract talks as well as formal bargaining sessions. Discussions held one year before negotiations are necessary to permit interest group organizing. If general economic conditions change during the year, it may be necessary for the union leadership to consult more generally with their constituents.

152. Compare the similar plan used by the ITU to give the opposition political party access to members, *discussed in LIPSET, supra* note 76, at 297-304.

In this case, the older workers suggest that the union take one of two positions: insistence on a 36-hour workweek with a 40-hour pay base, even at the expense of other worker privileges, or insistence on a 36-hour workweek with a 36-hour pay base *and* guaranteed overtime assignments for all older workers, regardless of seniority.

In response, the younger workers form their own interest group, intent on defending the position of the union leadership.<sup>153</sup> The groups debate at the various local meetings, which work as a crucible for compromise.<sup>154</sup> Gradually, new alternatives evolve. The younger workers decide that they could live with a program offering guaranteed overtime to senior workers, as long as the guarantee only creates preferences for time-and-a-half — and not double-time — pay rates. The interest groups conduct straw polls of their members to determine which alternatives are acceptable and which are not. These polls give the union leadership guidelines for its negotiations with management. In fact, the negotiators use the guidelines as bargaining tools to present management with the nonratification risks associated with each management position. The negotiating parties can bargain knowing the limits of a ratifiable agreement.

Anything can happen during union-management negotiations, and I will now consider how several different possibilities would be treated under the proposal. Suppose first that the union leadership and management agree to a contract including a provi-

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153. In addition, the older workers' proposal could generate a third faction of workers with low seniority who might be displaced due to the high cost of preferential overtime. Of course, they would be entitled to the same organizational opportunities as the older workers, and ideally, their interest would be accommodated through compromise. If low-seniority workers were younger workers as well, the younger workers as a group might support their colleagues with low seniority.

The proposal generally requires interest groups to negotiate with the union before the union-management bargaining. However, if management subsequently proposes contract terms that would disadvantage an identifiable group of workers, the union would have an obligation to notify its membership and to submit any subsequent agreement on that issue to affected members. (Affected members would be identified by local officials.) Of necessity, the requirement of union-initiated notification regarding controversial management proposals would be limited to those situations where the harm to economic groups within unions was or should have been clear.

154. A union could decide, in consultation with its membership, that the best way to deal with sustained disagreement over contract terms is to submit the matter to an arbitrator or panel of arbitrators. In order to avoid biased decisions, the arbitrator would need to be designated as a permanent umpire for intraunion disputes with an established tenure; and the arbitrator would be required to give up any union-management appointments as arbitrator for issues arising under the collective bargaining agreement.

sion identical to the union's original fallback position: a 36-hour workweek, with a 36-hour pay base and no guaranteed overtime. In such a situation the older workers' interest group would have legitimate grounds to veto the agreement because it is directly opposed to the interests they expressed earlier. Of course, the older workers may decide not to exercise the veto — a majority of the interest group may prefer the security and over-all terms of the negotiated contract. Assuming that the older workers veto, however, the union leadership must decide whether to recognize the veto as a legitimate expression of interest group goals.<sup>155</sup> Under these circumstances, the leadership probably would; to defy the veto and declare the negotiated contract valid would certainly invite a successful appeal to the NLRB. After the veto, the leadership would caucus with the interest groups once more and return to bargain with management a second time. If still dissatisfied with the results, the interest group could impose a supermajority requirement for ratification by registering its disapproval.<sup>156</sup> Should the requisite supermajority ratify this version, the older workers' only recourse would be to complain that the union had violated its duty by not bargaining in good faith.

But things may not go so smoothly. During the first negotiations, management and the union may not agree to anything that anyone had proposed earlier. They may come up with a contract including a clause offering a 36-hour workweek with a 36-hour pay base and guaranteed overtime up to 39½ hours per week. Such a proposal would be very close to what the older workers had asked for, and thus one might expect them to choose not to veto. Yet perhaps this is a particularly contentious interest group, one that has been ignored for many years. The group may choose to veto anyway. In such an instance, the union leadership may reasonably decide that the interest group's behavior is beyond the legitimate scope of their interest and therefore choose not to recognize the veto. The interest group's appeal to the NLRB would most

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155. As is true throughout this proposal, the union administers every stage of the system. Its judgment is subject to review by the NLRB.

156. One reason that members might vote for ratification in such large numbers, despite the opposition of coworkers, would be a union assertion that the barrier to a satisfactory compromise on the workweek issue was the employer's unwillingness to approve any workweek contract term acceptable to the interest groups. The union's responsibility to a defeated interest group in this situation would be to file an unfair labor practice claim for refusal to bargain under 29 U.S.C. § 158(d) (1976), and to attempt to persuade the management negotiators to embrace a workweek proposal acceptable to the union as a whole in the next negotiations.

likely fail because of the close similarity of the group's expressed goals and the ratified provisions.

Thus, in my hypothetical, the veto proposal would help the older workers without allowing them to strangle the union. A group that is normally ignored would be given enough power to force discussion and a search for compromise, but not enough power to hold the majority hostage. This delicate balance is fairer than the accommodation reached under the present system.

### C. *NLRB Review of Union Conduct and Decisions*

#### 1. *Union Action That Violates Section 8(b)(1)(A)*

Under the veto proposal, various types of union conduct would be vulnerable to attack through section 8(b)(1)(A). First, union leadership might not hold local meetings to discuss proposed contract terms. Although I sincerely doubt that a union would ever violate the proposal so blatantly, the possibility should not be completely discounted. A union bent on defying section 8(b)(1)(A) or the duty of fair representation would probably prefer subtler efforts to exclude dissidents from local meetings or to limit the scope and amount of debate. Nonetheless, the NLRB should strike down with equal vehemence both the obvious and the devious forms of bad faith.<sup>157</sup>

The union could also violate section 8(b)(1)(A) by refusing to acknowledge an interest group, to circulate its proposals among the membership, or to provide funds for it to conduct its campaign. For example, if three workers in a small New Jersey local complained at a local meeting, declaring their dissatisfaction with the union's treatment of workers who share their interests, the president of the local would be obligated to inform them of their right to seek certification. Should they pursue that right, the union leadership would need to decide the showing of interest required to certify an interest group. The spirit of the veto proposal suggests that unions ought to respond to all expressions of discontent. On the other hand, the interest group certification process might be exploited by workers wanting to pursue petty vendettas or to siphon off union funds. That is a serious danger; I would therefore suggest that the NLRB find a violation of section 8(b)(1)(A) only when there is evidence that the leadership

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157. *Steele v. Louisville & N.R.R.*, 232 U.S. 192, 204 (1944), establishes that all unions must give bargaining unit members the opportunity to express their views on collective bargaining issues.

ignored a group whose interests were held throughout the membership, or were of compelling national concern.

For example, a union proposal to shorten the workweek would affect most workers' economic status and could be expected to inspire argument in each local. Once the locals fulfilled their duty to inform members of their right to apply for certification as an interest group, applications would undoubtedly flood the national headquarters. In such a situation, no one would question the significance of the interest. One can imagine other proposals that might stimulate opposition less widespread, but just as substantial. A proposal sacrificing benefits for those who are relocated might only receive criticism in those locals with high turnover rates; nonetheless, the opposition could be substantial enough to warrant certification if the dissidents could adequately define their shared economic interest.

There may even be situations where a union has a duty to respond although only a few locals report membership agitation. For example, only scattered locals having a high percentage of blacks and hispanics would be apt to propose a contract clause mandating preferential treatment for qualified members of minority groups. However, the small number of concerned locals should not relieve the union of responsibility to recognize the group, circulate the proposal, and support the group financially. The issue raised is of general social concern and a union would surely confront it eventually.<sup>158</sup> That the union did not choose the timing or forum for discussing the issue should be irrelevant to its obligation to deal with something so intimately related to both worker livelihood and public policy. The NLRB could require unions to follow the veto proposal procedures whenever the leadership knows or should know that a decision is vital to a discrete group within the union.

A final way for union leaders to violate section 8(b)(1)(A) would be to negotiate with management in bad faith or in disre-

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158. Sensitive or inherently disruptive issues that are not of current concern might not be sufficiently important to require immediate union discussion. For example, requests by blacks for a contract clause mandating preferential treatment would not require union response if made in 1930, because the contemporary climate would not alert the union that the issue was of general concern *and* was expected to be dealt with in the near future. Such demands would require union consideration in 1970. To the extent that guidelines are required for union decisions as to the seriousness or relevancy of interest group complaints, the Board could decide to require union compliance with the veto proposal when interest groups raise issues concerning all mandatory subjects of bargaining and those permissive subjects that are commonly bargained over in the industry.

gard of the veto procedures. This category of violations would include failure to negotiate consistently with the interest group objectives, failure to allow the affected interest groups an opportunity to veto any union-management proposals that differ significantly from intraunion compromises, refusal to recognize legitimate interest group vetoes, and, perhaps, knowing use of grievance settlements to change the meaning of previously ratified contract provisions in a way that harms interest groups. In each of these circumstances the NLRB should consider the reasons for the union's final decision (such as employer intractability or a reasonable belief that the rejected interest group proposal was unlawful), and the fairness of the union's decision in light of compromise discussions.<sup>159</sup> In essence, the Board would evaluate the union's bargaining posture.<sup>160</sup>

If the Board found in favor of the complaining interest group, it could choose among a variety of remedies commensurate with the nature and extent of the union violation. The NLRB might set aside the bargaining agreement or sever any offending provisions. It might also order the parties to bargain again and reach an agreement consistent with particular guidelines. If the NLRB required renegotiation of the offending provisions or the entire contract, it might direct the union and management to permit representatives of the affected interest groups to be parties to the negotiation. Even if it stopped short of ordering full participation in the negotiations, the NLRB might insist on interest group ratification of any subsequently negotiated contract or clause. Of course, the NLRB need not void the contract or sever the challenged provision. If the effect of the union's violation on interest group members is minor, the Board might order the union to compensate any disadvantaged workers but let the bargain stand. This lesser remedy would be available, standing alone or as a supplement to stronger sanctions, no matter what form the Board's order took. Similarly, the Board could hold the union

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159. The Board's role would be different from that condemned in *H.K. Porter Co., Disston Div.-Danville Works v. NLRB*, 397 U.S. 99 (1970), in which the Supreme Court held that the Board could not itself impose a contract term on the parties as a remedy for violating § 8(d) of the L.M.R.A., 29 U.S.C. § 158(d) (1976). Under the veto proposal, the Board would be evaluating the union's conduct and the fairness of the union's decision to the protesting interest group, not the quality of the bargain struck by union and management. To the extent that employer intractability or the illegality of the proposed contract provision constitute defenses, there would be no violation of § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976).

160. This is similar to the Board's role in duty-of-fair-representation cases.

liable to management for any monetary loss that the union's unlawful conduct caused. Whatever option the Board chose, it would have to ensure that the remedy was adequate to protect minority interests.

## 2. Designation of the NLRB to Remedy Violations

For purposes of description I have assumed that the NLRB will hear the employee challenges to union conduct under the interest-group-veto proposal. Although the NLRB is not the only possible reviewing agency, it is probably the most appropriate. Because my proposal governs conflicts between employee-workplace expectations and general union interests, it affects matters traditionally adjudged within the scope of the NLRA, the Act from which the Board draws its purpose and direction. Moreover, the NLRB has already developed a familiarity with worker-union conflicts over bargaining and grievance arbitration through cases alleging violations of the duty of fair representation. The Ninth Circuit has noted, "As a practical matter, intra-union conduct could not be wholly excluded from the duty of fair representation, for . . . internal union policies and practices may have a substantial impact upon the external relationships of members of the unit to their employer."<sup>161</sup> This familiarity would be useful in the early stages of implementing the veto proposal. Although federal judges are no doubt as able as Board members to evaluate straightforward claims of frustrated employee expectations, they lack the Board's intimacy with the union environment in which contract proposals are spawned.<sup>162</sup> In addition, litigating a challenge to union conduct before the Board may save time and money.

The NLRB has asserted jurisdiction over claims alleging union interference with members' statutory or contractual rights even where there was no allegation that the union violated its duty of fair representation. In *Glass Bottle Blowers Association (Owen-Illinois, Inc.)*<sup>163</sup> the Board found an independent violation of section 8(b)(1)(A) of the Taft-Hartley Act, and the Sixth Cir-

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161. *Retana v. Apartment Operators Local 14*, 453 F.2d 1018, 1024 (9th Cir. 1972).

162. There are two methods for attacking alleged violations of the duty of fair representation. See note 35 *supra*.

163. 210 N.L.R.B. 943 (1974), *enforced*, 520 F.2d 693 (6th Cir. 1975). See also *IAM Local 697 (Canfield Rubber)*, 223 N.L.R.B. 832 (1976) (ordering local to handle grievances of any bargaining unit member, without regard to union membership).

cuit enforced its order.<sup>164</sup> The Board determined that the union had violated section 8(b)(1)(A) by maintaining sex-segregated locals, each processing its own grievances although they operated under identical contracts. Since resolution of a grievance brought by either local would be binding on both, the first local to prosecute controlled the fate of any disputed contract interpretation issue. As Member Kennedy stated, "Denial of a voice to those who may be affected by the settlement of a grievance is an interference with Section 7 rights."<sup>165</sup>

The only plausible alternative to Board review of employee challenges under the veto proposal is arbitration. Arbitrators have surely developed a great sensitivity to issues of contract interpretation and industrial practice. However, two objections to the use of arbitrators appear decisive. First, disputes would involve not only concerns with grievance-arbitration procedures, but also statutory rights under section 7 of the Taft-Hartley Act.<sup>166</sup> Despite a preference for arbitral resolution of labor disputes, even the NLRB has recognized that it would be inappropriate to defer to arbitration when violations of section 7 rights are alleged.<sup>167</sup> More importantly, arbitrators, because they specialize in applying individual contractual provisions to single events, are relatively unconcerned with establishing uniformity among decisions interpreting different contracts. But uniform standards of union conduct are essential to the operation of the veto proposal: the proposal must protect all minority causes equally, even unpopular ones. Thus, the Board is the proper agency to provide consistency and to develop guidelines by which unions may judge their own conduct.

### 3. *Authority of the NLRB to Find and Remedy Violations*

There are three ways to establish the veto proposal and permit the Board to review union conduct. Congress could add a new unfair labor practice provision to the NLRA. Such a provision might read as follows:

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164. *NLRB v. Local 106, Glass Bottle Blowers Assn.*, 520 F.2d 693 (6th Cir. 1975).

165. 210 N.L.R.B. at 946. (Member Kennedy concurring in part and dissenting in part). The Sixth Circuit upheld the Board's order requiring the merger of the two locals, despite the proviso to § 8(b)(1)(A) which permits unions to establish their own membership criteria. 520 F.2d at 697.

166. 29 U.S.C. § 157 (1976).

167. *General Am. Transp. Corp.*, 228 N.L.R.B. 808 (1977).



8(b). It shall be an unfair labor practice for a labor organization or its agents

. . . .

- (8) *not to recognize and attempt to accommodate the diverging economic interests within any bargaining unit, provided that said interests are made known to the labor organization in a timely manner and with a sufficient showing of interest, as provided for by the decisions of or regulations promulgated by the National Labor Relations Board.*

Second, the NLRB might incorporate the veto through its decisions, finding that a union violated section 8(b)(1)(A) by not dealing fairly with the protests of an interest group.<sup>168</sup> The Board could describe the procedures expected of labor unions in such a decision.

Finally, the NLRB could promulgate rules and regulations, as provided for in section 6 of the Taft-Hartley Act,<sup>169</sup> articulating the position of interest groups and the responsibilities of unions.<sup>170</sup> Failure to meet these regulations would constitute a violation of section 8(b)(1)(A). For my purposes, this last approach is the most satisfactory. It would not require the legislative action that the first option entails, and unlike the second option, it would provide adequate notice of the Board's intentions and allow public comment before taking effect.

Whichever of the three methods of implementing the interest group veto proposal the Board selects, it already has the power to enforce the proposal pursuant to its authority to remedy any unfair labor practice violation under section 10(c) of Taft-Hartley:

[The Board may] issue and cause to be served . . . an order requiring [the violator] to cease and desist from such unfair labor practice, and *to take such affirmative action*, including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act].<sup>171</sup>

168. The NLRB routinely announces new rules of decision when adjudicating cases. See, e.g., *Shopping Kart Food Mkts. Inc.*, 228 N.L.R.B. No. 190 (1977). Of course, the Board may also recant and revive the prior rule of decision as it did when it overruled *Shopping Kart* in *General Knit*, 239 N.L.R.B. No. 101 (1978).

169. 29 U.S.C. § 156 (1976).

170. The NLRB has rarely used the rulemaking approach to regulating conduct under the NLRA. For a general discussion of the issue involved, see Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 *YALE L.J.* 571 (1970).

171. 29 U.S.C. § 160(c) (1976) (emphasis added).

Courts have broadly construed that authority to issue affirmative orders, not limiting it to the specific remedy of reinstatement.<sup>172</sup> They could certainly construe it to permit the sanctions necessary to effectuate the veto proposal.

#### IV. CONCLUSION: WHY FOLLOW THE VETO PATH?

The traditional internal union structure of unbridled majority rule evolved at a time when survival of the labor movement was conjectural. There is no longer any question, however, about the ability of modern labor organizations to organize workers, negotiate with management, and effectively administer collective bargaining agreements.<sup>173</sup> Thus, the need to concentrate power in a few leaders and limit rank-and-file debate over policy has abated. With the issue no longer union survival but the quality of union representation,<sup>174</sup> the focus of contemporary debate should be on alternative means of structuring the relationship between the union leadership and union members.

In this Article I have proposed a new plan, one that speaks directly to the workers' need for better control over the terms of their employment contracts. Its centerpiece, the interest group veto, has already received a limited test from one major union, the United Auto Workers.<sup>175</sup> Since 1957, the UAW has attempted to quell the dissatisfaction of skilled workers by increasing their control over the contract ratification process. The UAW constitu-

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172. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941) ("Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces."); *Wicker v. Hoppok*, 73 U.S. (6 Wall.) 94, 99 (1867), *quoted with approval* in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975) ("The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.").

173. The Supreme Court noted this change in the emphasis of labor law in *Boy's Mkts. Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 251 (1970), where it observed that there has been a shift "from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes."

174. The Director of the Federal Mediation and Conciliation Service has identified different workplace changes to which unions have failed to respond: "the thrust of minorities with many demands for jobs, for improvement of jobs, for acceptance into the system . . . new attitudes, new mores, a change in the value system of younger people coming into the workforce." Horvitz, *supra* note 119, at 453, 454.

175. In addition, some workers have formed caucuses within their unions to pressure union leadership into recognizing the interests of caucus members. Unlike the proposed economic interest groups, however, these caucuses have no right or power to reject union decisions and the membership may be constant over time, regardless of the particular issues on which the caucuses are working.

tion was amended in that year to permit skilled trades and production workers to vote separately on contract "matters that are common to all members."<sup>176</sup> In 1966, the skilled workers were able to pressure the UAW into amending the constitution further, to provide that production and skilled-trades workers "would vote separately on contractual matters common to all and, in the same vote, on matters which relate exclusively to their group."<sup>177</sup> As then-Vice President Leonard Woodcock explained the amendment:

What happens when one group rejects and the other accepts? Well, it is pretty obvious what happens if production rejects, because the majority is an automatic rejection, isn't it? But . . . what happens when production accepts and skilled trades rejects?

[W]e want to say here and now that separate ratification is an empty process, and it cannot trigger necessary action to solve problems that have led to rejection if it does not lead to pressure on the companies.

So we want to say very clearly, if either group rejects, then there is no agreement . . . .<sup>178</sup>

The UAW decision to give skilled trades workers veto power over the entire bargaining agreement was not altruistic. The International Society of Skilled Trades (ISST) was agitating to pull the skilled trades workers out of the primarily industrial UAW on the ground that it did not adequately promote the specialized interests of the skilled workers.<sup>179</sup> The UAW needed the leverage

176. UNITED AUTOMOBILE WORKERS OF AMERICA (UAW) PROCEEDINGS, SIXTEENTH CONSTITUTIONAL CONVENTION 275 (1957). The debate on the proposal is at 278-88. In addition to granting separate ratification rights to production and skilled workers, the amendment extended these rights to office workers, engineers, and technicians, on application to and approval of the International Executive Board.

177. UNITED AUTOMOBILE WORKERS OF AMERICA (UAW) PROCEEDINGS, TWENTIETH CONSTITUTIONAL CONVENTION 405 (1961) [hereinafter cited as 20TH CONV.]. The debate on the proposal is at 405-13. The UAW also extended special ratification rights to office workers, engineers, and technicians. See note 176 *supra*.

178. *Id.* at 407. When tested in 1973, the UAW public review board rendered the separate ratification rights provision useless. See *Poszich v. UAW Local 316* (Pub. Rev. Bd., Intl. Union UAW, April 10, 1974), [BNA] Daily Labor Reporter, No. 75, at E-10, April 17, 1974. For a description and early analysis of the public review board, see J. STEIBER, W.E. OBEROR, & M. HARRINGTON, *DEMOCRACY AND PUBLIC REVIEWS: AN ANALYSIS OF THE UAW PUBLIC REVIEW BOARD* (1960). More recent evaluations appear in Brooks, *Stability Versus Employee Free Choice*, 61 CORNELL L. REV. 344, 359-61 (1976); *THE DUTY OF FAIR REPRESENTATION*, *supra* note 36, at 99-103.

179. See Brooks, *supra* note 178, at 357-61, for a description of the relationship between ISST organizing efforts, NLRB rules on disaffiliation and separate bargaining units for skilled workers, and the UAW decision to grant greater internal power to the skilled-trades members. See also Raskin, *Labor: Mass-Production Unions Facing Schism in their Ranks*, N.Y. Times, Oct. 18, 1976, at 47, col. 1.

provided by the skilled workers when bargaining for the more easily replaced production workers, and the leadership believed that the union's future depended on adapting to automation and converting production workers into skilled tradespeople. Thus, the UAW's grant of special veto rights to an interest group was one union's response to a powerful minority whose value outweighed the majority's interest in retaining unlimited control.<sup>180</sup> Obviously, most economic interest groups lack the leverage of the skilled workers in the UAW. But the UAW example demonstrates that a large, international union believes that it can function effectively in the face of a potential veto by an interest group.<sup>181</sup>

The general veto proposal goes beyond the narrow UAW system and further improves the quality of representation. Its principal advantage is that its procedures encourage rank-and-file participation in union activities. Regardless of whether they use the veto successfully, workers who share economic interests and who join together to further those interests may regain some control over their economic lives by influencing union decisions or even by seeking positions of authority within their unions.<sup>182</sup> Further-

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The UAW constitution also provides that "contract or supplement demands affecting skilled workers . . . shall be submitted to the Skilled Trades Department [before being submitted to management] in order to effectuate an industry-wide standardization of agreements on wages, hours, apprenticeship programs, journeymen standards and working conditions." 20TH CONV., *supra* note 176, at 405.

180. Other unions have responded to worker dissatisfaction in less radical ways. One interesting approach, which incorporates some procedural aspects of the veto proposal, is that of the Oil, Chemical and Atomic Workers (OCAW) union, which represents about 60,000 workers who are under 400 contracts. The OCAW has a policy of prenegotiation meetings which maximizes worker participation in formulating union bargaining goals. Bargaining demands are promulgated by a national bargaining policy committee, composed of eight rank-and-file workers and four administration officers, after a conference at which rank-and-file workers meet to suggest bargaining policy. The bargaining demands established by the national bargaining council are then submitted for ratification to every bargaining unit in the country. *See* 98 L.R.R.M. 131 (1978).

181. Furthermore, the auto companies' acceptance of the UAW decision to condition final ratification of any bargaining agreement on approval by the skilled-trades workers suggests that private sector management is able to live with conditional agreements and to deal with the pressures inherent in separate ratification.

182. Although participation in union political life may be a beneficial by-product of the veto procedures, the proposal is not designed as a means for developing an established political party which opposes the incumbent leadership. Under the veto proposal the likelihood that formation of an economic interest group will lead to political aspirations on the part of interest group members is great; but the opportunity to challenge the leadership of the union is remote, since a single-issue interest group would not create a stable, loyal, and hardworking constituency. At most, the leaders of interest groups would develop the abilities required to become part of the existing political process within the unions.

more, increased member participation strengthens unions and improves the public image of these vital economic institutions.<sup>183</sup>

The veto proposal also enhances union responsiveness to member needs because it requires interest groups to identify their concerns and formulate concrete alternatives to leadership proposals. And since the employees themselves must designate which union decisions are significant, increased participation helps the NLRB, union leadership, and management. The Board, drawing on an interest group's initial statement of goals and the positions it takes during subsequent negotiations, is better able to evaluate the reasonableness of an employee's challenge. Without these employee-initiated guidelines, the Board must speculate about an item's significance to protesting employees and about the fairness of the union's decision in light of alternatives that the union may or may not have been aware of during contract negotiations or grievance procedures. Additionally, because interest groups must identify themselves (and their leaders) seasonably, the proposal limits the nature and frequency of Board findings that invalidate union-employer decisions. Most will be disposed of on simple procedural grounds.

From the union's perspective, the veto plan directs attention toward issues which workers feel are important through early group self-identification and the requirement that interest groups formulate proposals to deal with their concerns. This information should aid the leadership in revising and improving its own contract proposals. Management, too, may benefit. Informed by the union leadership about interest group formation and demands, management can foresee challenges to the negotiated contract and, to some extent, avoid them through anticipatory bargaining. The proposal spares the outside observer the onerous task of deriving the hierarchy of workers' values. Moreover, since the veto proposal places pressure on leadership to accommodate interest group demands, it may lessen the likelihood of wildcat strikes.<sup>184</sup> The proposal thus contributes in many ways to stability in collective bargaining.

Finally, by requiring unions to permit all interested members

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183. As pointed out previously, membership participation in union meetings is greater when critical decisions about union policies are under consideration than when routine business matters are on the agenda. Therefore, the generally low participation rates are irrelevant to this discussion and do not undercut the point being made. See note 89 *supra*.

184. See notes 117-20 *supra* and accompanying text.

to participate in union decisions, the veto proposal strengthens the law's protection of the legitimate interests of each member. Through this process, each union and concerned interest group should reach a decision that will more evenly distribute economic benefits to all bargaining unit members, unlike the present system, which assigns contractual benefits by the vote of a bare majority of workers. At the same time, the proposal blocks attempts by a powerful minority group, such as the skilled workers in an industrial union, to insist on the lion's share of wage increases for themselves, since it retains a modified principle of majority rule. In such a circumstance, discussions between skilled and industrial workers could lead to mutual understanding of each other's concerns, to compromise, and to accommodation.

Congress has bestowed upon unions the authority to speak for the workers they represent and to make decisions affecting the economic lives of those workers. The need for a strong voice on behalf of a union's constituency is clear, but the need for a single voice is less clear. Unionized workers, even those holding unusual views, deserve some control over the decisions that their unions make in determining bargaining goals. This Article proposes that unions adopt a process through which workers may take an active role in formulating union priorities and by which all unionized workers could assert their interests in contract issues of particular significance to their economic well-being.

The veto proposal, for all its laudable objectives, is not without its costs. It may involve more time and money than simpler ideas. It may increase the workload of the NLRB.<sup>185</sup> But the proposal offers a prototypical framework for giving individual workers a stronger voice in their own unions. Its concern with interest group formation and with union leadership accountability are intended to stimulate further inquiry and discussion about the relationship between a union and the economic needs of its members.

The struggle to achieve recognition infused the labor movement with dedication and idealism. That fervor abated as unions secured parity with management at the bargaining table. The labor movement's next task is to ensure that all union members

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185. A proliferation of interest groups can be anticipated following adoption of the veto proposal and there is no way to know the effect of this development on the functioning of labor unions. I suspect, however, that the ease with which interest groups can be formed, *see* text at notes 140-42 *supra*, is adequately counterbalanced by the requirements for a successful veto, *see* notes 143-47 *supra* and accompanying text.

have genuine control over how the fruits of that parity are distributed. As Joel Seidman has observed: "One of the tests of union democracy is whether members are free to express opposition to the leaders and their policies without fear of reprisal. Even more important, it seems to me, is whether they possess the right to organize to make their opposition effective."<sup>186</sup> The veto proposal, by guaranteeing effective and loyal opposition, may provide the necessary spark to recapture labor's lost enthusiasm.

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186. J. SEIDMAN, *supra* note 14, at 37.