Michigan Law Review

Volume 61 | Issue 8

1963

The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship

Alfred W. Blumrosen
Rutgers University

THE WORKER AND THREE PHASES OF UNIONISM: ADMINISTRATIVE AND JUDICIAL CONTROL OF THE WORKER-UNION RELATIONSHIP

*Alfred W. Blumrosen**

"[T]he organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency." Justice Oliver Wendell Holmes, Jr. (1896).[1]

UNIONISM emerged in the American industrial society to protect the economic and dignitary interests of employees. The national labor policy, developed in the 1930's, allowed employees to use their collective strength, channelled and developed through unions, to counter the power of the employers. In this process, the power of the labor union as an organization was enhanced. This increasing power over the economic destiny of employees has created problems not widely envisioned a generation ago.[2] For union power can be exercised not only against the employer, but in cooperation with him; not only for the employees, but against them.

The union affects employees in its performance of three somewhat different functions in our social-economic-political life. First, it affects them while it is engaged as a pressure group, asserting legislative demands in the name of the workers, in the national, state and local political arenas. Secondly, the union affects employees

* Professor of Law, Rutgers University.—Ed.

1 Vegelahn v. Guntner, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896) (dissent).

2 The legislation establishing the framework of labor relations law is discussed throughout the text. For a general background, see GREGORY, LABOR AND THE LAW (2d rev. ed. 1958). The various statutes and agencies referred to are as follows:

The National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-67 (1958), as amended, 29 U.S.C §§ 153, 158-60 (Supp. IV, 1963). It was amended and supplemented in 1947 in Title I of the Taft-Hartley Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-67 (1958), as amended, 29 U.S.C §§ 153, 158-60 (Supp. IV, 1963). This statute is hereinafter referred to and cited as the NLRA. Its provisions are administered by the five-member National Labor Relations Board, hereinafter referred to as the NLRB.

The Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-87 (1958), as amended, 29 U.S.C §§ 153, 158-60, 186-87 (Supp. IV, 1963), embraces the amendments to the NLRA, and several other new statutory features. It is hereinafter referred to and cited as the LMRA.

The Railway Labor Act, 44 Stat. 577 (1926), as amended, 54 Stat. 785 (1940), 45 U.S.C. §§ 151-63 (1958), hereinafter referred to as the RLA. It created bodies consisting of equal representatives of unions and employers, known as Railway Adjustment Boards, referred to hereinafter as RAB. It also creates the National Mediation Board, hereinafter referred to as NMB.

The Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (Supp. IV, 1963) hereinafter referred to as the LMRDA.

who are caught up in internal union politics. The union may be a battleground of personalities and economic issues which are in constant political turmoil. Thirdly, the union affects employees as it performs its economic function in the collective bargaining process, making day-to-day decisions in the negotiation and administration of collective bargaining agreements.

This article will examine the extent to which, and the methods by which, individual rights are protected in each of these three phases of union activity. We will see that the employee is well protected in his right to oppose political action of the union and has considerable legal protection for his rights to engage in internal union political struggles, but the employee has received little protection for his economic interests in collective bargaining between unions and employers. A recent decision by the NLRB, which will be examined in some detail, suggests that additional protection for individual economic rights in the collective bargaining process may be in the offing.

The evaluation of legal relations between union and worker in each of these three contexts must be tentative because the social, economic and technological foundation of the union-member relationship is undergoing constant change. Our society is moving in the direction of greater organization of economic activity, whether in private or governmental hands. In such a society, traditional concepts of civil liberties will be inadequate to preserve individual freedom. Civil liberties have been defined as limitations on the power of government over individuals. This concept does not protect the individual, either member or non-member, against the powerful associations which dominate our society. There has been little development of the concept of individual freedom in the context of group activity.[3] This failure may be

[3] An early modern law review study, well worth reading today, is Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937). Other writings which deal with the general problem of the role of the powerful group in modern society include: HORN, GROUPS AND THE CONSTITUTION (1956); HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 300-01 (1960); KARIEL, THE DECLINE OF AMERICAN PLURALISM chs. 1-9 (1961); MILLER, PRIVATE GOVERNMENTS AND THE CONSTITUTION (1959); PRESTUS, THE ORGANIZATIONAL SOCIETY (1962); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Blumrosen, *Union-Management Agreements Which Harm Others*, 10 J. PUB. L. 345 (1961); Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958); Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957); Symposium, *Group Interests and the Law*, 13 RUTGERS L. REV. 429 (1959); Wirtz, *Government by Private Groups*, 13 LA. L. REV. 440 (1953).

Cases which deal with critical aspects of the relation of member to group include: Lathrop v. Donohue, 367 U.S. 820 (1961); International Ass'n of Machinists v. Street,

most serious. In the organized society, individual freedom which is not protected against group power will lose much of its meaning.

Unions themselves provide a study in ambivalence on the question of individual rights. On the one hand, they are organized in accordance with the principle of centralized power. The authority of the union stems from the union's constitutional convention and is delegated outward.[4] But at the same time, the union seeks to act as the democratic interpreter of the interests of the employees.[5]

The necessity of applying basic values concerning freedom and power to the relation between individual and group has been recognized in those cases which apply due process and equal protection concepts to *some* of the activities of *some* of the more strategically located groups in the nation.[6] This, however, has not been the direction in which the law of union-worker relations has developed. The rules concerning this relationship are developing on other than constitutional grounds. Consequently, the relationship provides a laboratory in which the law relating to the individual and the group may consciously be tested and developed. In this crucible, we may seek meaningful individual freedom as the organized society becomes a reality.

The law with which we are concerned is of recent vintage, without the sanctity of age or the certainty of experience. Recent judicial decisions control the relation between union and worker in the political context. In the area of internal union affairs, the basic law was enacted in 1959. In the collective bargaining area, judicial decisions going back less than twenty years establish the principles governing the relationship. This suggests that the problems are those of contemporary society, and that, for this reason

367 U.S. 740 (1961); James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1962); Raymond v. Creger, 38 N.J. 472, 185 A.2d 856 (1962).

4 See LEISERSON, AMERICAN TRADE UNION DEMOCRACY (1959).

5 To state the conflict in this manner is not to suggest that all problems of union-worker relations are dealt with similarly by any given union at any given time. The complexities involved in the relationship between the organization and its members are far too intricate for such a simple characterization. See ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS (1961), for a discussion of some of these complexities. See also LIPSET, TROW & COLEMAN, UNION DEMOCRACY (1956). Nevertheless, for purposes of analysis of legal doctrine it is necessary to simplify the institutional problems into types of situations. No harm is done if we recognize that the intricacies of each situation will assert themselves on concrete occasions.

6 St. Antoine, *Color Blindness but Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961).

also, the area provides an opportunity for wise legal development on all fronts—legislative, administrative and judicial.

To put the clash of individual freedom and group power into a proper perspective, it should be noted that the union and its members are not usually in opposition. On most matters, most of the time, the member agrees with or accepts the union's action. As a result, the member's interest can generally be best expressed by giving full scope to union power. The focus of this study is the worker who opposes the union, not because of the number of such cases, but, rather, because his case sharply presents the potential conflict between individual freedom and group power.

I. THE POLITICAL SPHERE

> "The notion that economic and political concerns are separable is pre-Victorian . . . . It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor." Justice Felix Frankfurter (1961).[7]

In recent years unions have moved with increasing confidence between the bargaining table and the legislative halls. Their lobbying activities on almost all legislative matters are well known. When legislation concerning the permissible scope of union economic power comes before Congress, unions mass their political strength to preserve and expand their freedom to use economic pressure in collective bargaining. The interrelationship between union economic activity and union political action is obvious and intense.

As government takes a greater interest in collective bargaining activities, its attitude becomes more important. This attitude will inevitably be affected by political considerations. Continued political action thus is essential to the continued ability of the union to function in the economic area. Therefore, the union must muster all possible organizational strength in key political struggles. Inevitably, some members will disagree with the union position on the issues which emerge. The question then arises as to the extent to which the union may publicly and formally compel conformity with its political views.

A. *Expulsion for Political Action*

The power of a union to expel a member who takes a position antagonistic to its political interest was denied in *Mitchell v.*

[7] International Ass'n of Machinists v. Street, 367 U.S. 740, 814-15 (1961) (dissent).

International Ass'n of Machinists,[8] a case recently decided in California. In that case, Mitchell and Mulgrew had been employed by Lockheed Aircraft for seventeen and six years respectively when they were expelled from the union because of their vigorous public campaign in support of a proposed state right-to-work law. Union leadership in California, as elsewhere, viewed the right-to-work laws as a serious threat to union strength. The union had publicly opposed such laws and was undoubtedly embarrassed by the contrary activities of these two long-time union members. After the right-to-work law had been defeated in the 1958 election,[9] Mitchell and Mulgrew were tried by the union for conduct unbecoming union members, found guilty, and expelled. They did not, however, lose their jobs.[10] The California District Court of Appeals, per Justice Fox, set aside the expulsion.

In his opinion, Justice Fox recognized that a union is not a social club entitled to the kind of minimal judicial supervision which the pre-existing common law had accorded "private voluntary associations." A large part of a union's power and authority is derived from its recognition, under federal legislation, as an exclusive bargaining agent. "Further, [unions] are not primarily social groups which require homogeneous views in order to retain smooth functioning. They are large, heterogeneous groups, whose members may agree on one thing only—they want improved working conditions and greater economic benefits."[11]

Additionally, the plaintiffs had a valuable interest to protect in their union membership, even though they had not been discharged as a result of the expulsion. Lack of union membership might make it more difficult to get other jobs, the union might have built up funds in which they could participate only as members, and the union might not represent *all* of the employees adequately in dealing with management.

While the union may expel members for activity directly related to collective bargaining, such as serving as labor spies or violating no-strike clauses, when the cause for expulsion relates to the political action of the members, Justice Fox identified a

8 196 Cal. App. 2d 796, 16 Cal. Rptr. 813 (1961).

9 In the 1958 elections, right-to-work laws were rejected by voters in five of the six jurisdictions in which they were proposed. See the full discussion in Sultan, *The Union Security Issue*, in PUBLIC POLICY AND COLLECTIVE BARGAINING 88 (Shister, Aaron & Summers ed. 1962).

10 For a report of the aftermath of the litigation, see N.Y. Times, July 29, 1962, p. 60, cols. 3-4.

11 196 Cal. App. 2d at 799, 16 Cal. Rptr. at 815.

public interest. "[U]nlimited freedom to express political views is the very heart of a democratic body, pumping the life blood of ideas without which our system could not survive."[12]

The public interest in the free expression of ideas, together with the individual's right to speak freely on political matters, was held to outweigh the union's interest in presenting a unified political front on the issue. It is unlikely that the court which decided *Mitchell* would allow expulsion because of a member's position on *any* political issue, including the repeal of the basic labor legislation. The public and individual interest in free political debate increases in direct relation to the union's interest in unanimity of political support.

Justice Fox supported his decision with a footnote reference to the California Labor Code which prohibits employer discrimination against an employee because of his political views or activities.[13] California is one of the few jurisdictions in the nation which legislatively protects the employee against political demands made by the employer. In most jurisdictions, it is possible for the employer to demand political allegiance of the employee as the price of continued employment.[14] The social interest in freedom of political debate has been generally subordinated to the employer's interest in securing political conformity.

In light of the decision in this case, the privilege of the *employer* to require political conformity of his employees is open to re-examination. There is no reason to allow the employer to demand political conformity of the employee if the union is not free to take the same action. In the past, the courts assumed that employer action reflected the social interest, but union action did not. Employers were permitted to act in antisocial ways toward their employees, but unions were not.[15] The labor legis-

12 *Id.* at 804, 16 Cal. Rptr. at 818.

13 *Id.* at 807 n.7, 16 Cal. Rptr. at 820 n.7.

14 See Annot., *Discharge from Private Employment on Ground of Political Views or Conduct*, 51 A.L.R.2d 742 (1957).

15 See Blumrosen, *supra* note 3, at 350-51. Employers have been held entitled to discharge employees in the following cases: Odell v. Humble Oil & Ref. Co., 201 F.2d 123 (10th Cir.), *cert. denied*, 345 U.S. 941 (1953) (for giving truthful testimony while under government subpoena in an antitrust suit against employer); Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956) (for filing workmen's compensation claims); Bell v. Faulkner, 75 S.W.2d 612 (Mo. Ct. App. 1934) (for refusing to vote as employer directed). On the other hand, unions have been prohibited from penalizing members in the following instances: Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), 14 RUTGERS L. REV. 624 (1960) (for giving of truthful testimony before legislative committees); Spayd v. Ringing Rock Lodge No. 665, Bhd. of R.R. Trainmen, 270 Pa. 67, 113 Atl. 70 (1921) (same); Burke v. Monumental Div. No. 52,

lation of the past thirty years has destroyed any basis which may have existed for this distinction between unions and employers, and requires that they be treated similarly. Otherwise, what appears to be enhanced individual freedom may be no more than a disguised judicial preference for employer, rather than union, political pressures on the worker.

By emphasizing the social importance of individual participation in political activities, the courts lay a foundation for political freedom of the employee not only against the union, but also against his own employer. Freedom to engage in political activity without retaliation is equally important in the employer-employee relation. This aspect of the *Mitchell* case has considerable growth potential. The right of employers to discharge for antisocial reasons, like the right of the union to expel, is a judicial invention which can be judicially modified.[16]

In *Mitchell* the court interpolated values found in the Constitution and in democratic political theory into the relation of individual to union. This was a legitimate exercise of the judicial law-making function. The same result is suggested, if not impelled, by the language of section 101(a)(2) of the LMRDA.[17] Thus, both judicial decision and legislative determination have protected the

Bhd. of Locomotive Eng'rs, 273 Fed. 707 (D. Md. 1919) (for bringing suit against the union in connection with its decision to call a strike); Schneider v. Local 60, United Journeymen, 116 La. 270, 40 So. 700 (1905) (for refusing to follow union suggestions while in an official position). For a criticism of these cases giving unlimited freedom to the employer, see Blumrosen, *The Right To Seek Workmen's Compensation*, 15 RUTGERS L. REV. 491 (1961). The decision in Petermann v. International Bhd. of Teamsters, *supra*, was adhered to, after trial, resulting in a $50,000 verdict. 53 L.R.R.M. 2105 (Cal. App. 1963).

16 The principle that an employment contract is presumed to be at will unless the contrary is clearly disclosed was first stated in a legal treatise. WOOD, MASTER AND SERVANT, § 134 (1877). It was adopted by the New York Court of Appeals in Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895), and spread rapidly. For a collection of materials dealing with the development of this doctrine, see BLUMROSEN, MATERIALS AND CASES ON THE LAW OF THE EMPLOYMENT RELATION 190-205 (multilith 1962).

17 This section reads: "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting." Commas originally followed the words "members" and "opinions."

The semicolon after the word "members" was introduced in the following exchange on the floor of the Senate, 105 CONG. REC. 6718 (1959); II LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1230 (1959) [hereinafter cited as 1959 ACT LEGIS. HIST.]:

"Mr. MCCLELLAN. Mr. President, I suggest an amendment, in this part of the amendment, by inserting a semicolon after the word 'members' on line 9 of page 2 of the amendment. That is simply a clerical change. There ought to be no objection to that modification.

"Mr. KUCHEL. There will not be any objection, and I accept the amendment. . . .

political rights of union members against discriminatory retaliation by the union.

B. *Political Use of Union Dues*

Although the dissenter may not be expelled for his political beliefs, may the union use his dues to support political causes with which he disagrees? The earlier view was that the member was bound by the majority decision concerning the use to which union dues would be put.[18] The present position of the Supreme Court is to the contrary. The leading case is *International Ass'n of Machinists v. Street*,[19] which arose under the Railway Labor Act. The issue was whether dues collected under a union-shop agreement could be used for political purposes over the objection of a union member. Plaintiffs sought an injunction against enforcement of the union-shop agreement rather than against the allegedly improper use of the dues. This raised the question of whether the complainants were seeking to get rid of the baby rather than the bath—seeking to undermine the union-shop agree-

"Mr. COOPER. Mr. President, will the Senator yield for a question?

"Mr. KUCHEL. I yield to the able Senator from Kentucky, a distinguished co-author of the amendment.

"Mr. COOPER. I wish to call my question to the attention of the Senator from Arkansas. I think it is wise to make some legislative history on the point. I assume the purpose of placing a semicolon at that point, is to assure, if there is any question about it, that the constitutional safeguards of free speech shall be preserved outside the union hall.

"Mr McCLELLAN. The purpose is to make certain that union members shall have freedom of speech not only in a union hall, but outside.

"Mr. KUCHEL. I agree."

A few moments after this exchange, Senator McClellan rose to indicate that the semicolon added had been misplaced. He sought, and received, unanimous consent to place it after the word "opinion" instead of after the word "members." 105 CONG. REC. 6722 (1959); II 1959 ACT LEGIS. HIST. 1234. This revision was copied into H.R. 8432, as it was engrossed in the House, 105 CONG. REC. 15883 (1959); II 1959 ACT LEGIS. HIST. 1693.

The original language, using commas after the two words, suggested that the statute protected freedom to communicate with fellow union members. Inserting a semicolon after the word "members," as was originally done, could give rise to the argument that the expression of opinion was protected regardless of the composition of the audience. However, when the semicolon was moved to the end of the word "opinions," it suggested again that the communication protected by the act involved other union members. The decision to use semicolons in both places was apparently made by the draftsman of the Landrum-Griffin bill, H.R. 8400. It is there, without explanation, that the double use of the semicolons first appears. The result of all this is that it is possible to argue either that expression of views to the general public is protected, which would confirm the result of the *Mitchell* case, or that only expression directed to other union members is protected. Senator McClellan's statement does not solve the problem. At times, one becomes skeptical of the utility of the process of tracing legislative history at least on such matters as punctuation.

18 DeMille v. American Fed'n of Radio Artists, 175 P.2d 851 (Cal. Dist. Ct. App. 1946), *aff'd*, 31 Cal. 2d 139, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 906 (1948).

19 367 U.S. 740 (1961).

ment as inconsistent with the political rights of the union members.[20]

If the plaintiffs had hoped to upset the union shop in the name of political liberty, they were disappointed. The Supreme Court sustained the validity of the union-shop agreement.[21] At the same time, it held that the dues of the dissidents could not be used over their objection for political purposes. The Court tailored a remedy to fit the employees' claim. Their dues were to be divided in accordance with the proportion of dues spent by the union for political purposes. Plaintiffs were entitled to a refund of that portion of their dues, or to an injunction against the expenditure thereof, by the union.[22]

Seven Justices concluded that Congress either had not permitted, or could not constitutionally permit, the union to spend dues for political purposes over the objection of a member.

Justices Douglas and Black argued that, since the association of member and union was coerced by a combination of the "facts of life" and congressional authorization, the union could not constitutionally use the dues of dissenters for political purposes. Such use of these funds was inconsistent with their political freedom under the first amendment. Constitutional standards were

20 This was Professor Aaron's view of the case as it reached the Supreme Court. "Stripped of all its disguises, the *Street* case thus emerges as simply another attack on the validity of the union shop; and the issues it raises are neither novel nor particularly significant." Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39, 63 (1961).

21 This decision reaffirmed the holding in Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956), that authorization of a union-shop provision was within the scope of congressional judgment permitted by the fifth amendment.

22 Mr. Justice Whittaker agreed with the decision but dissented from what he conceived to be an ineffective remedy. He would have enjoined enforcement of the union-shop agreement. Mr. Justice Douglas, who believed the union-shop requirement unconstitutional as applied to the political dissenter, joined the majority to provide a decision on the remedy. On remand, the Georgia Supreme Court declined to dismiss the action although the union offered to make a full refund of *all* dues to the plaintiffs in the case. That court remanded to the trial court so that the latter could formulate an appropriate remedy to protect the dissidents via either a reduction in dues or a refund. If the trial court was unable to develop a practical remedy, it was to enjoin the union from expending any funds for political purposes. 217 Ga. 351, 122 S.E.2d 220 (1961). This proposed remedy is clearly inconsistent with the views of the Supreme Court in *Street*. See 367 U.S. at 773. See also United States v. UAW, 352 U.S. 567 (1957).

In Brotherhood of Ry. Clerks v. Allen, 83 Sup. Ct. 1158 (1963), the Supreme Court held that an injunction against the enforcement of the union-shop agreement was not a proper remedy to enforce the right recognized in *Street*. The Court elaborated on the the remedial problems involved in the *Street* decision, holding (1) that the employee is entitled to a refund of all dues which have been spent for any political purpose if he makes timely objection to the expenditure without specifying the particular political use to which he objects, and (2) that relief should consist of a refund of the proportion of the dues which reflects the proportion of political expenditures to total union expenditures, and a reduction of future dues by the same proportion.

applicable because the funds were collected under federal statutory authorization.

Justices Frankfurter and Harlan, on the other hand, concluded that the connection between governmental and union action was "too fine spun" to justify application of the constitutional standards to the use of dues. Congress had merely permitted, but not required, the union-shop agreement. Therefore, constitutional standards were not applicable, even if the political use of dues of dissenters could be viewed as an infringement on their political freedom.[23]

Mr. Justice Brennan, writing for five members of the Court, avoided the constitutional question. He concluded that Congress had not intended to allow the union to make political use of the dues of dissident members. The legislative history of the 1951 amendment to the RLA, which permitted the union-shop agreement, did not demonstrate that the dues of dissenters collected under such agreements could be used for political purposes. Since Congress had been concerned with the rights of dissenters, and had not expressed an intention to override their political liberties, the statute should not be construed so as to authorize a union to use dues collected thereunder for political purposes over the objection of a member.

This opinion was criticized by Justices Frankfurter and Harlan on the ground that Mr. Justice Brennan asked the wrong question of the legislative history. Union political activity was so well known—especially to congressmen who bear the brunt of it—that its continuance under union-shop agreements probably was assumed by the legislators. The burden of demonstration from legislative history should have been imposed on those who claimed that Congress had *not* authorized the political use of the dues of dissenters. This criticism is unwarranted. Mr. Justice Brennan demonstrated judicial statesmanship of high order when he placed the burden of demonstration on those who wished to justify the restraint on political freedom involved in the *Street* case. His approach simultaneously adjusted two sets of important relationships

23 For a discussion supporting the Black-Douglas position and opposing that taken by Frankfurter-Harlan on the constitutional question, see Blumrosen, *Significant Supreme Court Decisions Affecting Labor Relations, 1960 Term; Herein of Political Use of Union Dues and of Hiring Halls*, 16 SW. L.J. 57, 59-61 (1962). For the opposite view, see Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961); Wellington, *Machinists v. Street; Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUPREME COURT REV. 49.

which converged in *Street*—the relation between Court and Congress, and the relation between union and member.

C. *Judicial Protection of Constitutional Rights on Statutory Grounds*

Judicial control of labor legislation on constitutional grounds has not proved satisfactory. Early in this century, economic predilections led the Supreme Court to invalidate legislative efforts to regulate labor relations, but the Court overturned these decisions during the 1930's and the 1940's.[24] But then the Court began its surveillance of state regulation of picketing under the first and fourteenth amendments. By 1957 this approach had withered while another basis for restriction, the pre-emption doctrine, emerged to limit state action.[25]

This rather rapid revision in constitutional law approaches is rooted in changing economic and social facts, and in the shifting attitudes of the country and the Court. Yet, constitutional decisions under the first amendment and due process clauses seek to identify and implement the more permanent values in our system, as distinct from those which are merely transitory. To the extent that these decisions are given only passing deference by the Supreme Court, their authority is diluted and the protection afforded these important values is jeopardized. At the same time, such decisions create rigidities in the lower courts which are not easily modified.

As our society becomes more highly organized, constitutional decisions which appear well founded by today's standards may inhibit or delay important social developments, or fail to protect important freedoms. To avoid this, the Court must seek techniques

[24] Coppage v. Kansas, 236 U.S. 1 (1915), and Adair v. United States, 208 U.S. 161 (1908), which invalidated on constitutional grounds legislative attempts to restrict employer anti-union conduct, were distinguished, and finally discarded in Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). The *Lincoln* decision also interred the case of Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923), which had invalidated a system of compulsory arbitration of labor disputes. See Rodes, *Due Process and Social Legislation in the Supreme Court—A Post Mortem*, 33 NOTRE DAME LAW. 5 (1957).

[25] Thornhill v. Alabama, 310 U.S. 88 (1940), enveloped picketing in the "preferred position" given free speech under then current constitutional law doctrines under the first and fourteenth amendments. This protection was virtually eliminated in International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957).

The decline in regulation of state limitations on picketing was accompanied by an increase in restraint of state action under the pre-emption doctrine. See Blumrosen, *The New Federalism in Labor Law*, in SYMPOSIUM ON THE LABOR MANAGEMENT RELATIONS ACT OF 1959 (Slovenko ed. 1960).

to accomplish two seemingly inconsistent objectives: the preservation of the values implicit in constitutional principles, and the avoidance of rigidities which often flow from constitutional adjudication. Both of these objectives are served when the Court interpolates the values protected by constitutional guarantee into the construction of statutes. The process of "construction to avoid a constitutional question" which protects the asserted constitutional claim is a valuable judicial technique. It might better be termed "construction to protect constitutional values." It preserves the values protected by the Constitution, but leaves the legislature free to overrule the decision. If the legislature directly rejects the Court's judgment on the issues involved, the process of construction may be repeated, or the constitutional issue may be faced by the Court. But, in the interim, the legislative branch will have spoken directly on the issue which the Court had faced. This legislative judgment will weigh importantly in the ultimate judicial decision on the constitutional question.

Labor relations law provides several illustrations of the successful use of the technique of construction to protect constitutional values. The *Virginia Electric & Power Co.*[26] case, requiring that employer unfair labor practices be construed in accordance with first amendment protection of freedom of speech, and the *Steele v. Louisville & Nashville R.R.*[27] case both illustrate this point. In the *Steele* case the Court interpreted the Railway Labor Act as requiring the union which acted as bargaining agent to represent all the employees fairly. The requirement was not explicit in the statute, but the Court found it implied through (1) the use of the term "representative," (2) a "principle of general application" that powers are to be exercised in behalf of their beneficiaries, and (3) an analogy of the union to the legislature and the application of standards of due process and equal protection associated with review of legislation.[28]

The Court achieved at least as much, and perhaps more, protection for individual employees and minorities by this construction as it could have afforded them by holding that the Constitution applied to union action. It also avoided the thorny problems involved in adopting the concept that union action was govern-

26 NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941).

27 Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

28 See Givens, *Federal Protection of Employee Rights Within Trade Unions*, 29 FORDHAM L. REV. 259 (1960).

mental action.[29] As a result, the growth potential of the duty of fair representation remains untested.[30] It may ultimately require the union to admit to participation in union affairs all those whom it represents.[31] As yet, the duty has not been expressly rejected or limited by Congress. This approach gives more flexibility and versatility than any direct application of the Constitution to trade unions could. It is not limited to claims which would rise to the level of constitutional demands, nor restricted by the amorphous concept of governmental action. It is a viable mechanism for the regulation of union action, but at the same time is subject to congressional review. It is a good illustration of the infusion of constitutional values into the process of statutory construction.

The saving of congressional power to review and reverse the Court assures that the judiciary will not for long frustrate the legislative judgment on important questions. This is an important aspect of the technique of construction to preserve constitutional values. It simultaneously recognizes legislative supremacy and liberates judicial energy. The Court may be more willing to protect constitutional values within a legislative context than to write them "indelibly" into the Constitution. This answers criticisms such as those levelled at the "old" Court that the judiciary, by interpolating its own views into the Constitution, was improperly hindering legislative developments.

While we normally think of legislation as posing issues for the courts to decide, the process can and does work fruitfully in the other direction, with the courts posing issues for legislative acquiescence or rejection. This interaction between legislative and judicial process is one of the most important developments in the art of governing labor relations. It can be carried on only if the Court avoids the constitutional issue and seeks to root its decision in the statute.

This, it seems, is what Mr. Justice Brennan did in the *Street* case. By asking a deceptively naive question of the legislative history, he was able, in writing the Court's opinion, to protect simultaneously the political freedom of the union member and leave the question of the extent of that freedom in the legislative

29 On this question, *compare* Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961), *with* Note, *Discrimination in Union Membership: Denial of Due Process under Federal Collective Bargaining Legislation*, 12 RUTGERS L. REV. 543 (1958).

30 See Blumrosen, *supra* note 3, at 358-76, and the discussion in Part III *infra*.

31 Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 OHIO ST. L.J. 21 (1961).

domain. The burden has been placed upon those who would weaken individual freedom to secure legislation to achieve that result. In short, Mr. Justice Brennan's opinion reflects a basic sympathy with the attitude of Justices Black and Douglas on the question of individual freedom, coupled with an unwillingness to fetter the legislature with a decision based on constitutional grounds.

D. *Union-Member Relations*

The *Street* decision bodes well for maximization of individual freedom against and within the group in the organized society. These groups have demonstrated little interest in protecting their members from themselves, save for the enlightened example of the United Automobile Workers' Public Review Board.[32] More likely, the groups will seek legislative action which will increase their power over their members. However, legislation which destroys or overtly minimizes individual freedoms will not gain popular support. Individualism is still the language of national political debate, even if the facts of associational life have rendered the concept less meaningful. The result is that the legislature is usually immobilized on the issue of individual versus group. Therefore, the decisions of the courts, either under the common law or in the interpretation of statutes, have more than transient significance. In the main, if the courts protect freedoms, the protection will stand. If they do not, then the freedoms will receive no legal protection. If the Court had held in *Street* that the dues of the dissenters could be used for political purposes, that would have ended the matter. The present decision, which for practical purposes is also final, ends the matter by protecting individual freedom against all but explicit—and unlikely—legislative restriction.

As a practical matter, it is unlikely that the unions will face serious financial problems as a result of the decision. Most union members are sufficiently aware of the correlation between union political activity and the effectiveness of the union as an economic force so that they will continue to pay their dues and allow them to be used for political purposes. In fact, the unions may gain because the dissenters have an opportunity to withdraw their dues, in that the unions can make a more genuine claim to repre-

32 See STIEBER, OBERER & HARRINGTON, DEMOCRACY AND PUBLIC REVIEW (1961); Brooks, *Impartial Public Review of Internal Union Disputes: Experiment in Democratic Self-Discipline*, 22 OHIO ST. L.J. 64 (1961); Oberer, *Voluntary Impartial Review of Labor: Some Reflections*, 58 MICH. L. REV. 55 (1959).

senting the authentic political voice of those workers who have not withdrawn their dues. Additionally, it is not easy for the dissenter to withdraw his dues. He must personally claim a refund. The device of class actions proposed in *Street* was rejected. Thus, only the dissenter with the courage of his conviction will gain by the decision.

Mr. Justice Brennan's conclusion in the *Street* case is supportable by reference to still other considerations. In 1947, Congress prohibited a labor union from making any "contribution or expenditure" in connection with elections which are subject to congressional regulation.[33] This statute clearly reflects the desire of Congress that union funds not be spent for political purposes. Mr. Justice Brennan might have supported his interpretation of the union-shop provisions of the RLA by construing them in light of this announced legislative policy disfavoring union political activity.

Of course, the constitutionality of the 1947 provision restricting union political activity is quite doubtful.[34] Perhaps this is why Mr. Justice Brennan did not utilize the statute as a manifestation of congressional policy.[35] Even if the provision is unconstitutional, however, it suggests the direction of congressional thinking about unions and politics. Mr. Justice Brennan may have correctly reconciled congressional policies which simultaneously recognized the legitimacy of the union shop and sought to minimize the union's financial participation in politics.

Ironically, if we conclude that the dues of the dissenters may not be used for political purposes over their objection, it is clear that the 1947 statute limiting the political activities of unions is an unconstitutional invasion of the right to associate for political purposes. The dues used for political purposes become, in a meaningful sense, "voluntary contributions" since the members have an option to prevent such use. Consequently, it seems clearly beyond the power of Congress to restrain individuals from making

33 Federal Corrupt Practices Act, 62 Stat. 723 (1948), as amended, 63 Stat. 90 (1949), as amended, 65 Stat. 718 (1951), 18 U.S.C. § 610 (1958). See Lane, *Political Expenditures by Labor Unions*, 9 LAB. L.J. 725 (1958), for a discussion of the course of litigation under this statute and its predecessors.

34 United States v. UAW, 352 U.S. 567 (1957).

35 Mr. Justice Brennan did indicate, in 367 U.S. at 773 n.21, that "no contention was made below or here that any of the expenditures involved in this case were made in violation of the Federal Corrupt Practices Act, 18 U.S.C. § 610 . . . or any state corrupt practices legislation."

such contributions for political purposes through their associations.[36]

Three elements—protection of constitutional values on non-constitutional grounds, implementation of a legislative policy restricting the political activity of labor organizations expressed in the Taft-Hartley Act, and certain expressions in the legislative history of the Taft-Hartley Act[37]—suggest that the *Street* doctrine is not limited to cases arising under the Railway Labor Act, but is equally applicable to union-shop agreements under the National Labor Relations Act.[38] Thus, the decision protects the right of political dissent in all areas regulated by federal labor legislation.

36 See United States v. UAW, 352 U.S. 567 (1957). A six-to-three majority refused to pass on the constitutionality of the 1947 legislation. Mr. Justice Frankfurter indicated issues which might be relevant on the question of constitutionality. One of these issues was whether the funds may "be fairly said to have been obtained on a voluntary basis." The answer to this question, in the light of the *Street* decision, is in the affirmative, since the dissident can withdraw his support from undesired political activities.

Justices Warren, Black and Douglas dissented, on the ground that the statute was an invasion of freedom of expression guaranteed by the first amendment.

In view of the *Street* decision, it would appear that the legislation violates the individual rights of the contributors. Hence, it would not be necessary to consider the additional proposition, relied on by the dissent in the *UAW* case, that the statute also improperly infringes on the rights of the association, *qua* association, to engage in political activity. On this question in general, see HORN, *op. cit. supra* note 3.

37 Senator Ellender, a supporter of the abolition of the closed shop, indicated that he wanted to avoid the result in the case of DeMille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 906 (1948), in which a union member who refused to contribute to a political cause in which he did not believe was ousted from the union and prevented from working. See 93 CONG. REC. 4138 (1947); II LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, at 1061 (1948).

Senator Taft, sponsor of the act, justified retention of the permission for the union-shop agreement on the ground that it prevented "free riders." He said: "[W]hat we do, in effect, is say that no one can get a free ride in such a shop. That meets one of the arguments for the union shop. The employee has to pay the union dues." 93 CONG. REC. 3837 (1947); II LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, at 1010 (1948). The reference to the avoidance of a "free ride" suggests that the union shop was designed to compel payment for collective bargaining activities about as forcefully as do similar references in the legislative history of the Railway Labor Act union-shop amendment relied on by the majority in *Street*.

38 Wellington, in *Machinists v. Street; Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUPREME COURT REV. 49, concludes that the *Street* decision is inapplicable to the NLRA's union-shop provision because under the NLRA, as distinguished from the RLA, Congress was not cutting back on the freedom given to dissenting employees, and the unions regulated under the NLRA have been interested in union security. *Id.* at 70.

However, the materials cited in note 37 *supra* suggest that, on the level of legislative history, an argument analogous to that advanced in *Street* can be made. More importantly, if the considerations discussed in the text supply the basis for the *Street* decision, they are equally applicable under the NLRA. Hence, the decision is properly treated as final under the present federal labor legislation, both under the RLA and the NLRA.

II. INTERNAL AFFAIRS

> "[T]raditionally democratic means of improving their union may be freely availed of by members without fear of harm or penalty. And this necessarily includes the right to criticize current union leadership and, within the union, to oppose such leadership and its policies. . . . The price of free expression and of political opposition within a union cannot be the risk of expulsion or other disciplinary action. In the final analysis, a labor union profits, as does any democratic body, more by permitting free expression and free political opposition than it may ever lose from any disunity that it may thus evidence." Judge Stanley H. Fuld (1958).[39]

Prior to 1959, legal protection for the union member's right to engage in political activity within the union had been developed by the courts in a series of cases dealing with the expulsion of members. The theories with which the courts regulated the internal political affairs of unions—contract, property, natural justice or public policy—were discussed with devastating clarity by Professor Chafee in his classic article in the *Harvard Law Review* in 1930.[40] To him, the underlying basis for judicial interference in union affairs was not expressed by any of these doctrines.

> "The member's relation to the association is the true subject matter of protection in most cases where relief is given against wrongful expulsions. The wrong is a tort, not a breach of contract, and the tort consists in the destruction of the relation rather than in a deprivation of the remote and conjectural right to receive property."[41]

The application of common-law principles relating to private associations to the union-member relationship has been ably charted by Professor Summers.[42] By 1958, the courts had finally articulated the policies which had led them to protect the union-member relationship in connection with internal union politics. The key decision was *Madden v. Atkins*,[43] with the quotation that appears at the beginning of this section. The New York Court of Appeals held in *Madden* that the union member had a right, protected by the law of torts, to engage in political activity within the union. A scant year later, the problems of fitting common-law principles to the

39 Madden v. Atkins, 4 N.Y.2d 283, 293, 151 N.E.2d 73, 78, 174 N.Y.S.2d 633, 640 (1958).

40 Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930).

41 *Id.* at 1007.

42 Summers, *Legal Limitation on Union Discipline*, 64 HARV. L. REV. 1049 (1951); Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

43 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958). See Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

new economic institution of unionism were submerged by the adoption of far-reaching federal legislation. Titles I to VI of the Labor-Management Reporting and Disclosure Act of 1959[44] (hereafter referred to as the LMRDA) regulate, in a mass of detail, many of the facets of internal union affairs. The rights of individuals to participate in the political processes of the union are treated by Titles I and IV of the LMRDA.[45] Title I guarantees to the union member the right to attend membership meetings, to speak on subjects relating to union activity without discrimination, to nominate candidates, to vote in elections, and to participate in the affairs of the union. Title I also protects an individual against retaliation by the union because he institutes an action in a court or a proceeding before an administrative agency. It requires that disciplinary action be taken only upon notice, opportunity to prepare a defense, and full and fair hearing.

Title IV, in dealing with union elections, guarantees the right of a member to be a candidate and to hold office, and to vote for and support the candidacy of others. It seeks to insure the regularity of elections, guarantees that the candidate shall have certain rights to inspect membership lists, to distribute literature by mail and not to be disadvantaged in connection with costs of the election by the incumbent. Elections are required to be by secret ballot. Enforcement of the election provisions of the act is vested in the Secretary of Labor.

The scheme for enforcement and implementation of the legislative policy appears to be all-embracing. But the statute has three major defects which minimize the protection it affords against discrimination or retaliation by an antagonistic union leadership.

A. *Membership*

First, the statute does not entitle all employees represented by the union to membership.[46] Yet, all such employees are directly

44 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (Supp. IV, 1963).

45 For general discussions of the LMRDA, see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 1086 (1960); Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195 (1960).

46 The definition of "member" which determines entitlement to protection of the act is found in § 3(o), 73 Stat. 520 (1959), 29 U.S.C. § 402(o) (Supp. IV, 1963).

"Member" or "member in good standing" includes "any person who has fulfilled the requirements for membership in such organization and [who has not withdrawn or been properly expelled]." This language was held sufficiently broad to entitle a member of one local (and the international) to be admitted to another local. Hughes v. Local 11, Int'l Ass'n of Bridge Workers, 287 F.2d 810 (3d Cir.), *cert. denied*, 368 U.S. 829 (1961). But the section has been held not to require the admission of a person with no previous union connection when one of the "requirements for admission" is a vote by the

affected by union decisions in negotiation and administration of the collective bargaining agreement. Elementary principles of democratic organization entitle those directly affected by the union's activities to participate in the formulation of the policies under which they will work. Notwithstanding this congressional inaction, the courts may require the union to admit, as to those aspects of union activities which relate to collective bargaining, all of the employees who are represented by it.[47] This result cannot, however, be based on the legislation of 1959 which was silent in regard to the ability of the union to determine its own membership.

B. *Candidacy for Union Office*

Second, the rights of members to speak and deliberate, discuss and vote, are guaranteed in Title I of the act, which affords a civil remedy for violation of these rights in suits brought in a federal district court. But a key to political participation in the affairs of the union is the ability to hold union office. The right to be a candidate is not recognized in Title I *at all.* It is found only in Title IV. Title IV is administered by the Secretary of Labor, but only *after* an election. The act provides no express protection against union action *prior* to an election which improperly excludes a candidate from the ballot or otherwise discriminates against him. A pre-election challenge to such actions must be based on the member's right to enforce the constitution and by-laws of the union, a right which existed under state law prior to, and independent of, federal law. Since the right is defined by state law, it is subject to no uniform national standards, and enforced by no administrative agency.

Thus, in regard to the critical period during which the political rights of the union member may be frustrated, the LMRDA's provisions are silent. This particular gap in the legislation is important. No post-election remedy can make whole a candidate whose name has been removed from, or prevented from appearing on, the ballot. The vigor of his campaign may have been dissipated in ways beyond repair once the election is over.

Either of two constructions of the statute would partially correct this defect. If the right to be a candidate were subsumed

membership. Moynahan v. Pari-Mutual Employees Guild, 53 L.R.R.M. 2154 (10th Cir. 1963).

47 See Blumrosen, *supra* note 31, for a more extensive discussion of this problem. See also Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962).

under Title I, a federal district court could protect that right prior to the election. While the right to *be* a candidate is conspicuous by its absence from Title I,[48] the right to *nominate* and *vote* for a candidate is expressly protected. Since the right to nominate and vote is hollow if the nominated candidate has been denied a place on the ballot, this right should be read as including a right to have the nominee on the ballot. The member, rather than the candidate, would have to initiate legal action to protect the candidate's appearance on the ballot, but this scarcely seems to present a major difficulty.[49]

A second line of analysis has been developed by Professor Summers. He argues that Title IV may be fully enforced in *state* courts prior to an election, and after the election only by the Secretary of Labor.[50] If his argument were to be adopted, the objection to the legislation would be obviated. It is difficult, however, to see why Congress would allow only the state courts to act in this area, since, in virtually all other areas regarding members'

48 The partial overlap between Title I and Title IV has been explored by a number of courts in suits by disgruntled candidates for union office. The cases decided thus far suggest that the post-election remedies under Title IV not only foreclose other post-election remedies, but also prevent the district courts from protecting any of the candidates' rights prior to an election under § 102. The courts assume that Title IV gives all the protection to a candidate that Congress intended, and that the candidate cannot protect his rights before an election under Title I. See Mamula v. United Steelworkers, 304 F.2d 108 (3d Cir.), *cert. denied*, 371 U.S. 823 (1962), which discusses the cases. *Mamula* involved an attack on an election which had been conducted before the case was decided by the court of appeals. In a similar case, decided less than a month after *Mamula*, the same circuit held that once an election had been conducted, the exclusive post-election remedies of Title IV foreclosed further judicial action. The court felt that its opinion "would be advisory and of no immediate consequence to the parties," and dismissed the case. However, the court reserved the question of "whether a federal court can grant relief under the Act before an election is held." Colpo v. Highway Truck Drivers, 305 F.2d 362, 363 (3d Cir.), *cert. denied*, 371 U.S. 890 (1962). *Colpo* thus casts considerable doubt on the vitality of the decision in *Mamula*, since it seeks to reserve judgment on issues which had been previously resolved in *Mamula*.

49 One of the bases of the decision against the union in Mamula v. United Steelworkers, 198 F. Supp. 652 (W.D. Pa. 1961), was that the procedure involved in selecting nominees for district director of the union was in violation of the right to nominate a candidate for union office because the system favored the incumbent officers. The court of appeals reversed, 304 F.2d 108 (3d Cir. 1962), stating that plaintiff had "ample opportunity to nominate candidates." *Id.* at 113. This suggests either that the court of appeals disagreed with the district court's conclusion that the nomination process was not meaningful, or that the court of appeals had refused to inquire into the significance of a nomination if the right to nominate was formally recognized. The continuing validity of the *Mamula* decision is questioned in note 48 *supra*.

The argument that the Title I right to nominate and vote for a candidate includes the right to have the nominee on the ballot was rejected in Jackson v. International Longshoremen's Ass'n, 212 F. Supp. 79 (E.D. La. 1962).

50 Summers, *Pre-Emption and the Labor Reform Act—Dual Rights and Remedies*, 22 OHIO ST. L.J. 119, 135-40 (1961).

rights, a federal cause of action was created. For this reason, such an analysis does not seem convincing.

In any event, the process of interpretation will not provide the candidate with pre-election protection of as high a quality as that available under the post-election remedy. Post-election complaints are handled through the administrative process within the office of the Department of Labor, while pre-election complaints must be handled through the judicial process, with all of its limitations in terms of counsel fees, inexpert counsel, judges unfamiliar with labor relations problems, and the absence of the informal investigative and settlement procedures available to administration. Only congressional action vesting pre-election as well as post-election supervision in the Secretary of Labor can provide complete protection.

C. *Right To Sue*

The third weakness in the statutory scheme lies in the complexity of the statutory language relating to the right of the union member to sue his union. Section 101(a)(4) provides that a member "may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization before instituting legal or administrative proceedings against such organizations or any officer thereof. . . ."

It has been argued by Solicitor General Cox that Congress, by the passage of this section, *added* a statutory requirement of exhaustion of remedies to the existing common-law exhaustion requirement. Under this construction, the statute gives a *union* the right to demand compliance with internal procedures for a maximum of four months, at the end of which time a *court* may require further exhaustion by reference to the common-law principle. Such a construction reflects more confidence in the internal review procedures of the union than Congress manifested.[51] It

51 COX, LAW AND THE NATIONAL LABOR POLICY 103-06 (1960). The reasoning which led Professor Cox to his construction of the section may be set out as follows: (1) *The language of the section refers to union actions which limit the employee's right to sue, not to the judicial doctrine of exhaustion.* Section 10(a)(4), 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(4) (Supp. IV, 1963) reads, in relevant part: "(4) Protection of the Right to Sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-

has not been adopted by the courts. They have considered the statutory exhaustion requirement to be in lieu of the common-law requirement. The courts may not require the member to exhaust union remedies for more than four months.[52] The union may require what it will in its constitution, but unless a reasonable hearing procedure can be followed within four months, exhaustion is not required. In any event, when four months are up, the statutory exhaustion requirement is satisfied.

The correctness of the courts' view that the statutory exhaustion requirement is in lieu of rather than in addition to the common-law requirement becomes evident upon a consideration of the different functions of the common-law and statutory requirements of exhaustion of internal union remedies.

month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof . . . ."

Cox's argument has merit insofar as it applies to the introductory sentence of the statute. But, the language which contains the four-month limitation is found in the first proviso. This proviso is not clearly directed at either union action or at judicial action. If it is assumed that the section is directed at union action, it can only be implemented by the judiciary and may be viewed, as may any law, as a direction to the court not to honor internal union remedies beyond the four-month period.

(2) *The exhaustion doctrine applies in state courts, and it "seems unlikely that Congress would so lightly sweep aside state rules of judicial administration." Id.* at 105. (Emphasis added.) But Congress was legislating to protect employee access to the courts. If this access was being unwisely blocked by a judicially invented doctrine of exhaustion, Congress could limit that doctrine. In any event, Congress was explicitly dealing with employee rights in the federal courts—see § 102—and is perfectly free to regulate the federal use of the doctrine of exhaustion. The question of whether the rights secured by § 101, in an action in the federal courts under § 102, may also be secured by an action in state courts is one which need not be dealt with when construing § 101(a)(4). That problem need only be faced when § 101 is asserted in state courts. The meaning of § 101 should be determined without regard to considerations of federal-state relations since a federal action is contemplated by § 102.

(3) *If the section applies to the exhaustion doctrine, perhaps the courts must allow the union to require exhaustion of internal remedies for four months, regardless of circumstances, and thus may delay access to the NLRB for the purpose of filing charges under the NLRA.* These conclusions lack persuasiveness. The statute uses the permissive *may* in describing the four-month rule, and the courts can apply their good sense to the questions of when the rule will be applied and when immediate access to judicial or administrative tribunals will be permitted. There is no reason to assume that they would read the section as limiting, in any way, employee access to the NLRB.

(4) *The application of § 101(a)(4) to the judicial doctrine of exhaustion may overturn the rule prohibiting employees from suing for breach of the collective bargaining agreement without exhausting contractual remedies, and may either interfere with contracts which provide that the individual's right is confined to arbitration or upset adjustments of grievances negotiated by union and employer.* This criticism attributes too much meaning to § 101(a)(4). The section does not affect other rules of judicial self-restraint which are rooted in considerations other than those relating to internal union affairs. It has no direct bearing on the other questions raised by Professor Cox except to suggest, in a most general sense, a more active role for the courts in these matters.

52 The leading case is Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

1. *The Common-Law Exhaustion Concept*

The common-law doctrine requiring the union member to utilize internal review procedures before seeking equitable relief against an expulsion was adopted against a background of confusion as to the basic legal theory regulating the relation of union and member.[53] The doctrine has been defended on three grounds.[54] The first justification is that judicial effort may be conserved in those cases which can be satisfactorily disposed of by internal union action. This conservation may, however, be illusory, since, at common law, the exhaustion requirement was applied only *after* the court had heard the merits of the case.[55] Secondly, it has been contended that the processing of a member's case within the union might shape the issues and the evidence so as to enable the court to handle the matter more wisely. But union procedures are normally so informal that they do not provide a record of sufficient clarity and definiteness either to shape the issues or permit a limited scope of judicial review.[56] This leaves only the third justification, the promotion of the democratic values of self-government and private decision-making, to be considered. This justification is intimately related to the theory that the union-member relationship is governed by a contract voluntarily entered into between union and member. Since the parties have decided by contract to utilize internal review proceedings before resorting to courts, this expression of their wishes should be honored.

The attempt to justify the exhaustion doctrine on contract

53 See text at note 40 *supra*. See also Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1086-92 (1951); Vorenberg, *Exhaustion of Intraunion Remedies*, 2 LAB. L.J. 487 (1951); Annot., *Exhaustion of Remedies Within Labor Union as Condition of Resort to Civil Courts by Expelled or Suspended Member*, 168 A.L.R. 1462 (1947); Note, *Exhaustion of Remedies in Private, Voluntary Associations*, 65 YALE L.J. 369 (1956).

54 See the discussion in Detroy v. American Guild of Variety Artists, 286 F.2d 75, 79 (2d Cir. 1961).

55 See Note, *supra* note 53.

56 Summers, *supra* note 43, at 186-87. However, see Phillips v. Teamsters Union, 209 F. Supp. 768 (D.N.J. 1962), where a member, suspended for riotous conduct at a union meeting, was afforded a trial de novo before the union trial body pursuant to a stipulation entered in his action under Title I of the LMRDA. He was found guilty after this trial and subsequently sought to secure a de novo hearing of the facts in the federal district court. The court, however, refused to apply a more stringent review standard than that applied to a trial court or an administrative agency. It even suggested that the union decision might have finality. On review of the record, the court held that the union decision was amply supported by evidence. Since the case did not involve allegations that the member was suspended for exercising rights protected by the LMRDA, but rather that he had not done the acts which, if proved, would have justified the suspension, it is of course not authority for the scope of review when a violation of LMRDA rights is alleged.

principles is inadequate because the terms of the contract—the constitution and the bylaws of the union—are beyond the control of the individual union member. He has no choice but to accept them or remain outside the union. The union-member "contract" is as much a contract of adhesion, with the terms already set and beyond bargaining, as is the typical automobile sales contract.[57] It is incumbent upon the courts to interpret, construe and apply this "contract" so as to preserve those interests of the weaker party which are entitled to judicial protection. Thus, even under a "contract" analysis, the application of the exhaustion of remedies requirement is subject to judicial policy considerations.

On a more abstract level, the argument which supports the exhaustion requirement, as a means of preserving private decision-making, must face the fact that unions have not generally developed *independent* judicial machinery.[58] Consequently, the existing union decisional machinery does not inspire confidence that the merits of a case will prevail. Furthermore, if the member has sued without protecting his right to proceed internally, a denial on exhaustion grounds may entirely terminate his claim, since many union constitutions limit the time for appeal.

For these reasons, the courts were reluctant to apply the exhaustion doctrine if the member was, on the merits, entitled to prevail. This, I think, explains why the courts initially heard the merits of every case, even those ultimately dismissed on the ground that internal remedies had not been exhausted.

Prior to the LMRDA, then, the courts usually handled union-member disputes in the following manner: (1) The court would hear the merits of the case.[59] (2) If, after hearing the merits, the court concluded that the member was entitled to prevail, it would avoid the exhaustion requirement by applying an exception.[60] (3) If the court did not believe plaintiff was entitled to

57 See Grodin, *Legal Regulation of Internal Union Affairs*, in PUBLIC POLICY AND COLLECTIVE BARGAINING 182, 189-90 (Shister, Aaron & Summers ed. 1962). For a discussion of the law in the automobile contract situation, see Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493, 540 (1962).

58 See BROMWICH, UNION CONSTITUTIONS 29-35 (1959); Summers, *Disciplinary Procedures of Unions*, 4 IND. & LAB. REL. REV. 15 (1950).

59 See Summers, *supra* note 43, at 207-12; Note, *supra* note 53, at 385.

60 This point is made clear in connection with procedural matters in Annot., *Exhaustion of Remedies Within Labor Union as Condition of Resort to Civil Courts by Expelled or Suspended Member*, 168 A.L.R. 1462, 1469 (1947): "[T]he rule as to exhaustion of internal remedies presupposes a legal and regular proceeding for suspension or expulsion."

In discussing the principle that, "if the action of the union is without jurisdiction,

prevail, it would apply the doctrine and leave the member to the judgment of the union tribunal.[61] The decision to require exhaustion of internal remedies was a clear expression of the court's view of the merits of the case. It was a procedural way of stating a substantive conclusion.

2. *Exhaustion of Remedies Under the LMRDA*

Under the LMRDA, the function of the exhaustion of remedies doctrine is vastly different. Congress took seriously the contention that democratic values require that the union be allowed a genuine opportunity to correct its own mistakes. The statutory exhaustion of remedies doctrine is designed to provide a time period within which this purpose might be achieved. Its nature is purely procedural. The exhaustion concept has been drained of the substantive implications which it had at common law. The basic difference between the statutory and common-law exhaustion concepts is that the statutory exhaustion doctrine may be applied

or is without notice or authority or not in compliance with the rules or constitutional provisions, or is void for any reason," the exhaustion doctrine does not apply, Professor Summers, *supra* note 43, at 210, stated: "It is apparent that this exception is capable of completely swallowing the rule, for it is applicable to every case in which the disciplined member has a meritorious claim. Contrary to the other exceptions, it has no visible roots in any of the policies underlying the rule, but under the thin verbal disguise of 'no jurisdiction' and 'void' it repudiates the rule and its policies. This exception, like other exceptions, is not consistently applied, but it is used frequently and is always available for courts to use when they feel the need to grant relief."

61 Professor Summers, who has investigated this problem more extensively than anyone else, has produced two sets of interesting statistics on the role of the exhaustion doctrine.

In *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1092 (1951), after examining all the reported decisions, he stated: "The general repudiation of both the exhaustion rule and its underlying policy is clearly revealed by a brief tabulation of the court decisions. Out of about 200 cases in which exhaustion of remedies was a potential issue, it was actually mentioned in 98. Out of these 98 cases, the courts used exceptions to excuse exhaustion in 60, and in 16 others discussed the merits and found the discipline entirely proper. In only 22 cases out of 200 did the courts rely on the exhaustion requirement as the principal ground for refusing to grant relief."

In 1960, Professor Summers reported on his extensive examination of cases which had been decided in the state of New York in a ten-year period. Summers, *supra* note 43. After discussing the exceptions to the exhaustion doctrine, Professor Summers concluded: "These multiple exceptions have obviously removed the requirement of exhaustion as an insuperable obstacle to judicial intervention. Systematic study of the cases shows that by applying the exceptions courts have sapped the rule of almost all vitality except in random cases. Out of more than 100 discipline cases, the rule has been applied in 20, but even this may exaggerate its importance. In seven of those cases, the court's opinion makes clear on its face that the plaintiff's case had no merit or was procedurally defective, and that failure to exhaust was added only as a makeweight. In six, suit was brought even before the union trial body had made a decision, and in none of these was there any clear error shown in the proceedings. The remaining seven cases . . . are not all of one piece." *Id.* at 210.

by the court on the moving papers without reaching toward a decision on the merits.[62]

The LMRDA allows the courts, at their discretion, to disregard the requirement of exhaustion. But the courts can protect the value of internal union decision, and also protect the member, by granting temporary relief while the member pursues his remedy within the union. With such temporary relief to protect him from immediate harm, the union member should be required to pursue his internal remedy, if such a remedy is clearly available.[63] Thus the court need not pass on the merits during the period in which exhaustion of internal remedies is required.

D. *LMRDA Standards Governing Union Action*

This reading of section 101(a)(4) gives the union greater freedom from judicial supervision during the first four months after

62 Three state courts have recently held that a union member who sues the union alleging improper handling of an internal matter must plead either that he has exhausted his internal remedies or has been excused therefrom. Knox v. Local 900, UAW, 361 Mich. 257, 104 N.W.2d 743 (1960); Wax v. International Mailers Union, 400 Pa. 173, 161 A.2d 603 (1960); Kopke v. Ranny, 16 Wis. 369, 114 N.W.2d 485 (1962). One lower state court has gone farther and held that a general allegation of exhaustion of internal remedies is not sufficient. The member must indicate with particularity the remedies he has utilized. Local 2, Int'l Org. of Masters v. International Org. of Masters, 50 L.R.R.M. 2167 (Pa. C.P. 1962).

On the other hand, one federal district court has held that the plaintiff need not plead exhaustion of internal union remedies to survive a motion to dismiss, but that the factual basis for the exception to the exhaustion requirement must await trial on the merits. Deluhery v. Marine Cooks Union, 49 L.R.R.M. 2756 (S.D. Cal. 1961). If, as a matter of substance, the federal courts under § 101(a)(4) limit themselves to granting temporary relief within the four-month period, the important allegations in the pleading should deal with the question of whether temporary relief should be granted. The pleadings should disclose facts relating to exhaustion. Thus, the state pleading cases cited above seem more consonant with the substantive law which limits federal courts to temporary relief within the four-month period.

Another approach which satisfies the mandate of § 101(a)(4) was adopted in Light v. Erskine, 47 L.R.R.M. 2276 (W.D. Mich. 1960), where the court stayed an action under the LMRDA pending the expiration of the requisite period.

63 In Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961), the court of appeals reversed a dismissal for failure to exhaust internal union remedies, stating: "[W]here the internal union remedy is uncertain and has not been specifically brought to the attention of the disciplined party, the violation of federal law clear and undisputed, and the injury to the union member immediate and difficult to compensate by means of a subsequent money award, exhaustion of union remedies ought not to be required." *Id.* at 81. The case was remanded with instructions to grant a temporary injunction against the disciplining, which, in that case, consisted of blacklisting the member in the union's publication.

After the temporary injunction was issued by the district court, defendant union filed an answer raising a number of issues not presented to the court of appeals, including the question of plaintiff's status as a dues-paying member in good standing. Plaintiff moved to make the injunction permanent and for an assessment of damages, but the district court denied the motion, pending further development of facts relative to the defenses and the disposition by the Supreme Court of a petition for certiorari. 48 L.R.R.M. 2652 (S.D.N.Y. 1961).

disciplining a member than did the common law. Thereafter, union decisions are subjected to a more extensive judicial scrutiny than was the case at common law. The federal courts are required by the LMRDA to measure the union discipline against two statutory standards, procedural and substantive.

Procedural. The procedure by which the disciplining was imposed must have afforded the member notice, opportunity to prepare a defense, and "full and fair" hearing under section 101(a)(5). All union disciplinary action must meet this standard, whether or not it infringed on any other rights of the member.[64] In deciding whether a full and fair hearing has been given by the union, the courts must necessarily examine the evidence presented before the union tribunal. The scope of this judicial review is now being established by the courts. If the substantive claim of the member is that his rights under the union constitution or bylaws have been infringed, the courts may continue to apply the "substantial-evidence" test developed at common law.[65] How significant this standard is as a limitation on judicial action is difficult to determine. Professor Summers believes that the courts have not in fact been limited by this formulation.[66]

The courts are free to adopt standards of review in these cases which will encourage the union to develop impartial internal review channels, such as those found in the UAW's Public Review Board, and in the Upholsterers' Union.[67] If the courts were to give more deference to decisions of such tribunals than to decisions emanating from the usual union appellate process, the development of impartial review machinery might be promoted.

64 See, *e.g.*, Rekant v. Shochtay-Gasos Union, 205 F. Supp. 284 (E.D. Pa. 1962).

65 For a discussion of the substantial-evidence test, see Summers, *supra* note 53, at 1084; Summers, *supra* note 43, at 185. For a case applying the test under the LMRDA, see Phillips v. Teamsters Union, 209 F. Supp. 768 (D.N.J. 1962).

In Robinson v. International Bhd. of Boilermakers, 52 L.R.R.M. 2703 (W.D. Wash. 1963), the court said: "[T]here was evidence on which the trial body could have relied in support of its findings and conclusions, and it is not the function of this court to evaluate the evidence and assess the credibility of the witnesses in order to substitute its own judgment for that of the trial body as to the sufficiency and weight of the evidence." The union action was upheld. In Vars v. International Bhd. of Boilermakers, 52 L.R.R.M. 2872 (D. Conn. 1963), the court stated the other side of the coin: "[I]n determining whether a full and fair hearing has been granted, it is within the province of the Court to satisfy itself that the findings and conclusions of the presiding trial hearing officer . . . are sufficient as a matter of law to sustain a finding of guilt. Where the record clearly indicates that the rule of law upon which conclusions were reached was in error, then such findings and conclusions should be set aside." The discipline in this case was set aside.

66 Summers, *supra* note 43, at 185.

67 For a discussion of the functioning of the Public Review Board, see material cited in note 32 *supra*.

This approach would satisfactorily resolve the dilemma created by the LMRDA requirement of a "fair hearing," unaccompanied by a requirement of an impartial tribunal.

Substantive. The second type of standard against which union disciplining must be measured under the LMRDA is substantive in nature. Rights to participate in union activities are protected by Title I from union retaliation and discrimination. The LMRDA, in implementing this protection, imposes absolute limits on the power of the union to take disciplinary action. Transgression of these limits may be the subject of a federal district court action.[68] Since the opportunity for union self-correction is equally important in cases involving alleged violations of LMRDA substantive rights, the statutory exhaustion principle applies in this area also.[69] However, the responsibility of the district courts at the expiration of the four-month period is different in these cases from those involving rights claimed under the union constitution and bylaws. Where substantive rights protected by the LMRDA are involved, application of the "substantial-evidence" test would allow the union tribunal to determine if the union had violated the LMRDA. Therefore, a de novo consideration of the facts by the district court is required. It is nonetheless useful, for two reasons, to require the member who claims a violation of LMRDA substantive rights to exhaust his intra-union remedies during the four-month period: first, settlements may be possible; and secondly, the LMRDA, in some cases, requires the court to judge the reasonableness of the union's conduct. This judgment can be facilitated if the union has developed the case from its perspective through the internal union processes. The cases in which reasonableness must be evaluated include:

68 "Sec. 102. [29 U.S.C. § 412 (Supp. IV, 1963)] Any person whose rights secured by the provisions of [Title I] have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

"Sec. 103. [29 U.S.C. § 413 (Supp. IV, 1963)] Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization. . . .

"Sec. 609. [29 U.S.C. § 529 (Supp. IV, 1963)] It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section."

69 Detroy v. American Guild of Variety Artists, 286 F.2d 75, 77 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

(a) Cases in which the employee claims his LMRDA rights were violated while the union claims he was disciplined for some permissible reason other than a violation of his statutory rights. In these "dual motive" cases, the courts may well be influenced in their decision by a well-developed record within the union review channels.

(b) Cases in which the exercise of LMRDA rights is limited by reasonable qualifications which may be imposed by the union. In these cases, the development of a record by union tribunals may be important to an accurate judicial determination of whether the disciplining imposed was within the area of discretion left to the union.[70]

The common-law and statutory concepts of exhaustion of remedies serve different ends and cannot be considered as complementary. The courts have correctly treated the statutory exhaustion requirement as a legislative substitute for the common-law exhaustion requirement.

E. *The Approach of Counsel*

The exhaustion of remedies doctrine is a rule of administrative convenience which, in one sense, is addressed to lawyers whose belief that there is *only one* correct road to relief requires that they choose between the internal union remedy and going into court. Plaintiff's counsel in many cases need not make any such choice. To avoid being trapped by the doctrine of exhaustion in uncertain situations, it is proper to proceed simultaneously within the union and to begin a judicial proceeding. It is better to pursue the various alternative than to lose the case because the alternatives exist.

An additional dimension of the problem of protecting the union member involves the role of counsel. Today, most of the members of the bar who understand the intricacies of labor relations represent either management or unions or both. These attorneys may be hesitant to take an individual's claim against either union or management, and the individual may be reluctant to retain them. The individual then must seek counsel from among general practitioners who are neither attuned to labor

70 The "equal rights" to nominate, vote, attend and participate in union meetings guaranteed under § 101(a)(1) are subject to "reasonable rules and regulations." Freedom of speech for union members protected in 101(a)(2) is subject to "published and reasonable rules pertaining to the conduct of meetings," and the right of the union to adopt and enforce "reasonable rules as to the responsibility of every member toward the organization . . . ." See Phillips v. Teamsters Union, 209 F. Supp. 768 (D.N.J. 1962).

relations nor well versed in the law relating to internal union affairs. This imbalance in representation aggravates the weaknesses of the statute. The answer to this problem may lie, as it has in other areas, in having an administrative agency act as counsel for the employee. The seeds of this idea are present in the NLRB proceedings and in the jurisdiction of the Secretary of Labor over union elections. Alternatively, it is possible that the answer may lie in a legal profession more adequately prepared to represent the individual.

The employee has his greatest protection against union action in the general political realm. He is now reasonably protected in the realm of internal union affairs. But the contrast between both of these areas and the law relating to employee rights concerning economic matters is sharp and startling. In connection with economic matters, the union—particularly when it acts in conjunction with the employer—has heretofore been allowed to exercise nearly absolute power over the claims of the individual employees.

III. COLLECTIVE BARGAINING

> "The task of this Court to maintain the balance between liberty and authority is never done, because new conditions today upset the equilibriums of yesterday. The seesaw between freedom and power makes up most of the history of governments . . . ." Justice Robert H. Jackson (1950).[71]

Collective bargaining has brought prestige, power, respectability and authority to the labor union movement.[72] Unions have checked the arbitrary will of the employer, and substituted a rough rule of law governing employment activities; they have improved the economic position of the employees they represent both in direct wage increases and in an impressive array of fringe benefits and devices to protect the jobs of the workers. Collective bargaining has become an accepted institution in many industries and with many employers.

Various forces at work in the bargaining process have worn down the harsh edges of antagonism and produced a variety of methods of accommodation between labor and management rep-

71 American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 445 (1950) (concurring opinion).

72 For a variety of reasons, unions are now losing ground, at least in the sense that a smaller proportion of the labor force is unionized than was true in earlier years. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1962, TABLE No. 319, at 241 (1962). For discussions of this diminution of relative union power, see BARKIN, THE DECLINE OF THE LABOR MOVEMENT (1962); BERNSTEIN, LABOR'S POWER IN AMERICAN SOCIETY (Univ. of Cal. Inst. of Ind. Rel. reprint No. 112, 1962).

resentatives.[73] While the spirit of accommodation may give way at negotiation time to the spirit of conflict, in increasing numbers of "stable relationships" the parties have learned to accept one another, to iron out their differences, and to submit the irreconcilable points either to an arbitrator or to occasional tests of bargaining strength.[74]

The very success of the collective bargaining process has created new problems for the relation between the union and the employee whom it represents. For the union's interests are now partially shaped by a desire to accommodate to management's needs, and vice versa. When union and employee interests correspond, the spirit of accommodation is of undoubted value to the employee. But, where union and employee interests differ, as they may on occasion, the spirit of accommodation—the success of collective bargaining—spells difficulty for individual rights of the employees.

A. *Factors Limiting the Significance of Individual Claims*

On many matters, the union hierarchy may be forced to choose between the competing claims of different union subgroups, for the union consists of men with disparate interests; differences in age, health, marital status, aspirations, skills, and departmental outlook mark the union membership. The internal union political process provides the forum in which many such decisions are initially hammered out. A basic reason for internal union democracy is to allow the full interplay of interested groups in developing the union's bargaining policy.

73 There is now a rather extensive body of literature discussing this aspect of collective bargaining. Perhaps the best discussion can be found in BELL, THE END OF IDEOLOGY ch. 10 (rev. ed. 1961), entitled "The Capitalism of the Proletariat; a Theory of American Trade Unionism." For an analysis of how the use of the grievance procedure leads to accommodation in day-to-day bargaining activities, see Ryder, *Some Concepts Concerning Grievance Procedure*, 7 LAB. L.J. 15 (1956). See also KERR, UNIONS AND UNION LEADERS OF THEIR OWN CHOOSING 8-9 (1957), where it is stated:

"If freedom is defined as the absence of external restraint, then unions reduce freedom, for they restrain the worker in many ways. They help to establish formal wage structures, seniority rosters, work schedules, pace of output, and the pattern of occupational opportunities, all of which limit his freedom of choice. They decide when he shall strike and not strike. They are—and this is one of the essentials to an understanding of unionism—disciplinary agents within society. They add to the total network of discipline already surrounding the workers through the practices and rules of the employer. They too insist upon order and obedience. It is inherent in their very existence. Two bosses now grow where only one grew before."

See KUHN, BARGAINING IN GRIEVANCE SETTLEMENTS (1961), for vivid descriptions of the workings of the bargaining process in the administration of the labor agreement.

74 See ROSS & HARTMAN, CHANGING PATTERNS OF INDUSTRIAL CONFLICT (1960). The general decline of the incidence of strikes in the United States since 1946 is charted in U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1962, TABLE No. 323, at 243 (1962).

Because the position of the union will reflect not only a desire to accommodate to management, but also some accommodation between the various claims within the union, there is an increasing likelihood that a given individual or group claim will be rejected by the union. The individual or group is hard put to find an alternative method of securing protection for such claim.

A change in membership from one union to another is becoming more difficult for an employee because of the widespread existence of "no-raiding" agreements.[75] In fact, only those unions outside the AFL-CIO umbrella, such as the Mine Workers and the Teamsters, provide a haven for employees who are dissatisfied with their union's decision-making. Craft severance of *part* of a bargaining unit is also difficult;[76] and the mandatory settlement of jurisdictional disputes further reduces the choice of a labor organization open to employees.[77]

This reduction in alternatives is not the result of selfish power-seeking by the unions; it is the consequence of the increasing bureaucratization and centralization of society in the interests of technology and efficiency. These interests demand that the union be given power commensurate with its responsibilities—the power to agree with the employer in such a way as to bind the employees.

This power is exercised within a structure which may make recognition of individual or minority claims difficult. Union policy decisions, in connection with the negotiation of new contracts, may be made at a high level within the union, away from the field in which any small group might significantly influence the decisions.[78] Administration of the labor agreement, on the other hand, is most often done by the union at the local level, and the minority or individual may be in a better position to make his judgment felt. But with the closeness of the relation between officer and member comes the increased possibility that officers may abuse their power by acting on the basis of personal sentiments rather than the merits.[79]

All of these factors have coalesced to make the union decision in any aspect of collective bargaining the critical one so far as the

75 See Cole, *Union Self-Discipline and the Freedom of Individual Workers*, in LABOR IN A FREE SOCIETY (Harrington & Jacobs ed. 1959).

76 See, *e.g.*, Chrysler Corp., 124 N.L.R.B. 792 (1959).

77 NLRB v. Radio Eng'rs Union, 364 U.S. 573 (1961), 61 COLUM. L. REV. 1142, 75 HARV. L. REV. 221.

78 Beach, *The Problem of the Skilled Worker in an Industrial Union: A Case Study*, in CORNELL INSTITUTE OF LABOR RELATIONS RESEARCH 8-15 (Fall-Winter 1961).

79 *E.g.*, O'Brien v. Dade Bros., 18 N.J. 457, 114 A.2d 266 (1955); Kuzma v. Millinery Workers, 27 N.J. Super. 579, 99 A.2d 833 (App. Div. 1953).

employees are concerned. For if that decision is adverse to their claims, the likelihood of the employees' securing protection in the judicial forum is slight. At least four types of problems confront such employees:

(1) Union and employer acting jointly represent important and influential segments of our social-economic system. When they have agreed on a point, it requires a clear understanding of possible limiting principles, as well as some judicial courage, to disregard their jointly expressed desires.

(2) The union and employer, in their agreement, are claiming to further the collective bargaining process. Since the national labor policy strongly prefers union-employer agreement to union-employer conflict, the need for careful articulation of limiting principles is again apparent.

(3) The employee's claim in most cases rests on a collective agreement negotiated by the union and the employer.[80] His complaint is either that they have negotiated away rights previously established through collective bargaining, or have administered away rights under presently enforceable agreements. He now contends that they are disabled from modifying their agreement so as to deprive him of its benefits. Such a claim often produces the response that, since plaintiff's rights were created by agreement between union and employer, they can be terminated by the same process.[81] Of course, this view is valid only if one assumes that expectations, which arose once the rights were created, are not entitled to protection. But this is the precise point at issue. If we assume that seniority or other contractual rights can be destroyed only by a showing of justification by union and manage-

80 There appear to be two exceptions. Union action may unfairly affect employees outside of the bargaining unit, as in Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952). The second exception lies in the case of a discriminatory seniority system negotiated into an initial collective bargaining agreement. If the classification is unreasonable, the union and employer must correct the situation, even if this means improving the position of the group which was initially discriminated against. This question has most often arisen in connection with racial discrimination. See Richardson v. Texas & N.O.R.R., 242 F.2d 230 (5th Cir. 1957); Central of Ga. Ry. v. Jones, 229 F.2d 648 (5th Cir.), *cert. denied*, 352 U.S. 848 (1956), discussed in Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 157, 176 (1957); Blumrosen, *Union-Management Agreements Which Harm Others*, 10 J. PUB. L. 345, 358-62 (1961); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 578-87 (1962).

81 See Hartley v. Brotherhood of Ry. Clerks, 283 Mich. 201, 277 N.W. 885 (1938), in which the union reduced seniority rights of married women in negotiations with the employer. An action was brought, on common-law principles, by an aggrieved employee. The court said, in denying relief, "The brotherhood had the power by agreement with the railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interests of all the members." *Id.* at 206, 277 N.W. at 887.

ment, then they cannot be destroyed as freely as they were created. Thus, the statement that contract rights can be destroyed in the same manner as they were created implicitly denies legal protection for these rights without an analysis of the problem.

(4) There is a tendency to seek limitations on union-management agreement in the collective bargaining contract itself. Since the employee's rights arise from that contract, it is argued, they are limited by it. But this search is usually futile, because most collective bargaining contracts provide that the union, not the employee, determines the extent to which a claim of violation will be pressed through the grievance and arbitration procedures.[82] Employee rights must be found in obligations imposed on union and employer, not by their agreement, but by law independently of their wishes.

Professor Cowan has dramatically described the difference as one between contract and tort law:

> "The fundamental purpose of contract is to create private legislation. The parties consciously try to put limits on their undertakings, to restrict their liability to what is assumed or normally to be implied from their actions. . . . The object of the agreement is theirs alone, and the legal incidence of their agreement is limited by the expression of their intent. So much for the theory of contract. Contract looks to the future, however fleetingly, and attempts to contain it within the bonds of legal form. Of paramount importance to it, therefore, is legal certainty and security. And it is not accident that the prime legal methods for obtaining certainty and security, namely rule and form, are peculiarly appropriate to contract. Here, as in certain other branches of the law, it is often more important to fix the rule than to fix it right.
>
> "Tort law serves other purposes. Briefly, these are to adjust inadvertent, not consciously envisaged, losses, and to enforce general standards of careful behavior. The ideal of tort law is reasonable conduct. When reasonable expectations comport with planned undertakings all is well. Tort and contract both are satisfied. What happens when this is not the case? The answer in the long run is that planned undertakings must accommodate themselves to reasonable expectations. Contract

82 See Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961). The contract analysis is sometimes pressed by plaintiff's counsel. See Terrell v. Local 758, Int'l Ass'n of Machinists, 150 Colo. App. 2d 24, 309 P.2d 130 (1957); Cortez v. Ford Motor Co., 249 Mich. 108, 84 N.W.2d 523 (1957); Cabral v. Local 41, Int'l Molders Union, 82 R.I. 178, 106 A.2d 739 (1954).

must yield to tort. But this is far from true in the short run. Tort does not always conquer contract."[83]

B. *The Duty of Fair Representation*

The "tort principles" operative to protect individual rights were spelled out by the Supreme Court in *Steele v. Louisville & Nashville R.R.*[84] In that case, arising under the Railway Labor Act, union and employer attempted to destroy seniority rights of Negro employees by cutting off channels of promotion and continued employment which had previously been established by collective bargaining. Union and management argued that their power to change the terms of the collective bargaining relationship was plenary—not subject to legal restraint. The argument was that, by mutual agreement between union and employer, the employee could be treated just as arbitrarily as the employer could have treated him before the collective bargaining process was adopted. The employee was free from arbitrary employer action only to the extent that the union chose to protect him. If the union agreed with management in an action which was arbitrary, there was no recourse under the statute.

The argument was rejected by the Supreme Court. The Court held that the statute required the union to represent all the employees for whom it bargained fairly.[85] It could not arbitrarily destroy seniority rights of some of those employees. The employer was also bound by this duty and could not rely on a contract entered into in violation of the duty.[86] Such a contract was ultra

[83] Cowan, *Rule or Standard in Tort Law*, 13 RUTGERS L. REV. 141, 152-53 (1958).

[84] 323 U.S. 192 (1944).

[85] See the discussion in text at note 27 *supra*. Since the duty of fair representation flows from the principle of exclusive representation, it is implicit in the National Labor Relations Act as well as the Railway Labor Act. Syres v. Oil Workers, 350 U.S. 892 (1955), *reversing* 223 F.2d 739 (5th Cir. 1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

The considerable number of discussions of the various aspects of the duty of fair representation 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 Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959); Blumrosen, *supra* note 80; Cox, *supra* note 80; Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Givens, *Federal Protection of Employee Rights Within Trade Unions*, 29 FORDHAM L. REV. 259 (1960); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L.Q. 25 (1959); Howlett, *Contract Rights of Individual Employees as Against the Employer*, 8 LAB. L.J. 316 (1957); Summers, *Individual Rights in Collective Agreements—A Preliminary Analysis*, 12 N.Y.U. CONFERENCE ON LAB. 63 (1959); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

[86] "The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action.

vires. Thus, the Court imposed, on union and employer, limitations which arise from values other than those underlying collective bargaining, which are not rooted in contract and which cannot be bargained away by union and management. In 1947, Congress legislated on one aspect of the duty of fair representation —discrimination based on membership or non-membership in the union.[87] Otherwise, the matter has rested in judicial and administrative hands.

The lower federal and state courts have not willingly protected individual rights under the duty of fair representation. Some courts initially assumed that the duty was operative only in cases of racial discrimination.[88] It has become clear, however, that it covers improper discrimination against other types of minority groups,[89] and even discrimination against an individual because of his personal characteristics.[90] The courts have given the unions broad discretion to select those claims which they wish to present. This principle of discretion, which the Supreme Court guardedly announced in a case involving the *negotiation* of a contractual preference for returning World War II veterans,[91] has been applied with vigor by courts to union decisions in the *administration* of the collective bargaining agreement, without apparent realization that the problem of union discretion is different in this latter situation.[92]

No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct." Steele v. Louisville & N.R.R., 323 U.S. 192, 203-04 (1944).

87 Section 8(b)(2), 29 U.S.C. § 158(b)(2) (1958), of the LMRA makes it an unfair labor practice for a union to cause, or attempt to cause, the employer to discriminate against an employee because of membership or non-membership in a labor organization. Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1958), makes such discrimination by the employer an unfair labor practice, except where the employer is enforcing financial obligations properly imposed under a valid union security agreement. See Radio Officers Union v. NLRB, 347 U.S. 17 (1954), for a discussion of the sweep of these sections. For a consideration of their application in cases where the employer has allocated all, or part, of his hiring functions to the union, see Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); NLRB v. News Syndicate Co., 365 U.S. 695 (1961). The problem of the scope of NLRB jurisdiction created by these clauses is discussed subsequently in text.

88 See Alabaugh v. Baltimore & O.R.R., 222 F.2d 861 (4th Cir.), *cert. denied*, 350 U.S. 839 (1955). The *Alabaugh* case was overruled in Thompson v. Brotherhood of Sleeping Car Porters, 52 L.R.R.M. 2881 (4th Cir. 1963).

89 See Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). Ferro v. Railway Express Agency, Inc., 296 F.2d 847 (2d Cir. 1961), clearly extends the protection of the duty to any minority group within the union.

90 See Nobile v. Woodward, 200 F. Supp. 785 (E.D. Pa. 1962), and cases cited therein.

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

92 See, *e.g.*, Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961). The concept

In addition, the courts have created numerous procedural and technical barriers which tend to restrict effective protection of employees. They have insisted on technicalities of pleading,[93] have applied doctrines restricting the suability of unions,[94] have imposed an exhaustion of contract remedies requirement where such remedies seemed unavailable,[95] and have hesitated to allow the employee to protect his interest in arbitration.[96]

The result is that, in the area of economic activity, the employee who is injured as a result of the combined action of union and employer has little chance of receiving protection from the courts. Recently, the NLRB suggested that it may provide him with some protection.[97] With the possibility that the duty of fair

that the duty is similar in negotiation and administration has been suggested in Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 622 (1956).

93 *E.g.*, Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir.), *cert. denied*, 371 U.S. 920 (1962) (complaint which alleged union action was arbitrary, capricious and unreasonable held defective in that it failed to allege that union had bad faith motive, intent or purpose); Wilson v. Ex-Cell-O Corp., 368 Mich. 61, 117 N.W.2d 184 (1962) (misjoinder of claim); Carlini v. Curtiss-Wright Corp., 71 N.J. Super. 101, 176 A.2d 266 (App. Div. 1961), *cert. denied*, 37 N.J. 133, 179 A.2d 569 (1962) (plaintiff's affidavits charging unfair representation not allowed to expand pleadings).

In Britton v. Atlantic Coast Line R.R., 303 F.2d 274 (5th Cir. 1962), Negro employees complained that their jobs had been abolished by contract and the work turned over to whites. The district court, construing the pleading as relating to the interpretation of the collective bargaining agreement rather than as alleging a breach of the duty of fair representation, dismissed on the grounds that contract interpretation under the Railway Labor Act is in the exclusive jurisdiction of the Railway Adjustment Board. The district court then denied leave to amend the complaint. The court of appeals affirmed the dismissal, but awarded leave to amend to allege illegal discrimination which is not subject to the RAB jurisdiction but is cognizable in the courts.

94 The doctrine prohibiting partners from suing co-partners for wrongful acts of mutual agents has been applied, incredibly enough, in the modern period, to prohibit suits by employees against their union. See text at note 148 *infra*.

95 See Widuk v. John Oster Mfg. Co., 17 Wis. 2d 367, 369, 117 N.W.2d 245, 247 (1962). Employee testified that the union official "said I might just as well forget it [the grievance]; I had gone as far as I could; it was final." The court held that this did not justify the inference that the union would refuse to represent her, or process her grievance fairly, or that further processing of the grievance would be futile. Therefore, the employee was not justified in failing to pursue further the contract grievance procedure.

In Larsen v. American Airlines, Inc., 207 F. Supp. 258 (S.D.N.Y. 1962), *aff'd*, 313 F.2d 599 (1963) plaintiff, an airline pilot, was discharged for negligence incident to the crash of one of defendant's planes at Midway Airport in Chicago. Plaintiff requested a hearing before company officials under the grievance procedure of the contract. The hearing was begun, but adjourned before completion. Three weeks later the company notified him that his hearing was forfeited. Plaintiff alleged that defendant thereby refused him a proper hearing. The court held that, under the exhaustion requirement of New York law, plaintiff was not relieved of his obligation to use the grievance procedure even if the airline refused him a full hearing, but should have gone on to the next stage in the procedure.

96 *In re* Soto, 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d 282 (1960).

97 Miranda Fuel Co., 140 N.L.R.B. No. 7 (Dec. 19, 1962).

representation may be enforced by the NLRB comes the question of whether the jurisdiction of that agency is exclusive, precluding judicial enforcement of the duty. This development will be discussed separately. The following discussion assumes that the judicial forum is available, but much of it is applicable to enforcement of the duty by the NLRB.

The individual's interest in the employment relationship should be protected by law to the fullest extent compatible with the continued effectiveness of the collective bargaining process. This value judgment has its roots in the concepts of individual liberty first formulated in connection with governmental action, and in the ideals of individual economic and dignitary interests which initially prompted the growth of legal protection for labor organizations. It assumes that the collective bargaining process is sufficiently mature to bear the weight of some conflicting individual employee claims, but it rejects the use of individual claims to frustrate the process of collective bargaining. It would restate the union's duty of fair representation so as to require the union to maximize individual employee rights in the bargaining process to the extent consistent with the legitimate claims of the group. Under this view, protection of individual claims becomes a primary, rather than an incidental, function of the union. Admittedly, this view has not been widely accepted by the lower courts, with the possible exception of those in Wisconsin and New Jersey.[98] It is, however, consistent with three cases decided by the Supreme Court on the matter,[99] as well as with suggestions in some recent lower court decisions and a recent NLRB opinion.

98 Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963); O'Donnell v. Pabst Brewing Co., 12 Wis. 2d 491, 107 N.W.2d 484 (1961); Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *rehearing denied*, 100 N.W.2d 317, *cert. denied*, 362 U.S. 962 (1960). See also Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362, 363-68 (1962), which vividly contrasts the law of New York and Wisconsin.

In a number of southern states, the courts are still treating the employee as a third-party beneficiary entitled to a damage action for wrongful discharge under the collective bargaining agreement. See Woodward Iron Co. v. Stringfellow, 126 So. 2d 96 (Ala. 1960); Dufour v. Continental So. Lines, Inc., 219 Miss. 296, 68 So. 2d 489 (1953); Mountain v. National Airlines, Inc., 75 So. 2d 574 (Fla. 1954); Scott v. National Airlines, 150 So. 2d 237 (Fla. 1963); Martin v. Southern Ry., 240 S.C. 460, 126 S.E.2d 365 (1962). This view apparently stems largely from the Supreme Court decision in Moore v. Illinois Cent. R.R., 312 U.S. 630 (1941). Rather than reflecting protection for employees within collective bargaining, these decisions seem to reflect an unwillingness to recognize the important role of the union in the grievance process.

99 See Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946). *Cf.* the extended discussion of the justification for modifying seniority rights in favor of returning veterans in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). The discussion occupies four pages of the official report and draws on congressional, execu-

C. *Individual Rights Within the National Labor Policy*

The law governing individual rights in the collective bargaining process must be developed in a manner compatible with national labor policy. This requires the rejection of decisions which were based on the common-law concept of the union as a voluntary association.[100] The union is now an institution with statutory authority and responsibility. The law concerning this responsibility must be worked out within the framework of national labor policy, much as the law concerning collective bargaining agreements is to be developed under the general statutory mandate of section 301 of the LMRA.[101]

"Judicial inventiveness" is required in both situations because Congress has not dealt in detailed legislative fashion with these problems. In 1947, during the formulation and passage of the Taft-Hartley Act, Congress operated on the assumption that union and employer were in perpetual conflict, and that the employer would be happy to protect the employee against oppressive union actions if he were given the tools to do so. Thus, the employer was made the watchdog of union security agreements,[102] and was allowed to process individual employee grievances under section 9(a) of the NLRA, regardless of union wishes.[103] The 1947 Con-

tive and collective bargaining policy. In Conley v. Gibson, 355 U.S. 41 (1957), the discrimination was based on race and no extended discussion was necessary.

100 Hartley v. Brotherhood of Ry. Clerks, 283 Mich. 201, 277 N.W. 885 (1938), justifying discrimination based on sex, is a prime example of such a case. See Blumrosen, *supra* note 80, at 367; Hanslowe, *supra* note 85, at 44-45.

101 Section 301 [29 U.S.C. § 185 (1958)] provides simply that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties," regardless of amount or diversity. On the basis of this language, the Supreme Court in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), held that the courts were to develop a substantive law of the collective bargaining agreement, utilizing statutory language and policy to accomplish the task. See Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962); Summers, *supra* note 98, at 370-76.

102 See International Union of Electrical Workers v. NLRB, 307 F.2d 679 (D.C. Cir.), *cert denied*, 371 U.S. 936 (1962); NLRB v. Die & Tool Makers, 231 F.2d 298 (7th Cir.), *cert. denied*, 352 U.S. 833 (1956).

103 Section 9(a) [29 U.S.C. § 159(a) (1958)], after establishing the principle of exclusive representation of the union designated by a majority of employees, provides that: "[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer 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 the bargaining representative has been given opportunity to be present at such adjustment."

This section has been held to permit, but not to require, the employer to process a grievance at the instance of an individual employee rather than the union. See Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962), and ma-

gress was unaware that it was actually legislating for a system of industrial relations in which union and management might cooperate extensively, sometimes to the detriment of the employee.

In 1959, congressional legislation concerning internal union affairs was grounded on another erroneous assumption. Congress assumed that there were two separate areas of activity: one dealing with internal affairs generally, and the other dealing with collective bargaining, and that it could legislate on the one without touching the other.[104] The impossibility of maintaining such a separation will be discussed shortly.

Congress thus never squarely faced the issue of legal protection for individual rights in the collective bargaining context, and the law in this area must be fashioned from statutory materials not drawn with an eye to the problems.[105] Policy considerations loom

terial cited in the court's opinion. On the difficulties of implementing the proviso, see Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731 (1950).

The policy of the proviso has been used as the basis for an argument that the employee is entitled to utilize all grievance channels created in the collective bargaining agreement, including arbitration. See Summers, *supra* note 98, at 376-85, 399-404. This argument has been recently adopted by the New Jersey Supreme Court in Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963). *Donnelly* and *Black-Clawson*, *supra*, are in opposition on the question of the effect of § 9(a).

On legislative intent, one commentator has said: "It seems probable that the members of Congress who were active in promoting the Taft-Hartley Act did not consider that a situation could arise whereby an employer would refuse to listen to an employee and adjust a meritorious grievance." Howlett, *supra* note 85, at 318.

104 Section 603(b) of the LMRDA [29 U.S.C. § 523(b) (Supp. IV, 1963)] provides, in relevant part: "[N]or shall anything contained in [Title I] be construed to confer any rights, privileges, immunities or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act."

"Person" includes labor organizations, within the meaning of both the LMRDA, § 3(d), and the NLRA, § 2(1). The right of the union to bargain collectively under the NLRA includes, in § 8(d), the "negotiation of an agreement, or any question arising thereunder." Hence, textually, it would appear that, under § 603(b), the LMRDA is not to affect union collective bargaining activity either in negotiation or in administration of the contract. This interpretation is confirmed by the legislative history. Language similar to § 603(b) appeared in the Kennedy bill, S. 505, 86th Cong., I 1959 ACT. LEGIS. HIST. 74. Senator Kennedy analyzed this provision as specifying "that Titles I, II, III, IV and V are not to be construed as affecting in any way rights or obligations under the National Labor Relations Act or the Railway Labor Act," II *id.* 972. The language of the statute appeared in § 502 of S. 1555, 86th Cong., 1st Sess. (1959), as introduced, but became § 603(b) by the time it was passed by the Senate. I *id.* 388, 573. Of this, Senator Kennedy stated that Titles I-VI "are not to be construed as superseding, impairing, or otherwise affecting the Railway Labor Act, or any obligations, rights, benefits, privileges or immunities thereunder, or as affecting in any way rights or obligations under the National Labor Relations Act." II *id.* 1262. Representative Griffin believed that the language insured that union responsibilities under the NLRA would not be reduced. *Id.* at 1521.

105 Mr. Justice Rutledge, who dealt with the basic problem of the relation between union and employee under the Railway Labor Act in Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945), faced the same difficulty under that statute. "Congress was concerned

large in any such development. The following analysis suggests that, within the existing statutory framework, protection for individual rights may be maximized without sacrificing the values of the collective bargaining process.

The national labor policy concerning collective bargaining has partially evolved through legislative, administrative, executive, arbitral, and judicial decisions. Most importantly, however, its development has resulted from the decisions of the parties. It envisions that the basic terms of the collective bargaining relation will be periodically re-examined by the union and employer, with both utilizing the full range of economic pressures available to them.[106] The outcome of such a reassessment is an agreement which crystallizes the terms of employment for a definite minimum time,[107] and provides that disputes over the application of those terms shall be administered through a grievance procedure terminating finally in the decision of an arbitrator.[108] Such disputes which are not subject to arbitration are to be decided by the courts.[109]

D. *Negotiation Versus Administration*

Thus, the national labor policy considers that problems of negotiation of the agreement are to be treated differently from problems of administration. More flexibility is afforded the parties in negotiation than in administration. The analysis of protection given individual rights must begin with this distinction.[110]

Obviously, the distinction is artificial. Negotiation looks to the future, but may settle matters which have been raised in the past. Administration deals with existing disputes, but may also establish a pattern for future settlements. Both processes are part of a spectrum of methods of dispute settlement which ranges from

primarily with differences between the carrier and the employees, not with differences among the latter or between them, or some of them, and the collective agent. The statute therefore was not drawn with an eye levelled to these problems." *Id.* at 738 n.37. The attempt to deal legislatively with this problem in § 9(a) of the NLRA is discussed in note 103 *supra.*

106 See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960).

107 See § 8(d) of the NLRA. The contract bar doctrine of the NLRB, and the prohibition against most stranger picketing during the term of a contract, NLRA, § 8(b)(4) and § 8(b)(7), and the presumption of majority status, are all aimed at providing stability in the contractual relationship, as is § 301 of the LMRA itself.

108 United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

109 Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

110 See Blumrosen, *supra* note 80, at 362-66, for additional considerations relevant to the distinction between negotiation and administration of the labor agreement. Summers, *supra* note 98, at 396-97, applies this distinction.

formal contract negotiations, on the one hand, to informal grievance settlement, on the other. The fact that all such activities are on a single continuum does not require similar legal treatment of individual rights all along the continuum.

The basic distinction between negotiation and administration lies in the fact that the individual employee's claim in the latter area is rooted in a collective bargaining agreement, while in the former case his claim rests on generalized expectations. The refusal to protect generalized expectations need not lead to a refusal to protect specific claims under specific contracts. The differences at each end of the spectrum, as they relate to employee claims of unfair treatment, may be indicated graphically:

Negotiation	Administration
1. No objective standard for judgment. Interests are pressed to limit of bargaining power. Expectations of employees rooted in hopes for improved treatment.	1. Contract language and relations of the parties supply standard for evaluating the claim of the employee. Expectation of employees rooted in the contract.
2. Negotiation policy often developed at high union level, adjusting many conflicts within the union.	2. Administration policy often made at the local level, with no apparent broad implications for other interests.
3. Consequence of finding that the union should press a given claim may mean a strike which affects many interests not otherwise involved.	3. Consequence of requiring the union to press a claim may most often be no more than an additional arbitration.

With this distinction in mind, it should be clear that only the most important interests of the employees are entitled to protection in the negotiation of a new contract. The ordinary inconveniences or disadvantages to some of the employees should not be allowed to overshadow the dominant purpose of the bargaining process by delaying or deterring agreement between union and management. In the case of administration of the labor agreement, however, considerations relating to the stability of contractual rights dictate that the balance be struck more favorably to the employees.

E. *Negotiation and Seniority Rights*

The protection of accrued seniority claims in the negotiation of

collective bargaining contracts is a minimum requirement if individual rights are to be meaningfully secured. Union and employer should not be allowed to dilute seniority claims of employees acquired under previous agreements without adequate justification rooted in the national labor policy. The importance of protection of seniority claims based on prior collective bargaining contracts has been recognized by the Supreme Court. The Court has recognized that dilution of seniority rights may be justified as a matter of national policy in favor of returning veterans[111] but may not be justified on grounds of preferring one racial or union group over another.[112]

In earlier lower court decisions, the union was allowed to bargain away accrued seniority rights on the ground that it was a private voluntary association[113] whose members were entitled to only minimal legal protection. As it has become clear that the union is an institution vested with power and responsibility by government, the courts have begun to shift the basis of their decisions in seniority cases. In the recent cases, the use of more stringent standards in reviewing union decisions curtailing seniority rights suggests that the courts are becoming more sensitive to their importance.

In *O'Donnell v. Pabst Brewing Co.*[114] a seniority problem arose after the Pabst Brewing Company had purchased the assets of

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

112 Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

The problem of racial discrimination and the duty of fair representation is discussed in Blumrosen, *supra* note 80, at 358-62; Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 OHIO ST. L.J. 21 (1961); Sovern, *supra* note 80.

The problem of discrimination against workers by union and employer because of their union membership was not directly treated by the Wagner Act of 1935. Therefore, the NLRB developed two techniques to protect the employees from such discrimination. One was the finding that the employer committed an unfair labor practice when he participated in such activities. See Wallace Corp. v. NLRB, *supra*. The other was the device of revoking the certification of the bargaining agent. Larus & Bro. Co., 62 N.L.R.B. 1075 (1945). In the 1947 Taft-Hartley amendments to the NLRA, § 7, § 8(b)(1)(A) and § 8(b)(2), Congress made discrimination to encourage or discourage union membership an unfair labor practice on the part of both union and employer. See Radio Officers Union v. NLRB, 347 U.S. 17 (1954). The NLRB has continued to claim, and to exercise sparingly, the power to revoke certification for "conduct unbecoming a certified union." See A. O. Smith Corp., 119 N.L.R.B. 621 (1957); Nathan Warren & Sons, Inc., 116 N.L.R.B. 1662 (1957); Hughes Tool Co., 104 N.L.R.B. 318 (1953). The most recent development, in which the NLRB has claimed power to enforce fully the duty of fair representation, is discussed later in the text.

113 Britt v. Trailmobile Co., 179 F.2d 569 (6th Cir.), *cert. denied*, 340 U.S. 820 (1950); Donovan v. Travers, 285 Mass. 167, 188 N.E. 705 (1934); Hartley v. Brotherhood of Ry. Clerks, 283 Mich. 201, 277 N.W. 885 (1938); Hanslowe, *supra* note 85.

114 12 Wis. 2d 491, 107 N.W.2d 484 (1961).

Blatz, and had decided to close the Blatz plant and thereafter brew Blatz beer in the Pabst plant employing such Blatz employees as were needed. When the Blatz plant was closed, Pabst employees wanted the Blatz men placed at the bottom of the Pabst seniority list, while Blatz employees wanted the lists dovetailed, or integrated, on the basis of individual hiring dates with the respective employers. There were 925 Pabst and 940 Blatz employees involved. The union officials recommended dovetailing of the lists, and submitted the matter to a vote at the union meeting. Some 3,000 Milwaukee area brewery employees voted. The vote was 2,595 to 502 in favor of dovetailing. Some Pabst employees sued the union and the employer to prevent the dilution of their seniority rights which would result if Blatz employees were allowed to dovetail into the Pabst seniority list. The Wisconsin Supreme Court considered the voting procedure to have been fair because, as it stated:

> "To submit the question to only Pabst employees would have been unfair to the former Blatz employees; it would undoubtedly have resulted in a vote to give themselves preference. To limit the vote to Pabst and Blatz employees would have given the Blatz employees the advantage, since they were in the majority and could be expected to express their own self-interest."[115]

Submission to the entire membership "would be much more likely to reflect an objective view than either of the alternatives mentioned."[116] "The overall consideration," said the court, "is whether the bargaining which resulted in the [decision to dovetail the lists] was in good faith and reached *a fair and reasonable solution* of the merger problem."[117]

While the court went on to indicate that there remained a range of discretion within the limits of this test, it preferred the dovetailing decision over the proposals of the plaintiffs, which would have subordinated the seniority claims of the Blatz employees. The importance of the decision lies in the willingness of the court to evaluate the solution on its merits and in its recognition that the political processes within the union would be likely to reflect primarily, if not exclusively, the economic self-interest of the affected employees, and might not take fair account of all relevant factors.

115 *Id.* at 500, 107 N.W.2d at 489.
116 *Ibid.*
117 *Id.* at 501, 107 N.W.2d at 490. (Emphasis added.)

The inadequacy of the intra-union political process in protecting seniority rights was fully recognized in *Ferro v. Railway Express Co.*[118] The Baltimore and Ohio Railroad discontinued its New York-to-Baltimore run which had originated at the Comminpaw Terminal of Railway Express in Jersey City, New Jersey. Railway Express rerouted the traffic which formerly used the B. & O. service through other terminals in the metropolitan area and substantially reduced or terminated employment at Comminpaw. Comminpaw employees sought to "follow the work" to these other terminals under the collective bargaining contract. The railroad argued that there was no "work" to follow, that the employees' jobs had simply been abolished and that there was no contractual right protecting them.[119] A settlement was negotiated whereby sixty-five jobs were created for Comminpaw employees in the Pennsylvania Railroad Railway Express Terminal, on Long Island. The remaining Comminpaw employees were not protected.

Comminpaw employees who were not among the favored sixty-five sued, claiming that their contractual rights to follow the work had been ignored by the union in deference to a politically powerful local at the Pennsylvania Railroad terminal. The court of appeals construed their pleadings and affidavits as establishing a violation of the duty of fair representation. The decision suggests that plaintiffs must establish the following elements if they are to succeed:

(1) They are entitled to seniority rights, either by virtue of a prior collective bargaining agreement, as in *Ferro*, or by virtue of a discriminatory initial agreement.[120] (2) Dilution or destruction of such rights by negotiation or other agreement between union and

118 296 F.2d 847 (2d Cir. 1961).

119 Since plaintiff's claim was based on the collective bargaining contract, its resolution involves the interpretation of that contract. Under the Railway Labor Act, contract interpretation questions are within the exclusive jurisdiction of the Railway Adjustment Boards, and not within the jurisdiction of the federal district courts. But actions for violation of fiduciary duty are within the courts' jurisdiction. *Ferro* holds that this jurisdiction persists even though the interpretation of the contract is an integral element of the cause of action for breach of the duty of fair representation.

An analogous situation can arise under the National Labor Relations Act if interpretation of contract is normally within the province of the arbitrator. A case of breach of fiduciary duty may require interpretation, but is not for that reason beyond the jurisdiction of the court or agency. The court may engage in the interpretation itself, or might order arbitration of the disputed issue of contract interpretation, and then resolve the remaining controversy with the arbitrator's judgment in view.

120 *Compare* Ferro v. Railway Express Agency, Inc., 296 F.2d 847 (2d Cir. 1961), *with* Trotter v. Amalgamated Ass'n of Street Elec. Ry. Employees, 309 F.2d 584 (6th Cir. 1962), in which the plaintiff employees sought unsuccessfully to establish that the union violated its fiduciary duty by failing to negotiate a more favorable seniority clause. There was no prior seniority agreement on which they could rely, and no basis

company.[121] (3) Such dilution or destruction was in violation of the union's duty of fair representation. In *Ferro*, the basis of the claim of unfair representation was that the union negotiated the settlement in order to protect a politically more powerful local against the politically weaker Comminpaw local. The pith of the opinion of the court of appeals, reversing a dismissal of the complaint, stated:

> "A bargain which favors one class of employees over another is not necessarily prohibited as a hostile discrimination. . . . However, it is not proper for a bargaining agent in representing the employees to draw distinctions among them which are based upon their political power within the union . . . ."[122]

In this statement, the court removed the political element as a basis for union choice between conflicting claims, and required that the union decision be based on "rational standards" alone. Decisions subsequent to *Ferro* have implemented this approach by emphasizing the requirement of rationality in the choice of the union.[123] *Ferro* effectively destroys one basis by which broad union discretion in collective bargaining can be justified; that is, that the union represents a mélange of political forces and should be

was alleged on which the union could be required to create seniority rights for them. See, on this point, the material cited in note 80 *supra*.

121 In Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir.), *cert. denied* 371 U.S. 920 (1962), it is difficult to determine from the opinion how the employees were harmed when the seniority base was broadened retroactively from a divisional to a system-wide basis. Similarly, the identification of the harm is difficult in the following cases: Gainey v. Brotherhood of Ry. Clerks, 313 F.2d 318 (3d Cir. 1963); Florita v. McCorkle, 222 Md. 524, 161 A.2d 456 (1960); Gainey v. Local 71, Int'l Bhd. of Teamsters, 252 N.C. 256, 113 S.E.2d 594 (1960); Bailer v. Local 470, Int'l Teamsters Union, 400 Pa. 188, 161 A.2d 343 (1960); Falsetti v. Local 2026, UMW, 400 Pa. 145, 161 A.2d 882 (1960).

In Division 14, Order of R.R. Telegraphers v. Leighty, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962), plaintiffs argued, not that the union had been unfair, but that the international had no right to negotiate any settlement relating to seniority with the employer. The court was able to characterize this as a representation question within the exclusive jurisdiction of the National Mediation Board.

In Bolt v. Dining Car Employees, 50 L.R.R.M. 2190 (S.D. Fla. 1961), *aff'd*, 50 L.R.R.M. 2194 (5th Cir. 1962), although faced with a "clean hands" problem, plaintiffs failed to assert the "political basis" contention of the *Ferro* case when their seniority claims were downgraded by a vote of 220 to 20. These cases all emphasize the importance of counsel in the initial presentation of the case against the union and the employer to the courts. In the *Ferro* case the elements of the claim were made out only by reading together the complaint and affidavits opposing summary judgment.

122 296 F.2d at 851.

123 See Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir.), *cert. denied*, 371 U.S. 920 (1962).

allowed to exercise political judgments.[124] *Ferro* represents a long step toward effective protection of seniority claims in the area of negotiation of collective bargaining contracts by requiring that such cases be decided on their merits. Both *Ferro* and *O'Donnell* presage a more searching examination of the union decision to negotiate away seniority claims than has been undertaken in the earlier cases. This, coupled with decisions in other contexts recognizing the importance of seniority claims,[125] suggests that the courts are coming to see the importance, in this time of rapid technological and business change, of giving older employees a reasonable degree of protection for their accrued seniority.

Despite this trend, there are limitations on the protection which may be afforded seniority rights under the *Ferro-O'Donnell* line of decisions. Seniority rights are circumscribed by the economic and technological forces at work in the establishment in which seniority is claimed. If the employer determines to make changes in his operation which will inevitably entail alteration or reduction of seniority, and the union cannot prevail against that decision, then job security for some employees may be lost. The loss of seniority in these cases is viewed not as a failure of the union, but as resulting from larger economic forces for which the law does not hold union and employer responsible. Protection of employees thus laid off must come from general programs which are now in the process of formulation. The obligation to provide employment is one which falls on the federal government, not upon enterprise.[126]

The concept of seniority, although it centers on length of service, may embrace other considerations such as skill, ability, former position, industry-wide experience and the like. Thus, even from the perspective of a rational decision-maker attempting to minimize the impact of a situation which requires the alteration of some seniority rights, there may be several possible decisions which

124 Cox, *supra* note 92, provides a vigorous presentation of this position in connection with the administration of the labor agreement.

125 UAW v. Webster Elec. Co., 299 F.2d 195 (7th Cir. 1962); Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961). See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962), and Blumrosen, *Seniority Rights and Industrial Change: Zdanok v. Glidden Co.*, 47 MINN. L. REV. 505 (1963).

126 COMMITTEE FOR ECONOMIC DEVELOPMENT, PUBLIC INTEREST IN THE NATIONAL LABOR POLICY 122-27 (1961); Armour Automation Committee, *Progress Report*, 48 LAB. REL. REP. 239 (1961); Report of President's Advisory Committee on Labor-Management Policy, 49 LAB. REL. REP. 245 (1962). See also Manpower Development and Training Act of 1962, 76 Stat. 23, 42 U.S.C.A. §§ 2571-2620 (Supp. 1962); Employment Act of 1946, 60 Stat. 23, 15 U.S.C. §§ 1021-24 (1958).

can claim equal validity.[127] In such a situation, there appears no justification for judicial intervention.

Aside from seniority claims, and perhaps pension rights of retired employees,[128] the principles of collective bargaining established by the national labor policy dictate broad flexibility for union and management in rearranging the conditions of employment to meet their good faith needs.

In summary, the duty of fair representation should allow the union, in good faith, to negotiate changes in conditions of employment as to all matters except seniority rights. To justify an abridgment of seniority rights, the union must show not only that it exercised an honest judgment, but also that it made an appropriate decision, one based on objective factors, which would persuade a rational decision-maker, and not compelled by the internal political make-up of the union. By thus structuring the duty of fair representation, protection can be afforded to crucial individual rights of job security while leaving the collective bargaining process otherwise free of substantive limitations.

F. *Individual Rights in the Administration of the Labor Agreement*

The relationship between individual and union in the administration of the labor agreement must also be developed with reference to the national labor policy. This policy favors the settlement of disputes which arise under a collective bargaining agreement by a process which has two phases. First, disputes are discussed between union and employer representatives through a grievance procedure at progressively higher levels of the bureaucracies involved, looking toward an acceptable adjustment. Secondly, disputes which are not resolved in the grievance procedure are settled by arbitration.[129]

127 For example, in O'Donnell v. Pabst Brewing Co., 12 Wis. 2d 491, 107 N.W.2d 484 (1961) [see text accompanying note 114 *supra*], if the union had decided to integrate the seniority lists on the basis of original hiring date in the industry instead of the original hiring date with the previous employer, the result would have seemed as rational as the one reached, and probably would have been upheld, even though it might produce different results in particular instances.

Compare the approach of the union involved in Gavigan v. Bookbinders Union, 406 Pa. 508, 178 A.2d 567 (1962), *with* that involved in Outland v. CAB, 284 F.2d 224 (D.C. Cir. 1960). For a graphic description of the variety of methods used to integrate seniority lists in one industry, see Mater and Mangum, *The Integration of Seniority Lists in Transportation Mergers*, 16 IND. & LAB. REL. REP. 343 (1963).

128 See Aaron, *supra* note 85.

129 Timken Roller Bearing Co. v. NLRB, 161 F.2d 949 (6th Cir. 1947); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). "Arbitration is a stabilizing influence

This policy limits the employee's right to sue to protect his expectations under a collective bargaining contract. To permit employee suits without limitation would weaken the grievance procedure, and would reduce management incentive to settle with the union because the settlement would lack finality. It would also make union officials more reluctant to settle disputes with management for fear of embarrassment if the settlement were later upset by a court.[130]

Recognition of an employee's right to sue in all cases would also weaken the arbitration process. For, in an employee suit, the court, rather than the arbitrator, would decide the meaning of the agreement; finality of the arbitrator's decision would thus be denied.[131] Consequently, the national labor policies supporting the grievance and arbitration processes require that the employee not be permitted to sue in every case in which he claims that his rights under the collective bargaining agreement have been violated.[132] In addition, control of the grievance and arbitration machinery is usually vested by contract in the union.[133] The employee, there-

only as it serves as a vehicle for handling any and all disputes that arise under the agreement." *Id.* at 567.

130 Protection of the grievance channels is the basic explanation for the requirement, nearly universally imposed, that the employee exhaust the grievance procedures before being allowed to sue for violation of the collective bargaining agreement. See, *e.g.*, Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958); Rowan v. McKee, Inc., 262 Minn. 366, 114 N.W.2d 692 (1962); Jorgensen v. Pennsylvania R.R., 25 N.J. 541, 138 A.2d 24 (1958); Falsetti v. Local 2026, UMW, 400 Pa. 145, 161 A.2d 882 (1960); Kopke v. Ranny, 16 Wis. 2d 369, 114 N.W.2d 485 (1962).

131 This is the basis for holdings that, even if contract remedies are exhausted or waived, the employee may not maintain an action for breach of the collective bargaining agreement against his employer where the agreement provides that questions of breach of contract are referable to arbitration. See Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md. 1959), *aff'd*, 273 F.2d 614 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960); Jorgensen v. Pennsylvania R.R., *supra* note 130; Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959). See also Belk v. Allied Aviation Serv. Co., 315 F.2d 513 (2d Cir. 1963), interpreting contract in light of Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

132 Summers, *supra* note 98; Summers, *Individual Rights in Collective Agreements: A Preliminary Analysis*, 9 BUFFALO L. REV. 239 (1959); *Report of the Committee on Improvement of Administration of Union-Employer Contracts*, in PROCEEDINGS OF THE AMERICAN BAR ASS'N, SECTION OF LABOR RELATIONS LAW 33 (1954), reprinted in 50 NW. U.L. REV. 143 (1955), suggest that ultimately the individual should be entitled to press any claim arising under a collective bargaining agreement to a determination before an impartial tribunal. This analysis was adopted in Donnelly v. United Fruit Co., 190 A.2d 825 (N.J. 1963).

133 Until recently, the question of control of the grievance procedure has been considered a matter of contract. If the agreement clearly allowed the individual to process his own grievance through arbitration, the courts would honor this agreement. See Gilden v. Singer Mfg. Co., 145 Conn. 117, 139 A.2d 611 (1958). If the contract language was ambiguous on the question of who could control the grievance procedure, it might be interpreted either to protect individual employee interests, as in *In re* Norwalk

fore, is not entitled to arbitration of his claims in his own right.[134] The result of this combination of contract provisions and labor policy is to vest in the union officials unlimited discretion to deprive the employee of any job right by simply agreeing with management to do so.

Yet, concern for individual rights within the collective bargaining process requires that this power be exercised for and not against employees. The Supreme Court has held that it must be exercised consistently with the duty of fair representation.[135] In addition, Congress has in three instances adopted policies which affirm individual rights in the administration of the collective bargaining agreement. These are: (1) the expression in section 9(a) of the NLRA that the individual may present his own grievance under specified conditions;[136] (2) the provision of the LMRDA, in sections 101(a)(4) and 101(a)(5), that the individual is entitled to judicial review of union disciplinary action, which action must meet the statutory due process standards;[137] (3) the congressional desire, expressed in section 301 of the LMRA, that the collective bargaining agreement stabilize the employment relationship.[138]

While these statutory standards do not dictate where the line is to be drawn between individual and collective judgments, they do reflect congressional concern with sufficient protection of the individual employee in the administration of the union-employer agreement.

Thus, the two possible extremes in the relationship between union and employees in the administration of the agreement are foreclosed by the national labor policy. The employee cannot be given a judicial right to enforce every claim under a collective bargaining agreement, but neither can he be treated as having no rights against an adverse union-management judgment. A line

Tire & Rubber Co., 100 F. Supp. 706 (D. Conn. 1951), or to allow the union freedom of action to control the grievance process, as in Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 298 F.2d 644 (2d Cir. 1962).

In Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962), the court came perilously close to holding that, as a matter of national labor policy, employees would not be recognized as having rights under contracts to process grievances to arbitration. The court reasoned that such a construction was necessary to avoid chaos in collective bargaining. On this matter, see note 162 *infra* and accompanying text. The court held that the employee has a right to process a grievance only if the employer and union expressly give him one.

134 See notes 131 and 133 *supra.*

135 Conley v. Gibson, 355 U.S. 41 (1957).

136 See note 103 *supra.*

137 *Cf.* text accompanying note 39 *supra* and note 182 *infra.*

138 Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

must be drawn between those claims which the union may dispose of in good faith, and those which must be heard—in some forum —on their merits. The good faith discretion test does not adequately protect the employee's basic relation to his job. Discharge and seniority cases involving critical job interests should be heard on their merits in some impartial forum.[139] The employee should be allowed to prove that his claim is meritorious. The union would then be required to demonstrate why it rejected his claim, in light of its decisions to process other claims.[140] This pattern of proof might make the duty of fair representation more meaningful. It is consistent with the proof pattern in cases of prima facie torts. Plaintiff proves the infliction of harm by the defendant, and the defendant is then required to justify his action.[141]

Thus far, such protection for critical job interests has not developed. Although this area is one where we might expect the legal system to afford effective protection to rights under a written document, employees have received little genuine legal protection.

While several courts have indicated that an employee may recover damages against a union which fails to represent him fairly, this remedy is subject to two defects. The Supreme Court, as we will discuss shortly, has cast nearly fatal doubts on state court jurisdiction to provide such a remedy. But the other difficulty is that the damage remedy against the union may not meet the employee's basic need: the continuation of the employment relationship, or its advantages. This need can only be meaningfully protected if the employer is subject to suit. But the employer is

139 Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Autonomy Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959). A bare majority of the NLRB seem willing to undertake the task. See Miranda Fuel Co., 140 N.L.R.B. No. 7 (Dec. 19, 1962), discussed in text at note 196 *infra*.

140 For a clear illustration of this process, see Underwood v. Neuhoff Packing Co., 51 L.R.R.M. 2182 (Tenn. Ct. App. 1962). Plaintiff was discharged for absenteeism. The union processed her case through the grievance procedure and then dropped it. The court held that the employer had properly discharged her. Since the contract had not been breached, the union had not violated its duty of fair representation. A similar approach was taken in Stewart v. Day & Zimmermann, Inc., 294 F.2d 7 (5th Cir. 1961).

The failure to treat a complaining employee the same as similarly situated employees was the critical allegation which led the court in Thompson v. Brotherhood of Sleeping Car Porters, 52 L.R.R.M. 2881 (4th Cir. 1963), to recognize that a valid federal statutory complaint had been made against the union. Conversely, a showing that the union handled other similar situations in a like manner has been accepted as a justification for refusal to issue a charge of violation of § 8(b)(1)(A) of the NLRA by the general counsel of the NLRB. See Adm. Ruling S.R. 1761, 49 L.R.R.M. 1756, Feb. 6, 1962. For other cases in which the court has passed on the merits of employees' contentions, see Blumrosen, *supra* note 139, at 657-58.

141 See Halpern, *Intentional Torts and the Restatement*, 7 BUFFALO L. REV. 7 (1957); Comment, 52 COLUM. L. REV. 503 (1952).

not directly subject to the duty of fair representation. He is prohibited from benefiting from an agreement which violates the duty of fair representation. But the force of conventional legal analysis plus the availability of section 301 has led to the widespread use of an additional theory which will subject the employer to liability. The most convenient theory available is that of contract. The employee claims that the employer breached the collective bargaining agreement by discharging him or denying him other benefits due under the agreement. He seeks relief as a third-party beneficiary.

Thus the "tort" duty of fair representation can be effectively implemented only by joining the employer under a "contract" theory. But when this is done, the terms of the particular collective bargaining agreement are brought into sharp focus. These terms may and often do deal with the right of individual employees to enforce the contract in court or to utilize the grievance and arbitration procedures under the agreement. The Supreme Court has held that the right of employees to sue under section 301 of the LMRA depends upon whether the contract under which he claims gives finality to the decisions made within the contractual framework in grievance processing or arbitration. If the contract accords finality, then the employee cannot sue for breach of contract.[142]

Contracts containing grievance and arbitration procedures often permit the inference that control of the process rests in the union, not the employee, and that the decisions in that process are final. Under an agreement so interpreted, the individual could not sue under section 301 because the parties intended finality to attach to their decisions, and could not use the grievance-arbitration procedures himself because their control rests in the union.

However, the identification of the intention of the parties in the construction of these agreements is not a simple matter. Most contracts can be interpreted as ambiguous on the question of the right of the individual to press his own grievance. The resolution of this ambiguity will turn, in the last analysis, on judicial policy in connection with individual rights in the collective bargaining agreement. From contract considerations we have returned to legal policy as the basis for resolving the question of individual rights in the collective bargaining process. This being the case, the "contract-tort" analysis has been of little utility. It might have been more profitable had we phrased the question initially as the extent

142 General Drivers Union v. Riss & Co., 372 U.S. 517 (1963).

to which *both* parties—union and employer—are bound by the duty of fair representation. However, the courts have adopted the "contract" approach and have taken three discernible positions on the question of individual rights to enforce the contract, or to invoke its grievance and arbitration provisions.

The New Jersey Supreme Court has adopted the view of Professor Summers that section 9(a) of the NLRA permits the employee to press his claims through the grievance and arbitration procedures under the contract without the assent or assistance of the union. That court said, in *Donnelly v. United Fruit Co.*:

> "If the protection of those employees' interests is left wholly to the unlimited discretion of the union, then in a particular situation an important part of the security the employee hoped to gain by union membership, and which on the face of the bargaining contract he appeared to have gained, might be lost without a fair opportunity to defend himself or to realize upon the benefits granted to him by the contract. And such loss would occur even though the union acted in good faith in declining to use the grievance procedure to contest the validity of his discharge from employment. . . .
>
> "It is true the employee is not a nominal or formal party to a collective bargaining agreement. But the rights, duties and benefits of his employment are so created and controlled by the agreement made in his behalf by his statutory representative, the union, that for some purposes, at least, he ought to be regarded as a third-party beneficiary in substance as well as in spirit, or as possessing independent rights under section 9(a) of the Labor Management Relations Act . . . which ought to be considered as part of every such contract by operation of law."[143]

An intermediate approach which seems to have been adopted by the Maryland courts, and which I have elsewhere espoused, would permit the employee to pursue his action against the employer in those cases where the union breached its duty of fair representation. This view most closely relates the "contractual" action against the employer with the "tort" action against the union. It allows the union and employer to dispose of non-meri-

143 Donnelly v. United Fruit Co., 190 A.2d 825, 835-36 (N.J. 1963). Professor Summers' articles are cited in notes 85 and 132 *supra*. Donnelly did not benefit from the solicitude for individual rights expressed by the New Jersey court, because he had failed to indicate that he wished to press his grievance "pro se" without union help. This, the court held, deprived him of the right to do so. The insistence on this rather technical demand by the individual worker, in the context of a decision favoring his claim, is incongruous.

torious grievances, but would allow the individual to press those claims which the union should have asserted under its duty of fair representation. In *Jenkins v. Wm. Schluderberg-T. J. Kurdle Co.* the Maryland court explained its position on this question:

> "Conflicts of interest may exist or develop in many instances in grievance matters as between individuals or groups of employees represented by the same bargaining agent. It seems desirable that the bargaining agent should have power to deal with such problems. It is possible that even the discharge of a single individual might have wide repercussions in employer-employee relations, though usually this would not seem probable.
>
> "Possibilities of indifference, favoritism, discrimination and of trading off the interests of one group or member for the benefit of another group or member, of course, exist. Yet, possibilities of abuse of trust and confidence exist, in many fields. . . . Courts will redress misuse of power. In the case of trusts they may take over the direction and control of the administration of the trust in greater or lesser degree, but ordinarily they do not do so and leave the trustee free to exercise the discretionary powers which the trust instrument confers upon him. In corporate affairs, the courts do not undertake to take over the functions of the board of directors, though they may grant relief when the board abuses its powers, as by favoring the interests of one stockholder or group of stockholders at the expense of others. . . .
>
> "[A]s a general rule grievance procedures provided by a collective bargaining agreement should be a bar to suits by individuals against the Employer based upon alleged violation of the agreement, but that such suits are not barred if the Union acted unfairly towards the employee in refusing to press the employee's claim through to, and including, arbitration under the collective bargaining agreement."[144]

A third approach has been adopted by the Court of Appeals for the Second Circuit. The court, construing an ambiguous contract provision as not permitting the employee to process a grievance concerning his discharge without union assistance, was unimpressed with arguments based on section 9(a) of the LMRA. Basing its decision in part on its view of sound labor relations, the court stated, in *Black-Clawson Co. v. International Ass'n of Machinists*:

144 Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 574-75, 144 A.2d 88, 98 (1958). See Blumrosen, *supra* note 139.

> "Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union."[145]

The risks implicit in this position are most vividly demonstrated by a case arising in the Sixth Circuit.

In *Union News Co. v. Hildreth*,[146] the company operated a lunch counter in the Michigan Central railroad station in Detroit, where it employed approximately a dozen workers. It became clear that either money or food was being stolen when food costs rose significantly in relation to gross sales. The company could not identify any particular culprit, and wished to discharge all of the employees. The union objected. Prolonged union-management negotiations followed. The company convinced the union that a pattern of theft existed. A compromise was reached between the union's desire to protect the employees and the company's desire to discharge them all. Half of the employees would be laid off and replaced with another group. If the ratio of the cost of food to income then improved, this would signify that the theft had ceased. The layoffs would then be converted to discharges. Otherwise, the employees would be reinstated.

The layoffs resulted in a remarkable improvement. The income of the lunch counter went up 250 dollars a week, and the ratio of cost of goods to gross income returned to a normal level almost immediately. The union then acceded to the discharge of the laid-off employees. The union had not acted out of malice or evil intent. Management had acted out of legitimate motives.

Gladys Hildreth, who had worked as a waitress for ten years, was among those discharged. There was no proof of her guilt in the theft. The contract provided that no employee would be discharged except for just cause. She sought the support of the union in challenging the discharge but was, of course, rebuffed. The union honored its agreement not to press such a grievance. The company refused to process the grievance outside of the channels controlled by the union. Plaintiff sued the company.

145 313 F.2d 179, 186 (2d Cir. 1962).

146 295 F.2d 658 (6th Cir. 1961). Adhered to after trial, when reviewed in light of Smith v. Evening News Ass'n, 315 F.2d 548 (6th Cir. 1963).

The initial planning problems facing plaintiff's counsel in such a case are extraordinary. Most of the potential procedural obstacles in the *Hildreth* case were not raised. But in analogous cases they have so plagued the litigation that the merits were never reached. The procedural problems include: (1) *Indispensable parties.* The union has been held to be an indispensable party in an action against an employer for breach of the collective bargaining contract on grounds of its involvement as the other signatory to the agreement.[147] (2) *Amenability of the union to suit.* It has been suggested that no cause of action may be stated against the union for breach of its fiduciary duty because the injury was caused by the mutual agent of the employee and his co-principals.[148] The inapplicability of this defense is clear.[149] Where the union breaches its fiduciary duty, it is not acting on behalf of the injured employee. Furthermore, the duty stems from the federal statute, not from the fact of membership, and the defense based on membership is technically irrelevant.[150] The defense prevents enforcement of this federal statutory duty and is invalid on simple principles of federal supremacy.[151] (3) *Lack of subject-matter jurisdiction.* Given the plethora of tribunals active in the area of labor law, the hydra-headed concept of exclusive jurisdiction plagues every type of action. As applied to the action for breach of fiduciary duty, it takes three forms: (a) The courts defer to the griev-

147 Nix v. Spector Freight Sys., Inc., 264 F.2d 875, *rehearing denied*, 264 F.2d 879 (3d Cir. 1959).

148 See Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952), which was overruled by Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963).

149 That the union is a juridical entity subject to suit is almost too clear to require elaboration. Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962); Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960); United States v. White, 322 U.S. 694 (1944); Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958); LMRA, 61 Stat. 156 (1947), as amended, 29 U.S.C. § 185(b) (1958); Comment, *Unions as Judicial Persons*, 66 YALE L.J. 712 (1957). Marshall v. International Longshoremen's Union, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962), contains a dispositive exposition on the point. See also Donnelly v. United Fruit Co., *supra* note 148.

150 See note 86 *supra*.

151 If any further demonstration of the invalidity of the doctrine is necessary, the incongruity of applying it and the principle of Nix v. Spector Freight Sys., Inc., 264 F.2d 875, *rehearing denied*, 264 F.2d 879 (3d Cir. 1959), at the same time, might be illuminating. *Nix* holds that the union is an indispensable party in an action by the employee against the employer for breach of the labor agreement. But under the *Marchitto* rule the union is not amenable to suit by the employer. But if the union is not amenable to suit, then an action could not proceed against the employer. The result would be that the employee may never obtain a hearing on the merits of his contention of maladministration of the labor agreement, even though his substantive rights in the matter are clear—and all because a partner may not sue his co-partners for the wrongs of a mutual agent!

ance procedures under the collective bargaining contract. The requirement that contract remedies be exhausted as far as possible is rigorously applied. Any failure to press the claim as far as the grievance and arbitration procedures permit leads to dismissal.[152] (b) The principle that arbitration awards are subject to minimal judicial review has sometimes been applied to foreclose full hearing on an allegation that the award was rendered in violation of the union's duty of fair representation.[153] The principle that arbitration awards are virtually non-reviewable was developed in cases in which the union vigorously contested managerial action.[154] It has no application to cases in which it is alleged the union violated the duty of fair representation. Evaluation of such a claim requires full scrutiny of all the facts by the court.[155] The two issues should not be confused lest the finality principle dominate the question of whether there has been compliance with the duty of fair representation. (c) The pre-emption doctrine requiring judicial deference to the exclusive jurisdiction of the NLRB has been applied by some courts even when there was no indication that the NLRB would, or could, assert jurisdiction to define and enforce the duty of fair representation.[156] The present status of the pre-emption problem in light of recent decisions is more fully treated subsequently.

Defendant in the *Hildreth* case did not rely on any of these procedural defenses, but went directly to the merits of the case. The employer had, in good faith, entered into an agreement with the union to solve a difficult labor relations problem. It claimed the right to rely on this agreement as providing immunity from an action by a disgruntled employee.

152 See notes 130 and 131 *supra*; Blumrosen, *supra* note 139, at 642-65. The special problem under the Railway Labor Act of the jurisdiction of the Railway Adjustment Board is discussed in note 119 *supra*.

153 Palizzotto v. Local 641, Int'l Bhd. of Teamsters, 67 N.J. Super. 145, 170 A.2d 57 (Ch. Div. 1961), *aff'd*, 36 N.J. 294, 177 A.2d 538 (1962).

154 United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

155 As in Moore v. Local 89, Int'l Bhd. of Teamsters, 356 S.W.2d 241 (Ky. 1962), *cert. granted*, 371 U.S. 966 (1963); Underwood v. Neuhoff Packing Co., 51 L.R.R.M. 2182 (Tenn. Ct. App. 1962); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). In General Drivers Union v. Riss & Co., 298 F.2d 341 (6th Cir. 1962), *remanded*, 372 U.S. 517 (1963), the court of appeals distinguished between a grievance procedure and an arbitration award, and refused to attach to a decision of the former-type tribunal the finality that it was required to give to the latter. The Supreme Court remanded on the ground that "finality" was to be determined by interpretation of the contract.

156 *Compare* Lockridge v. Amalgamated Ass'n of Street Elec. Ry. Employees, 369 P.2d 1006 (Idaho 1962) (no pre-emption of action claiming breach of fiduciary duty of fair representation), *with* Baker v. Shopmen's Local 755, Int'l Ass'n of Bridge Workers, 403 Pa. 31, 168 A.2d 340 (1961) (pre-emption of similar action).

The Court of Appeals for the Sixth Circuit denied legal protection for Gladys Hildreth's claim because her discharge had been assented to by the union in good faith, and such assent was permitted under the contract. The court believed that this result was called for by the contract and by the national policy of promoting the collective bargaining process.

The case poses a dilemma. Group fault was established; individual fault was not. The court recognized that there was no basis for inferring that any of the laid-off employees were more guilty of theft than those who remained at work. There was simply no proof of individual guilt. The contract prohibited discharge without just cause and provided for arbitration. In labor arbitration the burden of proof of just cause is normally on the employer. When a criminal act is alleged, this burden is substantial.[157] In all probability, an arbitrator would not have sustained the discharge of these employees. But union and company had agreed to dispense with proof of the guilt of the laid-off employees. Thus, the union deprived the employees of a hearing before an arbitrator in which, on the evidence adduced, they would probably have prevailed.

Gladys Hildreth could not have been deprived of any of her legal rights, no matter how insignificant, by any court on the basis of the record in the case. Yet, she was deprived of her job, despite ten years of seniority, under a contract protecting her from discharge except for just cause, when her union refused to insist that her case be reviewed on its merits.

The court adopted three erroneous premises in reaching its decision.

(1) It assumed that the union is entitled to as broad discretion in the administration as in the negotiation of the collective bargaining contract. This assumption was made explicit by the court in quoting Professor Cox.[158] The preceding discussion demonstrates that the assumption is erroneous, and that the union is entitled to a much narrower range of discretion in the administration of the collective bargaining agreement than in its negotiation.[159]

(2) The court assumed that any limitation on the power of union and management to agree to the discharge of the employees

157 See Bendix Aviation Co., 26 Lab. Arb. 480 (1956); Universal Atlas Cement Co., 26 Lab. Arb. 529 (1956); General Refractories Co., 24 Lab. Arb. 470 (1955); Kroger Co., 25 Lab. Arb. 906 (1955). See STESSIN, EMPLOYEE DISCIPLINE ch. 8 (1960).

158 Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 622 (1956).

159 See text at note 110 *supra*.

must be found in the collective bargaining agreement.[160] However, the duty of fair representation is imposed by law, not by contract. Agreements which violate the union's duty of fair representation are voidable, and management may not rely on them. Thus, the duty of fair representation is binding on the employer as well as on the union.[161]

(3) The court assumed that the recognition of the employee's rights in this case would render the collective bargaining process ineffective. "Unless such bilateral decisions, . . . between a Union and an employer, be sustained in court, the bargaining process is a mirage, without the efficacy contemplated by the philosophy of the law which makes its use compulsory."[162] Other courts have made similar statements. In *Cortez v. Ford Motor Co.*,[163] the issue was whether the employer had violated the recall provisions of the agreement. The union had failed to press the matter, possibly because the aggrieved employees were all women. The contract provided that the union was to control the grievance procedure. The court said: "It is likewise obvious that for the courts to . . . [determine the propriety of the refusal to process the grievance] would quickly bring the wheels of industry to a standstill, along with the wheels of justice."[164]

In another case, the court approved the philosophy of union control over grievance processing as follows: "A contrary proce-

160 "Plaintiff's right of action, if any, must arise from the terms of the contract between the Union and the employer. . . .

"The question, then, for decision here is whether such statutory power [of the union to bargain collectively with the employer], in combination with the terms of the bargaining contract, authorized the union and the defendant to mutually conclude, as a part of the bargaining process, that the circumstances shown by the evidence provided just cause for the layoff and discharge of plaintiff and other of defendant's employees." 295 F.2d at 663-64.

161 See note 86 *supra*. Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958), explicitly holds that an agreement with the union generally will be a good defense to the employer, unless the union acted unfairly toward the employee in making such agreement.

It is possible to construe the *Hildreth* decision as implying no more than Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959), that the agreement with the union will provide a complete defense to the employer regardless of whether the union acted fairly, and that the only remedy for unfair union behavior is an action against it. In *Hildreth* the action was only against the employer. However, the tenor of the *Hildreth* opinion suggests that the court was satisfied that the union had not failed in its obligations toward the employee. On the appropriate remedy in these cases, see Blumrosen, *supra* note 139, at 658-64.

162 295 F.2d at 664.

163 349 Mich. 108, 184 N.W.2d 523 (1957).

164 *Id.* at 126, 184 N.W.2d at 532. The action had been brought in assumpsit, and the court expressly put to one side considerations relating to the union's statutory duty. Yet, the prediction as to the consequences of recognition of individual employee actions would be the same whether the recognition came under a contract or a tort theory.

dure which would allow each individual employee to overrule and supersede the governing body of a Union would create a condition of disorder and instability which would be disastrous to labor as well as industry."[165]

There are two difficulties with this type of statement. If it has validity, it is in connection with a system in which an employee has the legal right to press *any* claim of contract violation, irrespective of its merits or the position of the union, in an environment where this is a realistic possibility. However, these forebodings have no application to a narrower rule permitting employees to press meritorious claims concerning critical job interests, in an environment where the resort to law is not common. Thus, they appear to be an example of "straw man rhetoric," a rejection of a proposition not asserted, which implicitly rejects a narrower proposition without independent evaluation.

More importantly, the statements lack empirical proof. There is no evidence that the collective bargaining process would grind to a halt if individual employees were allowed legal protection for their critical job interests. The possibility of legal protection might make union and management officials more cautious in disposing of employee claims, but this would not mean the ruination of collective bargaining. It is as reasonable to assume that union and management would learn to accommodate to a rule which prohibited them from informally waiving employee rights in connection with discharge and seniority claims. The history of collective bargaining demonstrates the basic flexibility of union and management. Management has survived the demise of the managerial prerogative theory of business operation. Unions have adapted to technological change. There is no reason to assume that similar flexibility would not exist in connection with the recognition of individual rights. The prediction that individual rights are incompatible with collective bargaining is no more than a cloak for predilection. It is a form of policy making. But policy making should be done explicitly where possible, not as an implicit aspect of a prediction. Legal policy should protect employees' critical job interests unless it is demonstrated that such protection is incompatible with collective bargaining. No such demonstration has been made.[166] It seems doubtful whether

165 Bianculli v. Brooklyn Union Gas Co., 115 N.Y.S.2d 715, 718 (Sup. Ct. 1952).

166 The evidence developed thus far is inconclusive. Professor Summers has analyzed Swedish law which permits extensive individual protection of his contract rights. See Summers, *Collective Power and Individual Rights in the Collective Agreement—A*

it can be made. Some unions have survived every attack which government, management, and even other factions in labor have mounted against them. Recognition of the rights of a few unjustly treated employees will not spell the doom of collective bargaining.

The ultimate irony of the *Hildreth* decision is that the arbitrary action of the employer justified the equally arbitrary action of the union. Granting that, in the absence of unionism, the employer could arbitrarily discharge some members of a group without evidence of their guilt, the purpose of collective bargaining is to destroy the arbitrary character of employer action. This purpose is subverted if the arbitrary employer action becomes the justification for the union's failure to protect the employee. The question is whether this was the type of employer action with which the union was entitled to agree under its fiduciary duty to represent the employees fairly. The court in *Hildreth* never faced this question.

Because of the admixture of contract and tort and statutory obligations in these cases, problems of procedure, identification of issues, formulation of substantive standards and appropriate remedies are difficult. The forms of action still affect our conception of legal problems and their potential solutions. The categories of tort and contract supply us with ready-made procedural, substantive and remedial rules for the disposition of cases. To characterize a case as tort or contract automatically invokes the rules related to those respective categories. The problems of individual rights in collective bargaining contract administration cannot be satisfactorily solved in such a mechanical fashion. An analysis of the specific problems which seeks desirable and realistic solutions is

Comparison of Swedish and American Law, 72 YALE L.J. 421 (1963). However, Swedish collective bargaining contracts apparently do not protect job security so most of the issues which would be critical in the United States do not arise. The bulk of the cases are wage claims.

Under the Railway Labor Act, individuals have been afforded some minimum procedural protection without the destruction of collective bargaining. See Kroner, *Disciplinary Hearings Under the Railway Labor Act: A Survey of Adjustment Board Awards*, 46 MINN. L. REV. 277 (1961); Kroner, *Minor Disputes Under the Railway Labor Act: A Critical Appraisal*, 37 N.Y.U.L. REV. 41 (1962).

Moreover, the courts attribute unrealistic simplicity to the grievance procedure itself. The infinite complexity of the process is vividly described in KUHN, BARGAINING IN GRIEVANCE SETTLEMENT (1961). Kuhn concludes that various work groups within the bargaining unit exert their technologically based power through the grievance procedure to improve their own position with little regard for the broader interests of the union. This "fractional bargaining" benefits organized subgroups within the union, but not the individual. It works for claims held in common by coherent work groups. Kuhn suggests that considerable chaos is presently an expected part of grievance processing. Thus, the "avoidance of chaos" argument against recognition of individual rights in grievance processing loses some of its significance.

more fruitful than any attempt to characterize the employee's claim abstractly as sounding in tort or contract.[167]

(1) *The issues.* To prevail, the employee must establish that (a) he has a valid or meritorious claim under the collective bargaining agreement, (b) that it was denied by the employer with the assent or acquiescence of the union, and (c) that the union was obligated by law to press his claim on behalf of the employee. Since in most cases the agreement provides for arbitration of such disputes, this analysis means that the court must determine if the employee had a meritorious claim worth presenting to an arbitrator, and if it was the type of claim which the union should have pressed to arbitration.

(2) *The appropriate remedy.* (a) *Damages.* The New York[168] and Pennsylvania[169] courts have held that, in the event the union fails to press a grievance in violation of its duty of fair representation, the employee has a damage action against the union, but no remedy against the employer. The Maryland court has held that the employee in such a situation has an action against the employer as well as against the union.[170]

At first glance, the New York-Pennsylvania rule seems to reconcile the individual claim with the needs of collective bargaining. The employee may sue the union for damages, but the employer who relied on the union decision is immune. Thus, collective bargaining between union and employer is vindicated. This analysis is superficial for three reasons:

167 In Local 100, United Ass'n of Journeymen v. Borden, 83 Sup. Ct. 1423 (1963), the Supreme Court refused to accept the characterization of the cause of action as sounding in "tort" or "contract" as influential in the disposition of a pre-emption claim. "It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction." *Id.* at 1428.

In McGinnis v. Brotherhood of Ry. Clerks, 75 N.J. Super. 517, 183 A.2d 486 (App. Div. 1962), an action against union and employer for violation of seniority rights by failure to recall plaintiff in proper order, the court held that the contract claim rested in the exclusive jurisdiction of the Railway Adjustment Board, but it retained jurisdiction over the action for breach of fiduciary duty. In connection with allegations of conspiracy between union and employer to deprive plaintiff of his contractual rights, the court said, at 521, 183 A.2d at 488-89: "[T]hat pleading presents an odd mixture of tort claim and a claim of rights under the collective bargaining agreement." The court held that the employer was subject to liability on a conspiracy theory.

168 Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959).

169 Falsetti v. Local 2026, UMW, 400 Pa. 145, 161 A.2d 882 (1960).

170 Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958). New Jersey has adopted a rule holding the employer liable for conspiracy with the union to ignore the employee's contract rights, O'Brien v. Dade Bros., 18 N.J. 457, 114 A.2d 266 (1955); McGinnis v. Brotherhood of Ry. Clerks, 75 N.J. Super. 517, 183 A.2d 486 (App. Div. 1962). But it is not clear that the employer's liability is coterminous with that of the union.

First, it assumes that the employer is entitled to rely on an agreement made with the union which the union by definition had no power to make. This premise is refuted by the *Steele* decision.[171] The argument that the employer should not be held responsible for the union's default toward the employee breaks down because at some point in the negotiation of the grievance the employer will become aware that the union has decided not to press the claim. Since the individual must exhaust such remedies under the contract as are open to him,[172] knowledge of the conflict between individual and union will be brought home to the employer. Perhaps his monetary liability should not reach back prior to the time he acquired this knowledge, but this consideration goes to the details of the remedy, not its existence.

Second, the rule assumes that damages against the union are an appropriate remedy in these cases. The wrong is deprivation of continued employment, and measurement of damages is likely to be very difficult. Any damage remedy is likely to be either inadequate, exorbitant, or both, depending on the perspective.

Third, damages against the union do not reflect the wrong done to the employee. It consists of a breach of contract by the employer as well as a breach of the duty of fair representation by the union. It seems strange to absolve the employer of liability to the employee for breach of contract because the union breached its duty of fair representation.

However, it is appropriate to *limit* the damage liability of the employer in such a case for the following reason: if the union had performed its duty, it would have pressed the employee's claim to arbitration. If the arbitrator decided against the employer, he would require the employer to comply specifically with the contract in the future, *e.g.*, reinstate a wrongfully discharged worker, and would order the employee made whole for improper loss of time, *e.g.*, back pay from the time of discharge to reinstatement. The employer's financial liability in arbitration is normally limited to past losses which have been suffered by employees. It does not embrace the present value of lost future earnings. The future losses are avoided by requiring the employer to perform the agreement specifically. Thus, a back pay award by an arbitrator will be substantially less than a potential damage award for wrongful discharge. The employer, by agreeing to arbitrate,

171 Quoted in note 86 *supra.*
172 See cases cited in note 130 *supra.*

seeks to limit his financial liability for breach of contract to that amount which an arbitrator would impose, and he should not be exposed to heavier monetary penalties.

But this argument goes not to the question of whether the employer should be held responsible, but to the appropriate remedy. If the court were to impose the same remedy which the arbitrator would impose, for example, reinstatement and back pay in a discharge case, there is no reason to absolve the employer because the union breached its duty.

(b) *Specific performance of collective contract obligations.* This analysis suggests that the courts should order specific performance of collective bargaining contract obligations as a remedy in these cases. In the normal case of discharge, this will mean reinstatement, with or without back pay. These obligations have been successfully imposed by arbitrators for years, with ultimate court sanction rarely used. There is no practical or theoretical reason why the courts should not use the same remedies.[173]

There may be cases in which, because of the peculiar circumstances, it is appropriate to utilize the damage remedy rather than reinstatement with or without back pay. In such cases, a court would be in a position to assess the damages against the appropriate parties.[174]

(c) *Referral to arbitration.* The crux of the employee's complaint in most cases is the failure of the parties to submit his grievance to arbitration. The New Jersey Supreme Court in the *Donnelly* case has suggested that the appropriate remedy would be to require the submission of the grievance to arbitration with sufficient judicially imposed safeguards to assure fairness in the arbitral process.

(3) *The standard to be applied in defining the union's duty.* Two different points of view have been expressed on the scope of the union's duty to press employee claims. One is that the good faith test is at all times sufficient.[175] The other is that certain

173 The reluctance to use such equitable remedies because of a tradition of non-enforcement of personal service contracts is not in keeping with contemporary solutions to labor relations problems. See Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 175 A.2d 639 (1961); Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963). Compare, however, Mello v. Local 4408, United Steelworkers, 82 R.I. 60, 105 A.2d 806 (1954). In any event, if in doubt, the court could always order the matter submitted to an arbitrator and then enforce his awards. Compare Matter of Exercycle Corp. (Maratta), 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 353 (1961).

174 See Blumrosen, *supra* note 139, at 663.

175 See Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959); Falsetti v. Local 2026, UMW, 400 Pa. 145, 161 A.2d 882 (1960); Cox, *supra* note 158;

claims, such as discharge and seniority, must be administered by the union on their individual merits, while remaining claims are subject to the good faith test.[176] Ultimately, the Supreme Court must choose between these views. Hopefully, the Court will provide a level of protection for individuals within the structure of the collective bargaining agreement which most lower courts have not heretofore developed. A factor pointing in this direction is the 1959 legislation concerning employee rights within the union, which will be discussed shortly.

(4) *The standard to be applied in interpreting the agreement to determine if the employee has a valid claim.* The choice here is between a judicial construction of the agreement, or a judicial determination that the employee's claim is plausible enough so that an arbitrator might recognize it, even if the court would not. The gravamen of the employee's complaint is that his case did not get before a labor arbitrator. In some instances, arbitrators use a different hearing process and a different standard of judgment than courts.[177] The employee is not well protected if, as a result of a union refusal to process a grievance, his case is placed before a tribunal where he will lose on the merits, while, if the union had performed its duty, he might have prevailed. Therefore, in cases in which the issue is failure to arbitrate, the court might arrange, either as a part of the remedy or as a part of its decisional process, to have the crucial isssues of contract construction determined by a professional labor arbitrator. The judicial function then would be to determine not the merits, but the meritorious nature of the claim.

This consideration of some of the problems which arise in the context of an employee's suit suggest that the characterization of the employee's claim as tort or contract is inadequate to resolve the various specific problems which are likely to emerge. The

Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L.Q. 25 (1959).

176 See Miranda Fuel Co., 140 N.L.R.B. No. 7 (Dec. 19, 1962); Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *rehearing denied*, 100 N.W.2d 317, *cert. denied*, 362 U.S. 962 (1960); Blumrosen, *supra* note 139. Possibly the cases from the southern states, listed in note 98 *supra*, could be cited in support of this view, with the reservation indicated in that footnote. The articles cited in note 132 *supra* go farther in the direction of protection of individual rights than the suggestion made here.

177 The theft cases provided an illuminating illustration. Note the difference between judicial and arbitral approach to the problem by comparing the Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961) (theft by unidentified employee justified dismissal of employee without proof of guilt), and Jorgensen v. Pennsylvania R.R., 25 N.J. 541, 138 A.2d 24 (1958) (railroad entitled to discharge dining car steward if he "converted" a small piece of ham), with the arbitration awards cited in note 157 *supra*, which suggest that arbitrators view such matters with less severity.

cause of action against the employer can most conveniently be viewed as contractual, and allowable under section 301, only if the union breached its statutory duty of fairly representing the employees.[178] The suit against the union can most conveniently be viewed as in tort, for breach of a duty, and in some cases for breach of the LMRDA, a possibility which will be discussed in the next section. The required combination of the two elements in a single litigation can, if necessary, be viewed under the concept of conspiracy, provided this does not lead to a requirement of evil motive on the part of the employer or the union. But, each aspect of the rules relating to such a suit must be examined in light of its labor relations implications—characterization as tort or contract is no substitute for analysis.

The ultimate resolution of these problems lies with the Supreme Court, and the time is at hand for the Court to make good the obligation which it assumed when it first defined the duty of fair representation: to accept and decide a sufficient number of cases in the area within a reasonable time to provide the basic guidance necessary for the further development and integration of this new field of law. In other areas of labor law, the Court has met this obligation in connection with the constitutional problem of picketing,[179] the pre-emption problem,[180] and the interpretation of collective bargaining contracts under section 301.[181] It should now do so with respect to individual rights in the collective bargaining context.

Two additional developments will affect the immediate future

178 The principle that collective bargaining agreements are to be interpreted as precluding employee rights to sue the employer for breach of contract [Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 298 F.2d 644 (2d Cir. 1962); Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959)] is a rule of contract construction enforceable only as a federal principle under § 301 of the LMRA. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). As such, it must be coordinated with other principles of the national labor policy. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), for an analogous case construing the language of a no-strike clause, in light of the rights of employees under the National Labor Relations Act. The construction suggested in the text would similarly harmonize the collective bargaining process with the protection of individual employee claims. Reaching such a result under state law is Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958).

The possibility of an individual suit under § 301 was established in Smith v. Evening News Ass'n, 371 U.S. 195 (1962), but the circumstances wherein such actions would be permitted were not identified. See Mr. Justice Black's dissent, 371 U.S. at 201.

179 International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957).

180 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

181 Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962); Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

of the question of individual rights in the collective bargaining process. They are the adoption in 1959 of the LMRDA and the decision of the NLRB, in late 1962, to enforce the duty of fair representation.

G. *The LMRDA and Individual Rights Under the Collective Bargaining Agreement*

Obviously, division of the law regulating the relation of union and employee into three phases—political, internal and economic—is artificial. The behavior of union and worker does not always fall nicely into one of the categories. General political considerations may affect the internal affairs of the union and may also affect its performance in collective bargaining.[182] Furthermore, there is an intimate nexus between internal union affairs and the administration of the collective bargaining process. The collective bargaining agreement is administered by the union through a series of internal decisions relating to position in negotiation, the processing of grievances, and the taking of cases to arbitration.

This basic fact of institutional life—that collective bargaining decisions are made through the internal mechanism of the union—was ignored by Congress when it adopted the LMRDA. Congress assumed that there were two separate spheres of union activity, one relating to collective bargaining, the other to internal affairs, and it intended to regulate only the latter.[183] But this intention is impossible to carry out. If all internal union decisions are subject to Title I of the LMRDA, this will inevitably include decisions in connection with grievance and arbitration of individual rights. If such matters are not subject to Title I, then, to that extent, the protection which Congress envisioned for the individual in the area of internal union affairs will not be provided. The dilemma is unavoidable, and it falls to the judiciary to strike the balance. The courts must determine where protection of individuals, incident to internal affairs, leaves off and the union freedom of action, incident to collective bargaining, begins. The issue is clearly posed by section 101(a)(5) of the LMRDA which prohibits a union from disciplining a member without affording him notice, opportunity to prepare his defense, and a full and fair hearing. When a union agrees with management that an employee should be disciplined, does this constitute union "dis-

182 See Part I *supra*.
183 See note 104 *supra*.

cipline" within the purview of section 101(a)(5)? If so, the grievance procedure has ceased to be an informal mechanism for adjustment of disputes between union and employer, and must operate with the formalities prescribed by statute to protect the employee. The holding in *Detroy v. American Guild of Variety Artists*[184] is important in this regard. Detroy, a union member, was blacklisted in the AGVA magazine after failing to abide by an arbitrator's finding that he had violated a contract with the employer. The decision to blacklist had been made summarily by union officials. The court rejected the contention that the union action was not "discipline" within the ambit of section 101(a)(5):

> "Nor can we agree with the union's claim that the listing of the appellant's name did not constitute discipline within the meaning of § 101(a)(5). If a union such as the AGVA undertakes to enforce the contracts made by its members with employers, it does so because such enforcement is to the ultimate benefit of all the members, in that it promotes stability within the industry. A breach of contract or a refusal to abide by an arbitration award, therefore, is not damaging merely to the employer but to the union as well, and the union's listing of those of its members who do violate their contracts is an act of self-protection. In thus furthering its own ends the union must abide by the rules set down for it by Congress in § 101(a)(5), and any member against whom steps are taken by the union in the interest of promoting the welfare of the group is entitled to these guarantees."[185]

The *Detroy* decision is sound on its facts. The union, far from merely acquiescing in management discipline, had taken affirmative steps to enforce a sanction against the employee. In *Gross v. Kennedy*,[186] the employer had apparently turned his disciplinary power over to the union, thus creating an identity between union and employer disciplining which made section 101(a)(5) applicable.[187] But what of the typical case, where an employee is dis-

184 286 F.2d 75 (2d Cir. 1961).

185 *Id.* at 81.

186 183 F. Supp. 750 (S.D.N.Y. 1960).

187 Similarly, when the union voted to stop sharing work with a member, this was held to be "discipline" in Rekant v. Shochtay-Gasos Union, 205 F. Supp. 284 (E.D. Pa. 1962). The court stated: "Whether the action was disciplinary in nature is to be determined by its practical effect. By the act of the union, Plaintiff lost his then existing right to share work. This was of immediate consequence to him, and it was a disciplinary act." *Id.* at 289. See also Figueroa v. National Maritime Union, 48 L.R.R.M. 2017 (S.D.N.Y. 1961).

charged by the employer for misconduct or unfitness, and the union decides not to press a grievance? Is such acquiescence in the employer's disciplinary action subject to the notice and hearing requirement of section 101(a)(5)?

Section 101(a)(5) should not be so construed.[188] Congress did not intend to judicialize the collective bargaining process by requiring formal proceedings before a union could agree with the discharge of an inefficient or dangerous employee. If the employee was properly discharged under the contractual relations between the union and the employer, the failure of the union to press his grievance cannot be termed "discipline." But if the employee was not properly or justly discharged, then the union action in refusing to assert the employee's valid claim takes on the coloration of union discipline. This approach will allow the employee to test the union decision within the framework of section 101(a)(5) while preserving the union's freedom to refuse to process a non-meritorious claim against the employer.

If the union takes an affirmative hand in securing the discipline, the action is subject to the procedural provisions of section 101(a)(5). But if the union action is passive acquiescence, it becomes "discipline" subject to 101(a)(5) only if the union was under a duty to process the grievance.[189] This reading of section 101(a)(5) adds little to existing law concerning the union's duty to process a grievance. Such a duty must be found, and violated, before section 101(a)(5) comes into play.

Congress intended that the courts would play a greater role in determining the relations between union and member than they had in the past. This conclusion is supported by section 101(a)(4), which limits the duration of the required exhaustion of internal union processes to a maximum period of four months. Congress contemplated, at the end of that time, judicial decision on the merits of the union-member conflict.[190] This enhanced role of

188 See Rinker v. Local 24, Amalgamated Lithographers, 201 F. Supp. 204 (W.D. Pa. 1962); Beauchamp v. Weeks, 48 L.R.R.M. 3048 (S.D. Cal. 1961); Allen v. Armored Car Chauffeurs, 185 F. Supp. 492 (D.N.J. 1960). Implications of these cases are explored in Aaron, *The Union Member's "Bill of Rights": First Two Years*, Industrial Relations, Feb. 1962, pp. 47, 65-67: The cases hold that loss of employment is not actionable under Title I, LMRDA, because of the availability of NLRA remedies. They are not fully consistent with the cases cited in notes 184, 186 and 187 *supra*.

189 Aaron, *supra* note 188, supports this reading of § 101(a)(5).

190 The suggestion in the cases cited in note 188 *supra*, that, where the discipline consists of loss of employment, federal court jurisdiction is pre-empted by the NLRA, seems without merit (Aaron, *supra* note 188, at 67), unless the NLRB, under its newly announced doctrine stated in Miranda Fuel Co., 140 N.L.R.B. No. 7 (Dec. 19, 1962), asserts power to enforce fully the duty of fair representation. In the event

the courts may signal heightened protection for the interests of the individual in the collective bargaining process.

This entire discussion is premised on the assumption that enforcement of the duty of fair representation rests with the judiciary, and is not within the exclusive jurisdiction of the NLRB. A recent development has placed this assumption in doubt, and has added a new dimension to the problem of the relationship between the individual and the collective bargaining process.

H. *The NLRB and the Duty of Fair Representation*

Since the *Steele* decision, it has been assumed that the primary responsibility for implementing the duty of fair representation rests with the courts. The *Steele* case arose under the Railway Labor Act, a statute which was not administered by an agency capable of enforcing the duty. The duty, however, was carried over into the NLRA without a full examination of NLRB's power to enforce it.[191] The NLRB participated in the implementation of the duty through its control over the certification of the bargaining agent, and by enforcing the duty, imposed by the Taft-Hartley Act, not to discriminate against employees because of

Miranda is sustained, the cases in note 188 *supra* will turn out to state the law of the future correctly, although in error at the time of decision.

191 See Syres v. Oil Workers, 350 U.S. 892 (1955), *reversing* 223 F.2d 739 (5th Cir.), discussed in Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 154-55, 174 (1957). The duty was applied by the Supreme Court in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), involving the validity of a seniority preference for returning veterans, a case arising under the NLRA. The court explicitly declined to face the question of the NLRB's jurisdiction over the issue of fair representation. Footnote 4 of the *Huffman* opinion reads as follows: "International also questions the jurisdiction of the District Court. International recognizes that one issue in the case of whether it engaged in an unfair labor practice when it agreed to the allowance of credit for pre-employment military service in computations of employment seniority. It then argues that the National Labor Relations Act . . . vests the initial jurisdiction over such an issue exclusively in the National Labor Relations Board. This question was not argued in the Court of Appeals nor mentioned in its opinion and, in view of our position on the merits, it is not discussed here. Our decision interprets the statutory authority of a collective-bargaining representative to have such breadth that it removes all ground for a substantial charge that International, by exceeding its authority, committed an unfair labor practice." *Id.* at 332.

The technique used in this note, examining the merits to determine if the NLRB had jurisdiction, was explicitly repudiated by the Supreme Court in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 n.4 (1959). Under the rule of the *Garmon* case, if the matter is "arguably subject" to NLRB jurisdiction, the Board must decide first if it has power in the matter.

See also, noting the lack of careful analysis at the time the duty of fair representation was transplanted from the RLA to the NLRA, Durandetti v. Chrysler Corp., 195 F. Supp. 653 (E.D. Mich. 1961).

membership or non-membership in a union.[192] Enforcement of this latter obligation led the NLRB, in the 1950's, to develop the principle that union control over hiring practices was per se an unfair labor practice because it inherently encouraged union membership in violation of the NLRA.[193] This principle was rejected by the Supreme Court in 1961. The Court held that unions could enter into agreements with management which would give them control over hiring practices so long as they did not discriminate on the basis of union membership. The union was free to utilize such non-discriminatory hiring criteria as might be agreed to by the employer.[194] This approach forced the NLRB to examine, on a case-by-case basis, the question of whether any particular exercise of union control over employment opportunities violated the act. When the evidence supported the conclusion that encouragement of union membership was involved, a violation was declared.[195] But what of cases in which the union simply abused its statutory powers by violating the duty of fair representation, with no direct relation to union membership considerations? Did these cases involve violations of the NLRA?

This issue was faced by the NLRB for the first time in *Miranda Fuel Co.*,[196] decided in late 1962. By a vote of three to two,

192 See note 112 *supra*.

193 *E.g.*, Mountain Pac. Chapter of the Ass'n of Gen. Contractors, 119 N.L.R.B. 883 (1957), *rev'd*, 270 F.2d 425 (9th Cir. 1959); Pacific Intermountain Express Co., 107 N.L.R.B. 837 (1954), *enforced sub nom.* NLRB v. International Bhd. of Teamsters, 225 F.2d 343 (8th Cir. 1955).

194 Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); NLRB v. News Syndicate Co., 365 U.S. 695 (1961).

195 See Brunswick Corp., 135 N.L.R.B. 574 (1962), where an employee was discharged for questioning a union steward's authority to determine quitting time. The Board held that pressure for the discharge violated § 8(b)(2) because it was based on employee's failure to perform obligations imposed by the union on its members. In Local 825, Int'l Union of Operating Eng'rs, 135 N.L.R.B. 578 (1962), an employee was discharged because of failure to use the union hiring hall, and the union and employer were in dispute as to whether the hiring hall contract was applicable to the particular job. The Board held that the discharge violated § 8(b)(2) because use of the hiring hall was not justified by any contract and the union was applying its own procedures. In Local 294, Int'l Bhd. of Teamsters, 137 N.L.R.B. No. 112 (June 28, 1962), the union caused loss of seniority, either because employee was considered as a trouble-maker by drivers, or because the union wished to substitute its method of job assignments. Either basis violated § 8(b)(2). In Local 1070, United Bhd. of Carpenters, 137 N.L.R.B. No. 52 (May 31, 1962), an employee questioned a union agent as to the reason for a strike. A union official became angry because his authority and judgment were challenged, and used his office to bring about the discharge without contractual authority. This violated § 8(b)(2). See also M. Eskin & Son, 135 N.L.R.B. 666 (1962).

196 140 N.L.R.B. No. 7 (Dec. 19, 1962). Members Rodgers (term expires 1963), Leedom (term expires 1964) and Brown (term expires 1966) made up the majority, while Chairman McCulloch (term expires 1965) and member Fanning (term expires 1967) dissented.

the Board assumed responsibility for the full enforcement of the duty of fair representation, regardless of whether the case involved any special aspect of encouragement or discouragement of union membership.

Michael Lopuch had been employed for eight years as a fuel truck driver for Miranda. He was number eleven on a seniority list of twenty-one and had steady year-round employment. On April 12, 1957, Lopuch, with his employer's permission, left to spend the summer assisting a member of his family in another state, intending to return by October 15. He returned two weeks late, but his excuse of illness, backed by a doctor's statement, was accepted by the employer.

On his return the union sought to have him dropped to the bottom of the seniority list. In its argument, the union relied on a contract clause which designated April 15 to October 15 as a slack season, during which time men who would not have been steadily employed were entitled to a leave of absence without loss of seniority, if they reported back to the union steward by October 15. Failure to report on time meant loss of seniority. The union first argued that Lopuch's late return required a forfeiture of all seniority. Upon verifying his illness excuse, however, the union shifted its ground of attack. It argued that if the employee left before April 15 he was not protected against loss of seniority by the "slack season" clause and must be placed at the bottom of the list. The company "reluctantly" acceded to this "interpretation" of the contract and, as a result, Lopuch lost some weekend work.

The NLRB held that the "slack season" clause was inapplicable to Lopuch, who would have had steady work in the summer. By insisting on an "interpretation" of the clause which covered Lopuch, the union breached its duty to represent him fairly. The employer, by acquiescing or participating in this action, also violated the act. The NLRB held, three to two, that it was empowered to redress this statutory violation.[197] The majority and dissenters differed on two basic aspects of the case.

197 This case had been decided earlier by the NLRB on the theory that any delegation of control over hiring practices to the union violated the act, as well as on a specific finding with respect to the *Lopuch* case. 125 N.L.R.B. 454 (1959). The decision was enforced by the court of appeals [NLRB v. Miranda Fuel Co., 284 F.2d 861 (2d Cir. 1960)] solely on the ground that, since the agreement did not justify forfeiture of seniority rights, the action by the union "constituted a delegation of power over seniority rights which improperly encouraged union membership and discriminated against the

The majority reasoned that the concept of fair representation, implicit in the majority-rule-exclusive-representation principle, was an aspect of the right of employees to "bargain collectively through representatives of their own choosing." The right to bargain collectively granted by section 7 of the NLRA is the right to bargain through representatives who will fairly represent the employees. Section 7 rights are protected against a variety of union and management unfair labor practices by section 8.[198] The NLRB is empowered to protect section 7 rights by enforcing the provisions of section 8. Therefore, the full range of NLRB power to protect section 7 rights is available to enforce the duty of fair representation. The union violated section 8(b)(1)(A) of the act by "restraining or coercing" Lopuch when it required the forfeiture of his seniority rights. The employer, by agreeing, "interfered" with Lopuch's rights in violation of section 8(a)(1).

In addition, the union, in seeking to reduce Lopuch's seniority, violated section 8(b)(2), and the employer, by acquiescing, violated section 8(a)(3). These two sections prohibit the union and the employer from discriminating to encourage or discourage union membership. The majority held that any abuse of power by the union in violation of the duty of fair representation had the prohibited effect, whether or not the case involved any special issue of union membership.[199]

employee." The court of appeals rejected the broad ground of decision proposed by the Board, stating that the application of contract criteria to determine seniority rights involving merely administrative or ministerial functions on the part of the shop steward did not constitute an improper grant of authority to the union. The union petitioned for certiorari, and the Board acquiesced. The Supreme Court, 366 U.S. 763 (1961), ultimately remanded the case to the Board, for disposition in light of its decision in Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961). The decision discussed in the text was the Board's response to the remand.

198 Section 7 of the NLRA recognizes employee rights to organize, bargain collectively through representatives of their own choosing, engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and also to refrain from such activities. Section 8(a) lists a series of employer unfair labor practices which impinge on § 7 rights. These include: (1) interference, restraint or coercion of employees for exercising § 7 rights; (2) domination or interference with union activities; (3) discrimination to encourage or discourage union membership (union shop permitted); (4) discrimination for invoking the act; and (5) refusal to bargain.

Section 8(b) lists a series of union unfair labor practices which include: (1) restraint or coercion of employees for exercising § 7 rights; (2) causing or attempting to cause an employer to discriminate in violation of § 8(a)(3); and (3) refusing to bargain. Section 9 states the principle that the union designated by the majority of employees in an appropriate local union shall be the exclusive representative of all employees in the unit, and gives the NLRB authority to conduct representation elections. Section 10 empowers the NLRB to prevent and redress unfair labor practices.

199 The majority relied on the rationale of Radio Officers Union v. NLRB, 347 U.S. 17

The dissent did not challenge the crucial premise of the majority that the duty of fair representation was to be read into section 7 and was therefore enforceable by the NLRB. The dissent, however, argued that the NLRB's enforcement powers were limited, and did not embrace the full scope of the duty of fair representation. Sections 8(b)(2)-8(a)(3) prohibit only union-management conduct which specifically was intended to encourage or discourage union membership. No evidence of this was found in the facts in the *Miranda* case. Hence, those sections were inapplicable. Sections 8(b)(1)(A)-8(a)(1) were not available to the employee because section 8(b)(1)(A) had received a narrow construction in a recent Supreme Court decision and should not be read broadly.[200] Therefore, the Board had no remedial authority over a breach of the duty, if one existed. Remedy lay, if at all, in the courts. The dissent also suggested that the duty of fair representation might not protect Lopuch at all. The duty, as understood by the dissent, protected employees only against actions by the union based on arbitrary classifications, such as race or union membership. This case was not based on such a classification, and involved only a union policy based on length of absence.

Although discussion of all of the implications of the *Miranda* decision is beyond the scope of this article,[201] several matters do

(1954), for the proposition that the union violated the act when the foreseeable consequence of its actions was to encourage obedience to the union. The dissent believed that *Radio Officers* had been modified on that point by Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961), which required proof of specific intent to encourage or discourage unionism. The extended discussion of the significance of § 8(b)(2) and § 8(a)(3) in both the majority and dissenting opinions is understandable largely because of the history of the litigation. See note 197 *supra*. In earlier phases of the case, when the NLRB was proceeding on the theory that the violation consisted of giving the union control as to seniority, the §§ 8(b)(2)-(8)(a)(3) analysis was critical. But in the instant decision, the crucial issue was not union control but abuse of union power. The majority could have rested its decision solely on § 8(b)(1)(A) and § 8(a)(1) without recourse to §§ 8(b)(2)-8(a)(3).

The suggestion in some of these cases that the employee "violated" union rules and was penalized by the union in violation of §§ 7 and 8(b)(1) seems only a way station leading to full development of the duty of fair representation. The union may enforce against its members those rules which it has adopted through collective bargaining with the employer. See NLRB v. News Syndicate Co., 365 U.S. 695 (1961). Therefore the ultimate question is whether the "rule" enforced by the union was one which it was entitled, through collective bargaining with the employer, to enforce against the employee. This question then takes us back to the basic issue of the extent of the duty of fair representation.

200 The dissent relied on NLRB v. Drivers Union, 362 U.S. 274 (1960), discussed in note 209 *infra*.

201 Discussions of NLRB implementation of the duty of fair representation prior to the *Miranda* decision may be found in Cox, *supra* note 191, at 172 [suggesting the

require examination to obtain a complete perspective on individual rights in the collective bargaining process.

(1) *The statutory power of the NLRB to enforce the duty of fair representation.* All five Board members who participated in the decision of the *Miranda* case accepted the premise that the duty of fair representation, implicit in section 9 of the NLRA, is subsumed to some extent under section 7 and, hence, is enforceable by the Board. The propriety of this basic assumption cannot be determined by reference to the language alone, which guarantees to employees "the right to bargain collectively through representatives of their own choosing."[202]

Section 7 was written largely to protect employees' organizational rights, while the problems of the breach of fiduciary duties often stem from the operational activities of unions once they have become the established bargaining representatives.[203] The problem of individual rights in collective bargaining administration is in large measure a result of the success of the national labor policy in supporting the collective bargaining process. The NLRB has been the prime instrument of Congress in promoting this policy. Its charter has been written in broad language to permit it to come to grips with a variety of attempted limitations on employee rights. To confine the NLRB to the consideration of problems explicit at the time of formulation of the national labor policy would not be consistent with the broad language of section 7 or with previous decisions of the Supreme Court which have stressed the breadth of power vested in the Board.[204] The premise of the majority in *Miranda* seems to flow easily from the language of section 7 and from the legislative judgment, which that language expresses, that the Board's power should be adequate for the regulatory needs of the bargaining process.

Several recent decisions of the Supreme Court have rejected efforts by the NLRB to expand its power into new areas of regulation of labor relations. In all of these cases, the basic reason why the Court has rebuffed the Board was that the Board's policy

use of § 8(b)(3)]; Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 587-94 (1962) [suggesting the use of §§ 8(b)(1) and 8(b)(2)].

202 Section 7, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958).

203 See text at note 71 *supra*.

204 See, *e.g.*, NLRB v. Erie Resistor Corp., 83 Sup. Ct. 1139 (1963); NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. Truck Drivers, 353 U.S. 87 (1957); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

was not adequately rooted in the NLRA.[205] This cannot be said of the *Miranda* decision. Congress has indicated, in section 9(a) of the NLRA, its concern for individual rights in the administration of the bargaining process, as well as in other related legislation previously discussed.[206] These indications of congressional concern justify the conclusion that the Board's claim of power to implement the duty of fair representation is adequately rooted in the NLRA, and that the courts should uphold the statutory authority of the NLRB.

The determination of the scope of the duty of fair representation enforceable by the Board is a separate question. It is possible to adopt the premise that the duty is implicit in section 7 without resolving the more detailed questions concerning the scope of the duty. These more detailed issues, as the conflict between the majority and the dissent in *Miranda* demonstrates, take two forms:

(a) *Is the duty enforceable by the Board limited to cases in which the union has sought to discriminate against employees on the basis of union membership?* This was the argument of the dissent. While agreeing that the duty was implicit in section 7, they contended that it was enforceable by the NLRB only to the extent that it could be enforced under those sections of the NLRA which prohibit union-employer discrimination to encourage or discourage union membership. The dissenters argued persuasively that these sections are available only if there is some proof that the purpose of the union-employer action was related to union membership,[207] and also that the evidence fails to establish such a purpose in Lopuch's case. However, section 7 rights are implemented by sections of the act other than sections 8(b)(2)-8(a)(3). To argue that the section 7 rights are limited by the enforcement provisions of section 8(b)(2)-8(a)(3) is to allow the remedial tail to wag the substantive dog. The dissenters recognized that they had to deal with the alternative remedial section, 8(b)(1)(A), which prohibits union "restraint or coercion" of employees in the exercise of section 7 rights, and 8(a)(1), which prohibits employer

205 Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); NLRB v. News Syndicate Co., 365 U.S. 695 (1961); Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651 (1961); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960); NLRB v. Drivers Union, 362 U.S. 274 (1960).

206 See text at notes 136-38 *supra*.

207 See Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961).

"interference, restraint or coercion" as to the same matters. The dissenters, urging a narrow construction of section 8(b)(1)(A), relied upon the well-known *Curtis Brothers*[208] decision, an organizational picketing case. This reliance is misplaced. Congress has indicated its concern for individual rights in collective bargaining, whereas the concern for the unorganized worker expressed by the Board in *Curtis Brothers*, and rejected by the Supreme Court, was of the Board's own making.[209] Thus, the suggested narrow reading of section 8(b)(1)(A) is not persuasive.

There is an additional pragmatic reason for rejecting the dissenters' contention. If it were adopted, the duty of fair representation would be partially enforceable by the Board, and partially enforceable by the courts. This fragmentization of jurisdiction over the duty would create another jurisdictional puzzle, similar to those which have plagued labor law for the last decade or so. These existing puzzles seem close to resolution and there is no need to embark on another such venture.[210]

The ultimate weakness of the dissent is that it accepts the premise that section 7 embraces the duty of fair representation. Once that has been accepted, the majority view, that the full scope of the duty is enforceable by the Board through the unfair labor practice provisions of section 8, seems impervious to the limiting arguments of the dissenters. Thus, section 8(b)(1)(A), which prohibits a union from "restraint or coercion," and section 8(a)(1), which prohibits employers from "interference, restraint or coercion," are available to enforce the full scope of the duty of fair representation.

(b) *Does the duty require the union to protect the contract rights of employees, or only to refrain from destroying them on abstract and arbitrary grounds?* The majority, as discussed earlier,

208 NLRB v. Drivers Union, 362 U.S. 274 (1960).

209 In NLRB v. Drivers Union, *supra* note 208, the Supreme Court rejected efforts by the Board to use § 8(b)(1)(A) to prohibit organizational or recognition picketing. However, the case is neither dispositive of nor persuasive on the issue involved in *Miranda* because the problem of organizational picketing had not been dealt with by the LMRA, except in § 8(b)(4)(C), but had received significant direct congressional attention in § 8(b)(7) of the 1959 legislation by the time the *Drivers Union* case was decided by the Supreme Court. The Court could quite properly view § 8(b)(1)(A) as a part of a comprehensive network of congressional regulation of organizational picketing after 1959. There is no analogous network of legislation dealing with the duty of fair representation. Hence, the scope of 8(b)(1)(A) may be read differently by the Supreme Court in the fair representation cases.

210 See Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529 (1963).

considered that the union was obligated to enforce Lopuch's seniority rights, and that the failure to do so under the facts of the case violated the duty of fair representation. Presumably, the majority adopted the distinction between the negotiation of contracts and their administration, and concluded that in the latter area the union has a primary obligation to protect the individual employee's contract rights. The duty of fair representation requires that the union honor, not alter, the employee's seniority rights. The dissent suggested that the duty protected employees only against "arbitrary and invidious" discriminations based on union membership or race. The reduction of Lopuch's seniority because of his absence from work was a "far cry" from such discrimination. Thus, the dissent viewed the union's duty in the administration of the contract as no different from that in its negotiation, and further suggested that the duty did not extend beyond the cases of race and union membership. The courts have interpreted the duty as being much more extensive than this.[211]

The importance of the distinction between negotiation and administration has been discussed earlier. That discussion supports the position of the majority in expanding the union's duty in administration to provide greater protection for the employee.[212] However, the very breadth of the protection offered by the majority poses an additional problem. To determine whether the union had breached its duty, the Board had to interpret the contract to determine if Lopuch was entitled to the seniority rights which he claimed. The contract provided that it was to be interpreted by an arbitrator, and the arbitration process is itself a favored instrument of the national labor policy. This policy also dictates that if arbitrators do not interpret contracts, this task rests with the courts, not the NLRB. Virtually every claim of maladministration of the labor agreement, under the *Miranda* doctrine, will involve the interpretation of an agreement. Does this fact lead toward the conclusion that the functions involved in evaluating such a claim are those of the court and arbitrator and not those of the Board? There is precedent for this type of NLRB activity. The Board's power to remedy unfair labor practices is plenary,[213] and contracts have frequently been interpreted by the Board as a

211 See notes 89 and 90 *supra*, and Ferro v. Railway Express Agency, Inc., 296 F.2d 847 (2d Cir. 1961).

212 See text at note 110 *supra*.

213 Section 10(a), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(a) (1958).

part of the process of decision of unfair labor practice cases.[214] The Board, cognizant of a possible overlap in function with arbitration, may defer to the result of arbitration decisions. This, as will be discussed below, may encourage arbitration. Finally, the fact that the Board must interpret the contract in order to protect the employee under the duty of fair representation suggests that the protection afforded by *Miranda* will actually be rather narrow, applying only in those cases where the contract construction proposed by the union and the employer to defeat the employee's claim is clearly without merit.[215] In doubtful cases, the interpretation of the parties may stand as a defense to a charge of breach of the duty of fair representation.

The scope of that duty is to be defined initially by the NLRB. That the Board has the power to define the duty of fair representation broadly has been established; that it had the *duty* to define it so broadly remains uncertain. Time, changes in Board personnel (the decision in *Miranda* hangs by one vote), experience with problems as yet not understood, and subsequent decisions of the Board and the courts of appeals will probably reshape the issues in *Miranda* before they are finally resolved by the Supreme Court.

If the issues reach the Court in the form presented in *Miranda*, it would be appropriate for the Court to permit the Board to embark on the regulation of this aspect of labor relations. It seems doubtful that the Court can rest at this point and allow the Board unlimited leeway to define the duty of fair representation. As long as the duty is pressed by the Board to the limits set by the majority in *Miranda*, no problem will arise. If the Board attempts to cut back on the duty announced in *Miranda*, it will

214 See, *e.g.*, the discussion in Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943).

215 In Maxam Dayton, Inc., 142 N.L.R.B. No. 39 (April 30, 1963), the Board suggested some qualification on the scope of protection of contract rights guaranteed by *Miranda*. There the union had failed, "ineptly" or "negligently," to file a grievance concerning a discharge within the time limits provided under the contract. The Board refused to find that this action violated the duty of fair representation. The Board adopted the trial examiner's statement that "the basis for their discharges was not of such an insubstantial nature as to preclude a good faith belief that they were for just cause." Evidently the trial examiner believed that the duty applied only to deliberate failures by the union to press a claim. The evidence supporting the discharge was examined, but it appears to be of the type normally presented to an arbitrator. It is not clear that the claim of wrongful discharge was without merit. Obviously, the diminution of contract rights of the employee is just as great if the union acts negligently as when it acts deliberately. Query whether the issue of negligence should be projected in this type of case.

force the ultimate issue of individual versus group rights into the hands of the Supreme Court. My predilections, favoring broad protection for individual rights in that eventuality, need no repetition at this point.

(2) *The desirability of NLRB implementation of the duty of fair representation.* From one interested in maximization of individual rights in the collective bargaining process, the *Miranda* case should evoke warm support. There is no doubt that an administrative agency sensitive to the needs of the individual in the bargaining process will provide more effective guarantees for his rights than will the judiciary. The concomitants of administration —the power to investigate, to urge informal settlement and to provide an expeditious hearing, and the expertise of the personnel involved—all suggest that the NLRB is equipped to handle these problems more speedily and more fairly than are the courts. This is true even in light of the great difficulties which the Board has faced in keeping its dockets anywhere near current. With all of its overload and backlog, it provides a more effective forum for solution of these problems than the courts.[216] For such reasons, legal history has seen numerous instances, particularly in this century, of the replacement of the judicial process by the administrative process.

There is another desirable dimension to the prospect of the exercise of NLRB power. One problem with the *Miranda* doctrine is that it requires the NLRB to interpret the contract in every case in which the duty of fair representation is allegedly violated. Contract interpretation lies, by congressional mandate, in the judicial, rather than in the administrative, domain.[217] Construc-

[216] The time element in some of the cases discussed or cited herein is interesting:

Case	Grievance Date	Disposition Date
Cortez v. Ford Motor Co., 349 Mich. 108, 184 N.W.2d 523 (1957).	Nov. 1951	July 1957—Mich. Sup. Ct.
Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961).	March 1958	Nov. 1961—6th Cir.
Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963).	April 1955	May 1963—N.J. Sup. Ct.
Conley v. Gibson, 355 U.S. 41 (1957).	May 1954	Nov. 1958—U.S. Sup. Ct., D. Tex. dismissed in 1961.

[217] H. REP. No. 510 ON H.R. 3020, 80th Cong., 1st Sess. 40 (1947), dealing with LMRA § 301, permitting suits for violation of collective bargaining agreements to be brought in federal district courts [see note 101 *supra*], states: "Once parties have made a col-

tion of contracts incident to the determination of issues in unfair labor practice cases is common for the Board, but under *Miranda* each case of alleged maladministration would involve such a problem. This argument might operate against recognition of the scope of the duty of fair representation suggested by the majority in *Miranda* were it not for a related Board doctrine, most fully developed in the *Spielberg* case.[218] In that case, the NLRB attempted to reconcile its duty to prevent unfair labor practices with the desirability of promoting arbitration. The Board in *Spielberg* concluded that, if an issue has been submitted to an arbitration which was fair and regular, if all parties agreed to be bound, and if the decision was not clearly repugnant to the act, the Board will refuse to process an unfair labor practice charge arising out of the same transaction. The NLRB will defer, as a matter of policy, to the judgment of the arbitrator, even if it might have reached a different decision on the same facts. This doctrine has since been applied in a number of cases, and may be considered well established, although some details involved in its application remain unclear.[219]

Reading *Miranda* and *Spielberg* together, a union and employer would be well advised to submit important questions concerning employment status to arbitration, thereby enabling the *Spielberg* doctrine to foreclose the possibility of review created

lective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

218 Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

219 The doctrine was applied in I. Oscherwitz & Sons, 130 N.L.R.B. 1078 (1961), deferring to an arbitrator's judgment which upheld a discharge. It was also applied in Denver-Chicago Trucking Co., 132 N.L.R.B. 1416 (1961), to uphold a decision of a teamster-trucking association joint-area committee, consisting of an equal number of union and employer representatives, which did not include an impartial, non-affiliated "public" member. Such committees are really industry-wide grievance committees. This decision is questionable, but may be limited to its facts. In General Motors Corp., 132 N.L.R.B. 413 (1961), decided one month before *Denver-Chicago*, the Board refused to apply the *Spielberg* doctrine to the decision of a grievance committee consisting of union and employer representatives. One ground of distinction was that, "No impartial arbitrator has ruled in this case."

The Board refused to apply *Spielberg* in Gateway Transportation Co., 137 N.L.R.B No. 186 (July 31, 1962), because of procedural irregularities leading to the arbitration, including inadequate time for the employee to prepare his defense, refusal of union counsel to represent him, and refusal of the arbitrator to grant a continuance so that he might prepare the case. See also Raytheon Co., 140 N.L.R.B. No. 84 (Jan. 30, 1963); Precision Fittings, Inc., 141 N.L.R.B. No. 92 (April 4, 1963). The doctrine has been applied only where a matter has been resolved. It has not as yet been extended to a case where the parties agree to resolve a dispute by arbitration. See Jenkins, *The Impact of Lincoln Mills on the National Labor Relations Board*, 6 U.C.L.A.L. REV. 355 (1959).

by *Miranda*. Thus, one of the principal results of the *Miranda* decision should be the submission of more cases concerning individual rights to an arbitrator for an impartial decision. Assuming that the arbitrators have the courage to act independently in such cases,[220] this is precisely the result which should be encouraged, both from the standpoint of protection of individual rights and from the aspect of furthering the use of the arbitration process.

On the other side of the coin are these considerations. The primary role of the NLRB is to encourage union-management cooperation. The protection of individual rights stifles such cooperation on some matters. There will be heavy pressures on the Board to allow union-management agreements to stand, and hence to narrow the scope of NLRB protection of the right of fair representation. Such a constriction might result from a minor shift in Board personnel, since *Miranda* was decided by a bare majority. However, it is arguable that a narrowly defined duty, administratively enforced, is more desirable than a broadly defined duty, judicially enforced, and it is possible, in any event, that the Supreme Court will ultimately define the duty broadly.

Secondly, there is a question of allocation of the strained resources of the Board. Many cases arising under the *Miranda* doctrine will involve intricate questions of contract construction. Is the Board prepared to process such cases, and, if so, what other Board functions will be sacrificed? These cases will arise where collective bargaining has been established. Will the processing of such cases take administrative energy away from cases where collective bargaining is still to be achieved? If so, then perhaps the balance has been improperly struck, for the primary role of the NLRB remains the encouragement of collective bargaining. Only one familiar with the pattern of Board operation can answer these questions, but they are important in any attempt to assess the desirability of the doctrine.

There is an intriguing contrast between the simplicity of the majority position in *Miranda* and the almost infinite complexity, suggested in earlier parts of this article, in the construction of

220 See Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Autonomy Versus Employee Autonomy*, 13 RUTGERS L. REV. 631, 661-62 (1959); Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235 (1961); Wirtz, *Due Process of Arbitration*, in NATIONAL ACADEMY OF ARBITRATORS, THE ARBITRATOR AND THE PARTIES, PROCEEDINGS OF THE 11TH ANNUAL MEETING 1 (McKelvey ed. 1958).

theories by which the judiciary can effectively enforce the duty of fair representation. The courts, less directly involved in the problems of collective bargaining, would appear to be in a better position than the Board to protect individual rights. But experience has demonstrated a judicial tendency to defer to almost any arrangement to which union and management agree, in the interest of promoting collective bargaining at the expense of the rights of employees. The NLRB has a better idea of the toughness of the bargaining process and, in this sense, is in a better position to protect individual employee rights. Yet, NLRB protection rests on thin, politically charged ground, whereas judicial protection would seem to rest on a more solid foundation.

If the courts, through lack of understanding of the bargaining process, are unwilling to protect individual rights despite their advantages of tradition and lack of involvement, the only recourse may indeed be to the administrative process. Michael Lopuch may become one of the first individual employees ever *actually* protected by an adjudicatory tribunal's application of the duty of fair representation in the administration of a labor agreement.[221]

(3) *Pre-emption and the duty of fair representation.* Under the doctrine of "pre-emption," developed in picketing cases, if an activity is "arguably" subject to the National Labor Relations Act, whether protected or prohibited, the NLRB has exclusive jurisdiction.[222]

The principle of exclusive NLRB jurisdiction is based upon two factors: (a) In 1947, when Congress added restraints on unions to the existing restraints on employers, it adopted a comprehensive code of substantive law relating to labor relations. Rights under that code were immune from state restraint and obligations under that code were enforceable by the NLRB. The comprehensive regulation foreclosed the application of potentially

221 The application of the duty of fair representation to the administration of the labor agreement was announced in Conley v. Gibson, 355 U.S. 41 (1957), which set aside the dismissal of plaintiff's complaint. On remand, the case was dismissed on procedural grounds. 49 L.R.R.M. 2635 (S.D. Tex. 1961). The opinion on dismissal indicates that the ultimate complaint of employees was that they were excluded from the union because of their race. The Court held that this was not actionable. See Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 OHIO ST. L.J. 21 (1961).

222 *Ex parte* George, 371 U.S. 72 (1962); *In re* Green, 369 U.S. 689 (1962); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Delony, *State Power To Regulate Labor-Management Relations*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (Slovenko ed. 1960). See McCoid, *Notes on a "G-String": A Study of the "No-Man's Land" of Labor Law*, 44 MINN. L. REV. 205 (1959).

conflicting substantive law.[223] (b) Congress consciously placed administration of this code in the NLRB, thus evidencing a preference for the federal administrative enforcement of the code, to the exclusion of any other method of enforcement.[224]

These considerations led the Court to develop the principle that courts, state and federal, must defer, in labor relations matters, to the exclusive original jurisdiction of the NLRB. The scope of this preclusion of judicial action has not been clearly defined. In cases involving violence, the Court has refused to infer congressional intent to deprive the states of power to act.[225] In some instances, Congress has explicitly preserved the judicial power. These include the enforcement of collective bargaining contracts,[226] the awarding of damages for illegal secondary boycott,[227] and the protection of rights of union members under Title I of the LMRDA.[228] Before the passage of the LMRDA, the Supreme Court allowed a state cause of action for wrongful expulsion and loss of employment opportunities against a claim that the union action might violate section 8(b)(2) and, therefore, fell within the exclusive jurisdiction of the NLRB.

223 Garner v. Teamsters Union, 346 U.S. 485, 499-500 (1953): "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing."

224 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959): "[T]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience:

" 'Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . .' Garner v. Teamsters Union 346 U.S. 485, 490-491." *Id.* at 242-43.

225 Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956).

226 LMRA § 301, 61 Stat. 156 (1947), as amended, 29 U.S.C. § 185 (1958).

227 LMRA § 303, 61 Stat. 158 (1947), as amended, 29 U.S.C. § 187 (Supp. IV, 1963).

228 LMRDA § 101, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-67, as amended, 29 U.S.C. §§ 153, 158-60 (Supp. IV, 1963).

In allowing the state to process a member's action against his union for breach of the membership contract, the Supreme Court, in *Gonzales v. International Ass'n of Machinists,* concluded that the union activity involved was a "merely peripheral concern" of the LMRA.[229]

Since, in *Gonzales,* the union interfered with employment opportunities, its action could be characterized as a breach of the duty of fair representation. Under *Miranda,* it would be subject to the jurisdiction of the NLRB. *Miranda* thus makes the reasoning in the *Gonzales* case obsolete. After *Miranda,* the reasoning of the pre-emption cases requires that judicial actions to enforce the duty of fair representation be dismissed in deference to the primary original jurisdiction of the NLRB.

Without passing on the *Miranda* doctrine, the Supreme Court in the spring of 1963 clearly indicated that actions to enforce the duty of fair representation are pre-empted by the LMRA. In *Local 100, United Ass'n of Journeymen v. Borden,*[230] the Court held that state power was pre-empted wherever the crux of the action by an employee against his union was interference with the

229 International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), as explained in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959).

In Local 100, United Ass'n of Journeymen v. Borden, 83 Sup. Ct. 1423 (1963) and Local 207, Int'l Ass'n of Bridge Workers v. Perko, 83 Sup. Ct. 1429 (1963), the Supreme Court narrowed the scope of the *Gonzales* case by holding that, where the "crux" of the employer's action against his union was interference with his employment relation, the judicial power was pre-empted by the LMRA. Neither *Borden* nor *Perko* was based on the theory that the union had violated its duty as a bargaining agent toward the plaintiffs. Both cases could have been so argued, because plaintiffs were members of a union which used its collective bargaining power to damage their employment opportunities. In both the Supreme Court held that the union activity was arguably protected or prohibited by the LMRA and hence, under the *Garmon* decision, was not subject to state court jurisdiction. The Court made footnote reference to the *Miranda* case, but did not discuss it. If *Miranda* is upheld, *Perko* and *Borden* suggest that state (and federal) judicial jurisdiction over actions against a union for breach of the fiduciary duty may be foreclosed. Under *Smith v. Evening News Ass'n,* these actions apparently may be maintained if they are cast in pure contractual terms. But such a conclusion would make a plaintiff's rights to judicial protection against breach of fiduciary duty depend on the skill of the pleader. If the issue of contract construction which, under *Smith,* is open to judicial consideration depends upon a balancing of conflicting values of union freedom to bargain away employee claims and individual rights to enforce the benefits of collective bargaining contracts, and if the NLRB has been given the primary function of striking that balance, it is doubtful whether there is justification for leaving the matter in the hands of the courts. The potential conflict between *Smith* and *Borden-Perko* will probably plague us for some time to come.

230 83 Sup. Ct. 1423 (1963). In a companion case, Local 207, Int'l Ass'n of Bridge Workers v. Perko, 83 Sup. Ct. 1429 (1963), the Court held that actions by supervisors were also pre-empted since they might fall within the range of NLRB power. See note 191 *supra* for a discussion of earlier decisions on pre-emption.

employee's present or potential employment relations. In such cases, union conduct is arguably protected or prohibited by the LMRA and is beyond the reach of state power.

In *Borden* the employee charged that a union business agent willfully refused to allow him to accept work to which he was entitled under union rules relating to the operation of hiring halls. Since hiring hall rules are necessarily involved in the contractual relation between union and employer,[231] the case raises virtually the same problem as did *Miranda, i.e.,* union refusal to permit the plaintiff to obtain the benefit of contractual provisions with the employer which govern his employment opportunities. Thus the case would have been tried on the theory that the union breached its duty of fair representation to the employee in the administration of the hiring hall rules. But this argument was not made. Instead, the employee's action was pleaded in "tort" for willful interference with the right to pursue a lawful calling, and (in an obvious effort to invoke the *Gonzales* decision) in "contract" for violation of a promise implicit in the membership arrangement not to discriminate against members unfairly.

The Supreme Court was unimpressed. "It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather . . . 'our concern is with delimiting the *areas of conduct* which must be free from state regulation if national policy is to be left unhampered.' . . . In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards."[232]

This approach would be equally applicable to a complaint denominated "action for breach of the statutory duty of fair representation." The crux of actions for breach of the duty of fair representation is always interference with the employee's present or potential employment relations. Under the reasoning of *Borden* the actions can no longer be processed in the courts without going through the original primary jurisdiction of the NLRB.

However, this does not mean that states have no power over

231 See Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961).
232 83 Sup. Ct. at 1428.

such actions. It means only that they cannot exercise any power until the Board has decided how far it will press the *Miranda* principle, and the courts have passed on the *Miranda* doctrine. One of the issues which split the majority and dissent in *Miranda* was whether the Board should remedy all breaches of the duty of fair representation, or only those based on race or union membership. If the view of the majority prevails and all breaches of the duty are to be remedied by the Board, then the pre-emption doctrine would be fully applicable. Union conduct which violated the duty would be subject to remedy by the Board. Union action in compliance with the duty would be protected against judicial interference. But if the dissenting view prevailed, and the Board implements only one aspect of the duty, that relating to race and union membership, then the courts would retain jurisdiction over other facets of the duty of fair representation. Otherwise, a new "no-man's land" would be opened in labor relations, in connection with this duty, where the Board would not and, under *Borden*, the states could not act.[233] But Congress, in adopting section 14(c) of the NLRA in 1959, made it clear that this was not to happen.[234] If the Board will not act in the area, the courts are free to do so. The avoidance of this jurisdictional morass is another reason suporting the majority view in *Miranda*, albeit one which became apparent only in light of the post-*Miranda* decision in *Borden*.

The path of protection for individual rights in the collective bargaining process seems inevitably strewn with legal refinements. The contract-tort analytical problems and remedial difficulties plague the courts; internal disputes divide the Labor Board; jurisdictional disputes threaten to paralyze action on the merits of an employee's claim.

The thrust of the pre-emption doctrine will place the solution of these problems within the range of NLRB power. Acting under

233 See Guss v. Utah Labor Bd., 353 U.S. 1 (1957).

234 Section 14(c)(2) provides: "Nothing in this act shall be deemed to prevent or bar any agency or the courts of any state or territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction." See Blumrosen, *The New Federalism in Labor Law*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (Slovenko ed. 1960). State courts' jurisdiction to enforce the federal duty of fair representation implies the presence of federal court jurisdiction as well under 28 U.S.C. § 1337 (1958). See Syres v. Oil Workers, 350 U.S. 892 (1955). A contrary opinion, clearly erroneous, was expressed in GIBA v. International Union of Elec. Workers, 50 L.R.R.M. 2299 (D. Conn. 1962).

a broadly written charter, the Board is in a position to make the appropriate value judgments balancing the interests of employees and the union-management parties to the collective bargaining relation. If this opportunity is accepted by the Board, many of the problems previously discussed by this article will have been avoided. For example, the suggestion that contracts should be construed to permit individual actions under LMRA, section 301, if the union breached its fiduciary duty was designed to protect the individual. Such a construction might be unnecessary if the protection is forthcoming from the Board. Similarly, the argument that section 9(a) allows individual enforcement of grievance and arbitration provisions would lose much of its force. The analysis of section 101(a)(5) of the LMRDA which finds union "discipline" in any case where the employee breached the duty of fair representation could be dismissed if that duty was fully protected by the Board. If the narrower view of the NLRB's power to enforce the duty prevails, the courts will be free to use the available legal tools, section 301 of the LMRA and section 101(a)(5) of the LMRDA, to protect individual rights in the collective bargaining process.[235]

The *Miranda* decision seems to provide the best hope in years for the protection of individual rights to fair representation by the union. Until the Supreme Court has passed on the issues in the *Miranda* case, however, the existence of Board power, and its scope, will not be clear. To protect against the risk of losing a fair representation case for failure to choose the proper forum, counsel for the employee, besides requiring the exhaustion of all contract and internal union remedies, should institute suit under the *Steele* doctrine and direct the filing of charges with the NLRB. Only in this way can employee rights be preserved during the unfolding stages of this newest development.

In summary, the protection of individual rights in the collective bargaining context lags far behind the protection of the individual in his other relations with the union. During the past year, decisions in the *Miranda* and *Donnelly* cases have demonstrated increasing judicial and administrative concern for the rights of employees in the administration of the collective bargaining relationship. But these decisions have created many unanswered ques-

235 *Cf.* Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc., 257 F.2d 467 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958).

tions, which makes the search for meaningful individual rights difficult indeed. The Supreme Court, which has announced the duty of fair representation, has not developed that duty in sufficient detail to provide guidance to the lower courts or administrative agencies. The courts have been reluctant to protect the individual, and it may be that individual rights will fare better before the NLRB. It is now uncertain whether such protection will come from the courts, or the NLRB, or from both.

Obviously, major problems in our rapidly changing economic system, created by automation, business reorganization, the demands of national defense, and the international situation, all of which impinge on the employment relation, cannot be solved by providing individual protection in the collective bargaining context. But by providing such protection, the law may help to shape the appropriate roles of labor, management and government so that, in the handling of these broad problems, individuals will be protected to the maximum extent possible.[236]

IV. CONCLUSION

"The fullness of life must be found in the nature of work itself." Daniel Bell (1961).[237]

The legal profession is probably more cognizant of the importance of protecting individual freedoms than any other group in our society. Union and management counsel are in a position to advise their clients on decisions which will affect individual employee freedoms. Yet, the organizational objectives of union and management may appear to be better served by minimizing individual employee freedoms. Thus, counsel in labor relations may face a conflict between their obligations toward their clients and toward the larger social interests which they serve by virtue of their professional capacity.[238] The situation has its brighter side,

236 In Brotherhood of Ry. Clerks v. Allen, 83 Sup. Ct. 1158 (1963), Mr. Justice Brennan, while developing rules to protect the dissenter within the union from an objectionable use of dues for political purposes, urged the unions to devise appropriate internal procedures and formulas to accomplish the same result without litigation.

237 BELL, THE END OF IDEOLOGY 392 (Collier rev. ed. 1961).

238 See Guzzo v. United Steelworkers, 47 L.R.R.M. 2379 (Calif. Super. Ct. 1960), *cert. denied sub nom.* Smith v. Superior Court of State of California, 365 U.S. 802 (1961).

In his address at the 1962 Annual Meeting of the American Bar Association, NLRB Chairman McCulloch said: "[T]here are still some employers and unions . . . who deliberately flout the law which has been on the books for many years, and then utilize the appellate processes of our Board and the Courts to delay its application and enforcement." McCulloch, *A Tale of Two Cities: or Law in Action,* PROCEEDINGS OF THE

however. Counsel, as he directs and advises his institutional client, may channel the institution's efforts and desires in directions which will reinforce, rather than subordinate, individual freedoms. This challenge to the lawyer, who makes law informally as he advises his client, calls for the highest qualities of the profession. Most labor relations matters of importance involve the advice of counsel at some critical stage. The legal profession has an opportunity to help establish the conditions of individual freedom. It may be that employee rights can be made meaningful only as counsel for union and management work conscientiously toward this end.

This possibility is dramatically illustrated in a situation described recently by a respected attorney who represents management in labor matters. He was negotiating a collective bargaining agreement between a union and a medium-sized firm. As negotiations neared their conclusion, the parties were a few thousand dollars apart, a small sum considering the total amounts involved.

At this point, the union representative called counsel for the employer to the side and proposed this arrangement: if the employer yielded to the union's economic demands, the union would not later object to the dismissal of employees *A* and *B* who were "troublemakers" for both union and management. The savings in wages resulting from the dismissal would just about equal the difference which then existed between union and management.

Counsel for management made the following assumptions as he evaluated the proposal: (1) the employer's competitive position was such that he would probably accept the offer; (2) the subsequent discharge of the employees would be done in such a way that they could have no recourse to the legal system; (3) this discharge could not be accomplished without union acquiescence in a contract violation; and (4) the union proposal was in violation of its fiduciary duty to employees *A* and *B*.

How does his sense of professional responsibilty bear on the question of whether he should accept or reject the proposal, and, in either case, communicate or not communicate the existence of the proposal to the employer?

The same type of illustration could be duplicated by union

AMERICAN BAR ASS'N, SECTION OF LABOR RELATIONS LAW 14, 24 (1962). This suggests that the question of professional responsibility of the attorney is closely related to the effective application of law to labor relations problems.

counsel. For example, counsel has persuaded at least one Teamsters' local to arbitrate *any* discharge case in which the employee is dissatisfied, whether or not the union believes the employee is correct.

In the day-to-day world of the legal adviser, such opportunities to promote or minimize individual employee rights are not uncommon. Whether such opportunities are seized is a significant test of professionalism in this branch of the law. Undoubtedly a factor in the decision of counsel is the clarity of the rules of law relating to the union's duty to the employee. If the rule of law clearly protects the employee, counsel on either the union or management side are more likely to guide their clients along paths which protect individual freedom. If the rule of law does not clearly protect the employee, counsel may find it more difficult to afford him protection. This is a factor which should be considered carefully when developing the rules of law which fix the relationship between union and employee. The effect of the *Hildreth* decision, which sanctioned discharge of an employee without proof of wrongdoing, may be to reduce the likelihood that counsel will advise union and management against irrationally discharging an employee. Conversely, the *Miranda* decision may encourage counsel to submit doubtful cases to the impartial judgment of an arbitrator.

The rules of law relating the individual to the union must reflect the preferences of the policy makers, whether they are legislators, administrators, or judges. These preferences for the protection of individual rights have been made clear in the political area and in connection with internal union affairs. A similar development has not yet taken place, although it may be under way, in the area of collective bargaining.

In defining the duty of fair representation to maximize individual rights, and then by implementing that duty in day-to-day advisory functions, the legal profession can play an important role in determining the emphasis which will be placed on individual freedoms in the organized society into which we are moving. The organization of the world which Mr. Justice Holmes saw in 1896 is proceeding at a rapid pace. This organizing process creates the risk of uniformity and the reduction of the area of individual freedom. Perhaps diversity and freedom are inconsistent with the organization of society. Uniformity may be a necessary conse-

quence of increasing complexity. But this has yet to be established. It may be possible in a highly organized society to have either uniformity or diversity; freedom or conformity. This issue may not be foreclosed by the external forces operating on our social-economic system, but may be one in which man's judgment and political sense, expressed through law, can play a significant role.[239] This assumption, an aspect of the "robust common sense"[240] of the law, underlies efforts to promote individual freedom within the organized society.

239 See Woodward, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962).

240 "Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937) (Cardozo, J.).