UNION POWERS AND WORKERS' RIGHTS

Clyde W. Summers

University of Buffalo School of Law
ON January 1, 1944, the Trailmobile Company of Cincinnati absorbed the Highland Body Manufacturing Company, taking over all of its assets and business. All of the Highland equipment was moved to the Trailmobile plant, and all Highland employees were transferred to the Trailmobile payroll. The Highland workers claimed seniority as of their dates of employment with Highland, but the Trailmobile workers insisted that the Highland men were new employees as of the date of transfer. Since both groups were affiliated with the A.F. of L., the dispute was submitted to national representatives of the A.F. of L. When they held in favor of the Highland group, the Trailmobile employees, who outnumbered the Highland employees ten to one, immediately reorganized into a C.I.O. local and petitioned for an N.L.R.B. election. The new C.I.O. local, of course, won and immediately negotiated a contract providing that seniority of Highland employees should date from January 1, 1944.

This contract brought forth a series of suits by Highland workers seeking protection of their seniority status. One of them, Hess, brought a class suit in the Ohio courts to compel the union to restore him and his fellow workers to their seniority rights. The Ohio court refused to give relief, holding that seniority rights arose solely from contract, and the union was empowered as the certified representative to fix those rights by the collective agreement. A second suit was brought by a returned veteran, Whirls, who claimed that because of this clause he had been demoted in violation of his rights under the Selective Service Act. He, too, failed to obtain relief in the courts. In the meantime, the union retaliated by expelling Whirls for conduct unbecoming a union member and demanding his discharge under the closed shop contract. Not daunted, the Highland employees brought still another action in

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1. Matter of Trailer Company, 51 N.L.R.B. 1106 (1943). The board held that the motive for shifting affiliation and seeking an election was beyond its province.
3. Trailmobile Co. v. Whirls, 331 U.S. 40, 67 S.Ct. 982 (1947). The demotion had occurred more than one year after his return from service, and there was no evidence that he had been discriminated against because of his status. Therefore, there was no violation of the Selective Service Act.
the federal courts, this time to enjoin enforcement of the seniority clause as discriminatory and in violation of the union's duty to represent them fairly. The circuit court of appeals denied relief, holding that this "discrimination was in pursuance of the bargaining process, and was not without some basis." The Highland men should not complain, said the court, for they had obtained the closed shop (in the C.I.O.) and other "advantages."*

The plight of the Highland group is not the product of labor strife, but of collective bargaining; not of employer discrimination, but of union power. It symbolizes in an extreme form the potential fate of an individual worker within the structure of unionization and collective bargaining. It sharply reminds us that contracts apply to workers, and that unions consist of members. It warns us that we must not become so obsessed with the glamor of studying mass action that we ignore the fate of those who make up the mass and in whose name the action is taken.

Such cases as the Trailmobile case compel us to give careful attention and serious study to the place of the individual within our collective bargaining system. Since the union represents the worker's interests, and is designated as his spokesman, this is primarily a problem of the relationship of the union to the individual worker. In considering this problem, it will be helpful to view the relationship in two different lights: first, the power of the union to affect or regulate the life of the individual; and second, the right of the individual to control or limit the union's exercise of that power.

I

The Union's Power Over the Individual

Unions are first and foremost collective bargaining agencies. Their principal function is to speak for workers in negotiating terms of employment, to exercise the collective strength of workers in obtaining concessions, and to bind the workers by making collective contracts. The union's power over the individual, therefore, is measured largely by the impact which its bargaining has on the economic life of the employee. The force of this impact depends upon two separate factors: the breadth of bargaining—that is, the number of terms of employment which a union defines by its agreement; and the power of binding representation—that is, the degree to which an individual is

* Trailmobile Co. v. Britt, (6th Cir. 1950) 179 F. (2d) 569.
bound by his union's decisions and is compelled to speak only through his union.

A. The Breadth of Bargaining

The area of bargaining varies so greatly from industry to industry, from union to union, and from employer to employer that accurate generalizations are impossible. However, a quick look at some of the more customary contract provisions will suffice to illustrate the extensive powers which unions exercise over the economic welfare of individual workers.

First, unions bargain to determine who shall work. Most commonly known are the closed shop, union preference, or hiring hall agreements.5 Far more significant, however, is the common seniority clause. Although it does not control who shall be hired in the first instance, it rigidly controls the order in which individuals shall be laid off. Furthermore, by requiring recall of employees on layoff before new hires, seniority may severely limit the job opportunities of new workers seeking to enter the trade.6 In short the seniority clause which the union obtains determines who shall work and who shall not.

Second, unions bargain to determine the amount of wages each employee will receive. The collective contract governs not only the level of wages, but customarily provides for a complex wage structure with wide differentials between job classifications, automatic increases and premium pay. Under the Portal-to-Portal Act and recent amendments to the Wage-Hour Act, the union by bargaining may even create or destroy statutory rights to overtime pay.7

5 Although these have been outlawed by the Labor Management Relations Act, and either prohibited or seriously restricted in 19 states, they are still continued by subterfuge in many instances. See Hogan, "The Meaning of Union Shop Elections," 1 Ind. Lab. Rel. Rev. 319 (1949); Zorn, "New Union Responsibilities," First Annual Conference on Labor Relations at New York University 303 (1948).

6 In 1946, it was almost impossible for a newcomer to obtain a job in the auto industry, because many who had acquired seniority during the war were still laid off. The contract negotiated in May, 1950 between the United Auto Workers and Chrysler Corporation provides that a worker on lay-off retains his seniority for a period equal to his length of service. The company agrees, as far as practicable, to recall seniority employees before hiring new employees. Thus, the ability to get a job at Chrysler, especially during slack times, is practically nil.

7 Under the Portal to Portal Act, §4(b), time spent in preliminary or postliminary activities, such as walking to and from work, is not to be included in computing overtime unless that time is compensable by contract, custom, or agreement. Thus, a union, by obtaining a provision which requires pay for travel time, creates a statutory right to overtime pay. See Tyson, "Effect of 1947 Portal to Portal Act," Report of First Annual Conference on Labor Relations at New York University 541 at 566 (1948).

The Fair Labor Standards Act, as amended in 1949, provides in §3(o) that in determining hours worked, time spent in changing clothes shall be excluded if excluded by
Third, the union helps govern the individual every hour of his working day. The contract sets shift hours which call him to work, describes job classifications which define his work, and provides the offenses for which he may be disciplined. Through the union's grievance procedure he can protest against dangerous machines, poor ventilation, or overbearing foremen. If he is discharged the union can seek his reinstatement.

The power of the union is not confined to bargaining for his working hours, but may extend to his fireside and even to his grave. If he becomes temporarily disabled, he may receive disability payments. If his children become sick, they may receive free hospital care; when he becomes too old to work, he obtains a $100 a month pension; and when he dies, his wife collects the insurance—all of this obtained for him by the union acting as his representative in collective bargaining.\(^8\)

The union's power to bargain does not give it unrestrained power to govern the terms and conditions of employment, for management must agree to those terms. However, the union does make significant policy decisions which vitally affect every employee. The United Mine Workers have had to choose between foregoing wage increases or risking serious curtailment of work, just as many unions during the depression had to choose between wage cuts and mass lay-offs.\(^9\) The Steel Workers had to choose between wage increases and a pension plan, and the Auto Workers at General Motors had to choose between a flat increase and a cost of living formula. In bargaining, demands for skilled workers may be reduced to obtain larger increases for unskilled workers, custom, practice or bona fide collective agreement. Sections 7(b)(1) and 7(b)(2) excuse overtime payments on guaranteed wage contracts if the contract is made by a certified bargaining agent. The overtime-on-overtime amendment provides that shift premiums shall not be included in computing the regular rate, if the premium is established by a collective bargaining agreement. §7(d).

\(^8\) In 1948 over 3,000,000 workers were covered under health and welfare contracts, and many others have become covered since that time. Auto, coal, clothing, electrical machinery, steel and textile are almost completely covered by such provisions. Many other industries such as construction, furniture, fur, leather, paper, and rubber have substantial amounts.

The scope of these provisions is indicated by the new contract between United Auto Workers and Chrysler Corporation which provides hospitalization, surgical benefits, temporary disability payments of $28 a week for 26 weeks, permanent disability payments of $50 a month for 6 years, life insurance of $3,600 and $100 a month pension at 65 for those having 25 years service.

\(^9\) In 1931 the Hosiery Workers took a 30% to 45% wage cut, when, as George Taylor put it, they had to choose between wage cuts and unemployment. This was bitterly opposed by a strong minority of the rank and file. Twentieth Century Fund, How Collective Bargaining Works 484 (1942). A comparable problem faced the railroad brotherhoods during the depression when they had to decide whether they should share the reduced work or reduce the number of employees. Bitterness and internal dissension resulted, with the older men finally winning and eliminating most of the worksharing. Id. at 355.
merit increases may be surrendered for promotion by seniority, and plant-wide seniority may be obtained at the expense of job transfer privileges. The total concessions which can be obtained at the bargaining table are limited, but the union has a substantial power of choice between possible alternatives. The union's choice determines the worker's welfare. If the concessions are inadequate the union has a more drastic decision to make—whether to surrender or to strike. The union decides whether the individual shall forego his claim for future pensions or sacrifice his present savings. As the strike progresses, it is the union which decides whether the claims shall be compromised or further sacrifices required.

The extensive power of unions to regulate the lives of individuals does not arise solely from the union's own strength. The Railway Labor Act, the National Labor Relations Act, and similar state statutes provide affirmative legal protection for organizational activity and collective action. The Norris-La Guardia Act protects unions from labor injunctions, and the Supreme Court has freed them from the strictures of the anti-trust laws.

Unions are not only shielded by the armor of the law, but are armed with the authority of government. Under the Wagner Act and other

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10 One of the longest standing policy problems has been incentive pay plans. Sidney Hillman waged a long fight for piece work in the clothing industry. Although strongly opposed by much of the membership, he was finally able to make piece work the established pattern in the industry. On the other hand the leadership of the Auto Workers has vigorously objected to any form of incentive pay and has insisted on straight hourly rates. TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS 423, 612 (1942); BARBASH, LABOR UNIONS IN ACTION 70-71 (1948). See generally, KENNEDY, UNION POWERS AND INCENTIVE WAGE METHODS (1945).

11 Nine states have statutes which give unions substantially the same protection and authority as the National Labor Relations Act, although some of them also regulate other aspects of labor relations. These states include Colorado, Connecticut, Massachusetts, Minnesota, New York, Pennsylvania, Rhode Island, Utah, and Wisconsin. See KILLINGSWORTH, STATE LABOR RELATIONS ACTS (1948).

12 Seventeen states have also enacted anti-injunction legislation modeled upon the Norris-LaGuardia Act. These include the major industrial states of Connecticut, Indiana, Massachusetts, New Jersey, New York, and Pennsylvania.


14 Not all collective bargaining is carried on within the jurisdiction of a labor relations act. No figures are available to indicate the precise percentage. However, the broad reach of federal power, and the presence of state statutes in some of the most heavily populated areas preclude that percentage from being very large. Furthermore, the Wagner Act has established a pattern of bargaining which is followed almost exclusively in practice. The principle of exclusive representation by the majority union, with which we are most concerned here, is the first premise of collective bargaining in this country. It has been estimated that bargaining for members affects less than 1% of all those under union contract. WILLIAMSON AND HARRIS, TRENDS IN COLLECTIVE BARGAINING 40 (1945).
labor relations acts, they are designated by government as instruments for effectuating broad social policies and economic regulation. The National Labor Relations Board, by defining the appropriate bargaining unit, allocates the industrial territory for the exercise of union power. By officially certifying a union, the board constitutes it the statutory representative of all employees in the unit and vests it with the power to bargain for those employees. The board then compels the employer, under threat of severe penalties, to meet with the union and bargain in good faith. The employer is barred from establishing terms of employment unilaterally, but must first negotiate with the union. Within a wide but yet undefined area, he is compelled to share with the union the power of making any decisions affecting employees. Thus, in the *Allison* case, the employer was required to consult with the union before granting merit increases; and in the *Inland Steel* case he was compelled to permit union participation in deciding the operation of an employer-sponsored pension plan. Furthermore, the union can demand that the employer divulge information as to employment prac-

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15 Although the employer is not required to make concessions or reach an agreement, he must discuss the issues. If he does not make counter-proposals indicating to what he will agree, he runs serious risk of an unfair labor practice charge. See, e.g., NLRB v. Montgomery Ward and Co., (9th Cir. 1943) 133 F. (2d) 676. That this may approach compelling agreement, see Ward, “Mechanics of Collective Bargaining,” 53 Harv. L. Rev. 754 (1940); 26 Va. L. Rev. 769 (1940); Smith, “The Evolution of the ‘Duty to Bargain’ Concept in American Law,” 39 Mich. L. Rev. 1065 (1941).


17 George W. Taylor has said, “Workers join unions to give them the prerogative of interfering with the manner in which management operates its business. . . .” Transcript, *Conference on Training of Law Students in Labor Relations* Vol. 1, p. 24 (1947). Similarly, Professor Chamberlain has said, “Collective bargaining, at least in some areas, is now ripening into a method of management in the firm. . . . We have been particularly loath to accept the fact that union leaders . . . are now exercising the managerial functions. . . .” Chamberlain, “Collective Bargaining and the Concept of Contract,” 48 Col. L. Rev. 829 at 845-6 (1948).


19 Inland Steel Co. v. NLRB, (7th Cir. 1948) 170 F. (2d) 247. This pension plan had been inaugurated by the company and administered solely by the company for over ten years, before the union protested its operation and demanded that the company bargain concerning changes. In W. W. Cross & Co. v. NLRB, (1st Cir. 1949) 174 F. (2d) 875 it was held that the employer must also bargain concerning group health and accident insurance. See also 58 Yale L. J. 803 (1949) for discussion of the scope of bargaining.

For a vigorous criticism of these cases, see Cox and Dunlop, “Regulation of Collective Bargaining by the N.L.R.B.,” 63 Harv. L. Rev. 389 (1950).
Unions, in bargaining, are not private organizations but are governmental agencies garbed with the cloak of legal authority to represent all employees in the unit and armed with the legal right to participate in all decisions affecting terms and conditions of employment.

B. Binding Representation

The impact of the union upon an individual lies not only in the wide range of its bargaining, but in the tightness with which its decisions bind the individual. The union’s grant of power lies in section 9(a) of the National Labor Relations Act, which provides: “Representatives designated ... by the majority of employees in a unit ... shall be the exclusive representative of all employees in such unit for purposes of collective bargaining. . . .”

The completeness of the union’s power to bind individuals is indicated by three Supreme Court decisions. In J. I. Case Co. v. NLRB, the Court held that the union’s power to bargain could not be limited by prior contracts made in good faith between the employer and the individual. The union’s power was supreme, and though the individual may still contract for matters beyond the union’s scope, the breadth of union power leaves small room for individual bargaining. In Order of Railroad Telegraphers v. Railway Express Agency, the union had made a contract providing that each telegrapher be paid for each car of fruit switched at his station. Because of re-routing, this resulted in exorbitant payments to some telegraphers. To correct this, the employer made agreements with individual employees to establish new rates which would yield the amount contemplated by the contract. The court held these agreements invalid. The union’s power to bargain extended not only to general standards, but to each employee’s peculiar


21 321 U.S. 332 at 338, 339, 64 S.Ct. 576 (1944). Justice Jackson emphatically stated the subservience of individuals to collective bargaining. “The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. . . .

“... The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.”

22 Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 64 S.Ct. 582 (1944). The back pay award amounted to $40,000 for one employee, and from $200 to $2,000 for the others.
situation. Only through the union could any changes in terms of employment be made. In Medo Photo Supply Corp. v. NLRB, a majority of the employees attempted to ignore the union and meet with the employer as a group to negotiate an agreement. The court held that so long as a union is the designated bargaining agent, no agreement can be made except through that union. It is not the majority but the designated union which holds the bargaining power.

In short, these cases hold that a union which has been designated as bargaining agent can destroy individual contracts made previously, even though made in good faith; it can void individual contracts made subsequently, even though made to adjust contract terms to fit special needs; and it can prevent the employer from negotiating any agreement with a group of his employees, even though they constitute a majority.

This power of the union continues so long as it is the designated agent. If it is not certified, the employees may be able to escape by revoking their authorization before a contract is made. If it is certified, under section 9(c)(3) it has an irrevocable power for one year and can be unseated only by new representation proceedings. Whether certified or not, if the union obtains a contract, its irrevocable power may be extended as long as three years. Whether the union is still ap-

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23 This power of the union over the individual was further extended in the Allison case, (6th Cir. 1948) 165 F. (2d) 766, where the court held that the employer was compelled to bargain with the union concerning merit increases.
24 321 U.S. 678, 64 S.Ct. 830 (1944).
25 "Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained. . . . " 321 U.S. 678 at 684, 64 S.Ct. 830 (1944).
26 For an excellent discussion of the importance of the majority rule principle in collective bargaining and its application under the National Labor Relations Act, see Weyand, "Majority Rule in Collective Bargaining," 45 Col. L. Rev. 556 (1945).
27 In the Medo case, 321 U.S. 678, 64 S.Ct. 830 (1944) the Court implied that if the employees had voluntarily withdrawn their authorizations without any pressure from the employer, then the employer could have by-passed the union and dealt directly with the employees.
28 The representation proceeding may arise either out of a petition by another union for certification, or a petition by the employees for de-certification under §9(c)(1)(B).
29 In its first decisions, the board held that a contract for one year would bar an election. It later held that a two-year contract would bar an election where contracts of such duration were customary in the industry. In Matter of Reed Roller Bit, 72 N.L.R.B. 927 (1947) it held that a two-year contract would automatically bar an election even though not customary. In Matter of California Walnut Growers, 77 N.L.R.B. 756 (1948) it held a three-year contract a bar where such contracts were customary.

The certification bar and the contract bar may be combined to extend further the union's power. In Matter of Quaker Maid Co., 71 N.L.R.B. 915 (1946) the union renewed and extended its contract 10 months after certification. The board held this new contract negotiated within a year after certification was a bar to further representation proceedings. See Murdock, "Some Aspects of Employee Democracy Under the Wagner Act," 32 Conn. L.Q. 73 (1946); Cushman, "The Duration of Certifications by the N.L.R.B. and the Doctrine of Administrative Stability," 45 Mex. L. Rev. 1 (1946).
proved by the majority is irrelevant. Its power continues. The significance of the one-year rule and the contract bar doctrine is that, like the Medo case, they point an unerring finger at the locus of power. The power to bargain is not vested in the majority, but in the union as an entity wholly apart from the governed employees.

It is, of course, true that the union must have been authorized by a majority of the employees in the unit. With rare exceptions it continues to represent the majority. However, this does not lessen its impact on the lives of individuals, for its decisions bind both majority and minority alike. The Highland group at Trailmobile learned to their sorrow that a union could, by collective bargaining, drastically alter or destroy an individual's seniority rights and the courts would give no relief. Although these rights are the very foundation of a man's right to his job and have been acquired by many years of work, they are subservient to union power.

Thus far we have dealt only with the union's power to bind the individual by negotiation of an agreement. However, the union's control does not end here. The contract requires constant interpretation and day-to-day application; it has gaps which require further negotiation; and it is not self-enforcing but calls for constant vigilance to insure that every employee enjoys full rights. The primary instrument for additions, interpretations, and enforcement is the grievance machinery, and that machinery is completely controlled by the union. The individual files his complaint with the union steward, it is appealed through a union shop committee, is pleaded by union officers, and is arbitrated before a union-approved arbitrator. The individual's claim may be surrendered or compromised by the union at any step. His relief is largely dependent on the union's enthusiasm for his cause.

30 Where there has been a schism in the union, or the local has seceded from the international so that the identity of the union is in doubt, then the board will conduct an election. Matter of Owens-Illinois Pacific Coast Co., 36 N.L.R.B. 990 (1941); Matter of Jasper Wood Products Co., 76 N.L.R.B. 1306 (1947). It is in carrying out this policy that the board has recently conducted a number of elections among electrical workers where there has been a split between the U.E. and the I.U.E.


32 The union's power over the individual through the grievance procedure can scarcely
The union, however, does not have exclusive right to negotiate and settle all grievances. In *Elgin, Joliet & Eastern Ry. v. Burley*, the Supreme Court held that under the Railway Labor Act the union could not make a binding settlement of an employee's claim under the contract without his consent. The individual had a right to negotiate his own grievance with the employer, and to appeal it himself to final determination by the Adjustment Board. The Taft-Hartley Act, in section 9(a), expressly reserves to an employee the right to present grievances and have them adjusted without intervention by the majority union. By implication, this too would bar the union from making a binding settlement without the employee's consent.

This right of the individual must not be over-estimated, for it is hedged about with both legal and practical restrictions. First, individual grievances cannot alter the terms of the agreement; they can only en-

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83 325 U.S. 711, 65 S.Ct. 1282 (1945), affd. on rehearing, 327 U.S. 661, 66 S.Ct. 721 (1946). On rehearing the Court said that consent of the individual might be obtained through the union constitution and by-laws to which he became bound by joining the union, through express consent when he submitted the grievance or through implied consent by standing silent when he had notice or knowledge of pending settlement. However, consent cannot be implied from the bare fact that the individual submitted his grievance to the union grievance procedure, or from mere membership in the union.

84 If the individual does not wish to appeal to the Railway Adjustment Board, he may bring suit in the federal or state courts. However, the suit can be only for damages for violation of vested rights, such as damages for wrongful discharge. Moore v. Ill. Cent. R. Co., 312 U.S. 630, 61 S.Ct. 754 (1941). Suit cannot be brought for interpretations involving future relations of the parties. Slocum v. Delaware, L. & R.R. Co., 339 U.S. 239, 70 S.Ct. 577 (1950).

85 "Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment."

86 There is serious question whether under the Railway Labor Act or the Labor Management Relations Act an individual can be represented by a minority union in processing his grievance. In the Hughes Tool case, (5th Cir. 1945) 147 F. (2d) 69 arising under the N.L.R.B. before 1947, the court held that he could not be so represented. Following the Burley case the Attorney General ruled that a railroad employee was entitled to minority representation. 40 Op. Atty. Gen. 494 (1946). Last year, Judge Learned Hand held that under the Taft-Hartley Act, the employees were not only entitled to be represented by a minority union but that such a union could picket the employer for his failure to deal with it. Douds v. Retail Stores Union, (2d Cir. 1949) 173 F. (2d) 764. However, there is still a strong argument that the Taft-Hartley changes were intended only to enact the Hughes Tool doctrine. See Sherman, "The Individual and his Grievance—Whose Grievance Is It?" 11 UNIV. PRVT. L. REV. 25 (1949).
force existing provisions or deal with matters not covered by the agreement. 37 Second, the majority union can negotiate an amendment or an addition to the contract and thereby nullify the grievance except when it involves accrued money claims. Third, the majority union is entitled to be present and can object to the grievance or any disposition which the employer proposes. 38 This means that the individual faces the serious practical difficulty of overcoming the objections of both the employer and the majority union. Although the union does not have exclusive power over grievances, the individual's rights are so narrow, and his bargaining position so weak, that for all practical purposes he is subject to the union-controlled grievance procedure. 39

C. The Nature of Union Power

Enough has been said to indicate the breadth and depth of union power. As collective bargaining agents, unions help determine when a man shall work, what he shall do, how much he shall make, when he shall have holidays and the terms on which he shall retire. As exclusive representative, the union alone speaks for him in obtaining these terms, and he can speak only through the union. Even his personal grievances are not free of the union's controlling hand.

It is now necessary to state more explicitly the nature of union power. A union, in bargaining, acts as the representative of all workers within an industrial area. It weighs alternatives and determines policies which vitally affect all those whom it represents. It negotiates a contract which becomes the basic law of that industrial community. In making those laws, the union acts as the worker's economic legislature. After the laws have been made, the union is charged with their en-

37 In the Burley case, 325 U.S. 711, 65 S.Ct. 1282 (1945), Rutledge distinguished disputes over grievances and disputes over the making of collective agreements. Grievances relate "either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." (p. 723) Judge Hand interpreted this to mean that grievances included disputes for which no existing collective agreement has attempted to settle. Douds v. Retail Stores Union, (2d Cir. 1949) 173 F. (2d) 764 at 771.

38 Whether the union is entitled not only to be present at the adjustment but also to protest the settlement of the grievance by a counter grievance is left in doubt. See Cox, "Some Aspects of The Labor Management Relations Act," 61 HARv. L. REV. 274, 301 (1948); Shugerman, "Individual Employee Grievances Under the Wagner and Taft-Hartley Acts," 1949 Wis. L. REV. 154 (1949). However, the right of the union to know of grievances and be present gives it ample opportunity to make its objections known.

39 The weakness of individual grievances is partially evidenced by their small number. In NLRB v. North American Aviation, (9th Cir. 1943) 136 F. (2d) 898 the employer notified all employees that they could present grievances direct to management. In spite of this announcement, only two grievances had been handled on an individual basis while 800 had been handled by the union.
forcement, and through its grievance procedure helps judge their interpretation and application. It is the worker's policeman and judge. The union is, in short, the employee's economic government. The union's power is the power to govern. Only if we fully appreciate this cardinal fact and keep it clearly in mind can we critically evaluate the rights which an individual should have within the union.

All of the foregoing has emphasized the submergence of the individual under a tide of organizational control. This does not, however, constitute a criticism of collective bargaining nor a denial of the propriety of union power. The submergence of the individual came not with the Wagner Act in 1935, but with the industrial revolution in 1800; for it was not unions but the factory system which destroyed the individuality of the worker. In an industrial economy with large scale production and a chronic scarcity of jobs, the individual's power to bargain for himself became an empty fiction. Concentrations of capital, made possible by the corporate structure, placed in the hands of employers the power to determine who should work and at what wage. The employer's word was law. The worker retained full freedom—to submit or starve. The advent of unions has not changed the inescapable character of modern industry that an individual's economic life is governed by forces beyond himself. Collective bargaining does not alter the amount of power which is exercised over the individual. It only shifts its source.

With the question of whether unions have obtained too much power we are not here concerned. Our problem is not how much power the union should have, but how it shall be exercised. What rights should an individual have in the union which acts as his economic government? What responsibilities does the union owe to those for whom it bargains? These are the principal problems with which we are now concerned.

II

Individual Rights Within the Union

A. Standards of Union Government

The moment we recognize that the power to bargain is the power to govern, we immediately leap to the conclusion that unions should exercise that power democratically. Because of our heritage, we almost
automatically assume that individuals should have a voice in the decisions which directly affect them.\(^{40}\)

Before we make the easy assumption that unions should be democratic and impose upon them special standards of conduct, we need to inspect more closely the soil from which they spring and the climate in which they grow. We need to recognize the tug of conflicting forces to which they are subject, and we need to understand more clearly why we expect them to be democratic.

We must recognize that the economic soil from which unions spring has been almost barren of democratic practices. Management's labor policies have never been democratically controlled. Certainly major policies have not customarily been submitted to the affected employees for vote; neither have they been submitted to the stockholders for their vote.\(^{41}\) Corporate officers are theoretically elected by stockholders and are responsible to them. However, the concentration of many shares in a few hands, the widespread use of proxies, and the development of various financial devices have stripped from the majority of shareholders any effective voice and have centered control in a managerial class which exercises almost unlimited power to choose policies and enforce rules.\(^{42}\) In the management of business, as contrasted

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\(^{40}\) Professor Slichter resolved the problem with the simple assertion, "Democracy is needed in trade unions because there is room for great differences among members in the objectives of unions, in their policies, and in the ways in which they conduct their affairs." \textit{Challenge of Industrial Relations} 100 (1947).

\(^{41}\) When several companies during the past year suggested that they would grant pension demands if those demands were approved by a vote of their stockholders, the suggestion was so novel as to call forth extended comment in the public press. During the union-busting days of the '30's, few stockholders even knew of their company's policies. When some anti-union practices became so notorious, stockholders who objected were completely ignored. \textit{Cookie and Murray, Organized Labor and Production} 53, 251 (1946).

In Abrams v. Allen, 297 N.Y. 52, 74 N.E. (2d) 305 (1947) a group of stockholders in Remington Rand brought suit against their officers because of dismantling and moving plants to destroy the union. The petition alleged that assets had been wasted with no purpose but to break the law. The court held the complaint stated a good cause of action because it alleged unlawful conduct. As Professor Chamberlain has pointed out, the legal limitations on the board's powers have been only with respect to the purpose and intent of the actions taken under almost limitless powers. \textit{Chamberlain, The Union Challenge to Management Control} 12-13 (1948).

\(^{42}\) "The stockholder is therefore left as a matter of law with little more than the loose expectation that a group of men under a nominal duty to run the enterprise for his benefit and that of others like him, will actually observe this obligation. . . . Only in extreme cases will their judgment as to what is or is not to his interests be interfered with. . . .

"The only example of a similar subjection of economic interests of the individual to those of a group which appears to the writers as being at all comparable, is that contained in the Communist system." \textit{Berle and Means, The Modern Corporation and Private Property} 277-8 (1932).

"In most large corporations . . . the bulk of stockholders, holding in their name the
with the management of government, we demand efficiency, not democracy; instant obedience, not freedom of protest; productivity, not individual participation. When we demand that unions, which sit across the table from management, maintain democratic procedures, we are demanding a double standard. We seek flowers where only weeds have grown.

An obvious obstacle to union democracy is that the union has to maintain itself in a climate which is hostile to its existence and its objectives. Unions have had to struggle for survival against deadly attacks by employers who did not hesitate to use spies, bribery, intimidation, or even physical violence to destroy them. Although large segments of management have fully accepted collective bargaining, anti-union practices are not dead, and the old fears remain. Even though the employer accepts the union, much of collective bargaining is carried on with the prospect of an ultimate deadlock and a resort to economic force. The state of siege, the cold war, and the strike do not provide a healthy climate for the growth of democratic processes.

Finally, the need for democracy within a particular union is somewhat tempered by the existence of competing unions. If members are not free to correct the policies of their union from within, they can revolt and overthrow it in a board election. This right of revolution is meaningful, however, only if there is available a competing union of comparable strength. Decertification is merely a surrender to the employer of the right of self-government; and an independent union without bargaining strength maintains only the form of freedom. Although there are actively competing unions in many industries and

majority of the shares of stock, have, as every one knows, the passive relation to the company which has been referred to. With only the rarest exceptions, they exercise no real control over the company. . . . " Burnham, THE MANAGERIAL REVOLUTION 85 (1941).

There is no substantial evidence that management prefers to deal with democratic unions. In numerous instances employers have cooperated with dictatorial leadership to help them maintain control. Democracy may be turbulent and disruptive while management seeks stability and discipline. Preference may arise for unions which hold a firm grip on their members and can act as middlemen in supplying labor.

Professor Slichter has well said, "A trade union may be compared to a national government which is engaged in the main in foreign relations. . . . While the community can afford processes in the body politic which emphasize differences, at least in domestic affairs, unions must emphasize agreement." Slichter, CHALLENGE OF INDUSTRIAL RELATIONS 22 (1947).

The language of the strike is itself reflective of the battle spirit with ultimatums, tactical maneuvers, defense funds, strike lieutenants, and flying squadrons. See Selkman, LABOR RELATIONS AND HUMAN RELATIONS 18 (1947).

A. J. Muste, under the telling title "Army and Town Meeting" has vividly described the difficult problem of maintaining an organization to fight strike battles and yet use town meeting procedure. See Barke and Kerr, UNIONS, MANAGEMENT AND PUBLIC 187 (1948).
trades, substantial areas such as construction, printing, trucking, mining, and railroading are monopolized by unchallenged unions. The presence of a competing union not only reduces the need for internal democracy, but tends to encourage internal democracy. The very threat of a rival compels a union to permit its members more freedom and to be more responsive to their desires. On the other hand, where the need for democracy is the greatest, the incentives to provide it are the smallest. It is no accident that the most dictatorial unions are those unchallenged by rivals.

The foregoing discussion is not meant to imply that unions should not, cannot, or need not be democratic. It is intended only to suggest conditions which militate against the demands for internal democracy. In spite of these conditions, there are impelling reasons why unions should be democratic. First, their extensive power to regulate the lives of workers is largely derived from government through laws which provide them protection and grant them authority. In the exercise of the power thus granted to them, they should be required to maintain the same standards which would be required of government itself.

In the three-month period between January 1 and March 31, 1950, National Labor Relations Board elections were held in 1,243 units. In 1,009 the choice was between one union and no union. In only 234 was there any competing union.

Professor Jaffe has forcefully pointed out that "By such legislation Congress has bestowed functions of democratic government—though, withal, government—upon the members of industrial and railway labor. The representatives of a majority of the employees of an employer determine by the collective bargain the conditions under which all are to work." Jaffe, "Law Making By Private Groups," 51 HARV. L. REV. 201 at 234 (1937). Professor Lenhoff cogently developed the theory that the collective contracts made under such statutes are enforceable because, "the recent labor acts resorted to the method of incorporating the terms of employment as filed by collective contracts of the described type. Accordingly, it is the statute which regulates and rules the employment relationships in the unit." LENHOFF, THE PRESENT STATUS OF COLLECTIVE CONTRACTS IN THE AMERICAN LEGAL SYSTEM 1109, 1137 (1941).

"The increasing responsibilities placed on unions by governmental protection of their democratic rights demand that they in turn accept the responsibility for democratic conduct of their own affairs. An autocratic union, run without full participation of its members and without leadership responsive to its membership, cannot morally claim democratic rights in dealing with employers through the intervention of public agencies." AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN TRADE UNIONS 7 (1943).

A more legalistic statement of the proposition has been made by Professor Killingsworth: "Under the constitution the government must extend equal protection to all. It is reasonable for the government to impose a similar requirement upon private organizations when much of their power and authority are derived from public laws." Killingsworth, "Restrictive State Labor Relations Acts," 1947 WIS. L. REV. 546 at 599. See also Dodd, "Supreme Court and Organized Labor, 1941-5," 58 HARV. L. REV. 1018 at 1039 (1945).

The governmental character of unions is emphasized by their own argument for the union shop. They argue that just as all who receive the benefits of government are compelled to pay taxes, so all who accept the benefits obtained by the union should help pay the cost. If unions are permitted by government to exercise the power of taxation, then they should be compelled to protect the rights of those taxed. See GOLDEN AND RUTTENBERG, DYNAMICS OF INDUSTRIAL DEMOCRACY 213 (1942).
The second and most compelling demand for democracy grows from the very roots of unionism itself. The struggle for unionization is more than an attempt to obtain economic benefits for workers, for unions are more than brokers in the labor market. The struggle is also to introduce an element of democracy into the government of industry, to provide workers a voice in determining the conditions under which they work. The preamble of the United Auto Workers constitution declares: "The organized worker seeks a place at the conference table . . . when decisions are made which affect the amount of food he and his family shall consume, the education his children shall have and the clothes they may wear." At the root of unionism is the demand that the autocratic powers of management be leavened by a measure of industrial democracy. This demand can be fulfilled only if unions which sit at the bargaining table are themselves democratic. To the extent that individuals are permitted to participate in forming union policies, they are freed from submergence and become self-governing.

The reasons for union democracy provide a clue to our central problem—the right of an individual in his union. The rights which a worker should have in the union which acts as his economic government are essentially the rights of a citizen in a democratic state. Two of those rights are crucial here. Most important is the right to participate fully and freely in making the laws under which he lives. If this right of an individual worker within his union is not protected, then collective bargaining has not brought him freedom but an additional master. Also important is the right to equal and fair treatment. The individual must not be arbitrarily discriminated against or imposed upon by a grasping majority.

B. The Right to Participate

If the law is to protect the rights of individuals then it must first of all protect his right to participate fully and freely in the union which governs his working life. Just what this entails will become clear if we evaluate the protection which the law has given this keystone right.

48 "Workers organize into labor unions not alone for economic motives, but also for equally compelling psychological and social motives, so that they can participate in making the decisions which vitally affect them in their work and community life." Golden and Ruttenberg, Dynamics of Industrial Democracy 3 (1942).

49 "Fundamentally and ideally, collective bargaining is a process under which employees actively participate, as equals, with employers in fixing the terms and conditions of their employment. Such participation of employees, through representatives of their own choosing is visualized as a way to secure their genuine consent to the conditions under which they work . . ." Cooke and Murray, Organized Labor and Production 185 (1946).
Three areas will be adequate to indicate the pattern of protection; admission to membership, expulsion from membership, and union elections.

1. *Admission to membership.* Unions may bar individuals from participation at the very threshold by denying them admission to full membership in the union. Thus, the Locomotive Firemen exclude Negroes entirely, while the Boilermakers relegate them to auxiliary unions which have no power but are governed by white locals. The Rubber Workers exclude Communists, the Motion Picture Machine Operators frequently admit only sons or close relatives of members, while the Brewery Workers refuse to admit new members unless jobs are available. Regardless of the form which exclusion takes, it has and is intended to have one or both of two results. It always bars unwanted individuals or groups from participation in the activities of the union. In conjunction with the closed shop or union preference contract, it also controls who shall be entitled to work.

In deciding admission cases, the courts have almost unanimously failed to protect the right to participate. Parroting nineteenth century nonsense that a union is a fraternal order and free to choose its members, they have consistently refused to compel unions to admit those for whom they bargain. On the other hand, the courts have vigorously protected the so-called right to work by declaring that a union cannot deprive a man of employment by refusing to admit him to membership.

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50 For a more complete description, see Summers, "Admission Policies of Unions," 61 Q.J. Econ. 66 (1946). As there stated, the number of unions engaging in exclusionary acts is relatively small. The great majority of unions are not only open to all who wish to join, but they energetically seek new members. However, a substantial enough minority restrict admissions to create a real problem.


This measure of protection has surface appeal, but it is based on two false assumptions. First, it assumes that unions have no legitimate interest in allocating job opportunities. But unions in bargaining for seniority provisions do deprive some men of their jobs and give preference to others. Restricting admission under the closed shop does nothing more. Carpenters shift frequently from job to job, so customary seniority clauses would be meaningless. A closed shop with a closed union means simply that newcomers are excluded until older craftsmen are employed. If more carpenters are needed new men are granted work permits, but when jobs become scarce they are bumped by union members. The closed union thus provides a rough form of industrial seniority.

The problem is not whether unions shall be permitted to interfere with employment. In accepting the right of unions to bargain about seniority, we have recognized this power. Rather, the problem is whether the union, in restricting admission, has abused its power by establishing improper standards of job preference. The Brewery Workers, by refusing to admit new applicants while old members are out of work, give preference to prior employees—an accepted criterion of preference. The Motion Picture Machine Operators, by admitting only N.Y.S. (2d) 767 (1949); Wills v. Local 106, Hotel & Restaurant Employees, 26 Ohio N.P. (n.s.) 435 (1927); Schwab v. Moving Picture Machine Operators, 165 Ore. 602, 109 P. (2d) 600 (1941); Dorrington v. Manning, 135 Pa. Super. 194, 4 A. (2d) 886 (1939). For a more complete discussion of the legal limitations on exclusion see Newman, "The Closed Union and the Right to Work," 43 Col. L. Rev. 42 (1943); Summers, "The Right to Join a Union," 47 Col. L. Rev. 33 (1947).

Nor is seniority the only control over who shall work. Unions bargain concerning apprenticeship requirements, work sharing, job transfers, and discriminations based on race or sex and compulsory retirement—all directly controlling job opportunities.

Although the courts talk much of the "right to work," it is clear that there is no such right. No worker can compel anyone to give him a job. The determination of whether he shall be allowed to work always lies in other's hands. Usually the employer controls his job rights. The "right to work" is merely a slogan meaning that the union shall have no control. See Golden and Ruttenberg, Dynamics of Industrial Democracy 193 et seq. (1942); Vladek, "On the Sovereignty of Labor Unions," 1 Ind. & Lab. Rel. Rev. 480 (1948).

During the depression the garment trades locals refused to accept new members while old members were out of work. American Civil Liberties Union, Democracy in Trade Unions 21 (1943). In many industries such as construction, longshore, and maritime, employment is not continuous for the same employer but consists of a series of short term employments. Only through the closed union can any semblance of seniority be enforced.

In Ryan v. Hayes, 243 Mass. 168, 137 N.E. 344 (1922) the court permitted a union to manipulate membership in preserving seniority rights. Ryan obtained a job in a closed shop although he was not a member. When the union discovered this it demanded his discharge. He applied for membership and was accepted on the condition that he go to the bottom of the work list. This resulted in his discharge. The court refused to grant relief on the theory that when he joined the union he agreed to be bound by its rules.
sons, apply a standard of nepotism—a questionable though common practice in the business world.\textsuperscript{56} The Plumbers, by excluding Negroes, enforce a job preference based on race—an obnoxious standard whether established by unions or by management. The courts, however, have not restricted themselves to preventing abuses, but have given blanket protection to the individual’s job rights and ignored the union’s legitimate interest in job allocation.\textsuperscript{57}

The second false assumption upon which legal rules are based is that unions are private clubs, free to close their doors to unwelcome intruders. Thus, the absurd result that unions which have the power to govern are free to deny the franchise to those governed. The right of an individual to join the union which acts as his bargaining representative is the right to participate in his government, and should be protected as such. Company spies who seek to destroy, Communists who seek to pervert, or dual unionists who seek to alienate—these may justifiably be excluded. Their interests are antagonistic to the continued existence of the union as an effective bargaining agent. The right to vote can be made dependent on complete loyalty. But when the Railway and Steamship Clerks shunt Negroes into non-voting auxiliaries, when Electricians deny regular permit men the right to vote, and when the Newspaper Deliverers’ exclude new employees—then the right to participate has been wrongfully infringed.

Two recent New York cases have also touched on this problem. In Ryan v. Simons, (N.Y. Sup. Ct. 1950) 25 L.R.R.M. 2302, non-union employees with greater seniority sought to enjoin their replacement by union members with less seniority. The court held that the union could not cause their discharge out of line of industry seniority because of non-membership in the union. In another case involving the same union (Newspaper and Mail Deliverers) the court refused an injunction when it appeared that the men being discharged were only part-time employees and they were being replaced by full-time employees. Costero v. Simons, (N.Y. Sup. Ct. 1950) 25 L.R.R.M. 2280.

\textsuperscript{56} In the absence of union control of hiring, jobs frequently go to those who have some “pull” with officials or workers in the plant. There is no evidence that union practices are substantially worse than employer practices—the choice merely rests in different hands.

In a survey of 100 presidents of large companies, it was found that only 32 were “self-made,” 16 had clearly inherited their jobs, and the other 52 had received substantial aid from influential connections. Chamberlain, Union Challenge to Management Control 60-61 (1948). In the absence of union control, new jobs frequently go to those who know the manager, a foreman, or some other worker.

\textsuperscript{57} The measure of the courts’ unawareness of the union’s interest is revealed in Bautista v. Jones, 25 Cal. (2d) 746, 155 P. (2d) 343 (1944). The union of Milk Drivers had a closed shop which also provided that the distributors would not sell milk to anyone not observing union conditions. Bautista was denied admission because he was an independent peddler, and the union instructed jobbers not to sell to him. The court enjoined the union from interfering with Bautista’s work. It refused to recognize the interest which the union had in preventing its standards from being undermined by peddlers who worked for less than union rates.
These false assumptions have been carried into legislative provisions.\(^{58}\) Thus sections 8(a)(3) and 8(b)(2) of the Labor Management Relations Act bar the union from using admission as a device for regulating employment, but give no protection to the right to participate.\(^{59}\) Likewise, the Massachusetts statute protects only job rights and not democratic rights, although it does permit a union to bar an individual from a job for "bona fide occupational qualifications."\(^{60}\)

The hope for legal protection of the right to join is not entirely dead, for there are slight signs of an awakening.\(^{61}\) The most hopeful sign is the decision of the Kansas Supreme Court in Betts v. Easley.\(^{62}\) The Brotherhood of Railway Carmen was certified as bargaining agent under the Railway Labor Act, but like the Boilermakers, it relegated Negroes to auxiliary unions which had no power of self-government. The court held that denial of equal right to participate "is repugnant to every concept of equality" and is "abhorrent to both the letter and spirit of our

\(^{58}\) Legislative confusion undoubtedly reflects to a certain degree the scholarly suggestions. Almost without exception, writers on the subject have placed extreme emphasis on the right to work and ignored the right to participate. See, for example, Newman, "The Closed Union and The Right to Work," 43 CoL. L. Rev. 42 (1943); Hammett, "The Power of Trade Unions to Discipline Their Members," 96 Univ. Pa. L. Rev. 537 (1948); Cox, "Some Aspects of the Labor Management Relations Act of 1947," 61 HARV. L. Rev. 271, 296 (1947); SLICHTER, THE CHALLENGE OF INDUSTRIAL RELATIONS 119 (1947).

\(^{59}\) This disruption of orderly employment practices caused by these sections has been suggested in Zorn, "New Union Responsibilities," FIRST ANNUAL CONFERENCE ON LABOR RELATIONS, NEW YORK UNIVERSITY 303 (1948). The devices created to circumvent the statute reflect the deep felt need of unions to control hiring. Thus, the West Coast Shipowners contract provides that shipowners will give preference to applicants who formerly worked on ships of any member company. Other unions tried to continue using hiring halls open to union and non-union workers alike but assigning jobs on a rotation basis.

\(^{60}\) Massachusetts Labor Relations Act (1947) §§4 and 6 A. Colorado, Pennsylvania and Wisconsin statutes also protect the right to work. The Pennsylvania statute, however, goes beyond this and denies unions which exclude because of race, creed or color any protection or certification under the act.

\(^{61}\) In a number of cases, the courts have in effect prohibited taxation without representation. In James v. Marinship, 25 Cal. (2d) 721, 155 P. (2d) 329 (1944), the California court enjoined the Boilermakers from enforcing a closed shop against Negroes who were admitted only to an auxiliary union. They had no voice in bargaining, no grievance procedure, and no business agent, but were completely governed by a neighboring white local in which they had no voice or vote. Although they had not been prevented from working, the court enjoined the union from compelling payment of union dues. In a similar vein, the Texas court in A. F. of L. v. Mann, (Tex. Civ. App. 1945) 188 S.W. (2d) 276 upheld a statute outlawing work permits on the basis that it was improper for the union to exact dues from those who had no voice in union policy. Likewise the New Jersey court in Cameron v. International Alliance, 118 N.J. Eq. 11, 176 A. 692 (1935) enjoined the union from restricting some workers to "junior" status without voice or vote; and a California court enjoined the Barbers union from picketing to compel a barber to join the union when it was not willing to admit him to full active membership. Riviello v. Journeyman Barbers, (Cal. App. 1948) 199 P. (2d) 400.

fundamental charter.” It enjoined the union from acting as bargain-
ing agent until it admitted Negroes to full membership.\textsuperscript{63}

In spite of such signs of hope, there is little reason to be optimistic.\textsuperscript{64} Old ideas die hard, especially in the law. Until the courts and legis-
latures see clearly that at the heart of union democracy is the right of
an individual to vote in his economic government, there is little likeli-
hood that the law will protect the right to join.

2. Expulsion from membership. In deciding union discipline cases,
the court’s reasoning and results are entirely different, but reflect
the same misconceptions. If expulsion is improper, the court orders
reinstatement in the union and enjoins interference with the job. The
job and the vote are protected equally, although they are distinct in-
terests entitled to different measures of protection. If a union member
works for less than the union scale, it may be proper to suspend his job
rights for a period, but it does not follow that he should also be disen-
franchised.\textsuperscript{65} On the other hand, if a member campaigns for a rival

\textsuperscript{63}Hopeful straws have also appeared in the legislative winds. Most important have
been the fair employment practice laws now passed in Connecticut, Massachusetts, New
Jersey, New Mexico, New York, Rhode Island and Washington. These laws directly forbid
unions from excluding workers because of race, creed, color or national origin. Although
these laws operate within a limited scope, they do protect the individual’s right to full
membership and participation.

\textsuperscript{64}In Courant v. International Photographers, (9th Cir. 1949) 176 F. (2d) 1000 the
court rejected the reasoning of Betts v. Easley. The excluded member, who was unable to
obtain work because of a closed shop contract, argued that since the union was certified by
the N.L.R.B., it was legally bound to admit him. The court held, however, that although
the union obtained its power to bargain from government, it was still a voluntary association
and had no obligation to open its membership.

Most disappointing of all has been the trend of the N.L.R.B. In Bethlehem-Almeda
Shipyard, Inc., 53 N.L.R.B. 999 (1943) it suggested that a union which denied membership
on the basis of race might be denied certification. However, in a series of cases the
board failed to find such discrimination although its presence was quite apparent. See
Carter Manufacturing Co., 59 N.L.R.B. 804 (1944); Atlanta Oak Flooring Co., 62 N.L.
R.B. 973 (1945); Norfolk Southern Bus Corp., 76 N.L.R.B. 488 (1948). Finally, in Bal-
abian & Katz, 87 N.L.R.B. No. 143 (1949) the board distinguished away these cases to near
nothingness. In this case, the Motion Picture Machine Operators in Toledo refused to admit
several operators, keeping them as permit men for a number of years. These operators
organized an independent union and asked for a board election in one of the large theatres.
Although the evidence of discrimination both in employment terms and in union participa-
tion was present, the board rejected their plea to make this theatre a separate bargaining
unit so they might have a measure of self-government. Appropriate remedies for discrim-
ination must be pursued under other provisions of the act and not in the representation
proceeding, said the board. For a more full analysis of the board’s policy, see Aaron and
Komaroff, “Statutory Regulation of the Internal Affairs of Unions,” 44 Ill. L. Rev. 425
at 438-42 (1949).

\textsuperscript{65}See Harmon v. Matthews, 27 N.Y.S. (2d) 656 (1941) where the court upheld an
expulsion for violating the union scale. The more proper penalty would be either fine or
temporary suspension. This seems to be the normal practice of the Musicians. See Twen-
union, that may justify excluding him from union activities, but it does not justify his discharge. The courts have ignored this distinction, for they have not sought to protect either interest, but have protected membership as an independent right.

In establishing the standard of protection, the courts have likewise ignored the interests to be protected. Instead, the courts have adopted the theory that by joining a union, the individual enters into a contract, the terms of which are expressed in the union constitution and by-laws. Whether an expulsion is proper depends on whether it is in accord with the constitution. This theory means that the law provides no protection of democratic rights within the union other than those which the union itself is willing to permit.

The danger of the contract theory to free participation becomes apparent upon a survey of union constitutions. For example, the Railroad Trainmen prohibit the issuing of any circular or petition without the permit of the president; the Electricians (A.F.L.) prohibit any political campaigning within the union; the Hodcarriers expel any member who "willfully slanders any officer"; and the Steel Workers punish for "publishing or circulating among the membership false reports or misrepresentations." Beyond these more specific clauses, the majority of unions have general prohibitions against "conduct unbecoming a union member," "causing dissension," or "creating disharmony." Restricted by such provisions, members of the union can be deprived of their freedom of discussion and protest. The political process within

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66 See Davis v. International Alliance, 60 Cal. App. (2d) 713, 141 P. (2d) 486 (1943) where the court upheld an expulsion for promoting a rival union. In neither of these cases is there any suggestion that the penalty should fit the crime. The only question the courts will consider is whether the expulsion is proper.

67 This is at least in part due to the union's own failure to distinguish between the two interests. Only rarely has a union insisted on discharge as a penalty without at the same time suspending or expelling the offending member. For one of the rare cases, see O'Keefe v. Local 463, 277 N.Y. 300, 14 N.E. (2d) 77 (1938). Occasionally a union may expel a member but permit him to continue working under a closed shop, thereby protecting his job rights. See Ames v. Dubinsky, 70 N.Y.S. (2d) 706 (1947).

68 For explicit statements of the contract theory, see Snay v. Lovely, 276 Mass. 159, 176 N.E. 791 (1931); Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931). In Smith v. International Printing Pressmen, (Tex. Civ. App. 1947) 198 S.W. (2d) 729 it was held that an action for damages for wrongful expulsion was subject to the statute of limitations for breach of written contracts.

69 Dame, president of a local in the Telephone Guild, sent a letter to the Wisconsin Telephone Company stating that the contract made by the executive board had not been approved by the membership as required by the constitution. He was charged with revealing union secrets, tried by the executive board without notice and expelled. The Wisconsin court followed the contract theory with literalness, held the expulsion was in full compliance with the constitution, and refused to order reinstatement. Dame v. LeFevre, 251 Wis. 146, 28 N.W. (2d) 349 (1947).
the union can become sterile, and the right to participate a hollow shell. 70

Fortunately, not all courts have so blindly followed the contract theory as to leave individuals without protection. A few bold courts have declared oppressive discipline clauses void. Thus, in Schrank v. Brown, the court enjoined expulsion of Machinists who had issued a circular criticizing union officers. 71 The court said, "Fair criticism is the right of members of a union, as it is the right of every citizen. A provision in the union constitution which would suppress protests of members against their officers would be illegal and unenforceable." Less bold but more crafty courts have subverted the contract theory to provide protection of individual rights. In Jose v. Savage a member of the Carpenters was expelled because he filed charges against the officers for misfeasance. The court ordered him reinstated because the district council before which he was tried included three members who had not been regularly elected but merely appointed to fill vacancies. 72 These did not comply strictly with the constitution so the expulsion was void. In a substantial number of cases the courts have protected the individual's political rights within the union by narrowly interpreting constitutional provisions, 73 distorting the facts, 74 or discovering technical procedural defects. 75

70 These are not exceptional, but common clauses. Seventy-four unions have clauses which limit criticism of officers or fellow members, fifteen prohibit the issuing of circulars, and ninety-six have some form of cover-all provision such as "conduct unbecoming a union member." See Summers, "Disciplinary Practices of Unions," 4 IND. AND LAB. REL. REV. 15 (1950). Although the number of expulsions by unions is relatively small in proportion to the membership, the number is substantial enough to give most union members a healthy respect for the dangers of getting very far out of line.

71 192 Misc. 80, 80 N.Y.S. (2d) 452 (1948). See also Grand International Brotherhood of Locomotive Engineers v. Green, 210 Ala. 496, 98 S. 569 (1923); Reilly v. Hogan, 32 N.Y.S. (2d) 864 (1942).

72 123 Misc. 283, 205 N.Y.S. 6 (1924).

73 In Coleman v. O'Leary, 58 N.Y.S. (2d) 812 (1945) the court held that defying orders of union officers by holding forbidden shop meetings with the members did not constitute "conduct unbecoming a union member."

74 In Koukly v. Canavan, 154 Misc. 343, 277 N.Y.S. 28 (1935) members of Musicians Local 802 called a meeting of the local in direct defiance of orders by the international. The local rebelled against domination and control by the international, drew up a local constitution and elected officers. When the leaders of the movement were expelled the court ordered reinstatement, naively explaining that there had been no disobedience but only a dramatic demonstration of their desire for self-government. The rebellious leaders were informed by the court that they hadn't really meant it but were only play-acting!

75 In Johnson v. International Brotherhood of Carpenters and Joiners Local 971, 52 Nev. 400, 288 P. 170 (1930), the court voided an expulsion of a member for making offensive remarks about the officers because the charge with which he was served did not specify the particular section of the constitution violated. In Shapiro v. Gehlman, 244 App. Div. 238, 278 N.Y.S. 785 (1935), the court reversed an expulsion for slandering union
This protection by subterfuge and the unwillingness to protect openly the right of free participation leave dangerous pitfalls in the law. Less sensitive judges, misled by dicta, blindly follow the contract theory to its absurd conclusions. In *Elfers v. Marine Engineers*, a candidate for union office issued a pamphlet attacking the incumbent officers for failing to carry out the policies of the union. He was expelled for “disclosing union business in public,” and the court upheld the expulsion as clearly within the constitution. Thus, these timid and fiction-bound courts hold that an individual in joining a union, surrenders his rights of citizenship within the union. He has no Bill of Rights within his economic government.

The slowness of the courts to protect the right to participate is more than matched by the legislatures. The only two substantial statutes, the Labor Management Relations Act and the Massachusetts Labor Relations Act, protect only job rights. They do not prevent the union from expelling a member and depriving him of his voice and vote. To the extent that they protect the individual’s job, they reduce the severity of the penalty which the union can inflict, but this is not enough to keep free the political processes within the union. In *Hall v. Morrion*, officers of the St. Louis local of the Bridge Workers challenged the dictatorial control of President Morrion. Morrion did not expel them, or even interfere with their employment; he merely barred them from holding office or attending union meetings for five years, and thereby removed any threat of democratic revolt.

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76179 La. 383, 154 S. 32 (1934).
78 Some attempts have been made by unions to circumvent the Taft-Hartley provisions by including clauses in the contract which give the union power to initiate discharge proceedings. One such clause provides that the union can raise as a grievance the continued employment of any “who engages in any violation of this agreement, or otherwise interferes with the efficient operation of the employer’s business, or with the harmonious relations between the employer and the employees or among the employees.” The union may appeal such a grievance to arbitration. See Zorn, “New Union Responsibilities,” First Annual Conference on Labor Relations, New York University 303 (1948).
79 (Mo. App. 1927) 293 S.W. 435 Ames was a candidate for president of the International Ladies Garment Workers. He and his supporters charged the incumbent officers with misuse of union funds, selling out to management, and other misconduct in office. Ames was charged with slandering union officers and expelled. However, he was permitted to continue working in union shops. *Ames v. Dubinsky*, 70 N.Y.S. (2d) 706 (1947). Kovner, in discussing this case, suggests that the campaigning was of the virulence common in ideological battles between right and left wing factions. However he dismisses the case
3. Union elections. In dealing with membership rights, the courts have not given explicit recognition to the right to participate but have been misled by outmoded fictions and dangerous theories. But when the process of voting itself is involved, the courts have been more vigorous in giving at least formal protection. First, they have insisted that unions hold elections. When President Moreschi of the Hodcarriers took charge of Local 17 in New York City, prohibited the holding of elections, and gave his lieutenant, Nuzzo, full control, the court ordered an election held under the supervision of the court. "The right to membership in a union," said the court, "is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied. . . . the member denied the right to participate [in an election] is denied a substantial right which is neither nebulous nor ephemeral."[80]

Second, the courts have insisted that the voting be conducted according to proper form.[81] In a number of cases the courts have voided elections because they were held without proper notice,[82] the ballot box was stuffed,[83] or the ballots were not properly counted.[84] In some instances the courts have supervised a recount of the ballots and declared by saying the injury was not substantial because job rights were not disturbed. He completely ignores the fact that the effect of this discipline is to render practically powerless the leadership of the opposition. Kovner, "Legal Protection of Civil Liberties Within Unions," 1948 Wis. L. Rev. 18.


In a number of cases the courts have ordered elections to be held under the supervision of a master, or have appointed receivers to take charge of the local's affairs and conduct an election. Chambers v. International Hodcarriers, (D.C. D.C. 1943) 52 F. Supp. 978 (allege past elections illegal and international union controlling local); Webster v. Rankin, (Mo. App. 1932) 50 S.W. (2d) 746 (officers of Hodcarriers ordered elections in local postponed for one year); Harris v. Geier, 112 N.J. Eq. 99, 164 A. 50 (1932) (officers appointed by district council, and elections repeatedly postponed); Local No. 11 of Int. Assn. of Bridge, Structural & Ornamental Iron Workers v. McKee, 114 N.J. 555, 169 A. 351 (1933) (international appointed officers and suspended all meetings); O'Neill v. Journeymen Plumbers, 348 Pa. 531, 36 A. (2d) 325 (1944) (officers named by international and no election for 12 years); Raevsky v. Upholsterers International Union, 38 Pa. D. & C. 187 (1940) (international president ordered local election postponed).

[81] Thus, the California court voided the adoption of a new constitution by the Marine Cooks. The old constitution prescribed in detail the procedure for amendment, but this procedure was not followed. Instead, a constitutional convention was called and an entirely new constitution proposed. The court found the procedure not in compliance with the old constitution, and therefore void. (Cal. App. 1949) 24 L.R.R.M. 2459.


the proper result.\textsuperscript{85} The courts may look behind the form to determine basic fairness. Thus, in \textit{Bucko v. Murray}, the courts voided a union referendum on a change in seniority lists when it became clear that the only ones who were qualified to vote were the ones who would profit from the change.\textsuperscript{86}

Third, the courts have shown some concern that decisions made by the vote of the members not be overthrown or ignored. In 1942 the Plumbers convention rejected a proposal to consolidate the locals in and around Boston. However, two years later President Durkin ignored this vote and ordered the consolidation. The court held that although he had the general power to order consolidation, he could not use this power to reverse the decision made by the convention.\textsuperscript{87} Similarly, members of the Locomotive Firemen in three seniority districts voted not to combine their seniority lists. When the board of directors, in spite of this vote, ordered the lists combined, the court enjoined the board from enforcing its order.\textsuperscript{88}

In election cases, as in expulsion cases, the legal logic is based on the contract theory. In these cases, however, the theory can be a positive aid to the courts.\textsuperscript{89} Most union constitutions are replete with provisions requiring elections and referenda, and the courts by rigorously enforcing these provisions can provide substantial protection to the political process.\textsuperscript{90}

\textsuperscript{86}170 Misc. 902, 11 N.Y.S. (2d) 402 (1939). However, the courts usually seem more impressed with the form of the election rather than with its fairness. If the procedure complies with the constitution, they hesitate to intervene unless fraud or imposition is obvious. Stanton v. Harris, 152 Fla. 736, 13 S. (2d) 17 (1943); Rowan v. Rossehl, 173 Misc. 898, 18 N.Y.S. (2d) 574 (1940); O'Connell v. O'Leary, 167 Misc. 324, 3 N.Y.S. (2d) 833 (1938); Carey v. International Brotherhood of Papermakers, 123 Misc. 680, 206 N.Y.S. 73 (1924); Maloney v. District No. 1, UMWA, 308 Pa. 251, 162 A. 225 (1932).
\textsuperscript{87}Cameron v. Durkin, 321 Mass. 590, 74 N.E. (2d) 671 (1947).
\textsuperscript{88}Gleason v. Thomas, 117 W.Va. 550, 186 S.E. 304 (1936).
\textsuperscript{89}The contract theory, however, can cloud the issue. If the courts are so intent on seeing whether the constitution has been followed, they may seek the form and ignore the substance. For evidence that this happened in some cases, see the cases cited in note 86 supra.
\textsuperscript{90}Court interference in elections does not always produce corrective results. The union member's antipathy for legal interference may actually solidify the control which the court seeks to break. In \textit{Local No. 11 v. McKee}, 114 N.J. 555, 169 A. 351 (1933), the election ordered by the court was won by the very ones who had been dominating the union. Nine years after the court had ousted officers from a stagehands local, for causes which it deemed adequate, the same officers were back in power, apparently engaging in the same practices. \textit{Collins v. International Alliance}, 119 N.J. Eq. 230, 182 A. 37 (1937); \textit{Gilligan v. Motion Picture Machine Operators}, 135 N.J. Eq. 484, 39 A. (2d) 129 (1944). For an excellent discussion of this problem, see 51 \textit{Yale L.J.} 1372 (1942). Several states have enacted
In summary, it can be briefly stated that the law has granted almost no explicit recognition of the right of an individual to participate fully and freely in his economic government. In admission cases this failure has been fatal, for it has diverted the law to restricting union job control instead of requiring open membership so that this and other union powers might be subject to the check of the democratic process. In expulsion cases it has not prevented substantial protection by subterfuge, but that protection is so spotty and misleading that no member can feel secure in exercising his democratic rights. Only in regulating elections have the courts provided broad and clear protection, but this is worth little if workers are not free to join the union, criticize its policies, and campaign for officers.

C. The Right to Equal Treatment

Even if the law did fully protect the right to participate within the union so that majority will could freely operate, further protection of the individual might still be needed. Runaway majorities may use their power to discriminate arbitrarily against minority groups and obtain benefits for themselves at the expense of those too weak to resist. It may be necessary for the law to protect politically impotent minorities from oppressive operation of majority will. Workers, like citizens, are entitled to equal treatment by their government.

The United States Supreme Court, in the Steele and Tunstall cases, explicitly recognized this right of equal treatment.\textsuperscript{91} The Brotherhood of Locomotive Firemen and Enginemen made collective agreements with the railroads which destroyed the seniority rights of Negro Firemen and insured their ultimate elimination from the work. The Court, in holding the agreement invalid, said:

statutes regulating election. The Minnesota Labor Union Democracy Act of 1943 requires that elections be held according to the union constitution, be held at least every four years, and that reasonable notice be given and secret ballot provided. The Colorado statute (now invalid) requires that elections be held every year, that every member be eligible for office, and that voting be done by secret ballot. For a criticism of these statutes, see Killingsworth, "Restrictive State Labor Relations Acts," 1947 Wis. L. Rev. 546.

"We think that the Railway Labor Act imposes on the statutory representative of a craft at least as exacting duty to protect equally the interests of members of the craft as the Constitution imposes upon the legislature to give equal protection to those for whom it legislate."\(^92\)

Although the individual’s right to equal treatment was expressly affirmed, the precise scope of protection was left uncertain. The Court agreed that the union could make distinctions “based on differences relevant to the authorized purposes of the contract” such as seniority, skill, and type of work performed. But it refused to mark the allowable limit of differences by saying, “discriminations based on race alone are obviously irrelevant and invidious.” During the 1930’s the Railway and Steamship Clerks amended their seniority agreements to deprive married women of all seniority rights and thereby eliminate them from jobs sought by men workers who were unemployed. The Michigan Supreme Court held that this was within the union’s power.\(^93\) Under the Steele case, would this agreement be based on a relevant difference or an invidious discrimination?

From the meager evidence available, there is reason to fear that the lower federal courts may apply the Steele doctrine with mutilating narrowness. Thus, in the Trailmobile case, the Sixth Circuit refused to find that depriving the Highland employees of their seniority was discriminatory.\(^94\) Ignoring the obvious oppression, the court disposed of the problem by saying that the agreement was “not without some basis.” If such blatant exercises of majority power escape, then little protection exists against the more subtle discriminations available.\(^95\)

94 Trailmobile Co. v. Britt, (6th Cir. 1950) 179 F. (2d) 569. For other cases where the federal courts have failed to find discrimination under the Steele doctrine, see Elder v. New York Central R. Co., (6th Cir. 1945) 152 F. (2d) 361; Llewellyn v. Fleming, (10th Cir. 1946) 154 F. (2d) 211; Kordewick v. Brotherhood of Railroad Trainmen, (7th Cir. 1950) 26 L.R.R.M. 2164.
95 The most subtle form of discrimination occurs in the handling of grievances. In the railroad car shops, grievance committees of the white locals have frequently refused to hear complaints filed by Negroes. CAYTON AND MITCHELL, BLACK WORKERS AND THE NEW UNIONS 298 (1939). In Hughes Tool Co. v. NLRB, (5th Cir. 1945) 147 F. (2d) 69 the court indicated that a refusal to handle grievances by the representative union would constitute unlawful discrimination. However, there is no evidence that the courts are anxious to apply this doctrine.

The danger of discrimination against Negroes on the railroads is enhanced by the fact that the National Railway Adjustment Board, to which the final appeal is made, is dominated by the all-white brotherhoods. This board has power not only over grievances but jurisdictional disputes, and it has repeatedly permitted the white unions to take advantage
The Ninth Circuit has further limited the protection provided. Courant, a motion picture photographer, was unable to obtain work because the stagehands had a closed shop and refused to admit new members. He sought relief in the federal courts on the grounds that he was being discriminated against by a certified bargaining agent. The court denied him any relief, holding that the union’s duty not to discriminate extended only to those already employed in the bargaining unit. It owed no duty to those who sought employment in the unit. In short, by barring them from entry, it could escape any responsibility to them.

The danger of discrimination is obviously greater where individuals or groups are excluded from the union and are therefore unable to exert influence through the political processes of the union. However, even members are not free from dangers. The married women who were routed from their jobs were full members of the union, but they were hopelessly outnumbered by men who sought their jobs. The Highland men were not excluded from the Trailmobile local, but they were helpless to protect themselves. Even if Negroes were admitted to the railroad brotherhoods, there is no certainty that they would escape discrimination.

Whenever clearly defined minorities are contained within the bargaining unit, there is danger that their interests will be appropriated by grasping majorities. This danger is particularly great when seniority is involved, for the interests of groups within the shop conflict and the fear of lay-off is great. Although the law must permit unions wide latitude in negotiating contracts, it ought not turn a deaf ear on those who are victimized by unions which fail to accept responsibilities commensurate with their powers. No precise standards are possible, but of the Negro workers. The courts have given no substantial relief. See the excellent discussion of this problem in Aaron and Komaroff, “Statutory Regulation of Union Affairs,” 44 Ill. L. Rev. 425 at 428-35 (1949).

96 Courant v. International Photographers, (9th Cir. 1949) 176 F. (2d) 1000. There is also a question as to the extent of the Steele doctrine to non-statutory bargaining. If a union is bargaining under the jurisdiction of a labor relations act, but is not certified, it can be strongly urged that it is receiving the benefit of the statute even though it lacks the official stamp of authority. However, if the bargaining is outside the scope of any such statute, then the union’s claim of being a private agency becomes more plausible.

97 This discrimination took place in the United Auto Workers, one of the more democratic unions, and apparently contrary to usual union policies. Shortly after this the Ford contract was amended to require that when an operation was moved to another plant, the employees would move with the job taking their full seniority. 1945 Contract, Art. VIII, §6. The Chrysler contract also provided that when work was transferred to another plant, employees may transfer carrying their seniority to the other plant. 1945 Contract, Art. IV, §12.

at least the closeness of scrutiny should be proportionate to the degree of danger.

D. Complicating Considerations

In all of this discussion we have defined the relationship between the union and the individual as a relationship between a bargaining agent and the worker for whom it bargains—the relationship between economic government and the individual governed. This is necessary, for the central function of unions is to bargain collectively, and to that function all else is subordinate.

However, unions are more than bargaining agents. They are also political action organizations, mutual benefit societies, educational institutions and social clubs. Union membership is a complex web of relationships with widely varying rights and duties, and the individual’s place in these other activities is essentially different from that involved in collective bargaining. We are faced, therefore, with the problem of determining how these other functions of unions alter the individual rights which we have previously discussed. The study of one function, political action, will suffice to indicate the nature of the problem and to suggest the direction toward solution.

Since 1828 when a few infant unions organized the Workingmen’s Party, unions have sought to achieve some of their objectives by legislation. They have sought by legislation to protect themselves from attack by passage of such laws as the Norris-LaGuardia Act, the Wagner Act, and now by repeal of the Taft-Hartley Act. They have sought by legislation to obtain terms of employment which they could not obtain by collective bargaining—thus, child labor laws, minimum wage laws, and safety legislation. They have sought by political action to obtain general social legislation such as price control, public housing, and medical insurance.99

Our problem is not whether unions should engage in political action, or what objectives they should seek. We are solely concerned with the relationship between the union and the individual when it does engage in political action for these objectives. More precisely, our

99 Painters have sought to outlaw spray-guns, plumbers and electricians have obtained licensing and inspection laws, shipyard workers have advocated a large navy, merchant marine and railroad unions have opposed the St. Lawrence Seaway and utilities workers have opposed public ownership of utilities. For more full description of the political activities of unions, see Barbash, Labor Unions in Action (1948); Dankert, Contemporary Unionism (1948); Peterson, American Labor Unions (1945).
problem is whether, and to what extent, the union can bind the individual by its choice of political policy.\textsuperscript{100}

In 1940 the Railroad Trainmen voted in convention to support President Roosevelt for a third term. Pfoh, who was past president of the Cleveland lodge, opposed the third term and actively supported Willkie. When a letter urging Willkie's election and signed by Pfoh was sent to a number of local members, he was charged with issuing circulars without approval of the president. Although acquitted by his local union, he was found guilty by the board of directors and expelled. The Ohio Court of Appeals found the expulsion to be squarely within the union constitution and declared it valid.\textsuperscript{101} An Illinois court, however, took a different view in a similar case. Morgan, one of the organizers and a shop steward in the Electrical Workers (C.I.O.) objected to political action by the union. When the union voted to support Democratic candidates, he not only refused to cooperate, but in a quixotic gesture attempted to counteract the union's position by handing out Republican literature. He, too, was expelled, but the court refused to countenance this curtailment of his political freedom and ordered him reinstated.\textsuperscript{102}

The union undoubtedly has an interest in who is elected to public office, an interest which both Pfoh and Morgan were undermining. If the union were only a political organization, it would be entitled to eject those who sought to defeat its choice. But the unions here did more than that. They disenfranchised local leaders in their economic government, because those leaders disagreed. The unions used their positions as bargaining agents to inflict penalties for political nonconformance. The unions asserted not merely the right to persuade but the power to conscript political agreement, and sought to curtail the free discussion.

\textsuperscript{100} It is clear that a union cannot use its discipline power to prevent a member from carrying out specific citizenship obligations. The Barbers were enjoined from expelling a member who arrested a fellow member in enforcing Sunday closing laws, Manning \textit{v.} Klein, 1 Pa. Super. 210 (1896); the Plumbers were prevented from expelling a member, who, as a public official, refused to appoint another member as plumbing inspector, Schneider \textit{v.} Local Union, No. 60, 116 La. 270, 40 S. 700 (1905).

The Locomotive Engineers were compelled to reinstate a member who testified before the Interstate Commerce Commission against safety devices sought by the union, Abdon \textit{v.} Wallace, 95 Ind. App. 604, 165 N.E. 68 (1929); and other unions have been ordered to reinstate members who testified against the union in court. A. Angrisani \textit{v.} Steam, 167 Misc. 731, 3 N.Y.S. (2d) 701 (1938); Thompson \textit{v.} Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S.W. 834 (1905).

\textsuperscript{101} Pfoh \textit{v.} Whitney, (Ohio App. 1941) 62 N.E. (2d) 744.

\textsuperscript{102} Morgan \textit{v.} Local 1150, 16 L.R.R.M. 720 (1945) reversed 331 Ill. App. 21, 72 N.E. (2d) 59 (1946) because of failure to exhaust internal appeals. Similarly the Pennsylvania court ordered reinstatement of a Trainman who was expelled for signing a petition for repeal of the Full Crew Law. Spayd \textit{v.} Ringing Rock Lodge, No. 665, 270 Pa. 67, 113 A. 70 (1921).
of issues and the active support of candidates. The union's interest is not sufficient to justify such a restriction of our democratic processes.

This is not to say that unions ought to be barred from political action. It only argues that the union ought not be allowed to compel conformance of individuals by threatening their right to participate in their economic government.

When the union seeks to compel contributions for political purposes, the problem becomes more difficult. In a celebrated case, the union expelled Cecil B. DeMille because he refused to pay an assessment levied to fight an anti-closed shop amendment. The California court upheld the expulsion as within the union's constitutional power. Here there was no restraint on political activity or restriction on the free play of democratic forces. Rather, the issue was whether DeMille's right to participate in the collective bargaining functions of the union could be conditioned on his helping finance political activity with which he violently disagreed. This does not amount to compulsory conformance, but it does amount to compulsory contribution to political causes. A private poll tax for such ends is difficult to justify.

It is submitted that political organizations should be wholly voluntary and devoid of any power to compel conformance or contribution. Unions ought be no exception. If they choose to engage in both collective bargaining and political action, they ought not be permitted to so mix their functions that the right to participate in bargaining is conditioned upon compliance with political decisions. It is precisely this severance of functions which is required by section 304 of the Labor Management Relations Act. That provision prohibits unions which act as collective bargaining agencies from making political contributions or expenditures. This has not barred unions from political action, but has merely compelled them to create separate political organizations.

103 DeMille v. American Federation of Radio Artists, 31 Cal. (2d) 139, 187 P. (2d) 769 (1947). The expulsion was upheld even though it seriously interfered with DeMille's working due to the prevalence of closed shop contracts. For a companion case, see Warner v. Screen Office Employee's Guild, 16 L.R.R.M. 544 (1945).
104 In C.I.O. v. United States, 335 U.S. 106, 68 S.Ct. 1349 (1948) the Supreme Court evaded the constitutional issue and held that this provision did not prohibit unions from supporting candidates in union newspapers, or from reprinting and distributing free thousands of copies containing the union endorsement. It has also been held that a union does not violate the statute by buying newspaper space and radio time to oppose a candidate for office. United States v. Painters Local, No. 481, (1st Cir. 1949) 172 F. (2d) 854.

A broad Massachusetts statute prohibiting political contributions or expenditures was declared unconstitutional in Bowe v. Commonwealth, 320 Mass. 230, 69 N.E. (2d) 115 (1946) but a narrower Texas statute prohibiting only contributions was upheld. A.F. of L. v. Mann, (Tex. Civ. App. 1945) 188 S.W. (2d) 276.
such as the PAC and the LLPE which have no disciplinary power over workers but are supported solely by voluntary contributions.\(^{105}\)

This device in the political function is analogous to one used by the Railroad Trainmen in the insurance function. Recognizing that some offenses which might justify expulsion would not justify forfeiture of valuable insurance rights, they have provided that although a member is expelled he can continue paying dues and thereby maintain his policy.\(^{106}\) Both devices point the direction toward the solution of other complex problems created by the manifold functions of unions. Insofar as the right of an individual in one function is improperly impaired by the union's demand in another, then the two functions should be sufficiently severed to permit them to operate without conflict. No subsidiary activity should be permitted to impair the individual's central right—the right to participate in collective bargaining.

**Conclusion**

I have not attempted to delineate precisely the powers of a union over an individual, or the rights of an individual within his union. Nor have I attempted to touch on many of the intricate problems of intra-union affairs—the power of union officers, the financial responsibility of unions, or the parent local relationship. I have wholly omitted any discussion of the difficult question of what legal remedies can be effective to protect union democracy. The purpose in this paper has been to examine the essential character of the relationship between the union and the individual worker, and to suggest some of the individual rights which that relationship demands.

The thesis is simple and almost painfully obvious. Unions, under the protection and authority of the law, govern the lives of individual workers, controlling their jobs, regulating their conduct, and determining their economic welfare. Unions are the workers' economic govern-

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\(^{105}\) Serious practical and constitutional difficulties are raised by requiring the union to separate these functions. Prohibiting political assessments serves no purpose, for unions can merely raise their dues and use money from the dues dollar. Prohibiting union newspapers and publications is unthinkable, and censoring them for political material would be unbearable. Rather than endanger constitutional freedoms, it might be better to prohibit only contributions to campaign funds and leave unions free to publicize as they wish. The ability of a member to use the democratic processes within the union to oppose such activities gives some assurance against excesses.

\(^{106}\) Refunding of the cash surrender value was found an inadequate solution as the expelled member might be unable because of age or health to obtain other insurance. A number of railroad brotherhoods have created separate benefit departments, but they have not made general provision for separate membership. Usually expulsion from the union results in forfeiture of the insurance.
ment, and only through them can individuals have any voice in making the laws under which they work. Only if unions are democratic do workers become self-governing.

Although the law has granted the union extensive power over the individual, it has failed to recognize and protect the central right in a democracy—the right of an individual to participate fully and freely in the government under which he lives.