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DUE PROCESS AND THE LMRDA: AN ANALYSIS OF DEMOCRATIC RIGHTS IN THE UNION AND AT THE WORKPLACE†

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To further the goal of union democracy, Congress created a Bill of Rights in Title I of the Labor Management Reporting and Disclosure Act (LMRDA).[1] Title I, which was modeled on the United States Constitution,[2] extended selected democratic rights to the private sector. The LMRDA's Bill of Rights requires the union, as a private organization, to respect its members' statutory rights to equal treatment, freedom of speech and assembly, use of judicial process, and procedural due process in internal disciplinary proceedings.[3]

In developing a theoretical approach in statutory Bill of Rights cases, courts must decide whether to directly apply constitutional theory or whether factors specific to the union and labor relations context should have primary importance. In addition, courts that use a constitutional analogy may view the union more as a public institution. Thus, legislating constitutional rights may affect the nature of the union as a private organization. The LMRDA raises questions of the nature and effect of statutory "constitutional" rights.

This Article addresses these questions by focusing on Section 101(a)(5) of Title I, which provides procedural due process for union members subject to internal union discipline. This study will include pre-LMRDA state court decisions which had also applied a constitutional analogy to create procedural due process rights for union members. In order to explain the theoretical underpinnings of union members' procedural rights, this Article examines constitutional theories of due process and compares them to due process in the union context.

Constitutional due process[4] and due process in union proceedings show a common evolution from natural law theory to utilitarian interest balancing. Based on this convergence of theory, this Article attempts to integrate due process interpretation in both settings by conceptualizing public and private institutions along a single spectrum of due process rights. This analysis will also explore the rationale behind extending statutory due process requirements to unions, but not to employers, in the private sector.

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[1] 29 U.S.C. §§ 411–415 (1982).

[2] *See* United Steelworkers of America, AFL-CIO-CLC v. Sadlowski, 457 U.S. 102, 111 (1982).

[3] 29 U.S.C. § 411 (1982).

[4] The due process clauses in the fifth and fourteenth amendments to the United States Constitution prohibit the federal and state governments, respectively, from depriving any person of "life, liberty or property, without due process of law." U.S. CONST. amends. V, XIV.

I. Constitutional Procedural Due Process: Theories and Application

The United States Supreme Court has struggled throughout its history with the meaning of the constitutional right to due process of law. To some extent, this search for due process theory has revolved around the question of whether the content of due process changes with the nature of the legal proceeding. The Court has long accepted the now axiomatic principle that due process is an inherently flexible concept which varies with the nature of the proceeding.[5]

The Supreme Court has applied a number of different theories, drawn from both legal and moral philosophy, in determining the due process standards the government must follow before depriving an individual of life, liberty, or property. As concepts of justice, fairness, and social welfare underlie due process, the relevant legal and moral philosophy theories are necessarily tied to moral issues.[6] The Court has wrestled, however, with the question of whether constitutional theory should rely on judicial concepts of morality or whether the Court should attempt to separate judicial interpretation from moral philosophy.[7]

The Court has applied two major legal philosophy theories to interpret the due process clauses: natural law theory and utilitarianism.[8] The Supreme Court's natural law theory has its roots in the natural law philosophy of St. Thomas Aquinas.[9] Aquinas' theory held that positive law must be judged by the moral standards found in divine law, which Aquinas called the "law of nature."[10] Regardless of the source of moral standards for evaluating a society's laws, natural law theorists generally describe an individual's fundamental rights as existing prior to, and separate from, but recognized and affirmed in that society's positive law.[11] Natural law philosophy has had a major influence on American law.[12] One commentator has described the United States Constitution, particularly the Bill of Rights, as "essentially a natural law document setting out the fundamental authority of the people under natural law and guaranteeing the natural rights of the citizens."[13]

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[5] *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985); Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Board of Regents v. Roth, 408 U.S. 564, 572 (1972). *See also* Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 Yale L.J. 319, 325–27 (1957).

[6] D. Lyons, Ethics and the Rule of Law 1–3 (1984); Kadish, *supra* note 5, at 344–46. Concepts of justice, fairness, and social welfare are connected to basic issues of normative jurisprudence. D. Lyons, *supra* at 1.

[7] The issue of whether law and morality should be separated is a basis for differences among opposing legal theories. D. Lyons, *supra* note 6, at 6.

[8] The legal positivism theory has also influenced the Court's interpretation of due process when it has found liberty or property interests in "an independent source such as state law." *Roth*, 408 U.S. at 577. *See also* L. Tribe, American Constitutional Law 522–27 (1978). The Court, however, has specifically rejected the positivist position that state law is also the source of procedural requirements. *Loudermill*, 470 U.S. at 539–41. As this Article focuses on the scope of procedures required after identifying a liberty or property interest, legal positivism will not be addressed further.

[9] St. Thomas Aquinas, who lived during the thirteenth century, was "a founder of the 'natural law' tradition within jurisprudence." D. Lyons, *supra* note 6, at 7.

[10] *Id.* at 7–10.

[11] D. Lloyd, The Idea of Law 83, 91 (1976); Cranston, *Are There Any Human Rights?*, Daedalus 1, 15–16 (Fall 1983).

[12] D. Lloyd, *supra* note 11, at 83; L. Tribe, *supra* note 8, at 427.

[13] D. Lloyd, *supra* note 11, at 83, 91. *See also* R. Mykkeltvedt, The Nationalization of the

Proponents of the natural rights view of the Constitution's due process clauses seek to identify the moral content of due process requirements.[14] In substantive and procedural due process cases, the Supreme Court has expressed the clauses' moral content in terms of an individual's fundamental rights.[15] Initially, the Court applied natural law theory in substantive due process cases to determine whether state legislation had interfered with fundamental rights of private individuals and businesses.[16] During the last part of the nineteenth century through the early period of the New Deal in the 1930's, the Court applied substantive due process doctrine and, in virtually every case, struck down state legislation regulating private property, including an employer's power unilaterally to set employment conditions.[17] Commentators have criticized the Court majority's singleminded approach to due process as protecting only private property interests, noting that Supreme Court justices imposed their individual moral philosophies rather than apply an objective interpretation of the Constitution.[18] During the New Deal the Supreme Court rejected natural law theory in substantive due process analysis. The Court recognized that social legislation was needed during the Depression and that under such economic circumstances private control of property free from governmental regulation was not a right found in the "natural order of things."[19]

The Supreme Court's initial approach to procedural rights under natural law theory described a narrower scope of natural rights than the Court had identified in substantive due process cases.[20] The procedural due process cases arose as challenges to state criminal trial procedures under the fourteenth amendment's due process clause.[21] While the Bill of Rights afforded specific procedural guarantees to federal criminal defendants, the question remained whether the fourteenth amendment due process clause incorporated these procedural rights in state proceedings.[22] From the 1930's through the 1950's, the Court rejected the doctrine of incorporation, concluding that procedural rights such as trial by jury or freedom from self-incrimination existed on a lower "plane of social and

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BILL OF RIGHTS 141 (1983); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715–16 (1975).

[14] D. LYONS, *supra* note 6, at 7, 61–62. *See also* R. DWORKIN, TAKING RIGHTS SERIOUSLY vii, xi (1977); Kadish, *supra* note 5, at 325–27; Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50–52 (1976).

[15] *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) ("ancient liberties"); *In re* Kemmler, 136 U.S. 436, 448 (1890); Hurtado v. California, 110 U.S. 516, 530 (1884).

[16] R. MYKKELTVEDT, *supra* note 13, at 140; L. TRIBE, *supra* note 8, at 4–6, 425, 433; Kadish, *supra* note 5, at 325. Professor Tribe has defined substantive due process as setting "constitutional limits on the content of legislative action," while procedural due process sets "constitutional limits on judicial, executive and administrative enforcement of the legislative dictates." L. TRIBE, *supra* note 8, at 502 n.4.

[17] R. MYKKELTVEDT, *supra* note 13, at 29, 31, 140; L. TRIBE, *supra* note 8, at 4–6, 425, 433; Grey, *supra* note 13, at 716; Kadish, *supra* note 5, at 325.

[18] R. MYKKELTVEDT, *supra* note 13, at 34; L. TRIBE, *supra* note 8, at 6–7; Kadish, *supra* note 5, at 325–28, 335–36.

[19] L. TRIBE, *supra* note 8, at 6; Kadish, *supra* note 5, at 325; Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1051–57 (1968).

[20] L. TRIBE, *supra* note 8, at 5–7.

[21] R. MYKKELTVEDT, *supra* note 13, at 37.

[22] *Id.* at 34, 37.

moral values"[23] than substantive rights such as freedom of speech.[24] Instead, the Court adopted a case-by-case approach under a flexible fair trial rule[25] which tested whether, under the totality of the circumstances, the state had provided a criminal defendant with a fundamentally fair trial.[26]

The Court based the fair trial rule on natural law concepts and described the due process clause as protecting fundamental rights[27] in accord with canons of decency[28] and notions of fairness.[29] In determining, however, whether state procedures were "shocking to a universal sense of justice,"[30] the Court generally deferred to the state's procedural system.[31] As in the substantive due process cases, commentators criticized this one-sided approach, noting that the Court was engaged in a substantive interpretation of the Constitution.[32] Justice Black warned that the fair trial rule endowed the Court with limitless power to alter constitutional standards to agree with the Court's understanding of natural law requirements.[33]

With a change in the Court's membership during the late 1950's and early 1960's, the fair trial rule lost favor and the Court adopted the doctrine of selective incorporation.[34] Using this approach, the Court decided whether specific Bill of Rights provisions

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[23] Palko v. Connecticut, 302 U.S. 319, 326 (1937), *quoted in* R. MYKKELTVEDT, *supra* note 13, at 46.

[24] R. MYKKELTVEDT, *supra* note 13, at 46–47. *See also* Kadish, *supra* note 5, at 325; Mashaw, *supra* note 14, at 47 n.61.

[25] R. MYKKELTVEDT, *supra* note 13, at 51.

[26] *Id.* at 39–54, 142–43; L. TRIBE, *supra* note 8, at 507, 512–13, 539–40; Grey, *supra* note 13, at 717; Kadish, *supra* note 5, at 323–27.

[27] *See, e.g.*, Solesbee v. Balkcom, 339 U.S. 9, 16 (1950); Betts v. Brady, 316 U.S. 455, 471–72 (1942); *Palko*, 302 U.S. at 325.

[28] Adamson v. California, 332 U.S. 46, 67–68 (1947) (Frankfurter, J., concurring), *discussed in* R. MYKKELTVEDT, *supra* note 13, at 56–57. Supreme Court decisions prior to its formulation of the fair trial rule also based procedural due process findings on natural law concepts. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 101–06 (1908); *Hurtado*, 110 U.S at 530–37.

[29] *Solesbee*, 339 U.S. at 16; *see* R. MYKKELTVEDT, *supra* note 13, at 42–52; Ratner, *supra* note 19, at 1054–57.

[30] *Betts*, 316 U.S. at 462, *discussed in* R. MYKKELTVEDT, *supra* note 13, at 49–51.

[31] R. MYKKELTVEDT, *supra* note 13, at 42–51, 55; Kadish, *supra* note 5, at 325; Ratner, *supra* note 19, at 1055–56.

[32] R. MYKKELTVEDT, *supra* note 13, at 53–55; Kadish, *supra* note 5, at 326–27. In applying natural law concepts to procedural due process issues, the Court has attempted to avoid totally subjective decision-making by referring to objective sources in order to define the fundamental nature of procedural rights. These sources include opinions of the Constitution's framers, early English common law, opinions of state legislatures, opinions of other federal and state courts, and "the opinions of other countries in the Anglo-Saxon tradition." Kadish, *supra* note 5, at 328. *See also* R. MYKKELTVEDT, *supra* note 13, at 52.

[33] *Adamson*, 332 U.S. at 69 (Black, J., dissenting). Justice Black stated that the *Adamson* majority's constitutional theory "endow[s the Court] . . . with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.'" *Id. See also* Kadish, *supra* note 5, at 335–36.

[34] R. MYKKELTVEDT, *supra* note 13, at 67–82. Mapp v. Ohio, 367 U.S. 643 (1961), incorporating the fourth amendment, was "the opening shot in [this] doctrinal revolution." R. MYKKELTVEDT, *supra* note 13, at 69. During this period, prior to adopting the selective incorporation doctrine formally, the Court also applied the fair trial rule "to raise the minimal standards of fairness required by due process law." *Id.* at 64.

were incorporated into the fourteenth amendment due process clause.[35] The Court still applied natural law theory because it incorporated only those provisions of the Bill of Rights which it deemed "a fundamental right essential to a fair trial in a criminal prosecution."[36] By 1969 virtually every procedural protection in the fourth through the eighth amendments had been incorporated into the fourteenth amendment due process clause.[37]

The Supreme Court also has interpreted due process rights under the legal philosophy theory of utilitarianism. Since the Court first applied this theory in the late 1950's,[38] utilitarianism has become the dominant theory in noncriminal procedural due process cases.[39] In contrast to natural law theorists, utilitarian theorists beginning with Jeremy Bentham sought to separate the study of law from the study of morals.[40] Bentham developed a "principle of utility" as an objective moral standard of positive law[41] and argued that laws and governmental actions are valid only if they advance the greatest societal good.[42] Bentham's social welfare theory determines a law's validity by balancing quantitatively measured interests in order to reach the result that embodies the best interests of the general welfare.[43]

Scholars have criticized utilitarian theory for its failure to recognize that basic moral rights should remain intact regardless of whether the principle of utility would justify their infringement.[44] This failure to identify the independent moral grounds for these rights forms the basis for opposition to using utilitarianism in constitutional analysis.[45] Constitutional interpretation under utilitarianism would protect rights solely for their instrumental value.[46] In procedural due process cases, an instrumentalist approach would protect specific procedural rights only if the procedures enhanced the accuracy of the

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[35] R. MYKKELTVEDT, *supra* note 13, at 60, 67–82.

[36] Pointer v. Texas, 380 U.S. 400, 404 (1965). *See also* R. MYKKELTVEDT, *supra* note 13, at 74, 79–80; Ratner, *supra* note 19, at 1057, 1096–97.

[37] The only Bill of Rights provisions which have not been explicitly incorporated are the second amendment right to bear arms, the third amendment prohibition of quartering troops in private homes, the fifth amendment requirement of a grand jury indictment, the seventh amendment right to a jury trial in civil cases involving at least twenty dollars, and the eighth amendment protection against excessive bail. R. MYKKELTVEDT, *supra* note 13, at 82.

[38] Mashaw, *supra* note 14, at 47 n.61.

[39] L. TRIBE, *supra* note 8, at 539–43; Mashaw, *supra* note 14, at 46–49; Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 133–39 (1978); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1510–14 (1975) [hereinafter Note, *Specifying the Procedures*].

[40] D. LLOYD, *supra* note 11, at 100; D. LYONS, *supra* note 6, at 10, 113, 126.

[41] D. LLOYD, *supra* note 11, at 102; D. LYONS, *supra* note 6, at 10.

[42] D. LYONS, *supra* note 6, at 112 ("[U]tilitarianism says that we should serve the greater aggregate interest, taking into account all the benefits and burdens that might result.").

[43] *Id.* at 112–13. *See also* D. LLOYD, *supra* note 11, at 100; Mashaw, *supra* note 14, at 51.

[44] R. DWORKIN, *supra* note 14, at 4, 12, 92, 149, 191–93, 272; D. LYONS, *supra* note 6, at 126–28; L. TRIBE, *supra* note 8, at 540–43; Mashaw, *supra* note 14, at 51; Saphire, *supra* note 39, at 151–52, 155; Note, *Specifying the Procedures*, *supra* note 39, at 1526–27, 1542–43.

[45] R. DWORKIN, *supra* note 14, at 4, 12, 92, 191–93, 272; L. TRIBE, *supra* note 8, at 540–43; Mashaw, *supra* note 14, at 51; Saphire, *supra* note 39, at 151–52, 155; Note, *Specifying the Procedures*, *supra* note 39, at 1526–27, 1542–43.

[46] R. DWORKIN, *supra* note 14, at vii, 4; L. TRIBE, *supra* note 89, at 525–26, 540–43; Mashaw, *supra* note 14, at 48; Saphire, *supra* note 39, at 151–52, 155–56; Note, *Specifying the Procedures*, *supra* note 39, at 1523–25.

proceeding's outcome.[47] This analysis, however, ignores the moral content of due process standards which protect procedural rights in order to promote the intrinsic values of fairness, individual autonomy, and integrity — even though the accuracy of the proceedings may not be enhanced or may even be lessened.[48] For example, a coerced confession is not admissible evidence in criminal trials even when independent evidence proves its truthfulness.[49] Clearly, the right against compulsory self-incrimination and the right to due process promote and protect a fundamental concern — individual dignity — and that outweighs the utilitarian value of accuracy.[50]

The Supreme Court has adopted utilitarian interest balancing as its primary mode of analysis in cases involving procedural due process in administrative proceedings.[51] In contrast to criminal trials where a liberty interest is at stake, in state or federal administrative proceedings due process must be afforded because an individual's property interest is at stake.[52] The number of Supreme Court cases in this area greatly increased in the early 1970's due to the expansion of public sector agencies providing government benefits, contracts, and employment and the Court's determination that individuals could have a property interest in these government benefits.[53]

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[47] L. TRIBE, *supra* note 8, at 540–42; Mashaw, *supra* note 14, at 48; Saphire, *supra* note 39, at 158, 162; Note, *Specifying the Procedures*, *supra* note 39, at 1516.

[48] D. LYONS, *supra* note 6, at 205–06; L. TRIBE, *supra* note 8, at 525–26, 559–60; Mashaw, *supra* note 14, at 46–52; Ratner, *supra* note 19, at 1106, 1114–15; Saphire, *supra* note 39, at 151–52, 155–62, 193–94; Summers, *Evaluating and Improving Legal Processes — A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 2–7 (1974); Note, *Specifying the Procedures*, *supra* note 39, at 1525–27, 1538–39. Commentators have criticized the Court for relying on factors such as the cost of a procedural protection when it determines due process issues. L. TRIBE, *supra* note 8, at 540–42; Saphire, *supra* note 39, at 151; Note, *Specifying the Procedures*, *supra* note 39, at 1523.

[49] Kadish, *supra* note 5, at 347.

[50] *Id.* For other examples of a conflict in interpreting rights under utilitarian theory and an intrinsic value theory, see *id.* (stomach pumping); Ratner, *supra* note 19, at 1106 (search and seizure; prosecutor's comment on defendant's failure to testify); Summers, *supra* note 48, at 17–18, 23, 24, 29 (stomach pumping; other searches and seizures; coerced testimony and confessions).

Professor Dworkin has identified utilitarian interest balancing as a legislative method of analysis, inappropriate for judicial interpretation of constitutional rights which should not be negated by assertions of the general welfare. R. DWORKIN, *supra* note 14, at 82–83, 92, 199–204. *See also* Note, *Specifying the Procedures*, *supra* note 39, at 1523–24.

[51] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 573 (1972); *see also* L. TRIBE, *supra* note 8, at 514–27, 540–50; Mashaw, *supra* note 14, at 29–30, 36, 46–48; Saphire, *supra* note 39, at 158–62; Note, *Specifying the Procedures*, *supra* note 39, at 1510–15.

[52] In administrative law cases, a liberty interest may also exist when an agency's action injures the individual's reputation. *See, e.g.*, *Roth*, 408 U.S. at 573–74. According to Professor Tribe, the *Roth* Court divided the procedural due process inquiry into two steps: "(1) the question of what specific interests are entitled to due process protection" and "(2) the inquiry into what process is due." L. TRIBE, *supra* note 8, at 507. In addressing the initial question, the Court determines whether a property or liberty interest has been created by "an independent source such as state law." *Roth*, 408 U.S. at 577. If such an interest has been created, the Court moves to the second step to determine the procedures which are constitutionally required. *Id.* at 569–70. While the Court continues to apply a legal positivist approach to find property or liberty interests, a majority of the justices has specifically rejected the minority's positivist theory that state law is also the source of procedural requirements. *Loudermill*, 470 U.S. at 539–41. *See also* L. TRIBE, *supra* note 8, at 522–27.

For a discussion of the contrast between the Court's treatment of the individual's interest in criminal and non-criminal procedural due process cases, see Saphire, *supra* note 39, at 134–39, 191 n.359, 193.

[53] L. TRIBE, *supra* note 8 at 514–15; Mashaw, *supra* note 14, at 28–29.

The Court has applied utilitarian theory to administrative proceedings by balancing the parties' opposing interests to determine which procedure will assure the accuracy of the outcome.[54] The theory is expressed in a formula which balances various factors, including the private interest affected, the risk that the procedure may erroneously deprive an individual of that interest, the probable value of additional or substitute procedural safeguards, and the government's interest, including the financial and administrative burdens that additional procedural safeguards would entail.[55] In general, therefore, the Court balances the individual's stake in a property interest against the institution's interest in expedient decision-making.[56] Although it initially placed great importance on the individual's stake in receiving governmental benefits,[57] the Supreme Court has steadily restricted the scope of procedural protections by giving more weight to institutional interests.[58]

The 1970 case of *Goldberg v. Kelly*[59] began a "due process revolution"[60] and many subsequent cases have sought to extend its principles.[61] In *Goldberg*, the Supreme Court held that procedural due process required that a state afford an individual the opportunity for an evidentiary hearing prior to terminating welfare benefits.[62] The Court weighed the institutional interest against the individual's property interest and determined that a pretermination hearing is required.[63] The Court also enumerated specific procedures to protect the individual from erroneous benefits termination pending a subsequent statutory fair hearing.[64] Although the *Goldberg* Court stated that the pretermination hearing need not be judicial or quasi-judicial,[65] the Court later described *Goldberg* as requiring a full adversarial hearing before the government may terminate a benefit.[66] The *Goldberg* Court found that procedural due process under these circumstances required notice of the reasons for termination, the opportunity to present oral

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[54] L. TRIBE, *supra* note 8, at 540–42; Mashaw, *supra* note 14, at 48; Saphire, *supra* note 39, at 158, 162; Note, *Specifying the Procedures*, *supra* note 39, at 1515–16.

[55] Mathews v. Eldridge, 424 U.S. 319, 335 (1976). For discussion of the *Eldridge* utilitarian formulation, see L. TRIBE, *supra* note 8, at 540–42; Mashaw, *supra* note 14. *See also* Ake v. Oklahoma, 470 U.S. 68, 77–83 (1985), where the Supreme Court applied the *Eldridge* balancing test to hold that a state must supply an indigent criminal defendant with psychiatric assistance when sanity at the time of the offense will be a significant factor at trial, in order to increase the likelihood of the verdict's accuracy. *Id.*

[56] *See* Saphire, *supra* note 39, at 154–56; Note, *Specifying the Procedures*, *supra* note 39, at 1515, 1523 (government's interest in expediency).

[57] *See* L. TRIBE, *supra* note 8, at 525–27; Mashaw, *supra* note 14, at 29 (discussing Goldberg v. Kelly, 397 U.S. 254 (1970)).

[58] One commentator has described *Eldridge* as a possible "turning point in the Court's resolution of procedural due process issues. Since *Eldridge*, plaintiffs in due process cases have been uniformly unsuccessful, and a marked tendency has emerged to avoid 'balancing' by finding the due process clause inapplicable." Mashaw, *supra* note 14, at 29 n.5.

[59] 397 U.S. 254 (1970).

[60] Mashaw, *supra* note 14, at 29. *See also* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1273–1304 (1975).

[61] *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972).

[62] 397 U.S. at 266–70.

[63] *Id.* at 266–67.

[64] *Id.* at 268–69.

[65] *Id.* at 266.

[66] *Loudermill*, 470 U.S. at 545 (1985).

arguments and evidence, the right to confront witnesses, the right to retain counsel, and a statement by the decision-maker of reasons for the determination.[67] The Court also required an impartial decision-maker, although an agency employee with prior involvement in the case could fill this role so long as that employee had not participated in the determination under review.[68]

Subsequent Supreme Court decisions show a general trend to apply utilitarian theory to restrict the scope of procedural due process in administrative proceedings.[69] One issue which demonstrates the Court's retreat from *Goldberg* is the question of the scope of due process protections the agency must provide before terminating a governmental benefit. In several cases the Court has placed great weight on the institutional interest in internal control and expedient decision-making and has upheld the governmental deprivation of a property interest before a full evidentiary hearing.[70] In fact, in three recent cases — two involving the discharge of governmental employees[71] and the other involving disability benefits termination[72] — the Court approved pretermination procedures which did not provide any kind of hearing.[73] In each case the majority found that a pretermination opportunity to contest in writing the proposed agency action protected against erroneous decisions, where the agency would also provide a post-termination hearing.[74]

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[67] 397 U.S. at 269–71.

[68] *Id.*

[69] L. TRIBE, *supra* note 8, at 540–42; Mashaw, *supra* note 14, at 29 n.5.

[70] *Eldridge*, 424 U.S. at 343.

[71] *Loudermill*, 470 U.S. 532 (1985); Arnett v. Kennedy, 416 U.S. 134 (1974).

[72] Mathews v. Eldridge, 424 U.S. 319 (1976).

[73] In *Loudermill*, two public employees were discharged before the administrative hearings to review the evidence of cause for the termination, as provided by Ohio law. *Loudermill*, 470 U.S. at 535–37.

An oral hearing before a federal administrative law judge concerning Social Security disability benefits termination occurs only after the Social Security Administration has affirmed the state agency's termination of benefits. *Eldridge*, 424 U.S. at 335–39. *See* Mashaw, *supra* note 14, at 32–36.

In *Arnett*, a federal employee was discharged pursuant to procedures established by the Lloyd-LaFollette Act (5 U.S.C. 7501), which requires that the employer provide the employee with written notice of the charges and an opportunity to file a written answer. Federal regulations included an additional right to reply orally to the charges, but provided an evidentiary hearing only after the discharge. *Arnett*, 416 U.S. at 140–46.

[74] *Loudermill*, 470 U.S. at 545–46; *Eldridge*, 424 U.S. at 338, 348–49; *Arnett*, 416 U.S. at 168–70.

The *Loudermill* Court applied the *Eldridge* utilitarian balancing test to conclude that due process required that the government provide the employee an opportunity to respond to charges "either in person or in writing" as "an initial check against mistaken decisions . . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." 470 U.S. at 545–46. The discharged employees in *Loudermill* sought only notice and an opportunity to respond. *Id.*

In *Arnett*, a majority of the Court concluded that the Lloyd-LaFollette Act's discharge procedures satisfied due process but could not agree on a majority opinion. A plurality, consisting of Chief Justice Burger and Justices Rehnquist and Stewart, found that the legislature, because it created a property interest in employment, could simultaneously limit the scope of procedural protection afforded prior to deprivation of that interest. 416 U.S. at 152–55. A majority of the Court explicitly rejected this position in *Loudermill*. 470 U.S. at 540–41. In *Arnett*, Justices Powell and Blackmun, concurring in part and concurring in the result in part, applied a balancing process to conclude that the government's interest in maintaining control over personnel management and added administrative costs and delay outweighed the employee's interest in a prior evidentiary

The stress on institutional interests has also narrowed the scope of due process in the area of an individual's right to an impartial decision-maker. This issue arises in administrative determinations where an agency acts both as prosecutor and judge.[75] Under utilitarian interest balancing, separating these functions and requiring a neutral adjudicator from outside the agency would best protect an individual's property interest.[76] This procedural safeguard, however, conflicts with the institutional interest in control over agency decisions and places the Court in the interventionist position of restructuring the basic decision-making process.[77]

To retain institutional autonomy, the Court has compromised the right to impartial adjudications in the administrative context. By emphasizing the importance of an agency's autonomy and efficiency, the Court has held that an individual's right to an impartial decision-maker was not violated where a governmental agency official decided to terminate public benefits or employment, even where the official was previously involved with that particular case.[78] The Court reached this result by stressing the instrumentalist

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hearing, 416 U.S. at 167–68. Justices Powell and Blackmun concluded further that the pre-termination procedures would "minimize the risk of error in the initial removal decision." *Id.* at 170.

In *Eldridge*, the Court applied its utilitarian interest balancing formula to find that the individual's private interest in disability benefits was lower than the interest of welfare recipients because disability benefits did not depend on financial need. 424 U.S. at 340–43. Furthermore, the *Eldridge* Court found that the lack of an oral evidentiary hearing prior to benefits termination would not affect the decision-maker's accuracy because of the agency's reliance on documented medical evidence. *Id.* at 343–44. The Court also noted the additional costs which the government would incur by requiring a pre-termination hearing. *Id.* at 347. For a discussion and criticism of the Court's reasoning, see Mashaw *supra* note 14, at 37–46.

[75] *See, e.g.*, Hortonville Jt. School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 484–85 (1976) (school board acted as negotiator in collective bargaining with teachers and voted to discharge the strikers); *Eldridge*, 424 U.S. at 335–39 (Social Security disability benefits terminated after the Social Security Administration affirmed the termination of benefits; post-termination hearing before an administrative law judge reviewed by Appeals Council of the Social Security Administration); *Arnett*, 416 U.S. at 136–37 (employee in Regional Office of the Office of Economic Opportunity discharged based on alleged slander of the Regional Director (RD); RD reviewed rebuttal submitted by employee prior to discharge and made the decision to terminate employee); Morrissey v. Brewer, 408 U.S. 471, 485–86 (1972) (determination of reasonable grounds for parole revocation at preliminary hearing following arrest of a parolee may be judged by another parole officer not directly involved in the case); *Goldberg*, 397 U.S. at 271 (hearing on eligibility for welfare benefits judged by a welfare official involved partially in the case but who has "not . . . participated in making the determination under review"). *See also* L. TRIBE, *supra* note 8, at 556.

[76] *See* Saphire, *supra* note 39, at 167 n.244 (expressing the view that a neutral decision-maker "might be essential for purposes of reliable and unbiased factual and substantive determinations . . . [but] does not seem fundamental to the inherent dignitary concerns of participation and revelation").

[77] *See Arnett*, 416 U.S. at 155 n.21 (plurality opinion, expressing concern over circumstances in which the official bringing the charges also makes the discharge determination as the agency head; here, a finding of bias would disqualify all of his subordinates, resulting in a hearing "conducted by someone wholly outside of the . . . agency").

[78] *See, e.g., Hortonville Jt. School Dist.*, 426 U.S. at 496 ("[p]ermitting the Board to make the decision at issue preserves its control over school district affairs"); *Arnett*, 416 U.S. at 155 n.21 ("The decision of an employee's supervisor to dismiss an employee for such cause as will promote the efficiency of the service' will all but invariably involve a somewhat subjective judgment on the part of the supervisor . . . . We do not believe that Congress . . . required the complexities which would be injected into the [Lloyd-LaFollett] Act by our Brother White['s finding of bias]."); *Goldberg*, 397 U.S. at 266–67 (describing the required hearing as distinct from "a judicial or quasi-judicial trial,"

goal of accurate decision-making, which agency personnel can fulfill.[79] The Court's sole focus on accuracy, however, ignores the damaging effects of decision-making by an official whose institutional role prejudices the individual.[80]

II. Procedural Due Process for Union Members

A. *State Court Decisions Before the LMRDA*

Congress enacted the LMRDA against a background of state common law concerning the procedural due process rights of union members disciplined by their union.[81] In fact, state courts decided union discipline cases for more than sixty years before the LMRDA.[82] The state cases show the strong influence of Supreme Court constitutional due process theory.[83]

In developing a common law of union members' procedural due process rights, the state courts had to determine the source of the right. Without a statutory source such as the LMRDA, the state courts found either a property right in union membership or a contractual right under the union constitution and bylaws, which courts viewed as a contract between the union and the members or as a contract entered into by all union members.[84] The courts exercised broad judicial power in order to protect the property or contract right regardless of the actual terms of the contract.[85] For example, in interpreting a union constitution and bylaws under a property rights theory, one court stated that the requirements of notice of disciplinary charges and a prior hearing "exist[] independently of any provision to that effect in the organic law of the organization and

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citing the "interest in relatively speedy resolution of questions of eligibility," the interest in "dealing with one another informally," and "burdensome caseloads").

[79] *Hortonville Jt. School Dist.*, 426 U.S. at 494–95; *Arnett*, 416 U.S. at 170 n.5 (Powell and Blackmun, J.J., concurring in part and concurring in the result in part); Morrissey v. Brewer, 408 U.S. 471, 484 (1972); Goldberg v. Kelly, 397 U.S. 254, 298 (1970).

[80] *See Hortonville Jt. School Dist*, 426 U.S. at 499 (Stewart, Brennan, Marshall, J.J., dissenting) ("officials 'directly involved in making recommendations cannot always have complete objectivity in evaluating them,'" (quoting Morrissey v. Brewer, 408 U.S. 471, 486 (1972)); *Arnett*, 416 U.S. at 199 (White, J., concurring in part and dissenting in part) ("here the hearing official [the Regional Director] was the object of slander that was the basis for the employee's proposed discharge . . . . In ruling that the employee was to be terminated, the hearing examiner's own reputation, as well as the efficiency of the service, was at stake.").

[81] Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 835–36 (1960) [hereinafter Cox, *Internal Affairs*]; Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 613–16 (1959) [hereinafter Cox, *Role of Law*]; Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 Yale L.J. 175, 175 (1960).

[82] Summers, *supra* note 81, at 175.

[83] Cox, *Internal Affairs*, *supra* note 81, at 836; Cox, *Role of Law*, *supra* note 81, at 616; Summers, *supra* note 81, at 201. *See infra* notes 88–117 and accompanying text.

[84] Cox, *Internal Affairs*, *supra* note 81, at 835–36; Cox, *Role of Law*, *supra* note 81, at 613–14; Summers, *supra* note 81, at 178–80. *See, e.g.*, Local Union No. 57, Bhd. of Painters, Decorators & Paperhangers of America v. Boyd, 245 Ala. 227, 234, 16 So. 2d 705, 711 (1944); Blek v. Kirkman, 148 Misc. 522, 523, 266 N.Y.S. 91, 92, (N.Y. Sup. Ct. 1933); Hall v. Morrin, 293 S.W. 425, 439 (Mo. App. 1927); Simpson v. Grand Int'l Bhd. of Locomotive Eng'rs, 83 W. Va. 355, 365, 98 S.E. 580, 584 (1919), *cert. denied*, 250 U.S. 644 (1919). *See also* cases cited in Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1052, 1055, 1057 (1951) [hereinafter Summers, *Legal Limitations*].

[85] Cox, *Role of Law*, *supra* note 81, at 613–15; Summers, *supra* note 81, at 180–82.

any bylaw which assumes to dispense with notice and hearing is unreasonable and void."[86] Thus, under a contract or property theory, state courts could rewrite union disciplinary procedures in union constitutions and bylaws.[87]

Before Congress enacted the LMRDA, natural law theory, which dominated Supreme Court doctrine during the same period,[88] also influenced state court development of union members' procedural due process rights. While most courts used property or contract theories to justify the adjudication of procedural safeguards as a matter of public policy,[89] the explicit application of natural law theory is striking. Professor Summers has observed that the state courts embraced natural law theory as "a fundamental principle of near constitutional quality."[90] In so doing, they used terms similar to the Supreme Court's language, appealing to moral principles of "natural justice,"[91] "demands of fair play,"[92] "common decency,"[93] "good conscience,"[94] and the "spirit of the law of the land."[95] State court decisions also parallel the Supreme Court's "fair trial" rule, used before the Court selectively incorporated specific provisions of the Bill of Rights.[96] As in the fair trial rule, state courts approached the due process issues on a case-by-case basis in order to determine whether the procedure in general was substantially fair.[97]

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[86] *Kirkman*, 148 Misc. at 523, 366 N.Y.S. at 92.

[87] Summers, *supra* note 81, at 180–81.

[88] *See supra* text accompanying notes 20–26.

[89] Summers, *supra* note 81, at 180.

[90] Summers, *supra* note 81, at 201. Professor Summers described the legal theory as imposing "a standard of fairness or 'natural justice.'" *Id.* Professor Cox has described five categories of legal grounds which state courts used to set aside an expulsion from membership, based on the property or contract theory:

> (1) The [disciplinary] procedure violated the union's constitution or by-laws.
> (2) The constitution or by-laws did not authorize expulsion for the alleged offense.
> (3) The procedure . . . did not afford the member a fair hearing.
> (4) The expulsion . . . was 'unreasonable,' contrary to 'public policy,' or contrary to 'natural justice.'
> (5) The expulsion was in bad faith because the purported ground was only a pretense for getting rid of a troublesome member.

Cox, *Internal Affairs*, *supra* note 81, at 835–36.

[91] Blek v. Wilson, 145 Misc. 373, 377, 259 N.Y. Supp. 443, 448 (N.Y. Sup. Ct. 1932), *rev'd on other grounds*, 262 N.Y. 253, 185 N.E. 692 (1933). *See also Local Union No. 57*, 245 Ala. at 236, 16 So. 2d at 713 ("fundamental principles of right and justice"); Taylor v. Favorito, 74 N.E.2d 768, 772 (Ohio App. 1947) ("natural justice"); Becker v. Calnan, 313 Mass. 625, 628, 48 N.E.2d 668, 670 (1943) ("principles of natural justice"); McGinley v. Milk & Ice Cream Salesmen, Drivers & Dairy Employees Local Union No. 205, 351 Pa. 47, 52, 40 A.2d 16, 18 (1944) ("contrary to law and justice"); Cohen v. Rosenberg, 262 App. Div. 274, 276, 27 N.Y.S.2d 834, 836 (N.Y. Sup. Ct. 1941), *aff'd*, 287 N.Y. 800 (1942) (courts will interfere "[w]here there has been an injustice perpetrated"). *See also* cases cited in Summers, *supra* note 81, at 200–07; Summers, *Legal Limitations*, *supra* note 84, at 1075, 1081, 1082.

[92] Bricklayers', Plasterers' and Stonemasons' Union v. Bowen, 183 N.Y. 855, 859 (N.Y. Sup. Ct. 1920), *aff'd mem.*, 198 App. Div. 967, 189 N.Y. 938 (1921).

[93] *Hall*, 293 S.W. at 440 (Mo. App. 1927); *Simpson*, 83 W.Va. at 373, 98 S.E. at 587 ("bounds of reason, common sense, or fairness"). *See also* cases cited in Summers, *Legal Limitations*, *supra* note 84, at 1081, 1083.

[94] *Bricklayers' Union*, 183 N.Y. Supp. at 861.

[95] *Id.* at 859.

[96] *See supra* notes 20–33 and accompanying text.

[97] Summers, *supra* note 81, at 201.

The state courts' description of the union context and disciplinary structure in terms parallel to the government's relationship to its citizens also evidences the constitutional analogy. Thus, just as citizens have property rights which the government cannot deny without due process of law, state courts held that union members possess property rights to union membership and jobs controlled by unions which implicate due process concerns.[98] Some courts described union disciplinary proceedings as judicial or quasi-judicial.[99] Furthermore, state courts also applied criminal law concepts to union disciplinary proceedings, including the presumption of innocence[100] and the principle of strict construction of statutory offenses.[101]

In deciding specific due process issues, natural law concepts often provide the foundation for state court protection of procedural rights. Some decisions adopt the basic principle of natural law theory that an individual's rights exist independent of positive law.[102] The concept of pre-existing rights underlies state court willingness to protect procedural rights not explicitly provided in the union constitution or that conflict with other union regulations.[103]

Similar to the Supreme Court's use of natural law theory, state courts required that unions provide procedures which the courts assumed were essential to a fair hearing.[104] As a New Jersey court stated, a union's quasi-judicial procedures should accord with traditional due process notions.[105] Applying natural law theory to define the procedures necessary to satisfy due process requirements, this court stated that "natural justice" requires that the union provide an individual with notice, a hearing, and an opportunity to present defenses before discipline.[106] Other courts accepted this general outline of procedural due process rights and addressed additional procedural issues. These courts have held that union members have the right to confront and cross-examine witnesses during a disciplinary hearing.[107] Generally, state courts have also held that unions may deny the right to counsel outside the membership, so long as overall fairness is maintained by denying this right to the charging party as well.[108]

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[98] Cox, *Internal Affairs*, *supra* note 81, at 835; Summers, *supra* note 81, at 178; *Taylor*, 74 N.E.2d at 772 (Ohio App. 1947); *Local Union No. 57*, 245 Ala. at 234–35, 16 So. 2d at 711. *See also* cases cited in Summers, *Legal Limitations*, *supra* note 84, at 1055, 1075.

[99] *Taylor*, 74 N.E.2d at 772 (Ohio App. 1947) (quoting Dragwa v. Federal Labor Union, 136 N.J. Eq. 172, 41 A.2d 32 (1945)); *Simpson*, 83 W. Va. at 365, 98 S.E. at 584. *See also* cases cited in Summers, *Legal Limitations*, *supra* note 84, at 1055, 1081.

[100] *McGinley*, 351 Pa. at 52, 40 A.2d at 18 (1944); Schmidt v. Rosenberg, 49 N.Y.S.2d 364, 366 (N.Y. Sup. Ct. 1944). *See also* cases cited in Summers, *supra* note 81, at 184; Summers, *Legal Limitations*, *supra* note 84, at 1064, 1081.

[101] Summers, *supra* note 81, at 184 n.51.

[102] *See supra* notes 10–13 and accompanying text.

[103] Summers, *supra* note 81, at 201; *Local Union No. 57*, 245 Ala. at 234, 16 So. 2d at 711; *Kirkman*, 148 Misc. at 523; *Bricklayers' Union*, 183 N.Y. Supp. at 859. *See also* cases cited in Summers, *supra* note 81, at 181; Summers, *Legal Limitations*, *supra* note 84, at 1055, 1057, 1060.

[104] Summers, *supra* note 81, at 201.

[105] *Dragwa*, 136 N.J. Eq. at 174–75, 41 A.2d at 34 (1945) (quoted in *Taylor*, 74 N.E.2d at 772). *See also* Coleman v. O'Leary, 58 N.Y.S.2d 812, 815 (N.Y. Sup. Ct.), *appeal dism'd*, 269 App. Div. 972, 58 N.Y.S.2d 358 (1945); Brooks v. Engar, 259 App. Div. 333, 334, 19 N.Y.S.2d 114, 115 (1st Dep't. 1940), *appeal dism'd*, 284 N.Y. 763, 31 N.E.2d 514 (1940). *See also* cases cited in Summers, *supra* note 81, at 182, 201, 203; Summers, *Legal Limitations*, *supra* note 84, at 1060, 1065, 1075, 1081.

[106] *Dragwa*, 136 N.J. Eq. at 174, 41 A.2d at 34.

[107] *See* Summers, *supra* note 81, at 202–06; Shernoff v. Schimel, 28 L.R.R.M. 2377, 2378 (N.Y. Sup. Ct. 1951); Shapiro v. Gehlman, 244 App. Div. 238, 242–43, 278 N.Y. Supp. 785, 790 (N.Y. Sup. Ct. App. Div. 1935). *See also* cases cited in Summers, *supra* note 81, at 201, 203.

[108] Summers, *supra* note 81, at 202–03. This approach parallels the Supreme Court application

Another form of due process which state courts have considered is the requirement that unions may impose discipline only for offenses written in the union constitution or bylaws.[109] Courts have used this requirement to invalidate discipline for offenses not explicitly stated in the constitution or bylaws.[110] This due process protection also broadened judicial discretion to decide whether written provisions in union constitutions and bylaws included the offense for which a member was charged. State courts often interpreted the provisions strictly and overruled the union's attempt to read their constitutional provisions to include the alleged offense.[111] Such use of judicial discretion, especially when combined with judicial review of the evidence, involved the courts in the merits of the case and gave state courts broad control over the outcome of disciplinary proceedings.[112]

State courts have also held that union members have the right to an impartial hearing.[113] Again, the courts applied natural law principles, as illustrated in one case: "[O]f course common decency, to say nothing of the jealous eye of the law, would demand that the hearing or trial be an impartial one and that no bad faith be shown."[114] While state courts have invalidated union discipline imposed by a biased tribunal, Professor Summers has described the impartiality issue as the weakest point of judicial protection,[115] because of union tribunals' inherent bias in cases arising out of factional disputes.[116] The problem may also stem from an inherent bias in any internal union tribunal that considers a disciplinary matter.[117]

State courts generally did not apply the utilitarian theory of later Supreme Court due process cases, which balanced opposing interests to reach the instrumentalist goal

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of the "fair trial" rule to the issue of the constitutional right to counsel in state criminal trials, where the Court judged the due process allegation "by an appraisal of the totality of facts in a given case" to determine whether a procedure denied "fundamental fairness." Betts v. Brady, 316 U.S. 455, 462 (1942).

[109] Summers, *supra* note 81, at 181–82.

[110] *Coleman*, 58 N.Y.S.2d at 817; Polin v. Kaplan, 257 N.Y. 277, 282, 177 N.E. 833, 834 (1931). *See also* cases cited in Summers, *supra* note 81, at 181–82.

[111] Summers, *supra* note 81, at 182–84; *McGinley*, 351 Pa. at 52, 40 A.2d at 18.

[112] Summers, *supra* note 81, at 182–85; *McGinley*, 351 Pa. at 57, 40 A.2d at 20 (Stern, J., dissenting).

[113] Cox, *Role of Law*, *supra* note 81, at 834; Summers, *supra* note 81, at 204–06.

[114] *Hall*, 293 S.W. at 440 (hearing was not biased, although one member of the General Executive Board which judged the case had filed the charges and two other members were alleged to have been defamed by the plaintiff); *see also Coleman*, 58 N.Y.S.2d at 816 (impartial hearing denied where two members of the trial board were also witnesses and prosecutors); *Becker*, 313 Mass. at 629–30, 48 N.E.2d at 671 (1943) (impartial hearing not denied although a member of the lower tribunal sat on the appeal of the case in a higher tribunal); *Cohen*, 262 App. Div. at 275, 27 N.Y.S.2d at 836 (impartial hearing denied where trial board members had a direct interest in the case, as they had been elected in the union election challenged by the plaintiff); Gaestel v. Brotherhood of Painters, Decorators & Paperhangers, 120 N.J. Eq. 358, 363, 185 A. 36, 38–39 (Ch. 1936) (impartial hearing denied where the union district council proferred the charges and sat as the jury). *See also* cases cited in Summers, *supra* note 81, at 204; Summers, *Legal Limitations*, *supra* note 84, at 1082, 1083.

[115] Summers, *supra* note 81, at 206.

[116] *Id.* Professor Summers, however, also states that in general state "courts closely scrutinize union disciplinary proceedings to protect against procedural unfairness. Although the strictness of the standard may vary, . . . the variance is probably not greater than that practiced in criminal cases in the same courts." *Id.*

[117] *Id.* at 204.

of accuracy in administrative proceedings.[118] State courts also did not express the utilitarian goal of achieving union democracy by balancing the interests of unions and union members, specifically in the collective bargaining context, as did federal courts after the LMRDA's passage.[119] Rather, state court decisions show the prevailing influence of the natural law theory which dominated Supreme Court doctrine at that time. Many state court decisions do not consider interest balancing at all.[120] Furthermore, even decisions that identify countervailing interests only express a concern with maintaining the autonomy of private organizations when it conflicts with union members' individual rights or their right to earn a livelihood.[121] Concern for organizational autonomy may have had its strongest influence in judicial reluctance to find a violation of the right to an impartial hearing without direct proof of bias.[122] One court held that a union member received a fair trial despite the presence of interested parties on the hearing board and noted that a finding of bias would have disqualified the only body within the union's organizational structure with original jurisdiction to try the case.[123]

B. *Legislative History of the LMRDA*

Title I of the LMRDA, the Bill of Rights of Members of Labor Organizations, includes procedural due process rights for union members.[124] Section 101(a)(5) requires notice of disciplinary charges, a reasonable time to prepare a defense, and a full and fair hearing prior to any imposition of discipline on the union member.[125] The move from a judicially created right to a statutory right to procedural due process raises the

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[118] *See supra* text accompanying notes 51–80.

[119] *See supra* text accompanying notes 187–220.

[120] *See, e.g.*, Madden v. Atkins, 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957), *aff'd in relevant part*, 4 N.Y.2d 283, 151 N.E.2d 73 (1958); *Taylor*, 74 N.E.2d 768; *McGinley*, 351 Pa. 47, 40 A.2d 16; *Schmidt*, 49 N.Y.S.2d 364; *Gaestel*, 120 N.J. Eq. 358, 185 A. 36; *Kirkman*, 148 Misc. 522, 266 N.Y.Supp. 91; *Hall*, 293 S.W. 435.

[121] *See, e.g.*, *Coleman*, 58 N.Y.S.2d at 817; *Local Union No. 57*, 245 Ala. at 234, 16 So. 2d at 711; *Becker*, 313 Mass. at 631, 48 N.E.2d at 672; *Cohen*, 262 App. Div. at 275–76, 27 N.Y.S.2d at 836; *Bricklayers' Union*, 183 N.Y.S. at 858–59; *Simpson*, 83 W. Va. 355, 98 S.E. at 587. The general nature of the expression of conflicting interests is consistent with the state court development of union members' due process rights in the context of members' rights in other private organizations. *See* Cox, *Internal Affairs*, *supra* note 81, at 835; Cox, *Role of Law*, *supra* note 81, at 613.

[122] Summers, *supra* note 81, at 205–06. Professor Summers notes, however, that in cases lacking direct proof of bias, the courts "often make some rough compensation for that which they feel but can not find." *Id.* at 206.

[123] *Hall*, 293 S.W. at 440. *But see* Summers, *supra* note 81, at 205 (quoting *Madden*, 4 App. Div. 2d at 19, 162 N.Y.S.2d at 593) where the court found that "[t]he fact that there were no members of the board who could qualify as disinterested judges is irrelevant. If there was a problem as to how to provide an impartial tribunal for these cases the burden of its solution was [the union's]." *Id.*

[124] 29 U.S.C. §§ 411, 412, 413, 414, 415 (1982). The statute will hereafter be referred to by the relevant section of Title I.

[125] Section 101(a)(5) states:

> (5) Safeguards Against Improper Disciplinary Act. — No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with specific written charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.
>
> 29 U.S.C. § 411(a)(5) (1982).

issue of whether Congress, like state courts, relied on a constitutional analogy when it established union member rights. Similarities in the organizational structure and function of unions and government may support legislation of parallel rights and obligations. Once courts find these structural similarities, they may develop the content of constitutional due process theory.

The LMRDA's unusual legislative path complicates the search for the congressional intent underlying Title I.[126] Senate Bill 1555, reported out of the Senate Committee on Labor and Public Welfare, regulated internal union affairs in order to ensure union democracy[127] but did not contain the Bill of Rights of Members of Labor Organizations.[128] In the House of Representatives, H.R. 8342, reported out of the House Committee on Education and Labor, contained provisions for union members' individual rights which differed substantially from the final version of Title I of the LMRDA.[129] The addition of Title I resulted from a series of amendments and substitute amendments to the bills reported out of the congressional committees.[130] As a consequence, the congressional

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[126] For an excellent discussion of the legislative history of the Bill of Rights for union members, see Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 MINN. L. REV. 199 (1960). *See also* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960); Cox, *Internal Affairs*, *supra* note 81.

[127] S. REP. No. 1417, 85th Cong., 2d Sess. (1958) (quoted in Rothman, *supra* note 126, at 204). The goal of ensuring union democracy was reiterated in the Senate Labor Committee Report accompanying S. 1555. S. REP. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2318, *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 398 [hereinafter 1 LEG. HIST.]. The McClellan Committee recommended legislation for this purpose in 1958, based on its investigations into abuses by union officials.

[128] Rothman, *supra* note 126, at 206. S. 1555 included financial reporting and disclosure provisions, regulations of trusteeships and internal union elections, and provisions encouraging voluntary adoption of ethical practice codes by unions and employers of ethical practices. S. 1555, 86th Cong., 1st Sess. (1959), *reprinted in* 1 LEG. HIST. 338–396.

In 1958, the Senate passed S. 3974, the Kennedy-Ives Bill, which, like S. 1555, regulated internal union affairs without a bill of rights for union members. The House, however, did not pass the bill. In 1959, the Kennedy-Ervin bill was introduced as S. 505, and was reported out of the Senate Labor Committee as S. 1555. Rothman, *supra* note 126, at 204–05.

[129] H. REP. No. 741, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2424–75, *reprinted in* 1 LEG. HIST. 759–864. The differences between Title I of H.R. 8342 and Title I of the LMRDA included:

(1) H.R. 8342 did not contain an "Equal Rights" provision. Instead, Section 101(a)(1) provided that all members shall be accorded "all the rights and privileges pertaining to membership . . . ."

(2) As constructed, Section 101(a)(2) of H.R. 8342 did not clearly protect speech outside the union hall. (*See also* Rothman, *supra* note 126, at 211, regarding discussion of this problem in the Senate debate).

(3) The protection of the right to sue in Section 101(a)(4) of H.R. 8342 did not provide for a maximum time limit for the internal union exhaustion requirement.

(4) The due process protections of Section 101(a)(5) of H.R. 8342 were more general than the corresponding section of the LMRDA and were afforded only after the union imposed discipline, and provided for "a fair hearing on written charges and bylaws of such labor organization." H.R. 8342, 86th Cong., 1st Sess. (1959), *reprinted in* 1 LEG. HIST., at 696–700; Rothman, *supra* note 126, at 207–08.

[130] In the Senate, Senator McClellan introduced S. 1137, including his version of a bill of rights for union members, after the subcommittee hearings on the Kennedy-Ervin bill ended. Although the Senate subcommittee reconvened to hear Senator McClellan's testimony on the bill, S. 1555 was reported by the Senate Labor Committee without a bill of rights. Following the committee report, the Senate approved Senator McClellan's version of the union members' bill of rights, offered as

committee reports provide little evidence of the motivations behind Title I's passage.[131] Therefore, the major source for determining congressional intent is the floor debates that occurred when the Senate and House considered the Title I amendments and substitute amendments.[132]

During the Senate debate Senator McClellan, who introduced the initial bill of rights amendment to Senate Bill 1555,[133] analogized the individual rights of union members to the constitutional rights of United States citizens. Senator McClellan, noting that the Constitution does not exclude union members, stated that the bill of rights for union members would help ensure that union members would enjoy some of the freedoms guaranteed to citizens under the United States Constitution.[134] The Senator extended the political analogy and cited governmental support of unions to justify the legislation of individual civil rights within the union. He argued that the federal government grants unions tremendous power and should, therefore, compel the unions to advance democratic principles.[135]

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an amendment to S. 1555. The Senator's version of Title I, however, was changed by a substitute amendment introduced by Senator Kuchel and approved by the Senate. Rothman, *supra* note 126, at 205–07.

In the House of Representatives the Landrum-Griffin Bill was substituted for H.R. 8342. Rothman, *supra* note 126, at 208. Title I of the Landrum-Griffin Bill is the same as Title I of the final version of the LMRDA, with some minor punctuation differences in Sections 101(a)(1) and 101(a)(5). H.R. 8400, 86th Cong., 1st Sess. (1959), *reprinted at* 1 LEG. HIST. 619–686, at 628–31.

[131] Rothman, *supra* note 126, at 208–09.

[132] *Id.* at 209. Although Professor Rothman states that "almost all of the pertinent discussion [of the Bill of Rights] was on the floor of the Senate," *id.*, the House floor debate of Title I does include statements relevant to the constitutional analogy. *See id. See also infra* notes 141–148, 152, 156–57 and accompanying text.

While controversy exists over the use of legislative history, "the following are considered the most reliable components of legislative history in the interpretation of statutes:

Committee reports

Statements [during floor debate] of legislators who sponsored the bill or who chaired committees that favorably considered it

Studies, reports, and messages of bodies that initially proposed the bill." W.P. STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING 109 (2d ed. 1984). *See also id.* at 103–19.

[133] *See supra* note 130.

[134] 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 1098 [hereinafter 2 LEG. HIST.] (The bill of rights "would bring to the conduct of union affairs and to union members the reality of some of the freedoms from oppression that we enjoy as citizens by virtue of the Constitution of the United States.").

[135] *Id.* To a great extent, the "basic rights" which Senator McClellan enumerated in his proposed version of Title I are the same as those in the final draft of Title I of the LMRDA. One major difference is Senator McClellan's provision that the statute require that union charters include all the rights guaranteed to members by Title I. Senator McClellan's version of Title I also differed from the final bill in that it did not provide that union members' rights may be limited by reasonable union rules governing areas such as the conduct of meetings. Senator McClellan's provisions for "Safeguards Against Improper Disciplinary Action" were identical to the final version of § 101(a)(5) in requiring the union member to be "served with written specific charges," to be "given a reasonable time to prepare his defense," and to be "afforded a full and fair hearing" prior to imposition of any discipline. The important differences from § 101(a)(5), however, include Senator McClellan's requirement that discipline may be imposed only for "breach of some published written [union] rule" and that union members must be afforded an appeal before "an impartial person or persons . . . agreed to by [the union] and the accused, or . . . designated by an independent arbitration or mediation association or board." This appellate procedure also included requiring a written tran-

Senator Kuchel's substitute amendment for Senator McClellan's bill of rights was virtually identical to the final version of Title I.[136] The final version deleted from the McClellan bill explicit provisions for a union member's appeal from disciplinary action to an impartial reviewer.[137] In explaining this change, Senator Kuchel also drew an analogy between constitutional rights and an individual union member's rights. He stated that explicit safeguards were cumbersome and unnecessary because the courts will be able to determine whether a union member had "constitutionally reasonable notice and a reasonable hearing."[138]

The House of Representatives passed the Landrum-Griffin Bill as an amendment to the House committee bill.[139] Title I of the Landrum-Griffin Bill is identical to the final statute.[140] Congressman Landrum also drew a constitutional analogy during the congressional floor debate when he discussed Title I. He noted that all Americans, regardless of union affiliation, enjoy the rights contained in the LMRDA's bill of rights because they are substantially the same as those contained in the Constitution's Bill of Rights; the LMRDA, therefore, merely extends existing rights in a new environment.[141] Congressman Griffin argued for extending constitutional rights to internal union processes and quoted Senator McClellan's statement that "[t]here is no reason why a union [member] should be required to leave the rights guaranteed . . . by the Constitution of the United States at the door when he [or she] goes into a union meeting."[142]

Earlier in the House debate, Congressman Teller discussed the parallels between individual constitutional rights and the individual rights of union members. Although he agreed in general with the analogy, he expressed reservations about its absolute application in the union setting.[143] Congressman Teller cited the "unique nature of the

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script of the hearing. S. 1137, 86th Cong., 1st Sess. (1959); *reprinted at* 1 LEG. HIST. at 267–71. For a discussion of these and other differences, see Rothman, *supra* note 126, at 207, 209–16.

[136] *See* 2 LEG. HIST. at 1220–21. For a discussion of specific provisions of the Kuchel amendment as compared with the McClellan amendment and the final version of the LMRDA, see Rothman, *supra* note 126, at 206–07, 209–16.

[137] The McClellan amendment provided that the member subject to discipline must be "afforded final review on a written transcript of the hearing, by an impartial person or persons (i) agreed to by such organization and the accused, or (ii) designated by an independent arbitration or mediation association or board." S. 1137, 86th Cong., 1st Sess. (1959), § 101(a)(7)(E); *reprinted at* 1 LEG. HIST. 270.

[138] 2 LEG. HIST. 1232. *See also* Rothman, *supra* note 126, at 216. Senator Goldwater also created a constitutional analogy when he stated that the Senate was "in very much the same position" as the "Founding Fathers," who wrote the Bill of Rights because:

> In the future . . . people may not recognize the rights they have . . . . In the past 50 years laws have been written to protect the rights of the working people of the United States. Now we have reached a point where we need to spell out those rights and incorporate them in what we may call a bill of rights.

2 LEG. HIST. 5822–23.

[139] *See supra* note 130.

[140] The only differences are minor punctuation changes in §§ 101(a)(1) and 101(a)(5). *See supra* note 130.

[141] 2 LEG. HIST. 1645.

[142] *Id.* at 1566. Congressman Griffin also stated that the "basic guarantees [of the union members' bill of rights] are hardly new or novel — they are the essential and fundamental rights which every American citizen is guaranteed in the Bill of Rights of the Federal Constitution." *Id.*

[143] 2 LEG. HIST. 1434 ("I have heard it said often that a union member should have the same right of free speech and other democratic rights in his union as an American has in his relation to

collective bargaining process"[144] as the basis for his reservation regarding a true analogy between constitutional and union members' rights, for in collective bargaining the union may have to suppress some internal dissent in order to reach a settlement.[145]

In addition to the debate directly concerning the bill of rights, congressional justifications for internal union regulation provide support for a constitutional analogy. The congressional committee reports stress the public interest in union democracy created by the union's role as exclusive bargaining representative.[146] The Senate Labor Committee's Report found that the union's control over their economic welfare gives "union members . . . a vital interest . . . in the policies and conduct of union affairs."[147] Requiring the union to follow democratic procedures, therefore, would allow the individual member to participate in formulating union policies.[148]

Congress's second justification for enacting the LMRDA focused on the empowerment of unions by the federal government.[149] The federal government authorized and enforced the exclusivity principle under the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA).[150] Thus, the Senate Labor Committee Report noted that because the government grants labor unions the authority to act as exclusive bargaining representatives, government must ensure that unions use this power solely for the benefit of workers and not for personal gain.[151]

Congress's concern with governmental empowerment of unions supports a view of unions as quasi-public organizations, with judicial or quasi-judicial internal proceedings, as described by the state courts.[152] While not sufficient to constitute the state action

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his government. I agree with the spirit of the analogy but I doubt it can be applied with inexorable precision.").

[144] *Id.*

[145] Congressman Teller stated that "if the loud mouth, the subversive, or the neurotic were allowed to call the tune . . . in the working out of fair collective bargaining settlements, the resulting industrial strife might well cause recurring crises in our economy." More generally, Congressman Teller cautioned that democratic principles must be accommodated in the collective bargaining process. *Id.* In his view, strictly applying democratic rights within the union could affect adversely the American labor movement which currently functions as "a dam against much more pervasive radicalism." *Id.*

[146] S. REP. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2323.

[147] *Id.*

[148] *Id.* The House Labor Committee's Report also focused on this aspect of the union's representational role and referred generally to the need for democratic "practices and procedures" as well as for the protection of "basic rights of union members and employees represented by the union." H.R. REP. No. 741, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2429, 1 LEG. HIST. 765.

[149] This justification formed the basis for the election provisions and regulation against "racketeering, corruption, and conflicts of interest." S. REP. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2328.

[150] *See* National Labor Relations Act, as amended, 29 U.S.C. § 159(a) (1982); Railway Labor Act, 45 U.S.C. § 152 (1982).

[151] S. REP. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2331. The House Labor Committee Report echoed this view, stating that "if unions are to enjoy the protection of rights and exercise the broad powers which are guaranteed to them by the National Labor Relations Act and the Railway Labor Act, they ought also be held responsible for abuses that have accompanied the exercise of such powers and rights by some union leaders." H.R. REP. No. 741, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2430; 1 LEG. HIST. 766.

[152] *See supra* note 99 and accompanying text. Professor Klare observes that courts treat unions

required to bind a private party to constitutional obligations, the quasi-public status created by governmental involvement in unions does justify a constitutional analogy.[153] The parallels between political representative bodies and the public interest in the union's representative function further support the union's quasi-public status.[154] The public interest could be protected by ensuring democratic constitutional rights in addition to democratic elections. During the House debate Congressman Arends relied on the parallels between political and union representation to argue in favor of applying to unions the democratic principles underlying government processes in order to protect a worker's basic rights.[155] Congressman Arends directly compared the representative structures and argued that the election procedures for union officials should be as democratic as the election procedures for the House of Representatives.[156]

Advocates of a statutory bill of rights for union members also noted the structural and functional similarities of unions and governmental institutions and the resulting

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as "quasi-public entities," "by virtue of [the unions'] power, function, and legal authority." Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1372 (1982) [hereinafter Klare, *Public/Private Distinction*].

[153] Congressman Landrum and Senator McClellan focused on the governmental empowerment of unions to justify the union members' bill of rights. Congressman Landrum quoted Senator McClellan:

> In the words of the senior Senator from Arkansas:
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> "Since extraordinary powers of industrial government are granted to unions, and protected by Federal law, it is entirely appropriate that the Federal government insure that those union members' rights and personal freedoms contained in the Bill of Rights of our Federal Constitution will not be willfully violated by force."

2 LEG. HIST. 1557. For an argument against finding sufficient state action to apply constitutional obligations to unions, see Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961).

[154] Professor Cox has stated:

> In retrospect, it seems plain that the enactment of the LMRDA became inevitable when Congress, by enacting the Wagner Act . . . transported the political principle of majority rule into labor-management relations by giving the union designated by the majority the exclusive right to represent all the employees in an appropriate bargaining unit.

Cox, *Internal Affairs*, *supra* note 81, at 819. *See also id.* at 830 (describing the union's "quasi-legislative power to bind employees in the bargaining unit without their consent"); Summers, *The Public Interest in Union Democracy*, 53 N.W. U.L. REV. 610, 624 (1958) [hereinafter Summers, *Public Interest*] ("[U]nions have no real analogue in any other private group . . . . Their power to legislate concerning industrial affairs, reinforced by legal protection and government authorization, is compulsory in character, binding workers together whether they choose to be bound or not.").

[155] 2 LEG. HIST. 1633.

[156] *Id.* Congressman Arends continued: "And should there not be the the same right of the individual workingman to require an accounting of the stewardship of his elected officials over his interests as is required of us as elected officials?" *Id. See also* Steele v. Louisville & N.R. Co., 323 U.S. 192, 202 (1944), where the Court used a constitutional and legislative analogy as the basis for the union's duty of fair representation:

> [T]he Railway Labor Act imposes upon the statutory representative . . . at least as exacting a duty to protect equally the interests of the members . . . as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.

Id.

need for union democracy. In 1952, Professor Summers, writing for the American Civil Liberties Union (ACLU), described the representative function of the union as follows:

> The union in bargaining, helps make laws; in processing grievances acts to enforce those laws; and in settling grievances helps interpret and apply those laws. It is the worker's economic legislature, police [officer], and judge. The union, in short, is the worker's industrial government. The union's power is the power to govern the working lives of those for whom it bargains, and like all governing power should be exercised democratically.[157]

Professor Summers extended the political analogy and characterized the worker as a citizen of the union who should enjoy the right to participate freely in the processes of self-government.[158] In its statement before the House Education and Labor Committee in 1959, the ACLU tied governmentally enforced union power in collective bargaining to the need for unions to guarantee members' basic democratic rights "akin to those the Government must recognize generally — rights of free speech, fair procedure and non-discrimination."[159]

The constitutional analogies made by members of Congress during their debate of Title I do not reflect explicitly the theoretical content courts must apply when interpreting the union members' bill of rights. Some senators expressed natural law concepts during the debate, such as Senator McClellan's argument that union members have inherent constitutional rights.[160] Senator McClellan stated that the Title I rights are basic: "They ought to be basic to every person, and they are, under the Constitution of the United States."[161] Senator Allott, supporting this position, stated that union members needed the bill of rights because "our legal processes have broken down in respect to enforcement of the rights which human beings are guaranteed, not only by the Constitution of the United States, but which I personally believe every human being is guaranteed by God."[162]

The shift from judicially created rights to legislated rights for union members necessarily brings utilitarianism into focus. Critics of the Supreme Court's use of utilitarian theory to interpret constitutional rights have described utilitarian interest balanc-

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[157] AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN TRADE UNIONS 4 (June 1952). The American Civil Liberties Union (ACLU) was active in calling for a bill of rights for union members both in voluntary actions by unions and in federal legislation. *See* AMERICAN CIVIL LIBERTIES UNION, STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION ON PROPOSED LEGISLATION TO PROTECT INTERNAL RIGHTS OF UNION MEMBERS — S. 1555, H.R. 4473, H.R. 3028, AND H.R. 7265 — SUBMITTED TO THE HOUSE EDUCATION AND LABOR COMMITTEE (June 1959) [hereinafter PROPOSED LEGISLATION]; AMERICAN CIVIL LIBERTIES UNION, A LABOR UNION "BILL OF RIGHTS" — DEMOCRACY IN LABOR UNIONS — THE KENNEDY-IVES BILL (Sept. 1958); AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN TRADE UNIONS (June 1952); AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN TRADE UNIONS (1949); AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN TRADE UNIONS (1943); *See also* Rothman, *supra* note 126, at 201–03 (tracing the ACLU's history in proposing a bill of rights for union members).

Professor Summers has focused on the unions' legislative function in other publications. *See* Summers, *Public Interest*, *supra* note 154, at 624; Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805, 820 (1951) [hereinafter Summers, *Union Powers*].

[158] AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN TRADE UNIONS 5 (June 1952).

[159] PROPOSED LEGISLATION, *supra* note 157, at 1.

[160] 2 LEG. HIST. 1103.

[161] *Id.* at 1105.

[162] *Id.* at 1114.

ing as best suited for legislative rather than judicial processes.[163] Unlike the state court development of union members' rights,[164] Congress explicitly described the opposing interests which must be balanced in order to achieve the goal of union democracy. The Senate Labor Committee Report recognized as basic principles the union's need for institutional autonomy with "minimum interference by government,"[165] as well as the individual's interest in "minimum democratic safeguards."[166] These interests represent the conflict between preserving union internal control as a private organization and governmental protection of the individual's public democratic rights.

Title I provisions for "Equal Rights,"[167] "Freedom of Speech and Assembly,"[168] and "Protection of the Right to Sue"[169] also reflect utilitarian interest balancing. These provisions explicitly recognize the opposing interests by protecting the individual's democratic rights and by including a provision establishing the union's right to enforce reasonable rules.[170] Interpreting the Section 101(a)(2) right to free speech and the reasonable rule provision, the Supreme Court identified the constitutional analogy and stated that the "[legislative] history reveals that Congress modeled Title I after the Bill of Rights, and that the legislators intended § 101(a)(2) to restate a principal First Amendment value."[171] The Court, however, found that the reasonable rules provision refuted the argument that Section 101(a)(2)'s scope is coextensive with first amendment protections.[172]

Legislative history, therefore, provides evidence of congressional intent to draft the Title I Bill of Rights of Members of Labor Organizations as a legislative analogy to the Constitution's Bill of Rights. Governmental support of unions, union power over the

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[163] *See supra* note 50.

[164] *See supra* text accompanying notes 118–123.

[165] S. REP. No. 187, 86th Cong., 1st Sess. 7, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2323; 1 LEG. HIST. 403. ("[I]n establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.").

[166] *Id.*

[167] 29 U.S.C. § 411(a)(1) (1982).

[168] 29 U.S.C. § 411(a)(2) (1982).

[169] 29 U.S.C. § 411(a)(4) (1982).

[170] The provisions protect the unions' institutional interests: In § 101(a)(1), the union's ability to reasonably regulate nominations, voting, and meetings procedures; in § 101(a)(2), reasonable regulation of speech affecting "the organization as an institution" and "performance of [the union's] legal or contractual obligations"; in § 101(a)(4), the union's ability to require exhaustion of internal union appeals for a maximum of four months. *See also*, Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727, 729 (1969) ("The generality of the language [of the § 101(a)(5) full and fair hearing requirement] is the result of an incompletely resolved compromise between extreme positions of extensive and minimum interjection of federal power into the internal operations of unions").

[171] Steelworkers v. Sadlowski, 457 U.S. 102, 111 (1982); *see also* Finnegan v. Leu, 456 U.S. 431, 435 (1982) (Title I was "aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution").

[172] *Sadlowski*, 457 U.S. at 111. The Court found proof of congressional intent in the statutory "reasonableness" requirement rather than the first amendment strict scrutiny standard. *Id.*

Federal and state courts have held that § 101(a)(2) provides broader protection than the first amendment against discipline for defamatory speech. *See, e.g.*, Nix v. Fulton Lodge No. 2, IAM, 83 L.R.R.M. 2478, 2480 (N.D. Ga. 1972), *aff'd*, 479 F.2d 382 (5th Cir. 1973), *cert. denied*, 414 U.S. 1024 (1973); Salzhandler v. Caputo, 316 F.2d 445, 449–51 (2d Cir. 1963), *cert. denied*, 375 U.S. 946 (1963); Farnum v. Kurtz, 72 L.R.R.M. 2794, 2794 (Ca. Super. Ct. 1969).

members' economic welfare, as well as structural and functional similarities between unions and governmental institutions supported the view that unions are quasi-public. The legislative history, however, does not provide clear evidence of theoretical content for judicial interpretation of Title I. The Senate floor debate contains some evidence of a natural law foundation for extending democratic political rights to union members. The explicit interest balancing in the congressional reports and Title I provisions, however, demonstrates a stronger competing influence of utilitarian theory.

C. *Federal Court Interpretations of the LMRDA*

Federal judicial development of the LMRDA's Section 101(a)(5)[173] shows the continued influence of constitutional due process theory. The federal judiciary's partial reliance on state court experience in determining the procedural due process rights of union members[174] reflects the importance of the natural law theory prevalent in Supreme Court doctrine before the LMRDA.[175] The federal judiciary, however, has been influenced primarily by utilitarian theory both as expressed in the LMRDA's legislative history and as the dominant constitutional theory applied by the Supreme Court in administrative due process cases.

As in the state courts, federal judicial interpretation of Section 101(a)(5) has alluded to a constitutional analogy. The federal courts have stated that "the elements of . . . a 'fair hearing' often resemble constitutional due process requirements,"[176] and that "the fundamental and traditional concepts of due process do apply to the union disciplinary hearing."[177] Furthermore, as in the legislative history, the courts have drawn parallels between union institutional structures and governmental processes in order to justify the constitutional analogy. The Supreme Court has explicitly made this comparison, stating that the LMRDA Title IV election provisions and the Title I "Bill of Rights" reflect Congress's concern with protecting union members' right "to participate fully in

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[173] For discussions of judicial interpretation of § 101(a)(5), see *generally* Beaird & Player, *Union Discipline of Its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?*, 9 GA. L. REV. 383 (1975); Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U. L. REV. 227 (1968); Etelson & Smith, *supra* note 170; Note, *Facial Adjudication of Disciplinary Provisions in Union Constitutions*, 91 YALE L.J. 144 (1981) [hereinafter Note, *Facial Adjudication*]; Note, *Substantive and Procedural Due Process in Union Disciplinary Proceedings*, 3 U. SAN. FRAN. L. REV. 389 (1969) [hereinafter Note, *Substantive and Procedural Due Process*]; Note, *Free Speech, Fair Trials, and Factionalism in Union Discipline*, 73 YALE L.J. 472 (1964) [hereinafter Note, *Free Speech*].

[174] The LMRDA does not pre-empt the state court and legislative regulation in the area of due process and other individual rights of union members. 29 U.S.C. § 413 ("Nothing contained in [Title I] 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."). For statements concerning the influence of state common law on the enactment of § 101(a)(5) and on federal interpretation of § 101(a)(5), see Falcone v. Dantinne, 420 F.2d 1157, 1165 (3d Cir. 1969); Parks v. IBEW, 324 F.2d 886, 903–04 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963); Gleason v. Chain Serv. Restaurant, 300 F. Supp. 1241, 1251 n.8 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 342 (2d Cir. 1970).

[175] *See supra* text accompanying notes 88–117. *Parks*, 314 F.2d at 903–04 (influence on federal judiciary of state court decisions, including natural law concepts).

[176] *Parks*, 314 F.2d at 912 (including notice, opportunity to be heard, right to confrontation, and impartial judge); *see also Falcone*, 420 F.2d at 1165.

[177] Tincher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975).

the operation of their union through processes of democratic self-government."[178] The Court also stated that Congress modeled democratic union elections on elections for political office in government.[179]

The judiciary has refined the analogy between the democratic rights of citizens and union members by analyzing different types of interactions between government and its citizens. In particular, federal courts have determined the scope of union members' procedural due process rights by comparing union disciplinary hearings to other adjudicative settings.[180] While federal courts occasionally have applied criminal trial due process concepts such as the presumption of innocence[181] and issues concerning the disciplinary sentence,[182] most courts have held that "the full panoply of procedural safeguards in criminal proceedings" is not required.[183] Rather, some federal courts have compared federal administrative proceedings in order to judge procedural issues in union disciplinary hearings.[184] Applying this comparative approach, courts have described judicial review standards according to the nature of the institution. Given the private character of union disciplinary proceedings, one federal court has assigned the broadest scope of judicial review to criminal proceedings, a narrower "supervisory role" over administrative hearings, with the most limited judicial review of disciplinary proceedings.[185]

The content of the procedural due process theory which federal courts have applied under Section 101(a)(5) reflects the influence of both natural law and utilitarian theory, with a heavier stress on utilitarianism. Natural law concepts appeared in federal cases

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[178] Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 U.S. 492, 497 (1968); *see* Christensen, *supra* note 173, at 246–47.

[179] *Wirtz*, 391 U.S. at 504.

[180] *See*, Beaird and Player, *supra* note 173, at 406; Christensen, *supra* note 173, at 244–47; Note, *Substantive and Procedural Due Process*, *supra* note 173, at 404.

[181] *Gleason*, 300 F. Supp. at 1253 ("One cannot assume that an accused is guilty").

[182] *Id.* at 1255–56 n.10. ("Sentences" were not separately imposed on each charge). *See also* International Bhd. of Boilermakers v. Hardeman, 401 U.S. 233, 252 (1971) (Douglas, J., dissenting) ("[This] case is in the category of Stromberg v. California, 283 U.S. 359, where a conviction might have been valid under one charge but would have been invalid under the other"); *Parks*, 314 F.2d at 928 (4th Cir. 1963) (Sopor, C.J., dissenting) ("[R]ights and constitutional safeguards of a person accused of crime and of a person convicted of crime . . . should be afforded a law abiding work[er]"); Gulickson v. Forest, 290 F. Supp. 457, 466 (E.D.N.Y. 1968) ("A union like a State may not entrust the determination of whether [one] is innocent or guilty to a tribunal 'organized to convict,'" (quoting *Witherspoon v. Illinois*, 391 U.S. 510 (1986) (a death penalty case)).

[183] *See, e.g.*, Ritz v. O'Donnell, 566 F.2d 731, 735 (D.C. Cir. 1977); *Tincher*, 520 F.2d at 854; Null v. Carpenters Dist. Council of Houston, 239 F. Supp. 809, 814 (S.D. Tex. 1965). This concept has been applied to the requirement of written disciplinary charges and courts have held that the complaint need not include "the elaborate specificity of a criminal indictment." Curtis v. IATSE, 687 F.2d 1024, 1027 (7th Cir. 1982). *See, e.g.*, Berg v. Watson, 417 F. Supp. 806, 810 (S.D.N.Y. 1976); Eisman v. Baltimore Reg'l. Jt. Bd. of Amalgamated Clothing Workers of America, 352 F. Supp. 429, 435 (D. Md. 1972), *aff'd*, 496 F.2d 1313 (4th Cir. 1974); Magelssen v. Local Union No. 518, Operative Plasterers' & Cement Masons' Int'l Ass'n., 233 F. Supp. 459, 461 (W.D. Mo. 1964). *See also* Beaird & Player, *supra* note 173, at 406; Etelson & Smith, *supra* note 170, at 746.

[184] *Parks*, 314 F.2d at 913; *Gleason*, 300 F. Supp. at 1251 n.8; Smith v. General Truck Drivers, Warehousemen & Helpers Union Local 467, 181 F. Supp. 14, 17, 20 (S.D. Cal. 1960). *See* Beaird & Player, *supra* note 173, at 406 ("[S]trong parallels can and will be drawn between union proceedings and administrative law due process. At present, however, administrative due process has not been fully transplanted into the union hall.").

[185] *Ritz*, 566 F.2d at 737, 739.

from the 1960's which focused on the due process requirements of fairness as applied by the state courts before the LMRDA.[186] These and other early federal decisions, however, also articulate the utilitarian interest balancing expressed in the LMRDA's legislative history.[187] Unlike a few state court decisions which voice some concern about the opposing interests of individual rights and private organizational autonomy,[188] the federal courts have balanced interests unique to private sector collective bargaining structures. Identifying the goal of union democracy, the federal courts have weighed the union member's interest in due process rights against the institutional interest in internal control of union affairs.[189]

During this initial period of statutory interpretation, the Supreme Court explicitly applied utilitarian theory to the Title IV issue of eligibility for candidacy in internal union elections.[190] In the 1968 case of *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*,[191] the Court balanced the "need to protect the rights of rank-and-file members to participate fully in the operation of their union"[192] against Congress's "long-standing policy against unnecessary governmental intrusion into internal union affairs"[193] to achieve the goal of ensuring free and democratic elections.[194] The Court overruled a lower court finding that a union bylaw rendering ninety-three percent of its members ineligible for union office was reasonable.[195] In balancing the interests, the Supreme Court criticized the circuit court for ignoring individual democratic rights by its sole emphasis on the union's interest in autonomy.[196]

Following *Wirtz*, which interpreted Title IV, the Supreme Court shifted the balance in applying utilitarian theory to the Title I Bill of Rights. In 1971, in *International Brotherhood of Boilermakers v. Hardeman*,[197] the Court rejected a line of lower court cases for failing to stress adequately institutional interests in interpreting Section 101(a)(5).[198]

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[186] *Falcone*, 420 F.2d at 1165 (court will interpret full and fair hearing requirement using traditional concepts of due process and state common law, in addition to newly created federal standards); *Parks*, 314 F.2d at 903–04 (majority cites Professor Cox's identification of state court theories, including "natural justice"); *id.* at 926–27 (Soper, C.J., dissenting) (applies "rules of fair play"); Gulickson v. Forest, 290 F. Supp. 457, 465, 467 (E.D.N.Y. 1968) (court applied state law to find denial of fair hearing, using concepts of "fair play" and conduct which would "shock the conscience"); *Smith*, 181 F. Supp. at 17 (court cites constitutional standards and contract theory for due process in union disciplinary proceedings).

[187] See *supra* text accompanying notes 163–70.

[188] See *supra* text accompanying notes 118–23.

[189] *Falcone*, 420 F.2d at 1164–65; *Parks*, 314 F.2d at 906, 913; *Gleason*, 300 F. Supp. at 1245, 1250–51; *Null*, 239 F. Supp. at 814.

[190] Section 401(e) of the LMRDA states in relevant part: "In any election required by this section which is to be held by secret ballot . . . every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed)." 29 U.S.C. § 481(e).

[191] 391 U.S. 492 (1968).

[192] *Id.* at 497.

[193] *Id.* at 496 (quoting *Wirtz*, 389 U.S. at 470–71 (1968)).

[194] 391 U.S. at 496 (quoting *Wirtz*, 389 U.S. at 470–71 (1968)).

[195] *Id.* at 502–05. The union bylaw limited eligibility for candidacy for certain union offices to members who had served on one of three named union representative bodies. The Union argued that this requirement fulfilled the need for union officers familiar with relevant union problems. *Id.* at 503.

[196] *Id.* at 496–97.

[197] 401 U.S. 233 (1971).

[198] *Id.* at 242–44. Prior to *Hardeman*, the lower federal courts had held that union discipline

Hardeman alleged that the union violated the Section 101(a)(5)(C) full and fair hearing requirement by imposing discipline under a union constitutional provision forbidding members' attempts to create dissension or working against the interests and harmony of the union.[199] The lower courts upheld the LMRDA claim, finding no evidence of a violation of the constitutional provision, which the courts interpreted as applying to "threats to the union as an organization" but not to conduct such as Hardeman's, which involved "merely personal altercations."[200] The Supreme Court reversed, holding that Congress did not intend "such a substitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members."[201] The *Hardeman* majority interpreted Congress's rejection of a requirement that disciplinary charges be based only on previously published written union rules as a general congressional policy preserving union autonomy to determine the scope of offenses covered by specific written rules.[202] Under this policy, the Court refused to review the union's interpretation of this constitutional provision.[203]

Having placed the construction of disciplinary rules solely under union control, the Court limited judicial review to determining whether some evidence existed to support the disciplinary charges.[204] The Court found that this standard achieved a balance between protecting the individual member's due process rights and Congress's concern for union autonomy.[205] In his dissent, Justice Douglas focused on the need for judicial oversight to assure the fairness required by due process.[206] While recognizing that the

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could be based only on explicit provisions in the union constitution and bylaws, and these would be strictly construed. *See, e.g.*, Boilermakers v. Braswell, 388 F.2d 193, 199 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968); Simmons v. Local 713, Textile Workers, 350 F.2d 1012, 1017 (4th Cir. 1965); Allen v. Theatrical Employees, 338 F.2d 309, 316 (5th Cir. 1964); Boggs v. IBEW, 326 F. Supp. 1, 3 (D. Mont. 1971); see discussion of above cases in Beaird & Player, *supra* note 173, at 400–02.

[199] 401 U.S. at 236–37. Hardeman was also charged with "threatening and using force to restrain an officer of the local lodge from properly discharging the duties of his office." *Id.* at 236. The union disciplinary tribunal returned a general verdict, finding Hardeman "guilty as charged." *Id.* at 237.

[200] *Id.* at 242. The Fifth Circuit interpreted the union constitutional provision in this manner in Boilermakers v. Braswell, 388 F.2d 193, 199 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968), and this was, in turn, the basis for the district court's decision in *Hardeman* as affirmed by the Fifth Circuit. 420 F.2d 485 (5th Cir. 1969).

[201] *Hardeman*, 401 U.S. at 242–43.

[202] *Id.* at 243–44.

[203] *Id.* at 244–45. The Court stated that "if a union may discipline its members for offenses not proscribed by written rules at all, it is surely a futile exercise for a court to construe the written rules in order to determine whether particular conduct falls within or without their scope." *Id.*

[204] *Id.* at 246. Federal courts applied this standard of review before *Hardeman*. Beaird & Player, *supra* note 173, at 408.

[205] 401 U.S. at 246. While the *Hardeman* Court applied the "some evidence" standard in order to maintain a narrow scope of judicial review, as Professor Summers notes, the state court application of the "some evidence" standard before the LMRDA was "often but an apologetic prelude to a full re-evaluation of the evidence, justified by a holding that the findings were 'totally unsustained.'" Summers, *supra* note 81, at 185. Summers notes further that the state courts refused to engage in this broad review "almost exclusively" in cases where members "had communist ties." *Id.* The scope of judicial review of administrative hearings is defined by a "substantial evidence" standard. 5 U.S.C. § 706(2)(E) (1982).

[206] *Hardeman*, 401 U.S. at 250 (Douglas, J., dissenting). Justice Douglas found that Hardeman's substantive rights were denied when the union imposed discipline without any evidence to support the charges. *Id.*

scope of judicial review is more limited in union proceedings than administrative hearings, Justice Douglas maintained that judicial interpretation of union disciplinary provisions was needed in order "to check the intemperate use of union power."[207]

The *Hardeman* Court's utilitarian interest balancing severely limited judicial intervention under Section 101(a)(5) by eliminating the judicial role in interpreting union constitutions and bylaws. This limitation represents a significant departure not only from prior federal cases, but also from state court decisions which had applied broad judicial discretion to interpret the scope of union disciplinary provisions.[208] This shift in favor of the union's interest coincided with and may have been influenced by the Court's increased attention to administrative agencies' institutional interests in expediency under constitutional due process theory.[209]

Following *Hardeman*, the federal courts have been sensitive to their limited role in reviewing union disciplinary hearings, particularly when the sufficiency of the evidence is at issue.[210] In other procedural issues, courts have recognized the importance of institutional interests but have continued to invalidate disciplinary hearings where evidence of unfair procedures exists. The right to an impartial hearing historically has presented difficulties both in reconciling opposing interests under constitutional theory and in state court union discipline cases.[211] While reluctant to interfere with internal disciplinary processes, the federal courts have held that the right has been denied, particularly in cases of "built in bias," where the structure of disciplinary proceedings is inherently prejudicial.[212] In one case involving built-in bias, however, a federal court,

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[207] *Id.* at 251.

[208] *See supra* text accompanying notes 109–12.

[209] *See supra* text accompanying notes 51–80.

[210] Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, 605 F.2d 1228, 1240–41 (2d Cir. 1979) (noting that the issue on appeal did not concern sufficiency of the evidence or interpretation of the union's constitution or bylaws, which are "area[s] which Congress reserved to the unions."); *Ritz*, 566 F.2d at 736–37 (D.C. Cir. 1977) (describing the "limited judicial role staked out by the Supreme Court" in *Hardeman*); Mandaglio v. United Bd of Carpenters & Joiners of America, 575 F. Supp. 646, 651 n.7 (E.D.N.Y. 1983) ("[I]t is not a function of this court to determine what is and is not a violation of the union's constitution and bylaws.").

[211] *See supra* text accompanying notes 75–80 and notes 113–17. *See also* Klein, *UAW Public Review Board Report*, 18 RUTGERS L. REV. 304 (1964); Oberer, *Voluntary Impartial Review of Labor*, 58 MICH. L. REV. 55 (1959) (discussing the independent public review board created by the UAW constitution to review internal union affairs, including union disciplinary hearings).

[212] Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, 605 F.2d 1228, 1243 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980) (bias found where disciplinary charges were tried on remand by same tribunal which had originally imposed discipline); Stein v. Mutuel Clerks' Guild of Mass., 560 F.2d 486, 491 (1st Cir. 1977) (bias found where union "prosecutor" participated in disciplinary tribunal's private deliberation); Semancik v. UMW Dist. #5, 466 F.2d 144, 149–50 (3d Cir. 1972) (bias found where tribunal was made up of incumbent union board members whose reelection had been contested by individuals on trial); Perry v. International Longshoremen's Ass'n, 638 F. Supp. 1441, 1448–49 (S.D.N.Y. 1986) (distinguishing *Hardeman*, court found bias where two charging parties sat on executive board judging disciplinary charges); Kiepura v. Local Union 1091, USWA, 358 F. Supp. 987, 991 (N.D. Ill. 1973) (bias found where members of trial committee were witnesses to the alleged offenses; bias also found where accused who had been a candidate for union office was tried by union officers). *See also* Beaird & Player, *supra* note 173, at 411; Etelson & Smith, *supra* note 170, at 748.

A court also may find that the right to an impartial hearing has been denied based on the "subjective bias" of the tribunal members, although proof of actual prejudgment or prejudice is more difficult. *See, e.g.*, Frye v. United Steelworkers of America, 767 F.2d 1216, 1225 (7th Cir.

citing the "distinctly narrower supervisory role over union disciplinary proceedings"[213] required by *Hardeman*, refused to intervene in disciplinary proceedings absent proof of grievous unfairness.[214] While acknowledging that the evidence of the union appellate board members' conflicts of interests would have required judicial disqualification in other adjudicative contexts, the court found no denial of the right to an impartial hearing in the union disciplinary setting.[215]

Consistent with *Hardeman*, the Supreme Court recently applied utilitarian theory to another Title I provision, again emphasizing the union's interest in institutional autonomy. In the 1982 case of *United Steelworkers of America v. Sadlowski*,[216] the Court held that a union rule that prohibited candidates running for union office from accepting nonmember campaign contributions did not violate Section 101(a)(2)'s free speech protections.[217] Using a reasonableness standard to balance the individual's interest in free speech against the union's interest in organizational autonomy,[218] the Court concluded that "the ability of insurgent union members to wage an effective campaign"[219] was lawfully limited by the union rule which furthered "the union's legitimate interest in reducing outsider interference with union affairs."[220]

The federal courts, like state courts and Congress, have applied a constitutional analogy to internal union processes. In Section 101(a)(5) cases, the federal courts have further refined structural analogies between unions and government by identifying parallels between judicial review of union disciplinary proceedings and review in other adjudicative contexts, particularly administrative hearings. Judicial interpretation in union discipline cases also reflects the increasing influence of utilitarian due process theory applied in constitutional law. The Supreme Court and the lower federal courts

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1985) (bias charges "must be supported by specific factual allegations"; no bias proven in the instant case); Goodman v. Laborers Int'l Union of N.A., 742 F.2d 780, 784 (3d Cir. 1984) (alleged bias of tribunal members removed from union office by accused is sufficient, if proven, to violate § 101(a)(5)). *See also* Beaird & Player, *supra* note 173, at 411–13; Etelson & Smith, *supra* note 170, at 748–49.

[213] *Ritz*, 566 F.2d at 737.

[214] *Id.* at 739.

[215] *Id.* at 737 n.8. In *Ritz*, the union's appeals board violated its own rule "that a member disqualify himself in any case involving pilots of his own airline," where two board members were employed by the same airlines as two of the charging parties, who were also union officers at the time they filed the charges. *Id.* at 737. While acknowledging both the rule's purpose as "avoid[ing] any possibility of bias in favor of a party with whom one is acquainted and may have worked" and "[c]urrent developments in federal judicial recusals" to require the "utmost punctilio," the court found that the plaintiff received a full and fair hearing. *Id.* at 737 n.8. The dissenting judge emphasized the lack of fairness resulting from violation of the rule as well as from other aspects of the hearing, including evidence of a political motivation for filing the charges against the union members. *Id.* at 739–41, 747–48 (MacKinnon, J., dissenting).

[216] 457 U.S. 102 (1982).

[217] *Id.* at 112.

[218] *Id.* at 111–12. The Court derived the reasonableness standard from the § 101(a)(2) reasonable rules provision. The Court determined that this provision proved that Congress did not intend that § 101(a)(2) would be coextensive with the first amendment, which applies a strict scrutiny standard. *Id.* at 111. Rather, the Court found that Congress "intended § 101(a)(2) to restate a principal First Amendment value — the right to speak one's mind without fear of reprisal." *Id.*

[219] *Id.* at 112.

[220] *Id.* Four justices dissented. They based their dissent on the advantage the rule provided incumbent officers given the challengers' need to raise funds from outside sources in order to launch an effective campaign. *Id.* at 121–31.

have explicitly applied utilitarian interest balancing in Title I cases, weighing the individual's interest in democratic rights against the union's institutional interest in internal autonomy. In its single case interpretating Section 101(a)(5), the Court has indicated a narrow view of due process protections, closely paralleling its reasoning in administrative due process cases by striking the balance in favor of institutional interests.

III. Placing the Due Process Rights of Union Members Into Perspective

A. *Due Process in the Labor Relations Context*

The due process theories which courts have used to interpret both constitutional and LMRDA due process rights have shared a common evolution from natural law theory to utilitarianism.[221] Beyond tracking these similarities, describing the content of due process theories is important to understanding judicial interpretation of procedural due process from a broader perspective. With regard to union members' due process rights the courts' use of utilitarian theory is crucial to placing these statutory rights into the broader setting of collective bargaining. This perspective of due process in labor relations is tied to the legislative and judicial characterization of unions and employers as public or private institutions. The public/private distinction,[222] together with utilitarian theory, rationalizes the statutory imposition of due process obligations on unions, while leaving due process in the workplace to collective bargaining.

The private nature of collective bargaining is central to fitting the LMRDA due process requirements into a broader labor relations context. The dominant theory of collective bargaining under the NLRA, which one commentator has characterized as "industrial pluralism,"[223] is grounded on the view of collective bargaining as a private

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[221] *See supra* text accompanying notes 8–53, 88–108, 160–72, and 186–220.

[222] The description of the public/private distinction and its key role in labor law theory relies heavily on the work of Professor Karl Klare, particularly on his article, *Public/Private Distinction*, *supra* note 152.

This Article uses the term "public" to refer to institutions, such as the courts or governmental agencies, in which democratic rights are constitutionally or statutorily afforded to individuals subject to the institution's power. "Public rights" refer to these democratic rights identified with the public institution, such as due process rights. The term "private" refers to institutions or organizations which are not constitutionally or statutorily required to afford democratic rights to individuals subject to the institution's power. As the Article will show, these terms are meaningful when conceptualized as a continuum rather than having fixed characteristics.

[223] Professor Stone has characterized collective bargaining under the NLRA as industrial pluralism. *See* Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) [hereinafter Stone, *Post-War Paradigm*]. *See also* Stone, *The Structure of Post-War Relations*, XI REV. OF L. & SOC. CHANGE 125 (1982–83) [hereinafter Stone, *Structure of Labor Relations*]. Other commentators have described labor relations theory under the NLRA as consistent with an industrial pluralist view. *See* J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981) [hereinafter Klare, *Labor Law as Ideology*]; Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978); Klare, *Labor Law and the Liberal Political Imagination*, 12 SOCIALIST REV. 45 (1982) [hereinafter Klare, *Liberal Political Imagination*]; Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483 (1981). *See also* Klare, *Public/Private Distinction*, *supra* note 152.

process of negotiations between the employer and the union, with as little judicial intervention as possible.[224] The product of negotiations — the collective bargaining agreement — sets the terms for a system of industrial self-government[225] regulated by the parties themselves.[226] The parties normally resolve disagreements over contract interpretation, including employee discipline, under the contractual grievance/arbitration provisions, rather than through litigation.[227] The no-strike clause is the *quid pro quo* for the grievance/arbitration system of dispute settlement.[228]

Industrial pluralist theory highly values the grievance/arbitration process as a peaceful, structured method for addressing labor relations problems independent of the courts.[229] The arbitrator is a private third party, chosen and paid by the union and the employer.[230] The Supreme Court, in creating and interpreting the industrial common law,[231] has emphasized the arbitrator's expertise in resolving issues unique to collective bargaining in the industrial setting. The Court has described the arbitration process as "the very heart of the system of industrial self-government."[232] Arbitration thus brings

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[224] Klare, *Labor Law as Ideology*, *supra* note 223, at 458, 480; Klare, *Liberal Political Imagination*, *supra* note 223, at 51–53; Stone, *Post-War Paradigm*, *supra* note 223, at 1511–15; Klare, *Public/Private Distinction*, *supra* note 152, at 1385–1401. The Supreme Court has emphasized the private nature of collective bargaining in its interpretation of § 8(d) of the NLRA, and has required good faith bargaining without compulsion to agree to concessions. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) ("[T]he fundamental premise on which the [NLRA] is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.").

[225] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

[226] The Supreme Court has described the collective bargaining agreement as the product of the union and employer's decision to "hav[e their] relationship governed by an agreed-upon rule of law." *Id.* The Court consistently applies a governmental analogy to the private contract, viewing the collective bargaining agreement as "more than a contract; it is a generalized code to govern a myriad of cases which the draft[ers] cannot wholly anticipate." *Id.* at 578.

[227] *Id.* at 581. ("The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.").

[228] *See, e.g.*, Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 248 (1970); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957). The use of the term *quid pro quo* has been criticized as falsely "connot[ing] an equal exchange" rather than describing "the basic tradeoff . . . [which] is usually dramatically skewed in management's favor." Klare, *Public/Private Distinction*, *supra* note 152, at 1410 n.221. The inequality results from the usually "absolute and unlimited" nature of the no-strike clause, while arbitration does not extend to "'non-arbitrable' issues, that is, to issues within the employer's reserved managerial prerogatives." Klare, *Liberal Political Imagination*, *supra* note 223, at 52–53; Klare, *Public/Private Distinction*, *supra* note 152, at 1410 n.221. The inequality of exchange is increased by the prevalent acceptance of management's view of the contract by most arbitrators. *Id. See also* Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 CASE WESTERN RES. L. REV. 396 (1979); Klare, *Labor Law as Ideology*, *supra* note 223, at 468 n.65.

[229] Klare, *Labor Law as Ideology*, *supra* note 224, at 462–66; Klare, *Liberal Political Imagination*, *supra* note 223, at 57–59; Stone, *Post-War Paradigm*, *supra* note 223, at 1515–16.

[230] The collective bargaining agreement normally includes provisions for the method of choosing the arbitrator and the division of payment of arbitration expenses. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, 19–20, 135–37 (4th ed. 1985).

[231] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

[232] *Id.* at 581–82. *Warrior & Gulf* is part of the *Steelworkers Trilogy*, which includes United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

democratic values from the political and governmental system into the economic structures of private industry.[233] The political and economic systems remain separated,[234] however, and a private body of arbitral decisions has been developed which overwhelmingly favors the employer's managerial control as the method to preserve industrial order.[235] By maintaining the employer's hierarchical control, arbitrators help legitimize the undemocratic structure of workplace authority.[236]

Comparing union members' statutory due process rights with the contractual due process rights of employees under grievance/arbitration provisions reveals significant differences. The LMRDA's Section 101(a)(5) legislatively affirms the public interest in providing due process protection of the property right in union membership which state courts recognized before the LMRDA.[237] In the view of Congress and the courts, however, employment alone does not create a property interest in a job.[238] Employees who contest disciplinary actions gain procedural due process protection only by waiving the statutory right to strike in exchange for a grievance/arbitration clause in the collective bargaining agreement.[239] Furthermore, grievance/arbitration procedures are inferior to Section 101(a)(5) procedural rights in some respects. Arbitration hearings occur following disciplinary action, often after months of delay.[240] Furthermore, although the right to an impartial decision-maker appears to be better protected by the third party arbitrator, arbitral doctrine heavily favors managerial prerogatives in disciplinary and business decisions affecting employees.[241]

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[233] Stone, *Post-War Paradigm*, *supra* note 223, at 1515–16, 1572–73; Klare, *Public/Private Distinction*, *supra* note 152, at 1359, 1409; Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEVELAND ST. L. REV. 29, 34 (1979).

[234] Stone, *Post-War Paradigm*, *supra* note 223, at 1565, 1572–73, 1579–80; Klare, *Public/Private Distinction*, *supra* note 152, at 1416–17; Stone, *Structure of Labor Relations*, *supra* note 223, at 125–26, 131–32.

[235] Stone, *Post-War Paradigm*, *supra* note 223, at 1565, 1579–80; Klare, *Labor Law as Ideology*, *supra* note 223, at 468 n.65; Klare, *Public/Private Distinction*, *supra* note 152, at 1410 n.221; Stone, *Structure of Labor Relations*, *supra* note 223, at 131–32.

[236] Klare, *Liberal Political Imagination*, *supra* note 223, at 52–53; Stone, *Post-War Paradigm*, *supra* note 223, at 1509, 1572–73; Klare, *Public/Private Distinction*, *supra* note 152, at 1400–01, 1417–18; *See also* R. EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY 109 (1979).

[237] *See* S. REP. No. 187, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2324; 1 LEG. HIST. 404; H. R. REP. No. 741, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2430, 1 LEG. HIST. 765 (union members "are the real owners of the money and property of [the labor] organization").

[238] Klare, *Public/Private Distinction*, *supra* note 152, at 1367; *cf.* Board of Regents v. Roth, 408 U.S. 564, 567 (1972) (nontenured professor had no property interest in a teaching position where the decision on rehiring for another year was left to "the unfettered discretion of university officials"). *See also* Summers, *supra* note 233, at 44 n.86 (describing the view "that the employee has no interest in continued employment entitled to legal protection" as an "anachronistic assumption").

[239] *See supra* note 229 and accompanying text.

[240] F. ELKOURI & E. ELKOURI, *supra* note 230 at 9 (4th ed. 1985). While citing arbitration's relative speed when compared to litigation, the authors state that "in the bulk of the cases several weeks or even several months are required." *Id.* The authors also cite the "FMCS' 31st Annual Report," 102 LRR 245 (1979), for statistics "reporting that for cases administered by the FMCS, the average number of days required from the time a grievance was filed until an arbitrator's award was rendered was 223.5 days in 1978 and 268.3 days in 1977." *Id.* at 9 n.36. *See also id.* at 199–203, 713 ("obey now–grieve later" doctrine).

[241] *See supra* note 236 and accompanying text. *See also* Gross & Greenfield, *Arbitral Value Judg-*

Utilitarian theory and the public/private distinction provide a framework to explain the inconsistency of legislating statutory due process rights for union members while leaving due process for employees to the trade offs of collective bargaining.[242] Differential treatment of due process in the union and at the workplace furthers the utilitarian goals of the LMRDA and the NLRA. In particular, statutory due process rights for union members promote the LMRDA goal of union democracy, while contractual due process rights for employees promote the NLRA goals of maintaining private collective bargaining and industrial peace. Furthermore, the LMRDA's goal of union democracy can be used to justify the preservation of the private nature of collective bargaining. The public or private character of unions and employers is central to this reasoning. Congress and the judiciary have described the union as a quasi-public institution, subject to legislated imposition of democratic rights. Congress and the courts retain the view of the employer as a private entity, however, subject to due process obligations only by contract.

Citing the public interest in union internal affairs, members of Congress favored passage of the LMRDA because of the unions' role in representing employees' economic welfare and the governmental empowerment of unions under the NLRA exclusivity provisions.[243] The House and Senate Committee Reports identified a corresponding governmental duty to assure responsible use of union power.[244] Congress's emphasis on the public interest and on governmental involvement with the union transforms the union from a private organization into a quasi-public body subject to internal regulation.[245]

The industrial pluralist theory of the NLRA, in contrast, has stressed the private nature of businesses and corporations and resulted in judicial deference to managerial prerogatives.[246] This judicial attitude is demonstrated in the Supreme Court's protection of employers' private power to control business decisions even when they interfere with employees' statutory rights or may be subjects for collective bargaining.[247] In *Textile Workers Union of America v. Darlington Manufacturing Co.*,[248] for example, the Supreme

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ments in Health and Safety Disputes: Management Rights over Workers' Rights, 34 BUFFALO L. REV. 645 (1985). Grievants' representation may be better where the union is represented by counsel as compared to an internal union disciplinary process in which the union may refuse to allow participation by attorneys. The courts have held that § 101(a)(5) does not include the right to professional counsel where neither side is allowed to have professional counsel. Beaird & Player, *supra* note 173, at 409; Etelson & Smith, *supra* note 170, at 746–47.

[242] See Klare, *Public/Private Distinction*, *supra* note 152, at 1371–76, for a discussion of the courts' and Congress's willingness to regulate unions internally as quasi-public entities, while preserving the private status of corporations. Professor Klare concludes that "[i]t is doubtful that such regulation of internal operating procedures would be tolerated if applied to business corporations." *Id.* at 1373 n.60. Professor Klare also describes judicial manipulation of the characterization of public or private functions of unions as "often a way of rationalizing a political choice in legal terms." *Id.* at 1376.

[243] *See supra* notes 146–53 and accompanying text.

[244] *Id.*

[245] *See supra* notes 99, 153–55 and accompanying text. See also, Professor Klare's observation that courts treat unions as quasi-public entities "by virture of their power, function and legal authority." Klare, *Public/Private Distinction*, *supra* note 152, at 1372.

[246] *See* J. ATLESON, *supra* note 223, at 2–21, 171–79; Stone, *Post-War Paradigm*, *supra* note 223, at 1544–57; Klare, *Public/Private Distinction*, *supra* note 152, at 140–02.

[247] *See generally* J. ATLESON, *supra* note 223, chpts. 7–8.

[248] 380 U.S. 263 (1965).

Court held that an employer does not violate Section 8(a)(3) of the NLRA by closing its entire business for admittedly anti-union reasons.[249] In the collective bargaining area, the Supreme Court excluded the decision to partially close a business from the scope of mandatory bargaining subjects. The Court reached this conclusion by giving great weight to management's private interest in unilateral control over decision-making which affects "the scope and direction of the enterprise."[250] This description of businesses and corporations as private entities clearly is problematic in view of the governmental empowerment of business.[251] State incorporation laws enable business to reap the tax and limited liability benefits of corporate structure.[252] Governmental price supports retain the strength of industries ranging from tobacco to grain export.[253] Tax breaks for business and taxes on imported products also support American businesses.[254] Therefore, governmental empowerment transforms private businesses and corporations into quasi-public bodies. As in the case of unions, this quasi-public status justifies governmental regulation of internal organizational processes.

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[249] *Id.* at 273–74. The *Darlington* Court also protected managerial prerogatives where an employer closes part of his or her business for anti-union reasons by adding to the General Counsel's burden under § 8(a)(3). *Id.* The Court required proof that the partial closing was "motivated by a purpose to chill unionism in any of the remaining plants . . . and [that] the employer may reasonably have foreseen that such closing will likely have that effect." *Id.* at 275. See J. ATLESON, *supra* note 223, at 138–42, for a discussion of *Darlington*.

[250] First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 677 (1981). *See* J. ATLESON *supra* note 223, at 132–35; Stone, *Post-War Paradigm*, *supra* note 223, at 1547–48; Klare, *Public/Private Distinction*, *supra* note 152, at 1401–03. For other examples of the importance courts and the NLRB place on the employer's private power under the NLRA, see, *e.g.*, NLRB v. Babcock & Wilcox, 351 U.S. 105, 112 (1956) (employer can lawfully bar nonemployee union organizer from communicating with employees on company parking lot, which was employer's private property); Harter Equip., Inc., 280 N.L.R.B. No. 71 (1986) (employer may lawfully engage in an offensive lockout and hire temporary replacements where the purpose of the lockout is to gain an advantage in collective bargaining).

[251] A number of commentators have called for the imposition of constitutional obligations on the modern corporation which can rival the government in size, power, and control over employees. *See* D. EWING, FREEDOM INSIDE THE ORGANIZATION 11–12 (1977); A. MILLER, THE MODERN CORPORATE STATE (1975); Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience*, 24 OKLA. L. REV. 279, 299 (1971); Klare, *Public/Private Distinction*, *supra* note 152, at 1367 n.32 (citing Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1129 (1980)); Note, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. ON LEGIS. 35, 38–39 (1981); Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 530 & n.45 (1982). *But see* Wellington, *supra* note 153, at 348 ("The need to regulate unions and corporations is undeniable; but it need not be assumed a priori that the Constitution is the proper regulatory instrument.").

[252] *See* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 51–52, 130–43 (3d ed. 1983). As Professor Klare notes, however, the Supreme Court has "consistently advance[d] the view that action by government is *not* 'government action' for constitutional law purposes if the government's action consists 'merely' in structuring the environment for business behavior or performing routine tasks that underwrite private ordering the business (i.e., 'private') world." Klare, *Public/Private Distinction*, *supra* note 152, at 1379 n.83 (emphasis in original).

[253] *See, e.g.*, Pine, *U.S. Seems Ready to Pay Record Subsidy on Sale of Wheat to Soviets, Analysts Say*, Wall St. J., May 13, 1987, at 6, col. 1; *One Good Subsidy Merits Another*, NEWSWEEK, May 11, 1987, at 611; Stern, *Inspector's Call*, THE NATION, Oct. 31, 1981, at 429.

[254] *See, e.g.*, Lewis, *Trade Sanctions' Effect*, N.Y. Times, May 12, 1987, at 21, col. 1; Peterson, *Reagan Seeks Oil Industry Tax Relief; Imports are Called Threat to Security*, Wash. Post, May 7, 1987, at A17.

Commentators also have cited corporate power as a basis for imposing obligations on business similar to governmental obligations under the Constitution.[255] The size and power of some corporations rival that of state and federal governments.[256] Corporate power is particularly relevant in terms of the control employers exercise over employees' lives both inside and outside the workplace. In addition to employers' control over workers in such matters as setting workplace conditions and implementing massive layoffs as in the steel and auto industries, employers are expanding the reach of their power as the recent increase in compulsory employee drug screening demonstrates. Through drug screening, the employer invades employees' privacy and controls employees' conduct outside the workplace, as drug tests may disclose the presence of drug metabolites from substances ingested days or weeks earlier.[257]

The breadth of employer and union power, as well as the scope of governmental involvement with employers and unions, provide no justification for statutory procedural due process protection for members subject to union discipline, but not for employees subject to employer discipline. The failure to identify the need for legislated due process in the employment context becomes clear under a natural law theory. The moral content of natural law theory, which identifies a basic right to fair treatment in union disciplinary proceedings, similarly calls for fairness for employees subject to the coercive power of employer discipline.[258] The increased power of both unions and employers through governmental involvement strengthens the argument for similar treatment in identifying the basic individual rights that deserve protection within these institutions.

Utilitarian theory, however, may justify the legislation of procedural due process in unions only and may distinguish unions and employers based on their public or private character.[259] Statutory regulation under utilitarianism would provide due process rights in order to achieve an external goal rather than to affirm the inherent value of fair procedures. A utilitarian theory that only a democratic union can bring democracy to the workplace may support the need for statutory due process rights for union members.[260] The quasi-public character of the union, and the corresponding public interest

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[255] *See supra* notes 251–52.

[256] *Id.*

[257] *See* BUREAU OF NATIONAL AFFAIRS, ALCOHOL & DRUGS IN THE WORKPLACE: COSTS, CONTROLS, AND CONTROVERSIES (1986); Spitzer, *Drug Screening: Usually Unnecessary, Frequently Unreliable, and Perhaps Unlawful*, ILR REPORT, vol. XXIII, no. 2, at 21, 24 (1986); Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 EMPLOYEE REL. L. J. 422, 424 (Winter 1985/86). The presence of metabolites weeks later is a particular problem with marijuana. Additionally, drug screening does not show whether an individual is currently impaired. Spitzer, at 22; Rothstein, at 424.

[258] *See infra* notes 295–303 and accompanying text. *See also* Summers, *supra* note 233, at 48, identifying "the human dignity of the individual worker" as the basis for protecting a basic right against unjust discharge.

[259] The relation between the utilitarianism means-ends approach and the public/private distinction comports with Professor Klare's criticism that "[t]he public/private distinction poses as an analytical tool in labor law, but it functions more as a form of political rhetoric used to justify particular results." Klare, *Public/Private Distinction*, *supra* note 152, at 1361.

[260] See Summers, *Public Interest*, *supra* note 154, at 614–15, 618, 624, where Professor Summers asserts that the public interest in union democracy is grounded in the public interest in collective bargaining as "an instrument of industrial democracy" in which "the workers will have a voice through their union in determining the terms and conditions of their employment." *Id.* at 615. Professor Summers states that the lack of democratic processes within corporations requires de-

in democracy within the union's internal processes, strengthens this utilitarian argument.[261] The union may then extend its democratic values and processes to the workplace through the private collective bargaining system.[262]

A series of steps in instrumentalist reasoning extends this utilitarian approach. Statutory due process for union members furthers the goal of internal union democracy by protecting the individual rights of union members subject to the union's disciplinary power. Through a democratically run union, achieved by adhering to due process and other Title I and Title IV rights, union members can participate in formulating union policy. The members' influence over union policy will make the union more representative by increasing member participation in collective bargaining. A democratically run union will, in turn, bargain for democratic rights in the workplace, including procedural due process in the grievance/arbitration system, in return for waiving the statutory right to strike. This trade-off of statutory for contractual rights furthers two basic NLRA goals. First, the private nature of collective bargaining and dispute resolution remains.[263] Second, waiving the right to strike in exchange for arbitration channels the conflict into institutionalized resolution structures and helps maintain industrial peace and uninterrupted production.[264]

Utilitarian reasoning applied to due process in the labor relations context, therefore, justifies both the direct regulation of internal union processes and the failure to impose directly such obligations on employers. Direct regulation of employer discipline similar to the provisions of Section 101(a)(5) would create a floor of statutory rights upon which the union could build in collective bargaining.[265] Such legislation, however, would be counterproductive to the NLRA's goals of reducing governmental intervention in collective bargaining and eliminating strikes during the contract term.

This due process theory requires a balance between the characterization of the union as quasi-public and the employer as private. Thus, judicial interpretation of the LMRDA must account adequately for the union's private interests in institutional autonomy as well as the public interest in union democracy. The Supreme Court demonstrated this concern in *Hardeman* when it applied utilitarian reasoning to stress the private nature of internal union processes, particularly in defining the scope of union discipline.[266]

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mocracy within unions. He concludes that "[u]nion democracy is, in this sense, the antidote for corporate autocracy." *Id.* at 624.

Professor Cox also concludes that union democracy is essential in order to perform the union's functions of "extending the rule of law" to industry through enforcing collective bargaining agreements and "enabl[ing] workers to participate jointly with management in the government of their industrial lives." Cox, *Role of Law*, *supra* note 81, at 610.

[261] Summers, *Public Interest*, *supra* note 154, at 615.

[262] *See supra* note 260.

[263] *See supra* notes 223–29 and accompanying text.

[264] Klare, *Labor Law as Ideology*, *supra* note 223, at 452, 454, 459–60, 463, 482; Stone, *Post-War Paradigm*, *supra* note 223, at 1542, 1528, 1563–73; Klare, *Public/Private Distinction*, *supra* note 152, at 1400–01, 1407–11.

[265] *Cf.* Wellington, *supra* note 153, at 365, identifying the importance of welfare legislation, such as minimum wage laws, "which provide a foundation upon which unions may build in bargaining with management." *See also* Summers, *supra* note 233, at 48–49.

[266] *See supra* text accompanying notes 197–209. The Court showed this same concern in *Sadlowski* in the context of union elections. *See supra* text accompanying notes 216–20. See also Professor Klare's discussion of judicial treatment of unions as both quasi-public and private organizations and the Court's shift in *Hardeman*, in Klare, *Public/Private Distinction*, *supra* note 152, at 1372–74.

Federal judicial interpretation of other due process rights, including the right to an impartial tribunal, also reflects the concern for union autonomy through disciplinary decision-making by union members and officials.[267] Protecting the right to an unbiased judge by requiring third party arbitrators would expand the public character of the union, making it similar to governmental agencies or criminal proceedings.

One can conceptualize the due process rights of union members and employees and the public or private character of unions and employers along a continuum of public and private institutions, rather than as a clearly defined public/private boundary. The NLRA's industrial pluralist theory places the employer close to the private end of the continuum. Even the private sector employer is not at the extreme of the private pole, however, because the public interest in regulation under the NLRA and the resulting contractual due process rights impose certain obligations identified with public institutions. Unions, as quasi-public organizations, appear farther from the private pole of the spectrum. Because the public right to a full and fair hearing prior to disciplinary action is counterbalanced by the judicial emphasis on union autonomy, the union is near the middle of the continuum.

B. *Due Process in the Political and Economic Sectors*

Utilitarian theory and the public/private distinction also permit an overview of procedural due process beyond the labor relations context. Governmental agencies, as well as unions and employers, may occupy different positions on the public/private continuum. A single continuum may exist for institutions from both sectors because of the convergence of constitutional and statutory due process under utilitarian theory. Utilitarianism also underlies the contractual nature of due process rights in private sector employment under an industrial pluralist theory. Governmental and private institutions may be located on the public/private spectrum as shown in Figure 1 on page 63.

The stated goals of constitutional and statutory due process theories are different. Under constitutional theory, the goal is accuracy in administrative decision-making,[268] while LMRDA utilitarian theory seeks to further union democracy. Utilitarian theory for due process under the NLRA promotes a third goal of promoting industrial peace through private grievance/arbitration processes. Despite these differences, a single spectrum may be created based on the similar interests balanced under utilitarian theory in each context. The courts and Congress make constitutional and statutory due process determinations by balancing institutional interests against an individual's interest in fair procedures. In administrative agency cases, the institutional interest is ensuring governmental efficiency through internal control over decisions to terminate a public benefit or public employment. Under the LMRDA, the union has an institutional interest in internal autonomy in carrying out disciplinary action against union members. Under the NLRA, the institutional due process interest is preserving the private character of collective bargaining.

Utilitarian interest balancing determines the institution's location on the due process continuum. As the balancing always weighs public rights to due process against private institutional autonomy, the location between the two poles will not depend strictly on the formal definition of an institution as public or private. Rather, placement on the

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[267] *See supra* notes 211–15 and accompanying text.

[268] *See supra* notes 54–58 and accompanying text.

spectrum will depend on the relative weight accorded the opposing interests under utilitarian balancing, which will, in turn, determine the scope of due process procedural protection.

Judicial and legislative application of interest balancing explains the specific location of the institutions in Figure 1. Nonunionized private sector employers are located near the private pole because the Constitution, statutes, and employment contracts generally do not obligate them to provide employees with procedural protections against disciplinary actions.[269] Because of the broad scope of procedural due process in that setting,[270] criminal proceedings are placed at the public pole. Moving away from the public pole, parole and probation revocation hearings are subject to the next broadest scope of protection because of the weight placed on the liberty interest in parole or probation. One important due process protection required in revocation hearings is the right to an independent parole or probation board.[271] The degree of independence required of the decision-maker often reflects the weight afforded the opposing interests[272] and is important in determining location on the continuum.

Judicial interpretation of the right to an impartial decision-maker also is important in placing administrative hearings for welfare benefit termination farther from the public pole. While holding that an administrative agency must provide a full evidentiary hearing prior to terminating welfare benefits, the Supreme Court has decided that an agency employee with prior involvement in the case, but who had not participated in the particular determination under review, was sufficiently impartial.[273] Preliminary hearings for parole or probation revocation occupy the same point as welfare termination hearings. Though parolees and probationers are constitutionally entitled to a full evidentiary

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[269] The employment at will doctrine has been modified to some extent in state courts which have held private employers to a "just cause" standard for discharge in cases where an implied contract or a public policy basis could be identified to provide employment rights. These developing common law protections are more analogous to substantive due process rights than to procedural due process. For discussions of changes in the doctrine of employment at will, see Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082 (1984); Note, *Protecting Employees Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

[270] *See supra* notes 21–37 and accompanying text.

[271] Gagnon v. Scarpelli, 411 U.S. 778, 785–86 (1973); Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972). Other procedural protections required at this stage include written notice of claimed parole or probation violations; a hearing within a reasonable time; disclosure of evidence against the defendant; the right to present evidence; the right to confrontation, unless good cause is shown to limit this right; and a written statement by the factfinders of evidence relied on and reasons for revoking probation or parole. *Gagnon*, 411 U.S. at 486; *Morrissey*, 408 U.S. at 489. The Court left the right to appointed counsel to a case-by-case determination. *Gagnon*, 411 U.S. at 790.

[272] *See supra* notes 68, 75–80, 122–23, 211–15 and accompanying text. For a discussion of the right to an impartial judge, see Redish and Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986).

[273] Goldberg v. Kelly, 397 U.S. 254, 271 (1970). *See supra* notes 59–68 and accompanying text. Other procedural protections include timely notice of the reasons for benefits termination; right to confront witnesses; presentation of oral arguments and evidence; right to retain counsel; and a statement of both the reasons for the determination and the evidence relied on. *Goldberg*, 397 U.S. at 267–71. The Court left open the question of whether the scope of the hearing could be limited where no factual issues are in dispute. *Id.* at 268 n.15.

hearing to determine probable cause for their arrest, the Supreme Court has held that a parole or probation officer not involved in the case may act as decision-maker.[274]

Administrative agency determinations prior to termination of other public benefits are located at the next point of the spectrum. They are placed farther from the public pole than agencies responsible for welfare benefits based on the Supreme Court's holding that the Constitution does not obligate these agencies to provide a full evidentiary hearing prior to terminating benefits.[275] This difference in the scope of due process protections results from utilitarian interest balancing. The Supreme Court has held that the individual's interest in avoiding deprivation of welfare benefits is greater than the interest in retaining other public benefits.[276] Thus, in balancing the interests for non-welfare agencies, the institutional concern for expediency outweighs the individual's need for fair procedures prior to deprivation of property.[277]

Union disciplinary proceedings are closer to the middle of the public/private spectrum than administrative agency determinations. While the statutory requirement for a full and fair hearing prior to any union discipline could reverse the positions of unions and administrative agencies dealing with non-welfare benefits, the standard for judicial review is the basis for their positions on the spectrum. In *Hardeman*, the Supreme Court emphasized the narrow scope of judicial review of union disciplinary determinations, both in interpreting the scope of disciplinary charges and in reviewing a finding of guilt under a "some evidence" standard.[278] In reaching this decision, the Court noted the union's interest in retaining autonomy over disciplinary proceedings. Judicial review of administrative agency determinations under a "substantial evidence" standard,[279] however, provides room for greater judicial intervention, and places the agencies closer to the public pole of the spectrum.

The distinction between providing a full hearing before or after disciplinary action underlies the relative locations of unions and public employers on the spectrum. Due process in unions is also distinguished by the fact that the LMRDA guarantees all union members due process rights, while constitutional procedural due process rights apply only to public employees who can show a property interest in their jobs.[280] This places governmental agencies acting as public employers closer to the private pole than unions,

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[274] *Gagnon*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 485–87.

[275] Mathews v. Eldridge, 424 U.S. 319, 340 (1976). *See supra* notes 69–74 and accompanying text.

[276] *Eldridge*, 424 U.S. at 340–43. The *Eldridge* Court compared the degree of potential deprivation created by the loss of welfare benefits with the loss of disability benefits, and concluded that "[i]n view of [the terminated disability recipient's] potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 343.

[277] *See* Mashaw, *supra* note 14, at 48–49. The *Eldridge* Court found that the adequacy of the pretermination procedures was strengthened by the provision of a post-termination right to an evidentiary hearing and judicial review. *Eldridge*, 424 U.S. at 349.

[278] *See supra* notes 204–05 and accompanying text.

[279] Federal Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1982). See B. SCHWARTZ, ADMINISTRATIVE LAW 591–606 (1976) for a discussion of the substantial evidence standard.

[280] *See supra* note 52 and accompanying text. A public employee may also show a liberty interest where the public employer's action injures the employee's reputation. *See Roth*, 408 U.S. at 573–74.

even over the midway point of the continuum. The Supreme Court, in *Cleveland Board of Education v. Loudermill*,[281] decided that constitutional procedural due process did not require a full and fair hearing prior to the termination of public employees.[282] The Supreme Court balanced the competing interests and required the government to give notice of the reasons for discharge and provide an opportunity to respond orally or in writing before discharge.[283] These procedures reduced the possibility of erroneous decision-making while recognizing the public employer's interest in quickly removing an unsatisfactory employee.[284] The Court found this abbreviated process adequate partly because the employee had a right to a full post-termination hearing.[285]

Requiring a prior hearing emphasizes the individual's interest in fair procedures, while providing a hearing only after the discharge demonstrates concern for institutional interests. The disciplinary determination itself may be affected, as the public employee who is only provided a post-discharge hearing must overcome a decision already reached by the agency.[286] This is especially difficult when a decision-maker from the same agency conducts the post-termination hearing.[287]

While contractual due process in unionized private sector employment resembles the post-termination hearing constitutionally required for public sector employees, the private sector collective bargaining agreement does not usually require notice or an opportunity to respond prior to discharge. Therefore, unionized private sector employers are closer to the private pole than either union or non-union public employers. The contractual nature of procedural due process in private sector employment, involving the employees' waiver of statutory rights, also emphasizes the private character of the unionized private sector employer.[288]

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[281] 470 U.S. 532 (1985). See *supra* notes 70–74 and accompanying text for a discussion of *Loudermill*.

[282] *Loudermill*, 470 U.S. at 545–46.

[283] *Id.* at 542–46.

[284] *Id.* at 545–46.

[285] *Id.* at 545.

[286] Most federal employees who contest their discharge lose. In fiscal year 1970, for example, less than 20% of federal employees successfully contested removal within their federal agencies. Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 204 n.35 (1973). Professor Merrill analyzes the adverse action process in federal employment and recommends system reforms, including the additional right to an evidentiary hearing before a proposed adverse action becomes effective. *Id.* at 240–46.

[287] *Id.* at 248–51 (proposing that hearing officers for federal adverse action hearings be assigned from a pool established and employed by the Civil Service Commission, rather than from the employing agency).

[288] The arbitration standard under collective bargaining agreements requiring "just cause" for disciplinary actions would create protections analogous to substantive due process, which examines the reasonableness of governmental actions. *See* F. ELKOURI & E. ELKOURI, *supra* note 230 at 650–55, 653 n.10, 654 n.19 (4th ed. 1985) (authors discuss the "just cause" standard, giving examples of arbitrators' articulation of the standard as a "test of fairness and reasonableness" and requiring management to "have a reasonable basis for its actions and follow fair procedures"); *see also* L. TRIBE, *supra* note 8, at 433. This substantive review of employers' decision making does not create a broader scope of due process protection in private sector union workplace than within unions, as the LMRDA provides protection against union discipline which punishes members for exercising their substantive rights, such as the freedom of speech under § 101(a)(2). *See generally* Note, *Substantive and Procedural Due Process*, *supra* note 173.

The public/private spectrum demonstrates the absence of a clear division between so-called "public" and "private" institutions.[289] Applying utilitarian interest balancing, courts and Congress have defined the scope of procedural due process by adjusting the weight placed on public or private interests. This emphasis, in turn, determines the location on the continuum. Thus, where an individual's interest in public rights to due process outweighs institutional interests in private internal control, an organization will be closer to the public pole, regardless of its label as a private organization.

The continuum becomes more meaningful if the poles also represent the political and economic spheres, corresponding to the public and private poles respectively, as shown in Figure 2 on page 64. This distinction is consistent with the industrial pluralist emphasis on the private character of employers as economic organizations as distinguished from public political institutions.[290] Identifying the two poles as political and economic adds another dimension to the public/private distinction. The political institutions of government are characterized by democratic processes both in selecting representatives and in internal functions. On the public/private spectrum, therefore, the criminal courts are both public and political institutions, as the broad scope of procedural due process in criminal proceedings reflects the importance of the defendant's democratic political rights. At the private economic pole, however, democratic political rights do not exist in the nonunion private sector workplace, where employees are subject to the employer's unilateral control. Between the poles, the characterization of the institutions as public or private also reflects the scope of democratic political rights, in the form of procedural due process, available within the institution. In the case of unions, the added weight placed on public characteristics means that the legislature may impose upon private organizations those democratic rights associated with the public political sphere. For private sector employers, the emphasis on retaining their private nature as economic institutions allows employees to gain democratic due process only through trade offs in collective bargaining.

IV. The Choice of Theory

The choice of a due process theory fundamentally influences the description of due process rights in particular contexts. It is true that, regardless of the theory applied, a problem exists in the judicial manipulation of the scope of rights. Historically, commentators have criticized natural law theory because judges may determine outcomes by defining due process according to their subjective value systems. Utilitarianism suffers from the same problem. By emphasizing one side of the balance of interests, courts can

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[289] A number of commentators have addressed the lack of a clear boundary between the public and private sectors and challenged the continued legitimacy of making such a distinction. *See* Austin, *The Problem of the Legitimacy of the Welfare State*, 130 U. Pa. L. Rev. 1510 (1982); Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296 (1982); Ellickson, *Cities and Homeowners Associations*, 130 U. Pa. L. Rev. 1519 (1982); Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. Pa. L. Rev. 1331 (1982); Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. Pa. L. Rev. 1429 (1982); Klare, *Public/Private Distinction*, *supra* note 152; Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. Pa. L. Rev. 1441 (1982).

[290] Courts have interpreted the NLRA to apply an industrial democracy metaphor while maintaining the private character of collective bargaining and arbitration, independent of the courts. *See supra* notes 223–36 and accompanying text.

manipulate the scope of due process, as the courts' focus on certain interests may reflect the same subjective values imposed under a natural law theory.[291]

Despite these common pitfalls, however, the initial choice of natural law or utilitarian theories is crucial because of the normative differences in the theories themselves. These differences in theoretical content can determine whether due process rights should be developed contractually, judicially, or through legislation. Furthermore, depending upon the theory, the absence of due process rights may or may not be justified in a particular setting.

The labor relations context provides an example of the importance of theory. Prior to the LMRDA, state courts reflected constitutional due process analysis by applying natural law concepts to internal union affairs.[292] In developing union members' due process rights under a natural law theory, courts identified the members' basic moral right to fair treatment before union discipline regardless of the positive law of the union constitution or bylaws. Under the LMRDA, the shift to utilitarian theory removed the moral content from the identification of rights.[293] Union members' rights are protected in order to serve an external goal rather than for their intrinsic moral value. Legislating due process and other democratic rights for union members furthers the goal of union democracy and provides the foundation for more representative union leadership. These goals extend to the workplace under the utilitarianism of the NLRA. Democratically elected union leaders will bargain for democratic rights in employment, such as arbitration in exchange for a no-strike clause, which promote the statutory goal of uninterrupted production. In contrast to a natural law theory which protects due process rights based on the moral grounds of fairness and justice, this utilitarian approach values employees' due process rights solely as an incentive for the union to waive the right to strike.[294]

Utilitarianism's exclusive focus on external goals provides an inadequate foundation for a system of rights. Rights which are defined according to their instrumental worth are perceived as lacking intrinsic value.[295] Under utilitarianism, rights are expendable if a competing institutional interest outweighs the social utility of the individual's right. As a result, individual rights are less stable and less meaningful than they would be under a theory which values rights for their inherent moral content.

Rejecting utilitarian theory would influence the scope of due process rights in the labor relations context. A due process theory based on the moral content of rights would recognize the inherent value of fair procedures in any setting which subjects an individual to coercive institutional power. For this reason, an individual subject to employer as well as union discipline should have procedural due process rights. A return to a natural law theory, however, presents problems. Although the Supreme Court has applied natural law concepts to identify the fundamental nature of virtually the entire Bill of Rights, the

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[291] *See* L. TRIBE, *supra* note 8, at 505.

[292] *See supra* notes 81–117 and accompanying text.

[293] *See supra* notes 38–50 and 163–220 and accompanying text.

[294] *See supra* notes 228–29 and 263–64 and accompanying text.

[295] For analysis of the inadequacy of utilitarianism and the need to define rights by their intrinsic values, *see* R. DWORKIN, *supra* note 14, at 12, 136–49, 191; L. TRIBE, *supra* note 8, at 475, 504–05, 526–27, 540–43, 559–61; Mashaw, *supra* note 14, at 30, 46–53, 58; Saphire, *supra* note 39, at 117–24, 151–52, 155–59; Summers, *supra* note 48, at 2–5, 20–27.

court has also used natural law theory to defend the "right" of employers to assert complete and unilateral control over working conditions.[296] This preference for employer property "rights" over employee welfare is a poor historical recommendation for the continued use of natural law theory.[297] Thus, the procedural due process rights of union members and employees should be protected under a theory which identifies the intrinsic moral values of procedural due process, but which does not rely on the existence of natural rights. Morally based procedural due process theories have focused on values of "fairness,"[298] "personal dignity and self respect,"[299] and the "minimization of subservience and helplessness."[300]

In the context of union discipline, a shift to an intrinsic value due process theory would return the courts' focus to the value of fairness in disciplinary hearings. This approach, by reducing the emphasis on union institutional interests, would expand the scope of individual rights. In particular, courts could give greater attention to problematic issues such as the right to an impartial tribunal and interpreting the scope of disciplinary provisions.[301] At the workplace, an intrinsic value theory would affect both the existence and the scope of rights. With this theoretical shift, the right to grievance/arbitration procedures would be based on the intrinsic value of fair and just process before imposing employer discipline, rather than as a means to attaining uninterrupted production.

Recognizing the basic right of union members and employees to fair treatment requires a consistent approach to due process protection. Thus, statutory protection of due process for union members under the LMRDA calls for legislating due process rights at the workplace.[302] Such legislation would define minimum due process standards

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[296] *See supra* notes 16–19 and accompanying text.

[297] *See* Grey, *supra* note 13, at 711 n.35. The author notes that while Lochner v. New York, 198 U.S. 45 (1905) (applying natural law theory to support laissez-faire economics) was a bad decision, "the general mode of adjudication it represents" — that of identifying fundamental values — may still be legitimate. *Id.* The author further identifies the development of the constitutional right of privacy, the right to vote, and the right to travel as the "modern offspring . . . of the natural-rights tradition of the found[ers]" although the explicit source of the rights has shifted to the "Anglo-American tradition." *Id.* at 717. *See also* Note, *Specifying the Procedures*, *supra* note 39, at 1539 n.127 ("The identification of the natural law understanding of substantive due process with a *laissez faire* economic philosophy . . . which resulted in constitutional crisis and judicial recantation . . . brought the natural law view of due process into a disrepute from which it has never recovered.").

[298] L. TRIBE, *supra* note 8, at 505; Mashaw, *supra* note 14, at 53; Saphire, *supra* note 39, at 117–18 (identifying the need to view fairness "in terms of human dignity"); Summers, *supra* note 48, at 24–25.

[299] L. TRIBE, *supra* note 8, at 475, 560 (also identifying "personal integrity and autonomy"); Mashaw, *supra* note 14, at 49–50 ("individual dignity"; "self-respect"); Saphire, *supra* note 39, at 118 ("personal dignity"; "attitudes included in human dignity such as integrity, self-respect, self-esteem, resentment, and indignation"); Summers, *supra* note 48, at 23–24 ("humaneness and respect for individual dignity"; "personal privacy").

[300] L. TRIBE, *supra* note 8, at 560. For discussion of the additional intrinsic value of personal participation in the process, see, *id.* at 526; Mashaw, *supra* note 14, at 50; Saphire, *supra* note 39, at 122–24; Summers, *supra* note 48, at 20–21.

[301] *See supra* notes 197–215 and accompanying text.

[302] Professor Summers has identified the need for statutory protection for all employees, in union and nonunion workplaces, of "the right not to be discharged except for just cause." Summers, *supra* note 234, at 47. Professor Summers' proposal is consistent with an intrinsic value theory based on "the human dignity of the individual, for it gives him some escape from subservience to the employer, allows him to speak his mind, enables him to demand his rights, and encourages him to

in employment discipline without forcing employees to obtain procedural protections by trading off their statutory right to strike. Furthermore, the inherent value of fair disciplinary procedures justifies extending statutory protection to both union and nonunion workplaces. While the legislation could include provisions to cover the special needs of a union workplace, the statutory minimum would provide a floor upon which the union could build in collective bargaining.[503]

Conclusion

The history of procedural due process rights for union members has moved from state court protection under a natural law theory to federal legislation supported by utilitarian theory. This progression, as in constitutional due process interpretation, shifts the focus from the intrinsic value of due process to the external goal achieved by affording due process rights. Under utilitarian theory, the LMRDA protects due process rights because they promote the goal of union democracy, rather than for their intrinsic value of fairness. Utilitarianism is also central to the industrial pluralist theory of the NLRA, under which due process in the workplace is a means to the end of preserving private collective bargaining and avoiding strikes. Furthermore, instrumentalist reasoning can link the utilitarian theories of the LMRDA and the NLRA to justify the inconsistency of directly legislating union members' due process rights while leaving employees' due process rights to private contractual exchanges.

The institutional power of unions and employers establishes the need for fair procedures in disciplining union members as well as employees. Thus, under an intrinsic rights theory of due process, statutory due process is needed in the union and at the workplace. Such statutory requirements would extend the scope of democratic rights associated with governmental institutions into the private economic sector. Just as the LMRDA's enactment regulated the union as a "quasi-public" organization, legislating employees' due process rights would acknowledge the equally quasi-public status of the private sector employer. Given the continually blurred distinction between the public and private sectors, expanded statutory protection of democratic rights for employees is both justified and desirable in order to achieve greater parity between individual rights inside and away from the workplace.

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assert himself as a person." *Id.* at 48. *See also* Summers, *Individual Protection against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481 (1976).

Statutory due process in the workplace would extend substantive as well as procedural due process, for protection against unjust discharge requires examination of the reasonableness of the employer's actions.

[503] Summers, *supra* note 233, at 48–49. For the statutory floor to be meaningful, the legislated due process rights should not be interpreted as implying the existence of a no-strike clause. *Cf.* Teamsters, Chauffeurs, Warehousemen & Helpers, Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962) (contractual clause for final and binding arbitration implies a no-strike clause). The union may decide to waive the right to strike during the term of the contract in exchange for other contractual promises by the employer.

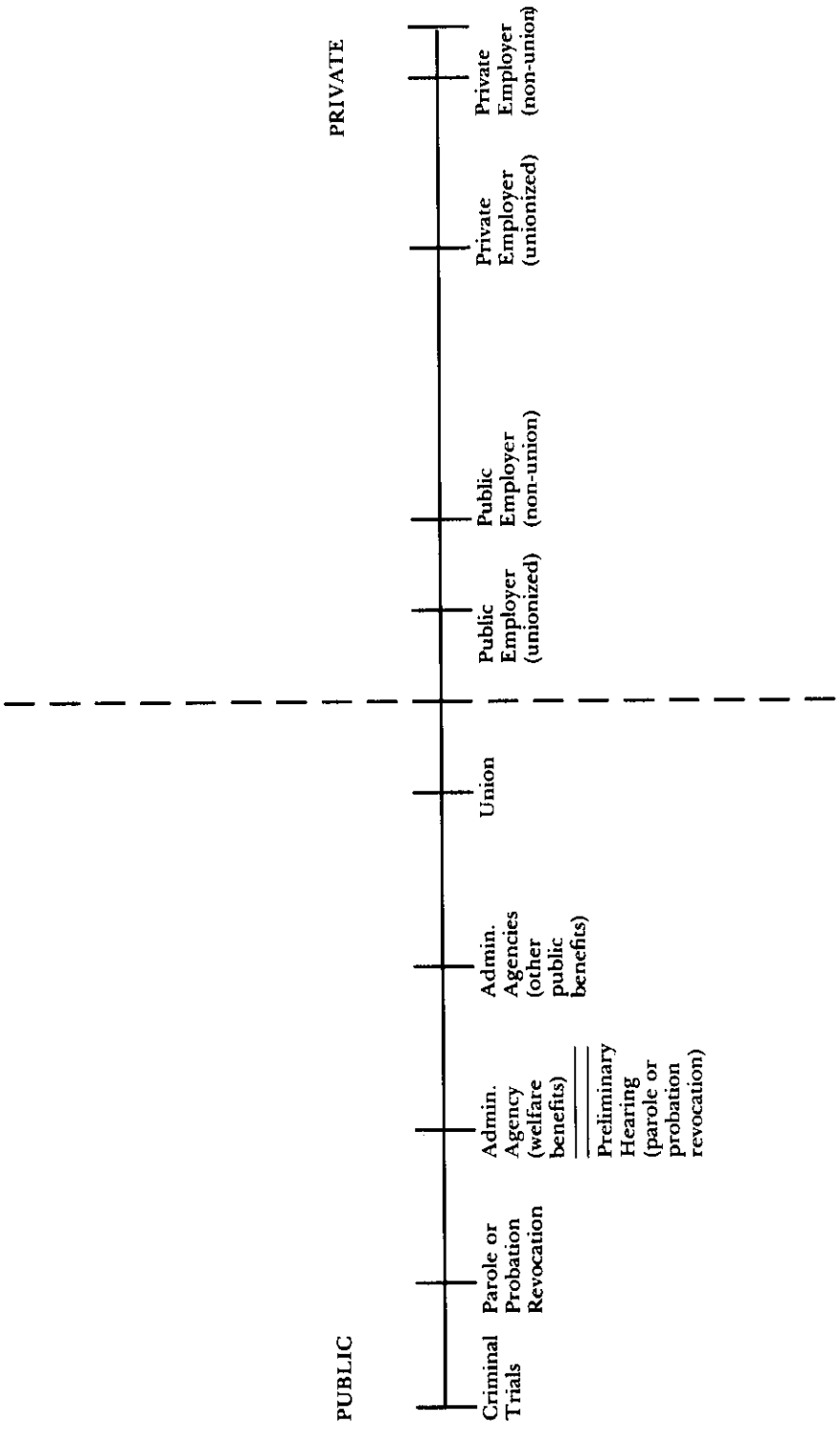
PUBLIC
PRIVATE
Criminal Trials
Parole or Probation Revocation
Admin. Agency (welfare benefits)
Admin. Agencies (other public benefits)
Union
Public Employer (unionized)
Public Employer (non-union)
Private Employer (unionized)
Private Employer (non-union)
Preliminary Hearing (parole or probation revocation)

Figure 1

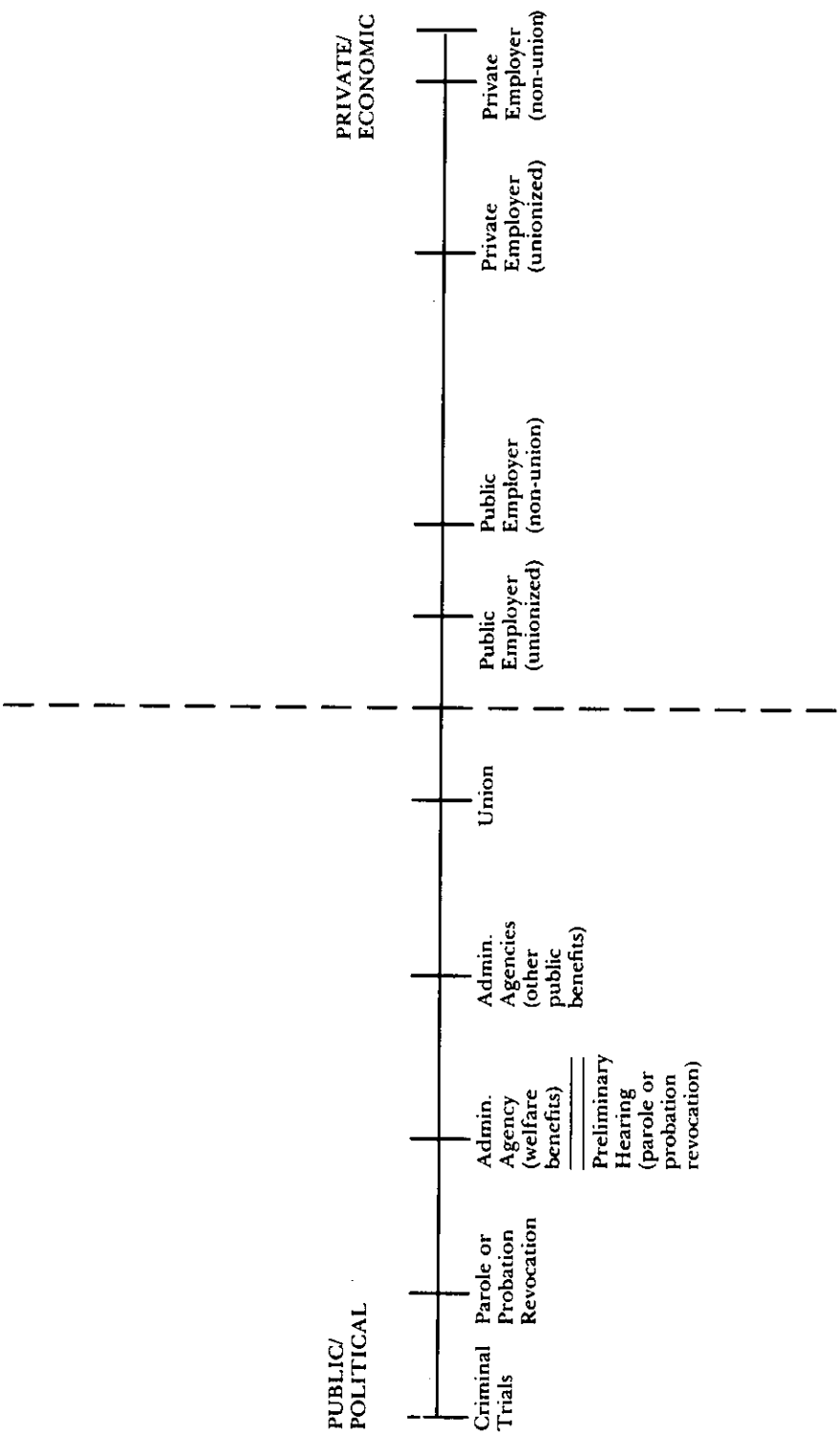
PUBLIC/
POLITICAL
PRIVATE/
ECONOMIC
Criminal
Trials
Parole or
Probation
Revocation
Admin.
Agency
(welfare
benefits)
Preliminary
Hearing
(parole or
probation
revocation)
Admin.
Agencies
(other
public
benefits)
Union
Public
Employer
(unionized)
Public
Employer
(non-union)
Private
Employer
(unionized)
Private
Employer
(non-union)

Figure 2

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