Further Thoughts on Deferral to Private Dispute Resolution Procedures: A Response

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Any policy of deferral to private dispute resolution processes must begin, we believe, by recognizing the difference between rights which parties, by private action, have created for themselves and rights which find their source in the law.

In our original Article, we criticized the National Labor Relations Board (NLRB or Board) for generating rules governing deference to private arbitral remedies without recognizing this distinction. The Board refuses to intercede when employers have been charged with violating employees' specific statutory rights, simply because the employee may also utilize an arbitral mechanism designed to enforce not statutory rights, but the privately created standards of conduct set forth in a collective-bargaining agreement. Moreover, as we argued in our original Article, the Board does so without making an adequate inquiry into whether, in a particular instance, the arbitral remedies provide even a minimal guarantee that the same standards of conduct will be applied in the private process as would be applied in an action before the Board to enforce statutory rights.

We also pointed out that the Board has established an entirely different rule when a union, rather than an employer, is accused of illegal conduct. Thus, in the context of duty-of-fair-representation charges, the Board refuses to defer to a union's internal procedures because the issue involves a legal
standard of conduct and "does not ... involve a dispute between contracting parties over the interpretation of a provision in the contract."  

Finally, we criticized the Board for developing this double standard of mandating great deference when an employer is the defendant, but refusing to defer when a union is charged with improper conduct. We argued briefly that there are strong, policy-based justifications for deferring to an internal union procedure when considering duty-of-fair-representation allegations. We did not, however, attempt to assert a reverse double standard that would grant unions broader deference. We outlined the pro-deferral arguments in the duty of fair representation context only to show that there is no basis for the Board's double standard. We did not intend to depart from our basic statutory/contractual rights distinction in making those arguments. Instead, we merely wished to point out that the Board's double standard neither comports with this crucial distinction nor flows from any policy-based

5. Western Conference of Teamsters, 251 N.L.R.B. 331, 338 n.31 (1980). A sharply divided Board first decided in Miranda Fuel Co., Inc. that § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A), prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee on the basis of classifications or considerations which are invidious, irrelevant, or unfair. See 140 N.L.R.B. 181, 185 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). In addition, the Board stated that an employer violates § 8(a)(1) of the Act to the extent that it participates in the union's arbitrary action against an employee. See id. at 185-86. Because these are violations of the Act, they come within the Board's jurisdiction. As the Supreme Court later explained, the Board in Miranda for the first time interpreted a breach of a union's duty of fair representation as an unfair labor practice. See Vaca v. Sipes, 386 U.S. 171, 177 (1967). Although the Second Circuit refused to enforce Miranda, see 326 F.2d at 180, the Fifth Circuit upheld the decision, see Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers v. N.L.R.B., 368 F.2d 12, 19-20 (5th Cir. 1966). The Supreme Court has declined to decide the correctness of the Board's decision. See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 170 (1983). More recently, the Court indicated what might be a growing acceptance of the Miranda doctrine, at least when considering charges under § 8(b)(1)(A) of the National Labor Relations Act involving alleged breaches of the duty of fair representation in the hiring hall context. The Court noted that the decision in Miranda was an attempt by the Board to broaden the remedies available to union members by finding that breaches of the duty of fair representation were also unfair labor practices. The Court refused to limit the scope of the duty to the unfair labor practices specified in § 8(b). See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 86-87 (1989). In Vaca v. Sipes, the Court held that the Board's assertion of jurisdiction over duty-of-fair-representation claims does not preempt federal court jurisdiction over such claims. See 386 U.S. at 180-88.

distinctions that would justify lower levels of deference to union procedures than to contractual arbitration proceedings. 7

Both Professor Theodore St. Antoine, in his Introduction to the original Symposium, and Paul Levy, in his Response in this issue, have responded to our observations. 8 We had not expected our observations to cause such reaction. We believed them to be relatively straightforward: that the Board should apply the distinction between contractual and statutory rights to charges against both unions and employers. It simply makes no sense for the Board to ignore that distinction to shield employers from agency scrutiny—as it did in Olin Corp. 9 and United Technologies Corp. 10—but not to show the same respect for union procedures.

Although we believe that both Levy and Professor St. Antoine thus misread the intentions of our original Article, we now accept their challenge and will attempt to justify a deferral analysis that recognizes the distinction between statutory and contractual rights, but nevertheless results in deferral to internal union procedures in many instances where duty-of-fair-representation allegations are involved. The analysis that we propose would not, however, result in deferral to contractual arbitration mechanisms in the face of allegations of many types of illegal conduct by employers.

7. Both the union and the employer can be named as defendants in “hybrid” § 301/duty-of-fair-representation suits. See, e.g., Vaca, 386 U.S. at 186–87. In that context, requiring exhaustion of internal union mechanisms would forestall the action against both the employer and the union, a result the Supreme Court has rejected. See Clayton v. UAW, 451 U.S. 679, 695 (1981). Similarly, if the results of that private process are to be given weight in subsequent agency or judicial proceedings, both the employer and the union should be equally bound by the determination. We believe that the Board should apply a similarly even-handed rule when duty-of-fair-representation allegations against the union under § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) (1988), and breach of contract allegations against the employer, are joined in a Board proceeding. In short, if the agency gives weight to the results of private processes in determining whether statutory violations have occurred, the same rule should apply to both unions and employers.

8. See Paul A. Levy, Deferral to the Intraunion Appellate Process: A Response, 25 U. Mich. J.L. Ref. 907 (1992); Theodore J. St. Antoine, Introduction to Symposium, The Government and Union Democracy, 24 U. Mich. J.L. Ref. 469, 475 (1991) ("Toward the end of the Page-Sherrick piece, the demands of special pleading seem to become too much to resist."). Professor St. Antoine also claims that our argument that the NLRB should require an employee to exhaust a union’s internal remedies before formally charging that the union has breached its duty of fair representation "tend[s] to diminish the force of the earlier argument" that deferral is inappropriate when the employer is charged with violation of statutory rights. Id.

We would first like to respond to one aspect of Levy's Article before discussing our proposal. Levy seems to argue as a general matter that "joint committee" determinations should not receive the same deference as arbitral resolutions. After establishing some of the basic analytic parameters in Part I of this Response, we argue in Part II that Levy's distinction between joint committees and arbitral resolutions has no relevance to disputes concerning contractual rights, and is useful only in the context of disputes concerning statutory rights. In Part III, we outline a framework for analyzing internal union review procedures that will establish—without ignoring the distinction between statutory and contractual rights—the case for deference to internal union procedures when the union is accused of having breached its duty of fair representation.

Before proceeding any further, we feel compelled to engage in a measure of responsive "special pleading." In a footnote to his Response, Levy notes the "common assumption that the UAW, if not perfect, [is] at least far more democratic and tolerant of dissent than most other national unions." Levy then indicates that certain recent events have caused him to "wonder whether the [UAW] is . . . simply more lucky and better at co-opting dissent" than other unions. The events to which Levy makes reference involve several election contests in recent years. We take this occasion to reject his suggestion firmly and to reaffirm the UAW's abiding commitment to the democratic rights of the membership. However, we have agreed that, rather than divert attention from the topic at hand with a lengthy debate about the state of democracy within the UAW and disputes about how to characterize various events and the authority that reports them, we will simply note our disagreement in this regard.

12. See id. at 560–61.
13. Levy, supra note 8, at 911 n.27.
14. Id.
15. We also must respond briefly to Levy's assertion that the UAW may simply be better at "co-opting dissent." See id. The unstated premise of this claim is that dissent is a natural and unavoidable fact of life. It ignores completely the possibility that dissent may be minimized not because it is "co-opted," but because the elected representative is responsive to the needs of the constituency. It seems to us that a lack of organized dissent may be a sign of the health of an organization; it may be a symptom of nothing more sinister than the fact that the elected representatives are well regarded and that the members believe that their representatives are carrying out their functions effectively. In short, no matter how deeply one values democracy, there
One other prefatory remark is in order. The NLRB has embraced very recently a modest form of deferral in the context of a particular type of duty-of-fair-representation case. The Supreme Court held in *Communication Workers v. Beck*\(^\text{16}\) that the duty of fair representation places limits on the ability of a union to assess dues or fees from objecting nonmembers.\(^\text{17}\) Compliance with the *Beck* decision thus requires that unions report expenditures by category so that the appropriate reduction in such fees, if any, can be determined. In addition, objecting nonmembers are provided with the right to challenge the union's calculations in this regard. All of these rights and obligations find their source in the duty of fair representation.

The NLRB recently issued a Notice of Proposed Rulemaking regarding compliance with *Beck*.\(^\text{18}\) In that proposal, the Board endorsed deferral to a private arbitral proceeding "where an employee's Board charge concerns only the accuracy of . . . [the] financial data" supplied by the union.\(^\text{19}\) In addition, the Board stated that it rejected a broader form of deferral in this context because it would not be "prudent to provide for deferral on a whole range of issues which the Board itself has not as yet considered."\(^\text{20}\) Even this very limited form of deferral, however, represents a departure from the Board's previously absolute anti-deferral policy in the context of duty-of-fair-representation charges. It is impossible to speculate whether this departure is evidence of a more general realization that deferral may in fact be applied more broadly in duty-of-fair-representation cases.

## I. ANALYTIC FOUNDATIONS

Board deferral doctrine arises in two very different contexts. First, the Board often defers when charges under

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\(^{16}\) 487 U.S. 735 (1988).

\(^{17}\) See id. at 762–63.


\(^{19}\) Id. at 43,639.

\(^{20}\) Id. Such issues could include, for example, whether a particular category of expenditure should be chargeable to an objecting nonmember.
section 8(a)(5) of the National Labor Relations Act (the Act)\textsuperscript{21} are filed during the term of a collective-bargaining agreement. Such charges allege, in essence, that the employer has violated an aspect of the contractual relationship between the employer and the representative of the employees by failing to bargain in good faith.\textsuperscript{22} Second, the Board also defers when charges are filed under section 8(a)(3) of the Act. These charges allege that an employer violated the specific statutory prohibition against "encourag[ing] or discourag[ing] membership in any labor organization."\textsuperscript{23}

\textbf{A. Contractual Rights, Private Procedures, and the Duty to Bargain}

Employees or their unions often assert that employers have violated section 8(a)(5)'s mandate to bargain in good faith when an employer unilaterally alters a term or condition of employment during the term of a labor agreement.\textsuperscript{24} In that context, the alleged violation of law is the employer's unilateral abrogation of standards of conduct set forth in the contract itself. Proof of a contract violation is therefore both necessary and sufficient to prove a violation of the applicable legal standard.

Sections 8(a)(5) and 8(d) obligate the employer and the union to bargain in good faith.\textsuperscript{25} Congress has also determined, however, that the parties are not thus thrown into a state of constant bargaining. Once bargaining has produced a contract, neither party is required to bargain on an issue covered by that contract until the contract expires.\textsuperscript{26}

\begin{itemize}
  \item \textsuperscript{21} 29 U.S.C. § 158(a)(5) (1988). The National Labor Relations Act, also known as the Wagner Act, was passed in 1935, see Pub. L. No. 74-198, 49 Stat. 449 (1935), and significantly amended in 1947 by the Labor Management Relations Act (LMRA), also known as the Taft-Hartley Act, see Pub. L. No. 80-101, 61 Stat. 136 (1947). We adopt the common practice, among the union-side bar at least, of referring to this law as the NLRA or simply the Act. Only when the LMRA added an entirely new section, such as § 203(d), do we refer to the LMRA.
  \item \textsuperscript{22} See 29 U.S.C. § 158(a)(5) (1988).
  \item \textsuperscript{23} Id. § 158(a)(3).
  \item \textsuperscript{24} CHARLES J. MORRIS, THE DEVELOPING LABOR LAW 950–55 (2d ed. 1983) and cases therein.
  \item \textsuperscript{25} See 29 U.S.C. §§ 158(a)(5), 158(d) (1988).
  \item \textsuperscript{26} See id. § 158(d).
\end{itemize}
When the NLRB "defers" to a contractually mandated procedure for determining whether a contract breach (and therefore a violation of section 8(a)(5)) has occurred, it is not determining that a private or contractual procedure is an adequate substitute for agency enforcement of specific statutory protections. Instead, the NLRB is merely recognizing that sections 8(a)(5) and 8(d) mandate only that the parties negotiate in good faith to reach a contract. Once a contract has been reached, the duties imposed by these sections cease to have any meaning apart from the enforceability of the contract itself.\(^{27}\) It is entirely proper, of course, to leave the enforcement of that contract to the parties' chosen vehicle for contract interpretation and enforcement; no violence to statutory protections occurs when the parties are allowed (and obligated) to utilize their chosen means to enforce the standards of conduct which they developed through private negotiations.\(^{28}\)

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27. Section 8(d) states that these duties "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period." 29 U.S.C. § 158(d) (1988). As we discussed at some length in our original Article, the Board and arbitrators have had some difficulty developing a consistent doctrine regarding the status of terms and conditions of employment which are not covered by the contract. Page & Sherrick, supra note 1, at 663-66. Thus, on the one hand, the Board has held that employers may not unilaterally impose drug testing policies when the contract is silent on such matters. See Johnson-Bateman Co., 295 N.L.R.B. No. 26, slip op. at 15, 25-26, 131 L.R.R.M. (BNA) 1393, 1398, 1402 (June 15, 1989). But see Michigan Bell Tel. Co., 306 N.L.R.B. No. 54, 1991-92 NLRB Dec. (CCH) ¶ 17,106 (Feb. 11, 1992) (concluding that because the substance abuse policy did not modify the parties' contract and was introduced after bargaining to impasse, the implementation did not violate § 8(a)(5)). But on the other hand, some arbitrators have held that contractual silence on a particular topic always means that the employer has successfully "reserved" its right to act in that area without concern for the duty to bargain. See Page & Sherrick, supra note 1, at 664 & n.79.

We also noted in our original Article that, in a small class of cases, the contractually mandated procedure might not fully vindicate the statutory rights at issue. See id. at 663-66. An employer, for example, might repeatedly and intentionally breach an existing contract, causing the union to expend its resources arbitrating frivolous cases and diminishing the union's role in the eyes of its members. In such circumstances, we believe that the arbitral remedy (enforcing the contract in each instance) may not provide adequate relief from the employer misconduct, and a distinct § 8(a)(5) charge would therefore have merit. This is a very specific example, however, and does not detract from the general point made in the text that alleged violations of § 8(a)(5) may properly be "deferred" to private dispute resolution mechanisms because the existence of the contract directly forecloses any ongoing duty to bargain on the areas covered by the contract.

We believe that it only confuses the issue to speak of the "contract rights" of individual employees in this context. Section 8(a)(5) does not confer rights on individual employees. It requires that the employer engage in bargaining with the exclusive collective-bargaining representative of the employees.29

Moreover, the result of that bargaining is a contract between the union and the employer, not between the employer and employee. In general, it is the union's role both to bargain for the contract and to enforce its terms on behalf of the employees. The union has great discretion in making contract enforcement decisions based, not on a myopic view of individual rights, but on a view of the bargaining unit as a whole.30 Individual employees also have the right to enforce the contract, but only after exhausting the bargained-for procedures for enforcement.31 If an individual then seeks judicial review of that private resolution, she will be bound by the private interpretation of the contract, and may obtain direct review of the "merits" of the contract issue only if she can prove that the system for private resolution malfunctioned because the union breached its duty of fair representation.32 Thus, the enforcement scheme for these contract rights is firmly rooted in the union's role as exclusive representative; individuals are allowed to disturb the internal process only by showing that the system itself malfunctioned because the union acted in an "arbitrary, discriminatory, or bad faith" manner.33

We believe that this system is entirely appropriate. The labor contract is a collective-bargaining agreement. It creates rights for the entire bargaining unit; it is not an individual contract for employment. The union is the elected representative of the entire bargaining unit. The law establishes many checks on the union's authority to act in

30. See Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S. Ct. 1127, 1135 (1991) (noting that any "examination of a union's performance . . . must be highly deferential"); see also Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (recognizing that because of the diversity of interests in a union, bargaining representatives must be granted a "wide range of reasonableness" when negotiating a labor contract).
33. Id.
this representative capacity: the duty of fair representation;\textsuperscript{34} employees' ability to vote to decertify a union;\textsuperscript{35} requirements that unions operate democratically and allow members equal rights to participate in union governance and decision making;\textsuperscript{36} and, perhaps most importantly, the requirement that union officials stand for election by secret ballot, at least once every five years in the case of international union officers, and at least once every three years in the case of local union officials.\textsuperscript{37}

As long as these standards of conduct are met, a union has discretion to act in the best interests of the employees that it represents. In this context, the contractually mandated process for resolving contractual disputes should not be judged by its fidelity to "individual rights." Instead, the values that the system is designed to promote are collective rights, and the mechanism developed for that purpose must be judged by that standard.

In short, where the law establishes a regime under which the union and the employer are encouraged to reach a contract, and thereafter leaves it to the parties to enforce their contractual rights, the Board's role in such contract-enforcement procedures is properly secondary to the mechanism chosen by the parties. In this context, the chosen method for contract enforcement does not derive its validity from being an adequate substitute for agency enforcement of statutory rights. Instead, the method derives its validity from the same mechanism that generates the underlying standards of conduct themselves: the labor agreement.

B. Statutory Rights and Private Procedures

Federal labor law not only encourages parties to bargain and reach a contract, it also creates a web of individual rights. Each individual employee has the right, for example, to be free from employer retaliation based on his union activities.\textsuperscript{38} These rights find their source in federal labor law, not in a collective-bargaining agreement. Therefore,

\textsuperscript{34} Ford Motor Co., 345 U.S. at 338.
\textsuperscript{36} Id. § 411(a)(1).
\textsuperscript{37} Id. § 481(a).
\textsuperscript{38} Id. § 158(a)(3).
where violations of these statutory rights are asserted, any policy of deferral to private processes must rest on analytical foundations entirely different from those outlined above. In this context, deference must flow not from the observation that the statutory rights have ceased to apply, but from the observation that the private process provides an adequate substitute for agency enforcement of the rights crafted by Congress.

The Supreme Court examined an analogous issue in a trio of cases and determined that arbitral awards should not be given preclusive effect, even where the contract language parallels the statutory or constitutional rights at issue.\(^3\) Instead, the Court determined that an arbitral award may be given some weight when considering the alleged statutory violation.\(^4\) The degree of weight will depend on a number of factors, including the similarity between the normative standard applied by the arbitrator and that mandated by the statute, the procedural fairness of the proceedings, and the qualifications of the private tribunal.\(^4\)

When statutory protections are at stake, such deference, by definition, runs the risk that the private mechanism will operate in a way that diminishes statutory protections. Two distinct areas of inquiry are therefore necessary. First, one must determine whether the degree of potential damage to the statutory protections has been minimized by ensuring

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\(^4\) In a more recent series of cases, the Court has considered application of the Federal Arbitration Act, 9 U.S.C. §§ 1–15, 201–08 (1988), to a variety of issues arising in connection with individual employment contracts. See Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1652 (1991); Perry v. Thomas, 482 U.S. 483, 489–93 (1987). In general, the principle established in Gilmer is that—unless a contrary intent can be found in the legislation creating the underlying statutory right—individual employees are required to utilize arbitral proceedings, pursuant to the terms of their individual contract for employment, before initiating litigation to enforce that statutory right. See 111 S. Ct. at 1652. The Court has yet to address the analog to post-arbitration deferral; that is, whether, or in what circumstances, the results of that private process are to be given weight in subsequent agency or judicial review. Instead, the Court has merely indicated that post-arbitral review, “necessarily . . . limited, [will be] sufficient to ensure that arbitrators comply with the requirements of the statute” at issue.” Id. at 1655 n.4 (quoting Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987)).
that the private processes both mimic the statutory standards at issue and provide an adequate level of procedural fairness. Second, one must determine whether other policy goals are served by a doctrine that allows some form of deference, and, if so, whether achievement of those goals outweighs the degree of damage to the statutory protections likely to flow from deference to the private procedure.

As we attempted to establish in our original Article, the Board’s current rule fails the first inquiry. The Board’s present deferral policy includes no effort to ensure that the damage to statutory rights is minimized. An allegation of improper discharge, for example, will be deferred to the arbitral proceedings without regard to whether the arbitrator will review the employer’s conduct under a standard similar to that mandated by the statute.

The Board’s current deferral doctrine fails to recognize the crucial distinction between statutory and contractual rights, and proceeds instead from a simplistic desire to develop a single rule that would apply to both circumstances. Having framed its goal in this manner, the Board, we believe, was doomed to failure from the start.

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42. See Page & Sherrick, supra note 1, at 655–56.
43. See id. at 657 n.52. As we noted in our original Article, however, there are a number of policy-based arguments that lend support to a policy of deferral. Federal labor law always has favored private resolution of workplace disputes. Section 203(d) of the LMRA provides: “Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes . . . .” 29 U.S.C. § 173(d); see also Page & Sherrick, supra note 1, at 648 n.5 (discussing the expansion of § 203(d) to stand for the general principle that federal labor policy favors private resolution of all workplace disputes, not merely “grievance disputes”).

In addition, the union’s role is strengthened to the extent that the resolution remains internal to the union-employer relationship and occurs without need for external review by agencies or courts. Page & Sherrick, supra note 1, at 669. Finally, all policies of deferral ease the docket of an overworked agency or judiciary. In our view, however, these policies lend support to a deferral policy only if that policy first makes an adequate effort to minimize the damage to statutory rights, as discussed in the text. Because the Board’s current policy makes no effort in this regard, we do not believe that it should be salvaged by reference to these generalized policies. In short, these policies could be used to justify virtually any form of deferral, and their presence should not relieve the Board of its primary duty to ensure that the potential damage to specific statutory protections has been eliminated or minimized.

44. Since our original Article, Judge Edwards again has sought to ground the Board’s deferral doctrine on a theory of waiver of statutory rights. See Plumbers & Pipefitters Local Union No. 520 v. NLRB, 955 F.2d. 744 (D.C. Cir. 1992). Judge Edwards begins by properly characterizing the Board’s present deferral doctrine as “vacuous . . . because it lacks any coherent theoretical basis,” id. at 746, but then proceeds to remedy this deficiency by suggesting that, when a union and an employer bargain for a contract (and agree to arbitrate disputes arising under that contract), they
II. JOINT COMMITTEES, ARBITRATION, AND CONTRACTUALISM

Most collective-bargaining agreements establish a grievance procedure that culminates in a hearing before an arbitrator selected by the employer and the union. That arbitrator is charged with the responsibilities of interpreting the contract and determining the rights of the parties thereto. Although not bound by legal principles of contract interpretation, most arbitrators apply traditional tools of contract construction borrowed from legal methodology, adding to those an almost intuitive approach to the "law of the shop." In addition, arbitration proceedings, although somewhat informal, share many characteristics with judicial proceedings: witnesses are examined and cross-examined; evidence is introduced; opening and closing statements are made; and briefs are often submitted. The arbitrator then reviews the evidence and the applicable contract language and generally applies interpretive methods very much like those developed under contract law.

In contrast, under many collective-bargaining agreements negotiated by the International Brotherhood of Teamsters, disputes involving alleged violations of contractual standards are subject to a grievance procedure that culminates in a negotiation. Under this system, if the parties are unable to resolve a contract dispute, the issue is referred to a "joint committee" and the union is released from its no-strike

are implicitly waiving reliance on a broad range of statutory rights, see id. at 751. As in our original Article, we respectfully disagree. Waivers of statutory rights may be found only if based on clear and unmistakable contract language. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 709 (1983). In our experience, when the parties agree in an arbitration clause that "disputes arising under this agreement" will be subject to mandatory arbitration, and further agree that the arbitrator has no authority to modify the agreement but only to interpret it, they have neither considered waiving, nor intended to waive, the background of statutory protections which are antecedent to that contract. In such circumstances, therefore, we do not believe that a clear and unmistakable waiver of those statutory rights can be shown.

46. Id. at 141–42.
47. Id. at 267–69, 273–76.
48. Id. at 342–65.
49. See Levy, supra note 11, at 555–58.
pledge. In that setting, the issue is resolved by traditional collective-bargaining techniques: the union brings its bargaining strength to bear on the issue by threatening the employer with a strike if union demands are not met. Unlike the arbitral model discussed above, the language of the contract and its intended meaning, while perhaps bearing on the parties' perceived bargaining strength, do not determine the outcome of the dispute. Instead, the parties resolve their dispute by recourse to bargaining (and its alternative, the strike).

Central to Levy's analysis of these joint committee processes is an assumed distinction between the union's "institutional" interests and the employees' individual interests. Given this thesis, it is not surprising that Levy sees little value in the joint committee approach. The arbitral approach comes much closer to fitting Levy's model of collective-bargaining agreements that endow each employee with individual rights. Levy would rather have arbitrators, acting like judges, read and apply contract language than have the union, backed by a strike threat, bargain on behalf of employees. This is a policy choice which, as we will attempt to show, should have

50. See id. at 554-55. It appears that the employer is not similarly released from its "no lock out" pledge. This, however, is not as asymmetrical as it might first appear. The employer took the action that led to the dispute in the first place by allegedly violating the contract. The union is in a wholly reactive position: it either strikes or it does not. If it does not, the employer's conduct stands, and the employer has no reason to stage a lock out. In short, the employer is not asking for anything from the union except acquiescence to its unilateral conduct. The employer does not need the affirmative lock-out weapon; it need only put the union in a position to choose between striking and acquiescing. This it can do simply by unilaterally imposing the term or condition of employment it seeks and thereby forcing the union to react.

51. In addition, after exhausting the grievance procedure, the union may sue directly to enforce the substantive terms of the agreement without striking. Groves v. Ring Screw Works, Ferndale Fastener Div., 111 S. Ct. 498, 503 (1990).

52. See Levy, supra note 11, at 535.

53. Several labor scholars may have come to the opposite conclusion: that the union should routinely determine the propriety of employer conduct by resort to the strike weapon rather than by a resort to a written contract. The contract-based approach, according to one of these writers, has led to "the domestication and decline of the labour movement." Staughton Lynd, Trade Unionism in the USA, NEW LEFT REV., Nov.-Dec. 1990, at 76, 81 (reviewing DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR (1987) and KIM MOODY, AN INQUIRY TO ALL: THE DECLINE OF AMERICAN UNIONISM (1988)). Another writer argues, "To place the contract somehow above the realm of human action and class interaction is to miss the dual character of class relations in the workplace." Kim Moody, A Reply to Staughton Lynd, NEW LEFT REV., Nov.-Dec. 1990, at 87, 92. Nevertheless, Moody concludes that the contract and the grievance procedure do have benefits in that they "provide a legitimizing focus around which to conduct resistance or organize struggle." Id.
no bearing on the degree of deference properly afforded to the parties' chosen mechanism in cases involving section 8(a)(5) and contractual rights.

A. Deferral in the Context of Contractual Rights

When the underlying rights at issue are those created by the labor agreement itself, the joint committee resolution mechanism is no less deserving of deference than the arbitral mechanism. As noted in Part I, when contract rights and the duty to bargain are the only issues contested, the existence of a contract covering a certain element of employer behavior completely ends the legal analysis; section 8(a)(5) has served its purpose and there are no longer any rights at stake other than those specifically created by the contract.54 In that context, whether the mechanism for determining the scope of those contractual rights is arbitration or a joint committee acting under the threat of a strike makes absolutely no difference. In both cases, the contract has created the rights at issue, and the contractual procedures provide the final answer as to the scope of those rights.55

The same analysis also applies to negotiated resolutions of contractual disputes. Virtually all grievance procedures require that parties attempt to negotiate a resolution to their dispute before submitting it to arbitration or to the joint committee.56 When these efforts end in resolution, as they do in the vast majority of cases, that negotiated result (just like the arbitral decision or the joint committee determination) is the final word on the contract and its meaning.57 As such, that result deserves the same kind of deference, and should

54. See supra notes 25–28 and accompanying text.
55. This analysis assumes that the procedure for interpreting the contract—whatever it may be—has operated without a breach of the union's duty of fair representation. That duty ensures that the procedure will operate with an assured level of fairness. See infra text accompanying notes 84–87.
57. See General Drivers, Local Union No. 89 v. Riss & Co., 372 U.S. 517, 519 (1963) (per curiam) ("Thus, if the [decision of the contractually created committee] is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under § 301 [of the LMRA].").
be challenged only by a showing that the process was tainted by a breach of the union's duty of fair representation.58

One might argue that this analysis would allow the union and the employer to agree upon any sort of dispute resolution mechanism and endow it with equal force. That is correct. The only caveat to this conclusion is that the union must always be constrained by its duty of fair representation.

Imagine, for example, that a union and an employer agreed that work on Sundays would be paid at double the normal rate and that disputes under the contract would be resolved by an arm-wrestling contest between the union steward and the supervisor. When an employee is paid at his normal (as opposed to the contractually required double time) rate for Sunday work, is his remedy to assert an individual contract right to double time? No. His remedy is to show that the union acted arbitrarily in negotiating the contract itself.59

Levy does recognize, somewhat begrudgingly, that a joint committee process, like an arbitration-based process, deserves deference when contractual rights are at issue.60 Levy, however, clearly prefers arbitration's more adjudicatory approach, even in this context. For example, in the brief discussion in which he admits that deference is proper in this context "as a matter of law," he also refers to the joint committee approach as "a quick and dirty way of deciding how those [contractual] rights ought to be applied," and asserts that doing so "decreas[es] fairness to the employees."61 Levy's views reflect two underlying assumptions: that the union's "institutional" interests are distinct from those of

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58. See, e.g., Alpha Beta Co., 273 N.L.R.B. 1546, 1547 (1985) (stating that arbitral deferral principles articulated in Olin apply equally to settlements "because they further the national labor policy which favors private resolution of labor disputes"), petition for review denied sub. nom. Mahon v. NLRB, 808 F.2d 1342, 1345–46 (9th Cir. 1987).

59. For a discussion of the standards established by the duty of fair representation in the context of negotiation, as opposed to administration, of collective-bargaining agreements, see Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S. Ct. 1127, 1133–35 (1991). While we are not aware of any case directly on point, we believe that the employee may also be excused from the requirement of exhausting the procedure if he can show that the procedure itself violates the duty of fair representation. Cf. Clayton v. UAW, 451 U.S. 679, 689 (1981) (stating that internal union procedures must meet certain thresholds of fairness and adequacy of relief before exhaustion is required). Only such a showing—like the showing that the union violated that duty in handling a particular grievance—should relieve the employee of the duty to exhaust the contractually mandated procedure for determining and enforcing rights created by the contract.

60. See Levy, supra note 11, at 567.

61. Id.
the employees it represents, and that the arbitration model provides an increased level of "fairness" by using an adjudicatory tribunal that at least pays lip service to the existence of individual rights arising under the contract.

Levy backs up the first of these assumptions with anecdotal evidence.Obviously, we will not argue that unions never err nor that some union officials are never motivated by improper concerns. Levy, however, does not indicate why he believes that the duty of fair representation is insufficient to guard against these problems, or why it is necessary to contort the collective-bargaining agreement into a series of individual contracts of employment in order to guarantee "fairness" and avoid "quick and dirty" enforcement of contract rights. The second assumption reflects Levy's preference for a juridical model of allocating power in the workplace. Levy apparently believes an adjudicatory approach provides greater "fairness" simply because individual employees, looking out for their own self-interest, are given a greater role to play. Levy does not even examine, however, the possibility that employees acting collectively, by threatening or conducting a strike, could obtain an equal or greater level of "fairness."

B. Deferral in the Context of Statutory Rights

Analysis of negotiated or joint committee determinations is entirely different when considering deferral in the context of statutory rights. As discussed in Part I, deference is justified in this context only to the extent that the private mechanism is an adequate substitute for agency or judicial consideration of the substantive statutory standards at issue, and when it is bolstered by other beneficial policies served by such deference. Here it makes little sense to defer to a process of negotiation or a joint committee decision; there is no reason to believe that either provides an adequate substitute for judicial scrutiny of employer conduct. When an arbitrator is called upon to interpret contract language that parallels the statutory language at issue, however, the

62. Id. at 480-92.
63. See supra notes 38-44 and accompanying text.
Supreme Court has held that an arbitral decision may be given weight in a subsequent judicial proceeding. 64

The Board's original deferral policy at least partially recognized this distinction between appropriate deferral analysis in the context of statutory, as opposed to contractual, rights. In Collyer Insulated Wire, 65 the Board deferred a section 8(a)(5) dispute to arbitral processes because in such cases "[t]he contract and its meaning . . . lie at the center of th[e] dispute." 66 Subsequently, however, the Board attempted to craft a uniform rule governing deferral, no matter whether the underlying violation concerned section 8(a)(5)'s bargaining requirements or an allegation that the employer violated the substantive statutory mandates of section 8(a)(3). 67 Most disturbingly, the Board held that—even in cases involving section 8(a)(3)'s substantive protections—the arbitrator's decision need not "be totally consistent with Board precedent," but will be deemed worthy of deferral as long as it is not "palpably wrong." 68 This deferential standard plainly fails to ensure that the contractual standard of conduct applied by the arbitrator parallels the standard that would be applied by the Board were it to consider the charge directly. Although there is no reason to inquire into that parallelism in the context of duty-to-bargain charges where the rights are purely contractual, the failure to do so in the context of a section 8(a)(3) dispute means that employees have lost all access to Board enforcement of those important substantive protections.

64. See supra notes 39–41 and accompanying text.
66. Id. at 842.
67. See, e.g., Olin Corp., 268 N.L.R.B. 573, 574 (1984) ("[D]ifferences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination . . . of whether an award is 'clearly repugnant' to the Act."); United Technologies Corp., 268 N.L.R.B. 557, 559 (1984) ("Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery.").
68. Olin Corp., 268 N.L.R.B. at 574.
III. DEFERRAL TO INTERNAL UNION PROCEDURES
AND THE DUTY OF FAIR REPRESENTATION

The duty of fair representation establishes the minimum level of fair play required by a union in all its activity. As such, it is a right that flows to individual employees from federal law rather than from a contract. Deferral to a private dispute resolution process in this context, therefore, cannot be justified by the observations described above regarding the special nature of section 8(a)(5) and the duty to bargain. Like other statutory protections, parties do not waive the duty of fair representation merely because they have executed a collective-bargaining agreement. As with other statutory rights, any deferral to private dispute resolution mechanisms can be justified only by reference to the two inquiries described in Part IB: (1) whether the private process will apply substantive and procedural standards similar to those mandated by the law and thus ensure that the potential damage to statutory rights has been minimized; and, if so, (2) whether other beneficial policies are furthered by deference.

The first of these inquiries, we believe, should parallel the Supreme Court's determination that a private arbitral award determination may not be given preclusive effect but may, under appropriate circumstances, be given weight in a subsequent agency or judicial review. The most important factor in determining the degree of such weight should be the extent to which the private process mimics both the substantive standards and the procedural safeguards fashioned by Congress. In short, deferral here is justifiable only to the extent that the private tribunal represents an adequate substitute for the legal procedures otherwise available. Although our analysis, like the Supreme Court's, never would result in the decision of a private tribunal being given "preclusive" effect in subsequent litigation, it may result in

69. See Air Line Pilots Ass’n, Int’l v. O’Neill, 111 S. Ct. 1127, 1130 (1991) (holding that the rule announced in Vaca—that a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith"—applies to all union activity, including contract negotiation).

70. See supra note 44.

71. See supra p. 934–36.

72. See supra notes 39–41 and accompanying text.
an agency or court giving substantial weight to those procedures and their results in the proper circumstances.\textsuperscript{73}

Before discussing the specific statutory standards involved in the duty of fair representation, we outline briefly some of the policies which a rule giving substantial weight to private internal union processes in this context would further. Where appropriate, we also note the distinctions between application of these policies in the context of internal union procedures and in the context of collectively bargained grievance procedures. We then discuss the statutory standards of the duty of fair representation.

\textbf{A. Policy Goals}

Among the potential justifications for a policy of deferral is the observation that until the private process has proceeded to its conclusion, the challenged action may be reversed; the private process may provide full (or even partial) relief to the complaining party who may, therefore, decline to seek agency or judicial review. Stated in general form, this observation clearly applies to any process of private dispute resolution.

This policy has two component parts. First, by staying its hand, the agency may reduce its docket simply because the dispute might be resolved to the complaining party's satisfaction without the need for agency or judicial intervention. As the Supreme Court has noted, arbitration often serves a "therapeutic" function by allowing the union or the employee to air the grievance and receive a determination.\textsuperscript{74} Providing

\begin{footnotesize}
\textsuperscript{73} In the case of § 8(a)(3), for example, we argued in our original Article that the Board's current policy of broad deference is incorrect. See Page & Sherrick, supra note 1, at 658-68. In contrast to our approach, the Board currently makes no effort to determine that the collective-bargaining agreement at issue protects the same categories of behavior that the statute was designed to protect. Id. at 661-63. Instead, all that it requires is that the dispute presented to the private tribunal is "factually parallel" to that which the parties would have presented to the Board and that the arbitrator was "presented generally" with the relevant facts. Olin Corp., 268 N.L.R.B. 573, 574 (1984). Moreover, rather than attempt a case-by-case analysis of the amount of weight to be given to the decision of the private tribunal, the Board has approached the problem by attempting to erect a threshold analysis: so long as that tribunal's decision is not "palpably wrong" when considered in light of the statutory commands, the Board will refuse to intervene. Id.

\end{footnotesize}
employees or the union with their "day in court," albeit before an arbitrator rather than an agency, serves this therapeutic function. This observation, however, applies broadly to any deferral policy, and, by itself, hardly compels removal of statutory protections.75

Second, when an agency or court allows the private processes an opportunity to work, and gives their decision some degree of weight in a subsequent agency or judicial review, the entity responsible for maintaining that private mechanism has an incentive to operate it effectively and to take pride in its integrity. This incentive effect, however, works only to the extent that the degree of weight or deference given to the decision varies depending upon the integrity of the private process. A universal rule setting a single level of deference will not reward those entities that establish more complete and neutral systems of internal review. Nor will a single standard punish those entities that fail to establish such a system.

This incentive effect, as we argued in our original Article, is more compelling in the context of internal union procedures than in collectively bargained dispute resolution mechanisms.76 In collective bargaining, the parties agree to a system of private dispute resolution with a view toward enforcing the rights they have created in their contract. The processes are designed to resolve contractual disputes, not to provide a general level of fair treatment nor to substitute for statutory

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75. In general, we have refrained here from distinguishing between arguments in favor of deferral prior to a decision by the private tribunal, as developed in Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), and deferral or deference applied to the results of that private process after its conclusion, as developed in Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955). As Levy points out, there are some differences between the Board's rationales for these distinct doctrines. See Levy, supra note 11, at 494–95, 501. In fact, one of the justifications, the "ripeness" or finality argument—that the decision remains capable of reversal until it has received all the review that is available—applies only to pre-arbitral deferral and does not advance the inquiry into whether that decision, once made, should be given weight by a reviewing court or agency.

Nevertheless, we believe that most of the arguments advanced in the text apply equally whether the question arises before or after the private tribunal has reached its conclusion. In addition, we believe that there are strong reasons to prefer a policy that is "symmetrical" in that it either (1) both requires exhaustion and gives weight to the private decision or (2) allows the aggrieved individual immediate access to an agency or judicial forum and applies statutory protections without regard to the results of private review processes. It hardly makes sense to require exhaustion of a private process and then ignore the result.

76. See Page & Sherrick, supra note 1, at 684 n.168.
rights. In addition, because these processes are the result of collective bargaining, they are neither designed exclusively by nor uniquely associated with either the employer or the union. Given these features of the environment in which these contractual procedures are developed, we do not believe that varying the levels of deference to collectively bargained arbitral processes would give the parties sufficient incentive to redesign the processes to obtain the greater degree of deference when statutory rights are at issue.

Internal union procedures are designed differently. They are not created to enforce particular contractual rights. Instead, their purposes are broader: preventing abuses by individual union officials and in general "[p]rotecting the democratic rights of [union] members . . . [and] minimiz[ing] the possibility that these democratic rights are undermined in any way." Moreover, the union creates these procedures on its own, and, therefore, is directly identified with them and the quality and integrity of their operation. For these reasons, we believe that a policy of deference to internal union procedures is much more likely to achieve the benefits of encouraging responsible self-government than would a similar policy of deference to collectively bargained arbitral remedies.

In addition to these incentives for union officials, a policy of varying deferral in this context also would have an effect


78. In his Response, Levy speculates that a policy of deference to an internal union appeal mechanism might reduce the incentive that front-line union officers have to provide quality representation. See Levy, supra note 8, at 914. Levy's argument in this regard would have some force if the fear of duty-of-fair-representation liability were the only motivating factor for local union officers. Happily, that is not the case. Local union officers are elected by the individuals they represent. 29 U.S.C. § 481. In our judgment, they would be unlikely to be reelected if their approach were to simply pass responsibility to a higher union body or, worse, to make decisions adverse to their constituencies only to have those decisions reversed by internal appellate mechanisms. Moreover, in the UAW's internal appeal procedure, the first step is to present the matter to the membership of the appellant's local union. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, CONST. art. 33, § 2 (1989). The union official who has refused to pursue a grievance or who has taken other action which is the subject of an appeal therefore always must be prepared to defend her decision before the membership body which has the ability to vote her out of office. In our experience, these factors provide much greater motivation for honest and zealous representation than the threat of union liability under the duty of fair representation.
on union members' selection of their representatives, which, after all, is done by secret ballot. As the Ninth Circuit recently noted, "Democratic processes atrophy when they are not exercised; union members will have no interest in improving their organizations' internal adjustment procedures if they never are required to use them." 79

Union members' ability to influence the review procedures adopted by their union also distinguishes this situation from that of the employer who promulgates unilateral procedures. Obviously, employees do not elect their employer. Requiring employees to use unilaterally promulgated employer tribunals and then deferring to the resulting decision therefore will not facilitate any helpful input from the end-user of that procedure (the employee) as to the rules of, or standards to be applied by, that tribunal. Instead, such a requirement would serve only to allow the employer, by promulgating such policies, to avoid statutory scrutiny of his actions. 80

B. Statutory Standards

Any policy of deferring, or even giving weight, to the results of private dispute resolution processes runs the risk of diminishing statutory protections. No matter how significant the other benefits of deferral are in terms of docket control, self-governance, incentive effects, or the promotion of the private resolution of disputes in general, we believe that no deferral policy should stand if it systematically diminishes statutory protections. In order to determine whether the potential damage to statutory rights is too great to be tolerated, we must inquire into the nature of those statutory rights and the standards applied by the private processes. As we attempt to show, the duty of fair representation is an excellent candidate


80. The incentives in such a system are perverse. The employer would have an obvious interest in establishing a procedure that accomplished the desired, and legal, result of preventing litigation, but would also seek a procedure with maximum bias against employee claims. Moreover, as noted in the text, the employees have no opportunity to influence the design of such procedures.
for deferral to properly constituted internal union procedures applying proper normative standards.

To begin our discussion of the statutory rights at issue in the duty-of-fair-representation cases, we first propose a distinction between two types of statutory rights. We characterize these two different kinds of statutory rights as follows: (1) those providing a narrow focus and strong protection in an otherwise nondemocratic relationship; and (2) those providing a broad focus and generalized protection in a relationship which is already required to be democratic.

The first category of rights are derived from statutes serving one of three functions: (1) protecting a certain category of behavior from private or state retaliation;\(^81\) (2) protecting persons from discrimination based on specific attributes such as race or gender;\(^82\) or (3) regulating the relations between private parties by establishing certain substantive terms which must be incorporated into those relationships.\(^83\)

The second category of statutory requirements dictate with much less specificity the ordering of relations between private parties. They require only that the parties develop private processes which meet some minimum level of good faith, rationality, or responsiveness to the body of represented individuals. The duty to bargain, for example, requires only that the parties develop a process for bargaining; the contours of that process—as well as its result—are intentionally left to the parties’ own discretion.\(^84\)

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81. Section 8(a)(3), which protects employees from employer discrimination based on union activities, is the example closest at hand. Other examples in the labor field include state statutes which prohibit employer retaliation for filing workers’ compensation claims or asserting other substantive rights. See, e.g., CAL. LAB. CODE § 132a(1) (West 1989) (prohibiting employer discrimination against an employee who applies for adjudication with the appeals board); LA. REV. STAT. ANN. § 23:1361(B) (West 1985) (forbidding employer discharge of employees who file worker’s compensation claims); MICH. COMP. LAWS ANN. § 15.362 (West 1981) (prohibiting employer discrimination against employees who report violations of state or federal law); see also Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 406 (1988) (referring to the Illinois common-law tort of retaliatory discharge for filing a workers’ compensation claim).


83. The Fair Labor Standards Act, for instance, establishes minimum-wage levels and requires that overtime work be compensated in a certain fashion regardless of any other contractual provision which exists between the employer and the employees or their representative. 29 U.S.C. §§ 201–219 (1988).

The duty of fair representation, we believe, fits within this second category of less specific statutory rights. It does not attempt to dictate the substantive terms of the relationship between the union and its members; nor does it single out particular categories of individual behavior for strong protection. Instead, the duty of fair representation serves as a further check on potential abuse in a process that is already required to operate democratically. But, importantly, the specific contours of the relationship between the elected union officials and the membership are otherwise left to the discretion of the members and their elected representatives.

This type of broadly focused, statutory right demonstrates a healthy respect for the self-determination of the regulated groups. Unlike a minimum-wage law, it does not dictate with specificity the terms of that private relationship. Nor does it intrude into a nondemocratic private relationship in order to specify a narrowly defined category of behavior for protection. As in all laws, of course, there is an undeniable degree of compulsion involved in the duty of fair representation. Nevertheless, the law exercises that compulsion only to ensure that a privately designed, democratic relationship between the union and its members will function in a manner that is not "arbitrary, discriminatory, or in bad faith."

In contrast, labor statutes in the first category regulate conduct with a much different goal: to protect certain specified categories of behavior from employer retaliation. For example, section 8(a)(3) prohibits employers from retaliating against employees for the purpose of encouraging or discouraging membership in a labor organization. Congress determined that, in these circumstances, the law must intrude narrowly into a private, and otherwise nondemocratic, relationship "by placing certain enumerated restrictions on the activities of employers" in order to provide strong and absolute employee protection. The need for this intrusion can be attributed, at least partly, to the nondemocratic nature of the employer/employee

86. Id.
87. Id. at 1130; Vaca v. Sipes, 386 U.S. 171, 190 (1967).
90. The Supreme Court stated, "The central purpose of [§§ 8(a)(1), (3), and (5)] was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employers." Id. at 317.
relationship. No natural checks and balances operate to moderate the potential mischief which employers might seek to visit upon their employees. The law, therefore, is the only mechanism that provides at least some measure of employee protection in this context.

Both the goal and the context of the duty of fair representation are different. The goal is to provide a more generalized form of protection that reaches broadly into the private relationship. Virtually all forms of union conduct are subject to scrutiny under the duty of fair representation. The protection that scrutiny affords, however, is focused much less sharply on any particular type of protected behavior. Further, the duty of fair representation arises in a more democratic context. As previously noted, employees elect union officials by secret ballot. These elected officials are then charged specifically with the duty of representing their members. In this circumstance, employees already enjoy, and properly so, a significant ability to influence their representatives' conduct. If employees feel that their interests are not being adequately represented, they are free to defeat the current leadership, run for office themselves, or decertify the union altogether. Obviously, employees possess none of these democratic rights when confronting an employer. This distinction, we believe, indicates that deferral is more appropriate in the context of procedures adopted by democratically controlled and representative bodies such as unions than in the context of procedures unilaterally adopted by employers whose interests are, after all, generally antithetical to employees in this context.

91. We recognize that the employment relationship remains "voluntary" in the sense that employees can always quit their jobs. Particularly in an era of high unemployment and decreasing real wages, however, this "right" is more formal than real. Even if an employee could hope to find a comparable job, there are other costs of quitting a job: one might be forced to sever important social ties developed through work; abandon benefits such as health insurance, pension plans, or accrued vacation; or even relocate. In any event, it need only be noted here that the employer retains the ability to compel an employee to either endure the terms of employment offered or face the significant costs of terminating that relationship. A union, in contrast, can be forced to change its policies when its members express that preference through the ballot box.

92. See Air Line Pilots Ass'n, Int'l, 111 S. Ct. 1127, 1134–35 (1991) (stating that the duty applies to union negotiation, as well as to the administration, of a collective-bargaining agreement).

93. Id.

94. See supra text accompanying notes 34–37.

95. See supra note 91. The ability to quit, like the ability to leave one's nation and adopt citizenship elsewhere, is hardly comparable to the right to influence, through democratic means, the policies or conduct of one's employer.
C. Deferral Policy in Light of the Type of Statutory Right in Issue

Section 8(a)(3) and the other forms of highly specific statutory rights are poor candidates for deferral. In those instances, Congress has determined that the agency or the judiciary must ensure that certain narrowly defined categories of conduct are free from retaliation. The right at issue is, in a true sense, an individual right. The statute does not envision a balancing of interests or a broad perspective on the totality of a relationship. Instead, it decrees that particular conduct is protected from reprisal in all circumstances. Moreover, these protections occur in the context of a relationship that is otherwise wholly lacking in any of the significant mechanisms that a democratic structure provides to ensure fair treatment.

The duty of fair representation, as noted above, establishes a more broadly focused and process-oriented standard. It is designed to ensure that the private relationship between the union and its members adheres to a broadly defined standard of fairness. As the Supreme Court has noted recently, duty-of-fair-representation charges can be evaluated only by considering the "factual and legal landscape at the time of the union's actions" to determine whether the union acted reasonably. In this context, the presence of an internal review mechanism is entirely relevant to the merits of the underlying claim. When the union voluntarily subjects its conduct to review by a tribunal which is capable of reversing the union's determination, the very availability of that tribunal is relevant to the inquiry of whether the employee has been

96. For example, § 8(a)(3) unequivocally states that an employer engages in an unfair labor practice when she, "by discrimination in regard to hire or tenure of employment or any term or condition of employment . . . encourage[s] or discourage[s] membership in any labor organization." 29 U.S.C. § 158(a)(3) (1988).

97. This is not to suggest that an arbitral decision in this context is in all instances to be given absolutely no weight in subsequent agency or judicial action. If the arbitral proceeding resolves factual disputes, or applies contractual provisions which are closely similar to the applicable statutory standard, there is no reason that the agency or the court must remain wholly uninterested in the results of that process. Any weight given to the arbitral result in this context, however, must be justified by specific observations about the quality of the process involved or the similarity of the standards applied and should not flow from any universal policy of deferral which ignores these factors.

98. See supra text accompanying notes 92–95.

afforded fair and reasonable treatment. In addition, the substantive legal right in controversy here, in contrast to the right at issue pursuant to section 8(a)(3), is the right to a fair and adequate process of representation.\footnote{100}{See Vaca v. Sipes, 386 U.S. 171, 177 (1967) ("[A]s the exclusive bargaining representative of the employees[,] . . . the Union had a statutory duty fairly to represent all of those employees . . . ."); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953) ("[B]argaining representatives[. . . .] statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any.").}

Moreover, as previously noted, democratic mechanisms already govern the union/member relationship.\footnote{101}{See supra notes 34–37 and accompanying text.} The law requires that members have a significant voice in the nature of the institution, its governing principles and priorities, and the identity of its leadership.\footnote{102}{29 U.S.C. §§ 159, 411, 481.} To allow statutory protections to be subsumed into internal processes presents a very different question when a democratically elected body creates those internal processes. When an employer promulgates such policies, he is doing so unilaterally and a desire to avoid litigation may be his primary, if not his sole, motivation.\footnote{103}{See supra note 80.}

When a union promulgates internal review mechanisms, in contrast, it is motivated by a desire to be responsive to the membership which, after all, retains the ultimate ability to elect new leaders or to abandon the union altogether.

None of the foregoing is meant to suggest, however, that the NLRB or the courts should always defer to any internal union procedure. When statutory rights are at stake, the agency or court must also evaluate the procedure based on its adherence to normative standards of conduct closely resembling those mandated by Congress. We do not intend to obviate the need for this inquiry by observing that the duty of fair representation arises in a unique context. Instead, we wish only to demonstrate that the nature of the statutory rights at issue, coupled with democratically controlled unions, make duty-of-fair-representation allegations better candidates for deferral than allegations that an employer has violated the specific statutory commands of section 8(a)(3).\footnote{104}{For the same reasons, most types of charges under the Labor Management Reporting Disclosure Act (Landrum-Griffin Act) would also be good candidates for deferral. There, as in the duty-of-fair-representation context, the law is designed to guarantee a fair process within the context of a democratic organization. See 29 U.S.C. §§ 401–531 (1988).}
D. The UAW Constitution

With that much as background, we now briefly survey the internal union procedures found in the United Auto Workers Constitution of the International Union UAW\textsuperscript{105} and attempt to show that they provide adequate standards of both procedural and substantive fairness, thereby deserving deference.

The UAW Constitution provides a level of procedural fairness comparable to that supplied by either the NLRB or a federal district court when it considers a duty-of-fair-representation case. Thus, under their Constitution, UAW members are free to participate in hearings, first before the membership of their local union, and then before a committee selected by the International Executive Board (IEB).\textsuperscript{106} Members then have the option to appeal IEB decisions before either the Public Review Board (PRB) or the Convention Appeals Committee (CAC).\textsuperscript{107} The PRB consists of distinguished individuals with no institutional ties to the UAW and, therefore, provides a neutral forum for resolution of these disputes.\textsuperscript{108} The CAC is composed of local union delegates chosen at random from the UAW Convention, the Union’s highest authority.\textsuperscript{109} These individuals are elected by their regional union membership and have no other institutional ties to the International Union.\textsuperscript{110}

Under the UAW Constitution, the private tribunal applies a substantive standard closely parallel to that mandated by the duty of fair representation. Thus, while the duty of fair representation requires that the union act in ways that are not “arbitrary, discriminatory, or in bad faith,”\textsuperscript{111} the UAW Constitution directs one of its internal tribunals of last resort, the PRB, to review union decisions whenever a complaining

\textsuperscript{105}. \textit{International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Const. art. 33, § 2 (1989) (on file with the University of Michigan Journal of Law Reform)}.

\textsuperscript{106}. \textit{Id. art. 33, § 3}.

\textsuperscript{107}. \textit{Id. art. 33, § 3(e)–(f)}.

\textsuperscript{108}. \textit{Id. art. 32, §§ 1–2; see Monroe v. International Union, UAW, 723 F.2d 22, 24 n.3 (6th Cir. 1983) (noting that the PRB “is, according to uncontradicted evidence, an independent group of academic and social agency persons with no UAW affiliation”)}.

\textsuperscript{109}. \textit{International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Const. art. 33, § 3(e) (1989) (on file with the University of Michigan Journal of Law Reform)}.

\textsuperscript{110}. \textit{Id}.

\textsuperscript{111}. \textit{Vaca v. Sipes, 386 U.S. 171, 190 (1967)}. 
member shows that the matter was "improperly handled because of fraud, discrimination or collusion with management, or that the disposition or handling of the matter was devoid of any rational basis."\textsuperscript{112}

\textbf{CONCLUSION}

We believe that where the union has subjected its own conduct to review by a neutral body, applying a standard of conduct very similar to that mandated by the duty of fair representation, both the Board and the judiciary should show that procedure the respect it is owed. We are not, however, arguing for a "rule" of deference like that currently applied by the Board to employer/employee grievance procedures. Instead, we argue only that both the Board and the courts should examine the quality of the internal review provided by a union and give the results of that procedure a significant degree of weight in subsequent litigation when, as in the case of the UAW, that tribunal supplies standards of procedural and substantive fairness which closely mimic those provided in the statute.

\textsuperscript{112} \textit{International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Const., art. 33, § 4(i) (1989)} (on file with the \textit{University of Michigan Journal of Law Reform}). The other internal tribunal, the Convention Appeals Committee, is empowered to review IEB decisions without a showing of fraud, discrimination, collusion, or irrationality. \textit{See id. § 3e}. 