Democracy in Collective Bargaining

Alan Hyde‡

The leadership of Willie's union has emerged from an all-night session with employer representatives bearing a tentative collective agreement covering Willie's wages, vacations, working hours, health benefits, seniority, bumping rights, right to strike, protection against discipline, and so forth, for the next three years. Now the agreement is ready to be submitted to a ratification vote.

Perhaps it will never be submitted, however. Although federal law requires votes by a union's membership on its dues and officers, the dominant interpretation is entirely indifferent as to whether Willie gets to vote on his contract. Perhaps Willie and his co-members passed a resolution in advance of negotiations forbidding negotiators to agree to any calculation of seniority on other than a plant-wide basis. If the negotiated agreement adopts departmental seniority, however, it is unlikely that Willie can do anything about it.1 Perhaps the constitution or by-laws of Willie's union require that proposed agreements be ratified by the members. If the leadership fails to do this, it is equally unlikely that Willie can do anything about it.2 As we shall see, union members who sue to require their unions

‡ Associate Professor, Rutgers, the State University of New Jersey School of Law—Newark. Visiting Associate Professor, University of Michigan Law School, 1983–84. A.B. Stanford, 1972; J.D. Yale, 1975. A version of this Article was read to the Rutgers Labor Law Group, where comments of unusual specificity were made by Alfred Blumrosen, Norman Cantor, Jerome Culp, and Michael Goldberg. The manuscript was also reviewed and criticized by James Alleson, Herman Benson, Arthur L. Fox, II, Paul Alan Levy, and Theodore St. Antoine. Eileen Willenborg provided research assistance. Finally, the Article received extraordinarily searching criticism in my seminar, “Workers and Their Unions,” at the University of Michigan Law School in the fall of 1983. Despite all this helpful commentary, the interpretations and any errors remain stubbornly my own.

1. Bright v. Taylor, 554 F.2d 854 (8th Cir. 1977); see infra pp. 823–27.
to submit agreements to ratification lose a shocking proportion of the cases.

Perhaps the leadership has conducted a ratification vote. Yet, it is far from clear that Willie has the same right to have the union distribute information or circulate opposing views that he would have if the vote were on the union's constitution or a merger agreement. Willie has no right to receive a copy of, or even to see, the text of the proposed agreement. He has no right to compel compliance with the majority vote: An agreement may have been voted down by the membership, or never submitted to them, and yet their union and employer may nevertheless be under a duty to execute it. Such a contract may be specifically enforced, and the newly bound employees may be barred from replacing the offending union. Certainly no court has required notice to the membership, informative ballot proposals, or any particular form of ballot for ratification of a contract.

I do not suppose that these facts about Willie's rights will shock many experienced scholars or labor lawyers. But how has this divorce of collective bargaining from democracy come about? How has a body of law that purportedly advances union democracy had the opposite effect on collective bargaining?

In order to answer this question, I would like to introduce two models or ideal types of collective bargaining: democratic and elitist bargaining. Democratic bargaining includes the participation of the membership in the articulation of demands for contract negotiations, communication between negotiators and membership on the state of negotiations, rank-and-file representation on the negotiating team throughout the negotiation, ratification by the membership of all proposed settlements, legal supervi-

---


5. See infra pp. 802-05; cf. Pignotti v. Local 3 Sheet Metal Workers Int'l Ass'n, 477 F.2d 825 (8th Cir.) (leaders obligated by Landrum-Griffin Act to comply with majority decision not to participate in national pension plan), cert. denied, 414 U.S. 1067 (1973).

6. See infra note 44.

7. See infra pp. 799-801.


9. Indeed, commentators frequently take it as a sign of the sophistication of American legislation that union democracy has been limited to internal union administration and has not modified collective bargaining. See, e.g., Soffer, Collective Bargaining and Federal Regulation of Union Government, in Regulating Union Government 106 (1964); Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435, 1474-78 (1963).
sion of the ratification to ensure accurate and understandable information on proposed contracts, the right to oppose proposed contracts, rational voting methods, and compliance by the leadership with the results of the vote. An essential feature of this ideal model of democratic bargaining is that it treats democracy as a right of membership: Democratic participation is required despite utilitarian arguments against its use in a particular case.  

By contrast, the model of elitist collective bargaining assumes that the top leaders of a union speak for the union. In fact, "the union" often refers only to the top leadership. A relatively small group of leaders articulates demands, forms the bargaining priorities, negotiates with the employer, and concludes a binding agreement.

It is important to see that elitist bargaining is not necessarily hostile to democratic forms. Polls of the membership may assist the leaders' formation of demands; expressions of public support from the membership may strengthen the leaders' negotiating position. In the elitist model, however, democracy is never favored for its own sake. It is rather a means to some other end, justified by policy, not principle.

This distinction clarifies contemporary American legal protection of union democracy in general and democratic collective bargaining in particular. The courts and the National Labor Relations Board (NLRB) assume that elitist bargaining is the norm and thereby perpetuate it. Despite a statute which would permit a principled right to democracy, the courts and the NLRB give limited effect to elements of union practice that foster democratic bargaining, such as union constitutions or by-laws which create democratic procedures for demand formation or ratification. Indeed, the courts advance democratic bargaining only when assured that such democracy will not disadvantage more fundamental policy interests, such as harmony between employers and "unions" (read union elites) or control of inflation.

In Part I of this Article, I survey the present legal status of democracy

10. R. DWORKIN, TAKING RIGHTS SERIOUSLY 90-100 (1977). There is considerable literature to the effect that the sort of utilitarian considerations appropriate in legislative choice should not dominate judicial application of rights under the resulting statute. See Rawls, Two Concepts of Rules, 44 PHIL. REV. 2 (1955); Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 YALE L.J. 221, 222-23 (1973). I have found this latter distinction helpful in criticizing the extent to which those examining collective bargaining see democracy less as a right than as a sometimes-appropriate policy, to be adhered to only where it helps to achieve other ends.

11. Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808, 812 (D.C. Cir. 1979) ("delegation of the decisionmaking function to the union membership") (discussed infra note 102); Davis v. Washington State Council of Carpenters, 47 L.R.R.M. 2245, 2247 (W.D. Wash. 1960) ("No rights were granted to individuals to inject themselves into the collective bargaining procedures . . .") (discussed infra note 57).

in collective bargaining. Until the late 1970's, no reported cases protected democracy in collective bargaining. In the past few years, a line of appellate cases has suggested, without extensive analysis, that some doctrines—such as the equal right of union members to participate in deliberations and voting, the rights of speech and assembly, the duty of fair representation, and the fiduciary obligation of union officers—might all apply to the formation of demands in negotiations or the execution of contracts. None of the recent cases, however, actually provides effective relief for infringements of democratic collective bargaining.

It is easy to see in this judicial queasiness about remedy the continued working of the attitudes which for so long impeded any application of union democracy law to collective bargaining—a queasiness which, I argue in Part II, rests on latent judicial fear derived from the dominant industrial relations literature on the economic effect of democratic collective bargaining. If, as I argue, courts that deny workers any right to democratic bargaining are guided primarily by their estimation of the anticipated economic results of extending such democracy, a practitioner hoping to achieve democratic collective bargaining cannot expect to succeed by extending the abstract principles of union democracy set forth in the Bill of Rights of Members of Labor Organizations. The practitioner must rather speak to the courts' inarticulate concerns.

An advocate of change must contend with the rationales of the status quo. In Part III of this Article, I examine the rationales which, though inarticulate in judicial opinions, assertedly support a restricted legal role in this area. I argue that these arguments are either unproved or misapplied, and they generally do not justify excepting collective bargaining from the general law of union democracy. Since in my view the underpinnings of the courts' rationales compel support for, or at least neutrality towards, democratic collective bargaining, I have not gone further here to criticize those underpinnings.

14. This is a distasteful procedure to some extent, since I believe that one can defend on philosophical grounds, even within a liberal tradition, the right of working people to participate in decisions that affect them. Since courts treat democracy as an element of policy, however, it seems necessary to confront the policies head-on.

One major obstacle in contemporary American labor law to the recognition of such a right to democratic participation is the relentless attempt to recast essentially political struggles as disputes over economic interest. I have illustrated and criticized this ideology elsewhere. See Hyde, Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism, 60 Tex. L. Rev. 1 (1981); Hyde, Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract, 1962 Wis. L. Rev. 1. By examining political problems commonly understood by legal personnel in economic or nonpolitical terms, the present Article is another attempt to make the law acknowledge authentic political participation in labor relations. For discussions of participation in collective bargaining that discount all but economic factors, see, e.g., Alexander v. International Union of Operating Eng'rs, 624 F.2d 1235 (5th Cir. 1980) (discussed infra note 65); Anderson v. United Paperworkers Int'l Union, 641 F.2d 574 (8th Cir. 1981) (discussed infra notes 90-91).
Collective Bargaining

I. THE LEGAL PROTECTION ACTUALLY AFFORDED DEMOCRATIC COLLECTIVE BARGAINING

Our initial problem is to understand why courts have been reluctant to require of the collective bargaining process the same democracy that they unhesitatingly require in other union decisions. Solving this problem requires us to examine several legal doctrines relating to contract ratification in contexts not ostensibly concerned with employee rights, which will better permit us to understand some of the unstated assumptions from which the courts proceed.

A. The Law of Ratification of Collective Agreements

1. Federal Statutes Requiring Ratification as a Way of Avoiding Strikes

No federal labor law generally requires union leaders to submit proposed contracts to the membership. Federal statutes, however, do authorize the government to submit proposed contracts in two circumstances. The Federal Mediation and Conciliation Service (FMCS) may submit an employer's last offer to an employee vote, as a means of inducing settlement of a dispute over a new contract. Similar "last-offer" submission is required in the case of presidentially determined emergencies, if the strike has been enjoined by a United States district court.

These provisions were enacted as part of the Labor-Management Relations (Taft-Hartley) Act of 1947, and their empirical predicate is obvious: At least some of the time, the rank and file would be more "reasonable"—more accepting of the employer's last offer—than their leaders. The provisions obviously fall short of a principled commitment to union democracy, but they do permit such democracy to be invoked selectively by the federal government as an instrumental technique of achieving industrial settlements and avoiding strikes. We will find this instrumental appreciation of the uses of democracy to be the hallmark of most current grants of union democracy.

Not much needs to be said about this particular instrumental use of democracy. Democracy has failed its intended purpose, and has rarely been invoked. Apparently, no employer's last offer rejected by union leaders has ever been accepted by the membership under the national emer-
ergency provision. As for FMCS's discretion to submit last offers, the Service distrusted this technique from the beginning. Indeed, it initially took the position that it would not unilaterally conduct such ballots, and would propose the device to parties only where efforts at settlements by other means had been exhausted. Last-offer ballots have occasionally been conducted over the years, and although the FMCS does not keep comprehensive records on the use of the device, the consensus among professionals is that last-offer ballots are largely ineffectual in settling disputes. So the provisions have lain, largely dead letters; they have provided no basis for a more general federal policy favoring ratification of collective agreements.

2. The Law of Ratification Before 1959

Until 1959, the only law of ratification of collective agreements concerned whether the absence of ratification would prevent a collective agreement from being effective among employers, unions, and the National Labor Relations Board; only those actors litigated the legal significance of ratification or nonratification. During this period, employees rarely sought judicial enforcement of democracy in collective bargaining. This litigation decided when an agreement was effective to bar further employee organizational activity under the Board's contract bar rules, when an employer or union had committed an unfair labor practice by refusing to sign an agreement, and when an agreement was judicially enforceable. While there is no logical reason for all these legal consequences to ensue at the same moment, the decisions in all three types of cases encouraged relatively early agreement. Since employee ratification votes delayed the onset of the blissful contractual state, they were disfavored in all three types of cases. In each, the public "interest" in labor peace defeated the employees' interest in participation in collective bargaining. Since these assumptions were critical when employees later sought to vindicate directly their right to ratify agreements, it is necessary to explore cases determining the moment of effectiveness of labor contracts.


a. The Contract Bar Rule

The most extensive legal discussion of the effects of ratification votes has been by the National Labor Relations Board, which decides whether collective agreements will bar organizational efforts by rival unions. This obscure corner of labor law has brought forth doctrine minimizing the effects of contract rejection. Without much reflection, this doctrine has carried over into all proceedings where the effect of a contract rejection is at issue.

The National Labor Relations Act includes one limit on the timing of petitions to the NLRB to conduct a representation election. The claim was made early in the Act’s administration that stability in labor relations required some additional administrative limitations on the exercise of the right. The Act itself, however, does not require, or even suggest, that the existence of a collective bargaining agreement should somehow limit the availability of representation elections. One could therefore argue that Congress had already struck the balance in favor of the employees’ right to change bargaining representatives at any time not specifically precluded by statutory provision. The Board has nonetheless felt itself authorized to alter the balance. In particular, it has always been receptive to the basic claim that contracts might bar representation proceedings. While the exact contours of the bar have varied over the years in ways not now material, the competing considerations have invariably remained the same: the employees’ interest in free choice of representatives against the interest of the employer, the union and, assertedly, the public in stable collective relationships. The “balancing” of these interests in individual cases remained particularly static. The employees’ “interest” in availability of elections, and the “interest” of the employer and union in stability have been treated as abstractions unvarying in strength. What is said to have changed is the strength of the public “interest” as interpreted by the Board.

22. The National Labor Relations Act of 1935 § 9(c)(3), 29 U.S.C. § 159(c)(3) (1976), provides that: “No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held.”

23. The Board bars elections within twelve months of a union’s certification, see Brooks v. NLRB, 348 U.S. 96 (1954), or within a “reasonable period” after an employer’s voluntary recognition of a union, see Keller Plastics Eastern, Inc., 157 N.L.R.B. 583 (1966).


26. For an example of such a shift, see the Board’s decision in Reed Roller Bit Co., 72 N.L.R.B. 927 (1947), holding that contrary industry practice would no longer be admissible to challenge as “unreasonable” a two-year collective agreement whose duration was then “not customary in the in-
What of the question of whether the contract that bars a new election must have been ratified by the employees? The Board could have assumed a model of democratic collective bargaining, under which employee ratification would be normal and contracts would be presumed ineffective until such ratification. Indeed, the Board might have even taken seriously the slogan of "industrial democracy" and made such ratification mandatory before a contract would bar an election. By contrast, under the model of elitism, employee ratification is permissible only in the service of some greater goal. If the goal is stability, employee ratification is at best irrelevant, and at worst a dilatory impediment to the achievement of a stable contract.27

The Board has never taken an "employee rights" position that would require contracts to be ratified in order to bar any representation proceedings. At one point, the Board did require contracts to be approved by whatever chains of command the union (and the employer on its side) had created on their own,28 but even this concession to ratification was short-lived.29 Moreover, this limited requirement was obviously not much protection for employee rights, since both employer and union have an interest in quick approval procedures that spare the employer the bother, and

\[\text{Id. at 930 (emphasis in original, citation omitted). The Board has since extended the "contract bar" to}
\[\text{three years and once more redefined the public interest. General Cable Corp., 139 N.L.R.B. 1123, 1125–26 (1962).}
\]

27. The association between the existence of collective agreement and "industrial stability" is a constant theme in postwar labor law. See United Steelworkers v. Warrior & Gulf Mfg. Co., 363 U.S. 574, 578 (1960). Despite its constant reiteration, the proposition has little empirical support. During World War II, for example, increased numbers of collective agreements and a union no-strike pledge were associated with extremely high levels of industrial unrest. See N. Lichtenstein, Labor's War at Home: The CIO in World War II 133–35 (1982); Freeman, Delivering the Goods: Industrial Unions During World War II, 19 LAB. HIST. 570 (1975). The United States figures annually among the leaders of the industrialized world both in the specificity and enforceability of collective agreements and in all measures of industrial conflict. Kassalow, Industrial Conflict and Consensus In the U.S. and Western Europe, in Labor Relations in Advanced Industrial Societies: Issues and Problems (B. Martin & E. Kassalow eds. 1980); Shalev, Industrial Relations Theory and the Comparative Study of Industrial Relations and Industrial Conflict, 28 BRIT. J. INDUS. REL. 26 (1980).


the union the direct challenge, of representation proceedings. Even this modest tolerance of union ratification procedures in any case diminished over the years—doubtless keeping pace with the national interest in stability. The first sign of weakening was finding a bar to representation proceedings in a contract rejected in a vote of the local but later signed by the union and employer since the union's constitution did not require that the agreement be ratified. Subsequently, in Appalachian Shale, the Board held that the document relevant to determining when membership rejection would prevent the contract from serving as a bar, was not the union's constitution—even where the constitution unambiguously required ratification—but rather the contract. This focus "eliminates the litigation of factual issues" in representation proceedings and "gives greater weight to the language of the contract itself."

Since the Board never imposed its own ratification requirement, the only employees who had the right to ratify were those who could claim it under the union constitution. Following Appalachian Shale, the legal effect of a union's inclusion in contract of a ratification provision is to increase its own vulnerability to challenges by rival unions. Appalachian Shale, then, cuts off rights to organize for a certain number of employees who have been deprived of their right to ratify under their own union constitution, all in the supposed public interest in stabilizing industrial relations. The Appalachian Shale doctrine, however, remains the Board's policy. The Board has applied it expansively, even where giving "greater weight to the language of the contract itself" has required extensive litigation, in representation proceedings, of the meaning of that language.

b. Bargaining in Good Faith

Another aspect of the NLRB's hostility to ratification is the doctrine that the duty to bargain in good faith may require an employer or union to execute an unratified agreement. From the Board's "public interest"

32. Id. at 1162.
33. The union's assent to the contractual ratification clause may be presumed. It is an unfair labor practice for the employer to insist on such a clause. Houchens Mkt., Inc. v. NLRB, 375 F.2d 208 (6th Cir. 1967); NLRB v. Darlington Veneer Co., 236 F.2d 85, 87 (4th Cir. 1956); cf. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (employer violates § 8(a)(5) in insisting on "last offer ballot" clause).
34. In Swift & Co., 213 N.L.R.B. 49 (1974) (3-2 decision), the Board construed the phrase "subject to ratification by the Local Unions" in the Master Agreement between the employer and a national union to mean a majority of total union membership, not a majority in each local. The contract thereby served to bar organizational activity at a plant that had never even voted on it.
viewpoint, this doctrine resolves exactly the same problem as the doctrine of contract bars: In both instances, ratification is an impediment to the contractual stability that the Board is supposed to promote. Consequently, the analysis employs the same distinction between ratification requirements: Those agreed to by union and employer, typically in the tentative agreement itself, may be a defense to charges of failure to bargain in good faith, while ratification obligations found in the union's constitution, by-laws, or practice, may not.

Under the proposed model of democratic collective bargaining, any doctrine that discourages employee ratification bears a heavy burden of justification. There is a good argument that submitting a proposal to employees should never be a violation of the duty to bargain in good faith, unless the submission was bad faith as a pretext to frustrate agreement. It may appear that the employer's or union's duty to execute an unratified agreement does less harm to employees' rights than the rules governing contract bars, which add insult to injury by telling employees deprived of their right to ratify contracts under the union constitution that they are now further deprived of their statutory right to change bargaining representatives. Whatever difference exists between the two situations, however, obtains solely because of the Board's policy, which regards the duty to bargain as a duty owed the public or the other party but not employees directly. Indeed, employees are generally not a party to duty-to-bargain cases.

Under a model of democratic collective bargaining, employees are legitimate participants in the collective bargaining process, with individual

---

37. North Country Motors, Ltd., 146 N.L.R.B. 671 (1964); see NLRB v. Seneca Envt'l Prods., 664 F.2d 1170 (6th Cir. 1981); Southland Dodge, Inc., 205 N.L.R.B. 276 (1973); De Palma Printing Co., 204 N.L.R.B. 31 (1973). These cases treat employers, but unions also violate § 8(b)(3) in refusing to execute an agreed-upon but unratified agreement, unless ratification is a term of the contract itself. See NLRB v. Truckdrivers Local 100, Int'l Bhd. of Teamsters, 532 F.2d 569 (6th Cir. 1976) (union commits unfair labor practice in refusing to execute agreement rejected unanimously by membership); NLRB v. International Union of Elevator Constructors, Local 8, 465 F.2d 974 (9th Cir. 1972); Office & Professional Employees Local 42, 226 N.L.R.B. 991, 997-98 (1976); Local 9, Int'l Union of Operating Eng'rs, 210 N.L.R.B. 129, 131-32 (1974).
38. There are § 8(b)(3) cases that do not adopt the simplistic collective agreement/constitution distinction, but rather test a union's ratification against an overall bad-faith standard. See, e.g., NLRB v. Brotherhood of Painters Local 1385, 334 F.2d 729, 731 (7th Cir. 1964) (submission to ratification bad faith in light of thirty years' contrary practice and continual representation that president could bind union); NLRB v. New Britain Mach. Co., 210 F.2d 61, 62 (2d Cir. 1954) (Frank, J.) (union negotiators did not waive right to certain information from employers when membership rejected settlement the next day, given no bad faith by union). Employers' complaints of surprise at unions' ratification procedures have a hollow ring in light of LMRDA § 201(a)(5)(K), 29 U.S.C. § 431(a)(5)(K) (1976), requiring unions to report to the Secretary of Labor their procedures for contract ratification.
39. The General Counsel is likely to dismiss charges of employer refusal to bargain filed by individual employees where the union has decided not to file a charge. See 102 LAB. REL. REP. (BNA) 237 (Nov. 19, 1979).
and group rights to good-faith bargaining. This right should not be terminated upon conclusion of an agreement that employees never saw.

Even on the Board’s policy terms, the hostility to ratification in the duty-to-bargain context has two unfortunate effects. First, it provides more support for the judicial conception that the “typical” collective agreement is not ratified by the employees affected. Second, and more surprisingly, this body of law sometimes requires either a union or an employer to execute an agreement that employees have decisively rejected. It is not easy to find a reason for this result. If the union’s submission to ratification came as a surprise to the employer, then this might be part of a union’s overall bad faith (although here again an employee rights approach would be disinclined to find bad faith in any polling of employees). Courts have held, however, that good faith requires execution of agreements actually rejected by employees even without a finding that ratification was employed as a device to avoid agreement. By contrast, seeing ratification as simply a manifestation of the employ-

40. NLRB v. Truckdrivers Local 100, 532 F.2d 569 (6th Cir. 1976); Office & Professional Employees Local 42, 226 N.L.R.B. 991, 997-98 (1976). A fortiori, a union does not breach the duty of fair representation owed employees when it enters into a collective agreement that employees have actually rejected, if ratification is not a condition precedent contained in the collective agreement itself. Teamsters “General” Local 200, 111 L.R.R.M. 1685 (NLRB Gen. Coun. Div. Adv. 1982).

41. NLRB v. Cheese Barn, Inc., 558 F.2d 526 (9th Cir. 1977); Martin J. Barry Co., 241 NLRB 1011 (1979) (offer rejected 42-3 before its “approval” at second meeting, 16-6, with no notice that contract would be voted on; though 73 employees signed petition to employer complaining of lack of notice and asking it not to sign contract, employer violated NLRA § 8(a)(5) in refusing to sign contract).

42. See supra p. 802.

43. For example, in Cheese Barn, 222 N.L.R.B. 418 (1976), enforced, 558 F.2d 526 (9th Cir. 1977), the employer had apparently been indifferent to the whole matter of ratification until the proposed contract was submitted to its employees and rejected. The union then presented the identical contract to the employer, who then refused to sign it without its being made subject to successful ratification. The employer was found to have insisted unlawfully on ratification as a condition of agreement and was ordered to execute the agreement. The decision follows logically from NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958), but something seems to have gone awry. Since the union intended to, and did, submit the proposed contract to the employees, and announced this intention during the bargaining process, it would probably have agreed to inclusion of a ratification requirement in the contract. The Board’s position is that a union’s announced intent to submit a contract to ratification is not the same as including that intent as a contractual term, and that only the latter may be relied on by the employer to refuse to execute a contract. Cheese Barn, 222 N.L.R.B. at 419; C. & W. Lektra Bat Co., 209 N.L.R.B. 1028 (1974), enforced, 513 F.2d 200 (6th Cir. 1975). In fact, the contract rejected in Cheese Barn actually contained such a clause, inserted by the employer to conform to what it thought were union desires and assertedly not noticed by the union. 222 N.L.R.B. at 419. The Board held there had been no agreement on the clause. Id. at 420. Had there been, the employer could lawfully have refused to sign the agreement and its employees would not have been obligated to work under an agreement they had rejected.

Perhaps Cheese Barn represents hostility only to the employer’s asserting the employee’s rights by proxy rather than to ratification as such. The employer’s action seems unobjectionable to me, since the employer remains bound by good faith. There is some suggestion in Cheese Barn that, following the employees’ rejection of the proposed contract, the employer began insisting on ratification but made no other concession. This would violate the duty to bargain in good faith, since it indicates a “desire not to reach an agreement with the union.” NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), cert. denied, 346 U.S. 887 (1953).
ees' rights or of union democracy (let alone any more threatening idea such as participatory democracy) would make it absurd to insist on employee voice as "bad faith."

There is little reason to suppose that any of these rules—ratification implicated in FMCS mediation, regulation of disputes in a national emergency, NLRB rules on contract bar, or the duty to bargain—exerts any great practical effect on labor relations generally or on ratification practice in particular. Yet their ideological impact cannot be dismissed so easily. They are powerful statements to the effect that employee ratification is not "normal"; that it is typically an impediment to blissful contractual harmony, like a stranger's stepping out from the crowd at the point in the marriage ceremony when objections are called for; that ratification has a place in national labor policy only on the rare occasions when employees are closer to their employer than are union officials. These attitudes—indeed, the cases themselves—have been influential when employees have sought to enforce directly their right to ratification.

B. Direct Enforcement of Employees' Right To Ratify Agreements

A lawyer is visited by a group of employees. They have, they say, lost their jobs because of a secret agreement between their local president and

---

44. There is surprisingly little case law on the related question of the circumstances under which an unratified agreement is enforceable against a union. In comparison to the numerous suits by employees claiming violation of their right to ratify the agreement, there are few suits in which defendants resist complying with an agreement on the ground that it was unratified. There is, however, a clear trend toward regarding ratification as an abnormal part of the contracting process, and hence toward enforcing unratified agreements. At common law, it was perfectly obvious to courts hearing actions to enforce collective agreements that unions might give their negotiators as much or as little authority as they liked. As a result, when employers sued unions for specific performance of a promise not to strike, and the officers defended on the grounds that they had not been empowered to conclude an agreement, the courts surveyed the unions' internal documents to determine if ratification was a condition precedent to agreement. See A.R. Barnes & Co. v. Berry, 169 F. 225, 229–41 (6th Cir. 1909) (refusing to enjoin strike because convention ratification unobtained); W.A. Snow Iron Works, Inc. v. Chadwick, 227 Mass. 382, 590–91, 116 N.E. 601, 604 (1917) (officers unauthorized to consent to employment of nonmembers). LMRA § 301, 29 U.S.C. § 185 (1976), which created federal jurisdiction for suits to enforce collective agreements, also provided that actual approval or subsequent ratification would not be controlling of agency questions, id. § 301(e), 29 U.S.C. § 185(e). "This has been properly construed as opening the way for application of general rules of agency and particularly the rules of apparent authority." United Steelworkers v. CCI Corp., 395 F.2d 529, 532 (10th Cir. 1968) (holding union bound by no-strike promise despite absence of approval by international officers), cert. denried, 393 U.S. 1019 (1969).

While unratified agreements are thus enforced against unions on the theory of apparent authority, e.g., KLM Royal Dutch Airlines v. Transport Workers' Union, 56 L.R.R.M. 2205 (E.D.N.Y. 1964) (injunction against strike); 57 L.R.R.M. 2063 (E.D.N.Y. 1964) (contempt), there is still some judicial willingness to examine internal union documents to unravel actual authority. See Lear Siegler, Inc. v. International Union, UAW, 419 F.2d 534 (6th Cir. 1969); International Sound Technicians Local 695 v. International Alliance of Theatrical Stage Employees, 611 F.2d 266 (9th Cir. 1979) (finding union approval based on union's internal documents); see also Figgly Wiggly Operators' Warehouse, Inc. v. Figgly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local 1, 611 F.2d 580 (5th Cir. 1980) (upholding arbitrator's determination that provision agreed to by business agent, but not included in draft submitted to membership for ratification, did not become part of contract).
Collective Bargaining

ts their employer, which permitted employees displaced at another establishment to “bump” them. They never heard of this agreement, never got to vote on it, and would have done all they could to vote it down had it ever been presented to them. Can the lawyer, they ask, prevent this contract from going into effect until the employees have a chance to ratify it?

While there are legal theories to help the employees, and while I will argue that courts should employ these theories in the many cases like this one, the lawyer’s most candid short answer is that he can do little. There is no legal requirement that contracts be ratified, so unless the union has violated its own rules or discriminated against these employees, they are without a remedy. Moreover, no court has ever enjoined an agreement already in operation, even if unratified by a membership plainly entitled to do so under applicable union rules. Even if the employees had a right to ratify the agreement under union rules, then they may at most be able to obtain money damages for the harm done them.

I will review here the cases that command this modest conclusion. In Part III, I will criticize the assumptions of those cases and argue for a greater judicial willingness to require, and supervise, democracy in collective bargaining.

1. The Limited Statutory Right To Ratify a Contract if the Union Constitution Is Silent

Perhaps sixty percent of unionized employees have no right under their union’s constitution to vote on collective agreements.\(^45\) As to them, the title of this section is ironic; they have no general statutory right to see in advance, to comment or vote on the agreement that governs their working lives.

This situation has not come about for want of legal theories which would support such a right of representation. First, there is a respectable body of opinion that the duty of fair representation, as applied to the negotiation of collective agreements, imposes on unions requirements of procedural fairness that include the obligation to ascertain employee interests and desires, through “rational decisionmaking processes.”\(^46\) This approach to the problem of fair representation in contract negotiations derives from the very case that announced the doctrine, \textit{Steele v. Louisville & Nashville Railroad}.\(^47\) Steele, of course, did not shy away from reviewing the union’s substantive negotiating position: The case enjoined the

---


\(^{46}\) The leading article is Clark, \textit{The Duty of Fair Representation: A Theoretical Structure}, 51 TEX. L. REV. 1119, 1131 (1973).

\(^{47}\) 323 U.S. 192 (1944).
union's attempt to eliminate black firemen from the railroad and appropriate their jobs for the whites. Yet, the case also contains a number of references to procedural inadequacies in the union's bargaining activities. We are specifically told, for example, that the union in Steele served its demands for the elimination of black firemen "without informing the Negro firemen or giving them opportunity to be heard" though minorities have a "right to have their interests considered at the conference table."

Finally, wherever necessary to the union's substantive obligation to bargain fairly for all employees, "the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action."

These remarks may be most pertinent to the formation of a union's demands in bargaining. Some courts have held that, in an intraunion conflict over bargaining demands, fair representation requires an equitable procedure for protecting the interests of all affected employees, and that simply advancing the demands of the most numerous group is not such a procedure. In the absence of intraunion conflict, however, fair representation does not seem to require any particular bargaining procedures. In

48. Id. at 195.
49. Id. at 200.
50. Id. at 204. An unusually perceptive scholar has recently discerned that Steele, too, makes an unexpected assumption of—even a choice for—elitist bargaining:

In holding that unions owe a duty of fair representation to all members of the bargaining unit, but that the duty does not require unions to allow all bargaining unit employees to become union members, the Court committed itself to a particular perspective on the questions of internal union democracy. It is a necessary premise of the Court's holding that it is possible for a labor organization to provide "fair representation" to employees whom it declines to admit to union membership or, indeed, to union meetings. That is, the Court believed a union can adequately fulfill its duties as a bargaining agent without the participation and active involvement of represented employees in the union's decision-making process and without inclusion of the represented in the leadership cadre who square off against the employer at the bargaining table.

Klare, The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law, 61 OR. L. REV. 157, 189–90 (1982). I agree with Professor Klare that the hints about participation in Steele are no substitute for the Supreme Court's full commitment to democratic bargaining, which would have entailed at a minimum a federal right to union membership. I believe, however, that Congress, in enacting the LMRDA in 1959, did adopt a considerably more participatory model of union democracy, one which the courts have wilfully failed to apply to collective bargaining. See infra pp. 834–36.

51. NLRB v. Truck Drivers Local 315, Int'l Bd. of Teamsters, 545 F.2d 1173 (9th Cir. 1976); Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976); see also Waiters Union Local 781 v. Hotel Ass'n of Wash. D.C., 498 F.2d 998, 1000 (D.C. Cir. 1974) (duty of fair representation "implies some consideration of the position of the members involved," but duty not breached where international officers "were apprised of the position" of one group of members and eventually adopted position advocated by another group). For a particularly thoughtful recasting of these and other "bargaining procedure" cases in substantive terms, see Finkin, The Limits of Majority Rule in Collective Bargaining, 64 MND. L. REV. 183, 198–239 (1980).

These cases, which hold that fair representation may limit the effectiveness of democracy in collective bargaining, must be reconciled with whatever theory of the right to democratic collective bargaining is put forward. See infra pp. 851–53.
particular, fair representation does not require that contracts be submitted to the membership for ratification. 5

Passage of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act in 1959 opened up a second source of potential arguments for an inherent employee right to ratify agreements. To be sure, the Act said nothing by its terms about collective bargaining, but this very silence was cause for concern to some leading figures of the period who wanted to make sure that full democracy for dues increases, election of officers, and internal by-laws did not infect the collective bargaining process. 5

It is possible to read the Bill of Rights of Members of Labor Organizations as creating a right to democratic bargaining, including the right to ratify agreements. Section 101(a)(1) grants union members "equal rights and privileges...to participate in the deliberations and voting upon the business of [membership] meetings." 5 Elitist bargaining is the antithesis of equal rights. Bargaining demands and proposed contracts are likely to be in some fashion the business at meetings, but there can be no equal right to participate if a few leaders hold all the information and members do not vote at all. Section 101(a)(2) grants union members the right to express their views on union business; surely this right is violated if meetings are held but members' views are never solicited. 6

Nevertheless, courts have refused to find such a right to ratification. They have spoken the language of policy and have identified a national interest in an authoritarian determination of the terms and conditions of employment. 5

53. See A. Cox, supra note 21, at 93-94 (1960) (attributing such views to others).
57. In this sense, the most candid and accurate judicial analysis of the relationship between union democracy and collective bargaining appears in an early case, which dismissed an employee suit seeking to enjoin withholding of payments into a new pension plan until the plan could be presented to all locals for a vote allegedly required by the union's constitution:
In brief, the Reporting and Disclosure Act is to secure to union members rights vis-a-vis the union in order to foster responsible collective bargaining between the union and employers. No rights were granted to individuals to inject themselves into the collective bargaining procedures
There is one circumstance in which the LMRDA grants employees a right of ratification. Section 101(a)(1) guarantees members “equal rights and privileges . . . to vote in elections or referendums of the labor organization.” Courts have held this section to require as a general matter that if some union members are afforded the right to ratify, others must also enjoy that right. This doctrine, however, reveals in two ways the lingering fallout from the earlier cases denying the applicability of the LMRDA to collective bargaining, as well as the present unease about the policy value of democratic collective bargaining.

First, it does not really hold that employees can ratify. Second, be-
cause the courts have not granted a remedy against the employer, the doctrine leaves the unratified agreement intact. Plaintiffs are apparently limited to injunctive and declaratory relief against the union and compensatory relief. It is the rare plaintiff who is in a position to show with any certainty the financial loss from the denial of her right to ratification, even though there seems little doubt that an average unratified agreement

ment for the defendant union, it did not grant summary judgment to the plaintiff local denied the right to ratify but rather "remanded for fuller consideration of the local's allegations and the union's defenses," 665 F.2d at 1104-05. The union was thus apparently given a chance to show that its discrimination among locals constituted one of the "reasonable rules and regulations" protected by § 101(a)(1), though the standard for such a showing was not discussed by the court. Compare 665 F.2d at 1103 (citing with approval cases permitting unions to limit votes to active members, those in good standing, or those affected by action) with id. at 1104 (noting none of exceptions was relevant to case at hand). One judge on the panel was bewildered by the remand. See id. at 1110-11 (Nichols, J., concurring and dissenting). On remand, the union did not seriously challenge the local's right to ratify; the litigated issue was whether non-members could also vote; the court held that they had a right to do so. American Postal Workers Union, Headquarters Local 6885 v. American Postal Workers Union, 113 L.R.R.M. 2433 (D.D.C. 1982).

Under Thomas, exclusion of retired employees would be permissible if performed in good faith. See Thomas v. United Mine Workers, 422 F. Supp. at 1117.

61. The employer owes employees neither a duty of fair representation, nor equal voting rights, nor any fiduciary or contractual obligations under the union constitution. See Wages v. Honeywell, Inc., 66 L.R.R.M. 2766 (D. Minn. 1967) (allegations of improper ratification dismissed as to employer). Yet plaintiffs seeking to enjoin operation of the unratified collective agreement may face the practical and legal objection that the employer is an indispensable party. See Case v. IBEW Local 1547, 438 F. Supp. 856, 859-860 (D. Alaska 1977) (dismissing claim for injunction against collective agreement due to lack of jurisdiction over employers' organization), aff'd on other grounds sub nom. Stelling v. IBEW Local 1547, 587 F.2d 1379 (9th Cir. 1979), cert. denied, 442 U.S. 944 (1979). And if the employer is found at any time to be an indispensable party, the entire action may be dismissed. 3 A MOORE'S FEDERAL PRACTICE ¶ 19.19 (1979); cf. Curtis v. United Transp. Union, 486 F. Supp. 966 (E.D. Ark. 1980) (court rejoined previously dismissed defendant in case involving duty of fair representation); Barrett v. Thorofare Mkts. Inc., 77 F.R.D. 22 (W.D. Pa. 1977) (dismissing claim alleging denial of fair representation in negotiating plan that denied plaintiffs' pensions on early retirement because pension plan's trustees were indispensible party); Johnson v. Colts, Inc., 306 F. Supp. 1076, 1079-80 (D. Conn. 1969) (refusing to dismiss employee's suit against employer on collective agreement for failure to join union; court ordered such joinder).


62. In Postal Workers, however, the plaintiffs were able to allege pecuniary loss under the unratified agreement.

As regards the money damages, the plaintiffs seem to contend that they would have been better off in a pecuniary way if no agreement had been negotiated, in view of the normal Civil Service and Post Office regulations that would have applied. They say they lost some 'merit increases' and 'saved grade' positions.

would be inferior to ratified agreements concluded by the same parties.\textsuperscript{63} In the individual case, however, how many employees could prove that, even if ratification had been observed, the eventual agreement would have differed from the one that union officials concluded?

In summary, then, for the sixty percent or so of unionized employees whose union constitutions do not grant them the right to ratify agreements, no court will generally require ratification. Even employees whose fellow union members are permitted something sufficiently close to ratification to permit a finding of denial of equal rights may not receive an injunction against the unratified agreement, and thus may go remediless unless they can demonstrate pecuniary loss from the failure to ratify the agreement.

2. \textit{Enforcing the Union Constitution on Ratification}

It is perhaps not too surprising that courts have refused to order ratification where not otherwise required by the union's constitution, since this might seem to be an inappropriate intrusion into internal union political decisions. Indeed, a frequent theme of the cases refusing to do so is that ratification is a matter between the union and its members.\textsuperscript{64}

Suppose, however, that the union's constitution \textit{does} require ratification of proposed agreements. And suppose that union officials conclude an

\textsuperscript{63} Judge Nichols explained:

\begin{quote}
It appears to me that the union officials who negotiated the contract placed themselves in a conflict of interests position by simultaneously negotiating with the same management some contracts that required ratification, and some that by their view did not. They would be under a strong temptation to make the inevitable concessions to management in the contracts not to be ratified, and obtain the plums in those that were to be.
\end{quote}

\textsuperscript{64} \textit{See}, e.g., Cleveland Orchestra Comm. v. Cleveland Fed'n of Musicians Local 4, 303 F.2d 229, 233 (6th Cir. 1962); Aikens v. Abel, 373 F. Supp. 425, 435 (W.D. Pa. 1974). In \textit{Aikens}, plaintiffs, members of the United Steelworkers of America, sought the right to ratify the famous Experimental Negotiating Agreement (ENA) of 1973, in which the union gave up the right to strike over unresolved new contract issues and agreed to binding interest arbitration, in exchange for a payment of $150 to each member and certain other benefits. The court rejected "the unspoken promise [sic] behind [plaintiffs'] thinking . . . that a union's legally recognized right to strike is so important, so hard-won, that no one, not even the union's representative leadership nor even, presumably, the membership themselves, can give it up." 373 F. Supp. at 437.

The Court was undoubtedly aware that membership ratification is a continuing political issue in the Steelworkers, with support for ratification concentrated among the union's younger and black members. See 99 LAB. REL. REP. (BNA) 62 (Sept. 25, 1978). Such a proposal is voted down at almost every biennial convention of the union, most recently in the fall of 1982. \textit{USW Rejection of Changes to Bargaining, Dues Structure}, 111 LAB. REL. REP. (BNA) 96 (Oct. 4, 1982). For an analysis of the unresponsiveness of USW conventions to the rank and file and their near-total domination by paid union staff, see \textit{J. HERLING, RIGHT TO CHALLENGE: PEOPLE AND POLITICS IN THE STEELWORKERS UNION} 360-361, 401 (1972); \textit{L. ULMAN, THE GOVERNMENT OF THE STEELWORKERS UNION} 99-117 (1982). Under these circumstances, judicial support for contract ratification by steelworkers would be less an intrusion into ongoing union politics than a vindication of union democracy over staff oligarchy.
agreement without notice to, or perhaps over the objection of, employees. What can the employees do? A well-pleaded employees’ suit, alleging a failure to submit a proposed contract for ratification as required by the union’s constitution, might allege any or all of five causes of action, each of which has been accepted by one or more of the circuit courts of appeal in the last five years:

1. The failure to submit to ratification is a violation of the equal rights provision of the Bill of Rights of Members of Labor Organizations, LMRDA § 101(a)(1). 65

2. The failure is a breach of the duty of fair representation. 66

3. The failure is a violation of the fiduciary obligation of union officers under LMRDA § 501. 67

4. The failure is a breach of the union’s constitution, which is a contract between labor organizations and between the leadership and the membership, and hence federal jurisdiction exists either under LMRDA § 301(a) for suits to enforce contracts between labor orga-

65. Christopher v. Safeway Stores, 644 F.2d 467, 468–71 (5th Cir. 1981); Trail v. International Bhd. of Teamsters, 542 F.2d 961, 966 (6th Cir. 1976). Contra Alexander v. International Union of Operating Eng’rs, 624 F.2d 1235, 1239–40 (5th Cir. 1980). This theory is most obviously applicable when, as in Trail, plaintiffs allege that other members of the union have been permitted to vote on agreements. See Alexander, 624 F.2d at 1241 (Clark, J., dissenting in part). The Christopher case does not require such an allegation, however, and expressly rejected “the Union’s contention that if all members are equally denied the right to vote there is no statutory breach . . . .” 644 F.2d at 470.


A local union’s business agent, apparently on direction from the international union’s president, signed a binding project agreement on behalf of the local, even though the local’s membership had unanimously declined on two prior occasions to participate in the project, and despite the presence of a provision in the parent union’s constitution that collective bargaining agreements must be approved by a majority of the affected local . . . . 624 F.2d at 1236. This was held to constitute a breach of the duty of fair representation. Such “business agent concessions” are common. See infra note 160.


While so far only the Ninth Circuit has held that a failure of union officers to submit a contract for ratification in violation of their constitution is a breach of fiduciary obligation under LMRDA § 501(a), three circuits have now held that the statutory provision reaches beyond purely financial obligations. Stelling, 587 F.2d 1379; Sabolsky v. Budzanowski, 457 F.2d 1245, 1250–51 (3d Cir.), cert. denied, 409 U.S. 853 (1972); Johnson v. Nelson, 325 F.2d 646, 649 (8th Cir. 1963). Contra Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964).
nizations, or as a state law claim pendent to the three federal claims above.\(^68\)

5. The last ratified agreement must be enforced on the theory that it remains unsupplanted pending ratification of a new agreement.\(^69\)

Despite judicial acceptance of these causes of action\(^70\), only two cases have ordered any relief for employees deprived of their right to ratify, and only one awarded more than nominal damages.\(^71\) Moreover, no court of

---

68. Since plaintiffs must allege that the union constitution grants them the right to ratify, can they just sue the union and officers directly for breach of the constitution, under LMRA § 301(a) which creates federal jurisdiction for suits for violation of "contract . . . between labor organizations"? A number of the cases cited reject this view, for one of two reasons. The first is the once-popular theory that § 301(a) jurisdiction to enforce union constitutions extends only to intra-union disputes accompanied by "concrete allegations of actual threats to industrial peace . . . ." 1199 D.C. Nat'l Union of Hosp. & Health Care Employees v. National Union of Hosp. & Health Care Employees, 533 F.2d 1205, 1208 (D.C. Cir. 1976), followed in Stelling, 587 F.2d at 1383-84. The second denies standing under § 301(a) to individual employees. Swacek v. Hotel & Restaurant Employees Local 400, 431 F.2d 705 (9th Cir. 1970), followed in Stelling, 587 F.2d at 1383-84; Trail, 542 F.2d at 967-68.

Recently the Supreme Court rejected the 1199 D.C. holding in United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v. Local 334, 452 U.S. 615 (1981), while reserving judgment on Swacek, 452 U.S. at 627 n.16. Thus, as of early 1984, it is clear that suits on a union constitution may be brought in federal court without alleging threats to industrial peace, but it remains an open issue whether individual employees may bring such a suit. But see Kinney v. Internat'l Bhd. of Elec. Workers, 669 F.2d 1222, 1229 (9th Cir. 1982) (such suits held to be permitted, following Plumbers).


As applied to the problem of a contract unratified in breach of a union's constitution, the entire focus on § 301(a) has always seemed incomprehensible to me. Federal jurisdiction now plainly exists in such suits by alleging the union's breach of the constitution as a violation of LMRDA § 101(a), the duty of fair representation, and the fiduciary obligations of LMRDA § 501(a). At that point, the breach of constitution claim is properly in federal court as a pendent state law claim. As the Supreme Court has had occasion to note, most states treat the union's constitution as a contract between all the members and the organization. United Ass'n of Journeymen, 452 U.S. at 621-22; International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618-19 (1958). I do not understand why breach of the union's constitution was not argued, as a pendent state claim, in any of these cases.


70. All five theories derive the standard for ratification from the union's constitution. This gives less protection than would reliance on equal rights, fair representation, or fiduciary obligations alone. When union leaders refuse to apply constitutional ratification procedures, courts sometimes defer to these strained constitutional interpretations under a deferential "reasonableness" standard. Stelling, 587 F.2d at 1388-89; United Bhd. of Carpenters Local 117 v. Albany Dist. Council of Carpenters, 553 F. Supp. 55, 59-61 (N.D.N.Y. 1982).

71. Christopher v. Safeway Stores, 644 F.2d 467 (5th Cir. 1981), represents the only award of other than nominal damages to employees deprived of the right to approve their contract. The plaintiffs were two individuals laid off in the closing of one store and unable to bump less senior employees in the district since, unbeknownst to the membership, the union and employer had, in the last contract, substituted a smaller seniority unit and concealed this fact from the membership. This action by
appeals has as yet enjoined an agreement from going into effect until ratified by the membership.72

It would be inappropriate to draw from this small body of federal cases extending jurisdiction the general principle that employees cannot enforce their right to ratify under the union constitution or by-laws. Before 1976 there were no such cases at all.73 Nevertheless, one can be a bit skeptical of the often-repeated assertion that the right to ratify agreements is a mat-

72. I have been able to locate only three injunctions issued against the enforcement of a collective agreement pending membership ratification as required by the union constitution. All were in the federal district courts, and none of the cases was officially reported.

On November 26, 1977, Judge Frankel enjoined the New York City 'Taxi Drivers' Union from entering into a collective agreement until it had been ratified by the membership. Taxi Rank-and-File Coalition v. Van Arsdale, 86 L.R.R.M. 2359 (S.D.N.Y. 1973). The plaintiffs had alleged a variety of Landrum-Griffin complaints which were not specified in Judge Frankel's oral opinion and further alleged a right to a ratification vote under the union constitution. They also proved that the last agreement between the union and the Metropolitan Taxi Board of Trade, Inc. had never been submitted to the membership at a ratification meeting. Judge Frankel's opinion is hurried; apparently unaware at the time of these injunctions how unprecedented they were.

The second injunction forbade the Amalgamated Transit Union "from entering into a collective bargaining agreement unless a majority of the voting members have voted to accept this offer." The officers' contention that a two-thirds vote was necessary to reject a tentative settlement and strike was disregarded as contrary to the "plain language" of the ATU Constitution. The defendants were ordered to disregard the erroneous "two-thirds" requirement and were further ordered to submit the most recent company offer to the membership at a ratification meeting. Judge Frankel's opinion is hurried; apparently unaware at the time of these injunctions how unprecedented they were.

The second injunction forbade the Amalgamated Transit Union "from entering into a collective bargaining agreement unless a majority of the voting members have voted to accept this offer." The officers' contention that a two-thirds vote was necessary to reject a tentative settlement and strike was disregarded as contrary to the "plain language" of the ATU Constitution. The defendants were ordered to disregard the erroneous "two-thirds" requirement and were further ordered to submit the most recent company offer to the membership at a ratification meeting. Judge Frankel's opinion is hurried; apparently unaware at the time of these injunctions how unprecedented they were.


ter best left to employees and their union, since if the union breaches that obligation in all likelihood nothing will happen to it. By hypothesis, employees deprived of the right to ratify their contract are frequently unaware of its wording and impact until long after the business agent and management have implemented it. The resulting situation puts plaintiffs in the unpleasant bind of either seeking to enjoin a functioning agreement with nothing to put in its place, or arguing for damages based on the difference, generally impossible to demonstrate, between the secret agreement and a hypothetical ratified agreement.

Before the remedy of nominal damages is graven in stone, I would suggest that courts retain a willingness to award relief when a collective agreement is concluded, in violation of union rules, behind the backs of employees. Certainly employees who suffer financial loss under the agreement should be awarded compensatory damages without having to show the impossible, namely the contents of the likely agreement after a lawful ratification process. The denial of the right to democratic participation in one's affairs is worth something, and damages for its deprivation are simply compensatory. Where plaintiffs proceed under fiduciary and equal rights theories, punitive damages may be appropriate in particularly outrageous subversions of democracy, as when union officials collude with the employer or feather their own nests.

Finally, courts should temporarily enjoin the operation of unratified collective agreements pending a judicially supervised, orderly ratification process. This brings us to our next topic: the courts' curious reluctance to require the same degree of fairness in ratification votes that they require in other internal union referenda under the LMRDA.

3. Supervising the Ratification Process: Must Ballots Be Meaningful?

When a proposed contract is submitted to the rank and file for ratification, the judicial role is not at an end. Federal courts have developed a
Collective Bargaining

substantial body of law guaranteeing that the electorate be informed adequately of alternatives, not be misled by the ballot or accompanying information, and be able to organize effective opposition. Nothing illustrates more clearly the current denigration of democracy in collective bargaining than the refusal of the courts to apply this body of law to ratification.

In cases involving the adoption of a union constitution or by-laws, mergers of locals, assessments, and other balloting, the general principle has emerged that the LMRDA's guarantee of "equal rights and privileges . . . to vote in elections or referendums of the labor organization . . . and to participate in the deliberations and voting upon the business of [membership] meetings" involves more than the "mere naked right to cast a ballot." The right to vote must be "meaningful." Accordingly, the federal courts have not hesitated to supervise internal union referenda. Ballots must be clear and nonmanipulative. The electorate must be informed adequately about the proposal under consideration and alternatives to it. Insurgent groups must be permitted to circulate opposing information as a vindication of their right of free speech. Voting constituencies must not be gerrymandered; all those affected must vote and those unaffected may not. Other provisions of the union's constitution and by-laws applicable to referenda must be followed.

82. Id. at 215 (referendum proposal that local affiliate with particular national union invalid where local members were not informed of alternate proposals by other national unions); Young v. Hayes, 195 F. Supp. at 917-18 (improper to require members to cast single "yes or no" vote on multiple proposals).
83. Blanchard, 388 F. Supp. at 214 (affiliation proposal omitting statement of degree of control international would have over local held invalid; court ordered full disclosure and dissident access to union mailing list); Young v. Hayes, 195 F. Supp. at 913, 916 (adoption of amendments to union constitution invalid where accompanying literature falsely claimed that changes were "made mandatory through the passage of the Landrum-Griffin Act").
84. Lodge 1380, Bhd. of Ry., Airline & S.S. Clerks v. Dennis, 625 F.2d 819, 827-29 (9th Cir. 1980) (claim that international's denial of membership lists to locals seeking to generate support for referendum on constitutional change states cause of action under LMRDA § 101(a)(2)); Sheldon v. O'Callaghan, 497 F.2d 1276, 1282-83 (2d Cir.) (invalidating referendum on new constitution where opponents had been denied access to union newspaper and mailing list), cert. denied, 419 U.S. 1090 (1974).
85. Alvey v. General Elec. Co., 622 F.2d 1279, 1287 (7th Cir. 1980) (improper to exclude laid-off members from vote on revised seniority rules); Turner v. Dempster, 569 F. Supp. 683, 689-91 (N.D. Cal. 1983) (union may not limit important votes to those with more than six years' service); Vestal v. International Bhd. of Teamsters, 245 F. Supp. 623 (M.D. Tenn. 1965) (union must permit all affected members to vote on separate charter for one craft group).

The reliance of most of these cases on the "equal rights" guarantee of LMRDA § 101(a)(1) is odd, since in each case all members were probably equally confused or misled by the fuzzy ballot wording.
When the union's officers submit a contract for ratification, however, these principles tend to be forgotten. Courts have repeatedly turned a deaf ear to claims that ratification districts have been gerrymandered to include heavy participation by workers unaffected by the agreement.87 There has

or accompanying misinformation. Clyde Summers has suggested that the "equal rights" being vindicated are those of the membership, as a class, as against those of the leadership which frames the issues, dispenses the misinformation, and restrains competing viewpoints. C. SUMMERS, H. WELLINGTON & A. HYDE, supra note 24, at 1249. This theory receives support in Lodge 1380, Bhd. of Ry., Airline & S.S. Clerks v. Dennis, 625 F.2d 819 (9th Cir. 1980). The denial of membership lists to the insurgent locals in that case did not violate "equal rights" under LMRDA § 101(a)(1) because the international leadership remained passive with respect to the proposed referendum. Id. at 826. This expansive reading of LMRDA § 101(a)(1) as creating rights in the membership equal to those of the leaders meets the Supreme Court's admonition that the section be understood as an antidiscrimination provision. Calhoon v. Harvey, 379 U.S. 134, 139 (1964); cf. Aleson, A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights, 51 MINN. L. REV. 403, 409-22 (1967) (discussing tension between conceptions of LMRDA § 101(a)(1) as provision creating substantive rights and as antidiscrimination provision permitting equal denial of democratic procedures).

87. At the time of the passage of the LMRDA, Professor Cox disingenuously expressed concern that the "equal rights" provision of § 101(a)(1) would lead to judicially mandated inclusion of workers unaffected by the contract ratification votes. Cox, Internal Affairs of Labor Unions under the Labor Reform Act of 1959, 58 MICH. L. REV. 819, 832 (1960). In fact, § 101(a)(1) offers the only promise of eliminating this extremely common practice—a promise the courts have not kept.

The issue has arisen repeatedly in the Teamsters Union. The union negotiates a National Master Freight Agreement along with 32 area supplements or riders. The entire package is then submitted to the national membership and voted up or down. Only if the entire package is rejected nationally—which has never happened, due in part to the requirement under the Teamsters' Constitution that contracts are considered ratified unless two-thirds of the members vote no—may any portion of it be renegotiated. Thus, it is by no means uncommon for a substantial majority of the only workers affected by a particular area supplement to reject it, only to be bound by the supplement because of national approval of the entire package. Despite the easy step from the equal rights cases to the conclusion that the package system deprives the affected rank-and-file of any equal rights with the leadership (or even with members in larger election districts)—let alone any sort of "meaningful ballot"—federal district courts have on three occasions upheld this system as consistent with "equal rights," Trail v. International Bhd. of Teamsters, 106 L.R.R.M. 2930 (E.D. Mich. 1980); Davey v. Fitzsimmons, 413 F. Supp. 670 (D.D.C. 1976); Highway Truck Drivers Local 107 v. International Bhd. of Teamsters, 65 L.R.R.M. 2265 (D.D.C. 1967).

International displacement of a local's ratification power was also upheld in International Sound Technicians Local 655 v. International Alliance of Theatrical Stage Employees, 611 F.2d 266 (9th Cir. 1979) (per curiam). Note again the assumption that ratification is deviant; that depriving employees of ratification presents no serious issues of fair representation or equal rights; but that the employees, seeking a voice in their working conditions, are "intermeddlers in their own lives."

A glimmer of judicial supervision temporarily attended the increasingly bizarre efforts of Transport Workers Union Local 100, which represents subway workers and bus employees in New York City, to pad the ratification voting rolls with employees unaffected by the relevant contract. In one of apparently only four recorded injunctions against a defective ratification vote, a federal court enjoined a contract ratification under a ballot which, departing from previous practice, went to employees of five private bus companies along with public employees. Committee of Concerned Transit Workers v. Transport Workers Union of America, 78-Civ.-1583 (S.D.N.Y. Apr. 24, 1978); U.S. Judge Holds Up Count of T.W.U. Vote on the New Transit Contract, N.Y. Times, Apr. 25, 1978, at A2, col. XX; Transit Union Voids Vote on Pact; New Balloting Will Be Supervised, N.Y. Times, Apr. 26, 1978, at A1, col. XX. For the other injunctions, see supra note 72.

Judicial supervision was only a stopgap, however. A subsequent ratification referendum excluded the employees of the private bus companies, but lumped together employees of two separate public employers with two separate contracts, the New York City Transit Authority (NYCTA) and the
Collective Bargaining

been some willingness to require that misleading ballot propositions be corrected. The problem of misleading ratification, however, is not generally on the ballot, but in the accompanying information or misinformation. Here, despite agreement with the abstract proposition that misinformation in the contract ratification process may deny workers fair representation, courts have provided no significant relief for workers victimized by such misrepresentation into ratifying contracts not in their interests. The simple expedient of delaying the vote pending adequate in-

Manhattan and Bronx Surface Transit Operating Authority (MABSTOA). NYCTA employees rejected their contract by a vote of 8,506 for to 10,825 against; MABSTOA employees approved theirs 3,214 for to 577 against. The union lumped both together and held both contracts ratified. This was held not to violate the equal rights provisions of LMRDA § 101(a)(1), despite provisions in the union's constitution and by-laws requiring ratification of contracts "by the members covered" or "by the majority of the members voting in the Branch affected." The union could without formal amendment interpret its constitution, which designated NYCTA and MABSTOA as separate branches, to make the two into one branch after the formerly private lines had been publicly taken over and merged. Nor were equal rights denied since all NYCTA and MABSTOA members counted equally. Black v. Transp. Workers Union, 454 F. Supp. 813 (S.D.N.Y.), aff'd mem., 594 F.2d 851 (2d Cir. 1978).

The TWU leadership's strained readings of the Local 100 constitution have received continued judicial deference. See Blair v. Local 100, Transport Workers Union, 106 Misc. 2d 1018, 436 N.Y.S.2d 912 (Sup. Ct. 1980) (evenly divided Executive Board held to have approved contract, permitting membership ratification).

88. Sertic v. Cuyahoga, Lake, Geauga, & Ashtabula Counties Carpenters Dist. Council, 423 F.2d 515 (6th Cir. 1970) (impermissible requiring ratification of contracts "by the members covered" to tie wage increase to dues increase in bargaining policy referendum). While the court relied on cases under other sections of the LMRDA, the relevance of Sertic to ratification votes, or bargaining policy referenda, unrelated to dues is unclear.

In Committee of Concerned Transit Workers v. Transport Workers Union, 78-Civ.-1853 (S.D.N.Y. Apr. 24, 1978), plaintiffs had objected to a ratification ballot limited to two choices: "I accept!" or "I reject and vote to strike." Plaintiffs maintained that this ballot might intimidate members dissatisfied with the contract into ratifying it.

89. See infra pp. 840-43. Information is critical because union members often vote to ratify or reject on the basis of a short summary sheet and oral explanations by union officials. See Christopher v. Safeway Stores, Inc., 644 F.2d 467, 469 (5th Cir. 1981). Courts have refused to require unions to distribute the complete text. See Gilliam v. Independent Steelworkers Union, 572 F. Supp. 168 (N.D. W. Va. 1983) (distinguishing cases, cited supra notes 83-84, that require full disclosure of complete texts in other referenda subject to LMRDA).


91. In Anderson, the union's staff representative who negotiated successive agreements assured employees at ratification meetings "that a special security fund existed which guaranteed that severance pay would be available if needed." 641 F.2d at 576. No such fund existed, and the staff representative admitted that he was aware of this fact. When the company went bankrupt, employees received only a portion of their anticipated severance pay. Nonetheless, the court reversed a jury verdict against the union for the amount of the shortfall because the plaintiffs could not show that their injuries would not have occurred "but for" the representative's lie. Id. at 579-80. Had the employees known the truth about the missing security fund, what else would they have done? It was conjectural, the court argued, whether employees would have struck over severance-pay funding and
formation from the other side has found no favor. Indeed, it is not clear what rights opponents of ratification have to get their views to the membership.

Equally conjectural whether such a strike would have induced the employer to fund the obligation it undertook: "Even though the plaintiffs' testimony is that [the staff representative] would suppress such inquiries by shouting at questioners and telling them 'to shut up because the money was there,' it cannot be said that but for [his] statements the severance pay would have been paid." Id. at 580.

In contrast to Anderson, Déboles probably does present a situation where the employees were unquestionably lied to but were probably not hurt by the lies. The union official misrepresented the degree of union insistence on a clause that had been sought unsuccessfully in past negotiations. By contrast, the union in Anderson misrepresented not its own efforts, but the actual existence of the benefits it asked employees to approve.

One possibility when employees are misled during the ratification process is to claim that, due to the misstatements, there was no ratification at all. Something like this happened in Christopher v. Safeway Stores, 644 F.2d 467 (5th Cir. 1981), treated by the court as a case of employees altogether deprived of their right to ratify. In fact a "contract" of sorts had been submitted. This consisted, as is common, of a single sheet of paper listing the purported changes from the predecessor agreement. As may or may not be typical, the sheet lied: It omitted any reference to the change from district to city seniority. This "ratification" was legally insufficient to deprive plaintiffs of their district-wide bumping rights.

In Warehouse Union Local 860 v. NLRB, 652 F.2d 1022, 1025 (D.C. Cir. 1981), the court held it a breach of the duty of fair representation for a union to fail to inform employees of the employer's threats to eliminate their jobs if requested wage increases were granted. The record revealed strong union hostility toward, if not sexist bias against, the affected employees. It is difficult to reconcile the asserted union obligation to pass on the employer's threats with the absence of any obligation to distribute the text of the very agreement negotiated, accurate information concerning the contents of the agreement, or the union's negotiating positions.

Where the misrepresentation results in the ratification of an illegal (because discriminatory) contract, back pay has been awarded. Farmer v. Hotel Workers, Local 1064, 99 L.R.R.M. 2166, 2188 (E.D. Mich. 1978).

92. The choice is between keeping the unratified agreement in effect pending a vote or granting no relief at all. Compare Parker v. Local 413, Int'l Bhd. of Teamsters, 501 F. Supp. 440 (S.D. Ohio 1980) (after considering "all the circumstances," court held that union's "approving" modification of contract to permit flexible work week at meetings called with inadequate notice and from which some employees were excluded, violated fair representation; court ordered rerun but refused to enjoin enforcement of agreement), aff'd mem., 657 F.2d 269 (6th Cir. 1981) with Baker v. Newspaper & Graphic Communications Union, Local 6, 628 F.2d 156, 167 (D.C. Cir. 1980) (union does not violate LMRDA §§ 101(a)(1) and (2) in permitting general discussion and vote on contract without separate vote on disputed seniority item) and Soto v. International Org. of Masters, Mates & Pilots, 466 F. Supp. 1294 (S.D.N.Y. 1979) (refusing to enjoin tabulation of ratification votes of members at sea despite shorter referendum period than union constitution provided for election of officers, which plaintiffs claimed inhibited opposition to contract). The contract modification in Parker was voted down at the rerun election ordered by the court.


Actually reaching the membership with this protected activity may be a different story. Contract dissidents have frequently had to litigate the questions of access to union membership lists or publications. See Lodge 1380, Bhd. of Ry. Clerks v. Dennis, 625 F.2d 819 (9th Cir. 1980). A union was recently ordered to accept a paid advertisement in its national weekly magazine from a local opposed to a proposed national agreement. Knox County Local, Nat'l Rural Letter Carriers' Ass'n v. NRLCA, 720 F.2d 936, 940 (6th Cir. 1983). The court noted, but did not rest its decision on, the absence of other feasible means for reaching the 64,000 members of a national union. Id. at 940–41.
Collective Bargaining

Nor is the law's deference to abuses of democratic ratification limited to gerrymandered voting districts and deceptive propaganda. Many cases indicate considerable manipulation of the balloting process. Although such gross defects as falsifying the ballot results can be reached through law, less blatant infringements of a fair ballot have not been corrected.

C. The Law of Democratic Negotiations

Attempts to use the law to grant rank-and-file access to collective bargaining at an earlier stage than at final ratification may be surveyed more quickly. The law has rarely been invoked to broaden participation in the formation and articulation of demands. It appears that the duty of fair representation imposes on unions only a modest and ill-defined obligation to consider employees' interests. Attempts by the rank-and-file to obtain particular bargaining results are difficult to enforce, while the union can cure any deviant bargain by employee ratification. Finally, although the circuits are divided, some courts have invoked trusteeships over locals to impose elitist bargaining control even where such a trusteeship would not be available for other purposes.


The Steele case, which gave birth to the duty of fair representation, suggested that the Railway Labor Act might of its own force impose certain democratic procedural obligations on unions forming bargaining demands, namely notice to the affected employees and entertainment of their objections. Only four subsequent cases, however, appear to have ad-

Moreover, the court's statement that "although the union leaders may control their union's publications, those publications are 'owned' in equal shares by the members whose union dues finance them," id. at 940, suggests that access might be available to dissidents unable to pay the going rate for commercial advertising.

94. Aguirre v. Automotive Teamsters, 633 F.2d 168 (9th Cir. 1980) (allegations of fraudulent tally of ballots and false announcement that contract had been ratified sufficient to state claims under LMRDA § 101(a)(1) and duty of fair representation).
95. See Petroff v. Teamsters Local 610, 96 L.R.R.M. 3410 (E.D. Mich. 1977) (refusing to enjoin collective agreement allegedly ratified without adequate notice under union constitution and ordering plaintiffs to exhaust internal union remedies); Arnold v. Amalgamated Meat Cutters, Local 653A, 60 L.R.R.M. 2013 (D. Minn. 1965) (denying injunction against exclusion of plaintiffs from expressing opinions on ratification or casting "meaningful vote" on theory that union members had not demonstrated "irreparable harm").
97. Id. at 195-96, 204. Professor Finkin regards this obligation as limited to employees affected by collective bargaining who are excluded from union membership. Finkin, supra note 51, at 202. Professor Finkin puts great stress on the following language in Steele:
While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft
dressed the claim that a union's process of forming demands is so elitist as to violate fair representation.

The earliest example involved a union's particularly gross disregard of one group's concerns to advance the interests of another, along with the union's violation of its own internal procedures. The Atlantic Coast Line Railroad began gradually to eliminate dining-car service in one of three functioning seniority districts (District Three). The local president, at the urging of a leader of the affected employees, attempted secretly to dovetail the employees into a surviving district (District One). Without consulting the Joint Council or the employees in District One, the local president struck an agreement with the railroad and then disclosed the dovetailing agreement only to the employees in District Three, who were asked to keep it secret. Employees of District One heard of the agreement only when some of them were bumped by employees of District Three. The court described the union's actions as "fraud and bad faith" against employees of District One.

Similarly, a consistent pattern of refusing to without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.

Professor Finkin argues that the inclusion of "minority union members" in the first sentence, which concerns substantive negotiating positions, and its omission from the second sentence, discussing procedures for demand formation, was deliberate. Under this reading, Steele creates two obligations: substantive obligations owed all employees in the unit, and procedural obligations owed only to employees excluded from union membership.

This is not the only possible reading. Elsewhere in Steele, the Court does not distinguish between substantive and procedural obligations or members and nonmembers, as in its discussion of the need to avoid unrest generated by minorities excluded from the negotiation process. 323 U.S. at 200.

Moreover, it is as easy to argue that the entire Steele opinion, not merely its discussion of union procedural obligations, should have been limited to nonmembers. The plaintiffs in Steele were excluded from union membership because of their race; consequently, they were unquestionably entitled to both substantive and procedural consideration. The Steele case, as a matter of precedent, could not have addressed the question of minority or other union members. Yet when unions actually argued that Steele should not apply to claims of union members, their contention was rejected in a one-sentence, per curiam opinion, Syres v. Oil Workers Int'l Union, Local 23, 350 U.S. 892 (1955).

Finally, as Professor Finkin admits, his suggested reading of Steele finds no support in subsequent cases actually addressing the question of procedural participation by union members. The cases extend such a right of participation to union members, Bolt v. Joint Council Dining Car Employees, Local 495, 50 L.R.R.M. 2190 (S.D. Fla. 1961), aff'd mem., 301 F.2d 20 (5th Cir. 1962), and to voluntary nonmembers, Branch 6000, National Ass'n of Letter Carriers v. NLRB, 595 F.2d 808 (D.C. Cir. 1979); American Postal Workers Union, Headquarters Local 6885 v. American Postal Workers Union, 113 L.R.R.M. 2433 (D.D.C. 1982). The group that has received no procedural protection is those employees excluded from union membership. Beriault v. Local 40, Super Cargoes & Checkers of the Int'l Longshoremen's Union, 445 F. Supp. 1287 (D. Or. 1978).


99. The facts of the case are discussed in id. at 2190–94.

100. Id. at 2194. Strictly speaking, the statement was dictum. The union subsequently put the local into trusteeship and held a vote among all affected employees, which resulted in a plan to merge the districts with District 3's employees dovetailed. The union's request to the railroad to renegotiate the secret agreement along these lines was pending at the time of the suit. The fair representation suit
negotiate members' demands and negotiating only the leaders' proposals may indicate a failure of fair representation.^{101}

When the union abandons a representation function in favor of a unilateral, standard-setting referendum for affected employees, the union must permit nonmembers to participate along with members.^{102} Nonetheless, a union that is "apprised of the position" of all affected subgroups in the union and gives each "due consideration," including "meaningful or

was brought by the District 3 employees, complaining that the union had deprived them of the secret dovetailing agreement. The court's observation that the dovetailing agreement resulted from procedural violations of the union constitution and substantive violations of the duty of fair representation supported its dismissal of the fair representation suit seeking to reinstate the secret agreement.

The case is nevertheless significant because, unlike the other "fair bargaining procedure" case, Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808 (D.C. Cir. 1979) (discussed infra note 102), it cannot be cast into substantive terms. Apart from the procedure of its creation, and in the absence of contrary union policy or practice, there could be no substantive objection to a merger of seniority districts dovetailing affected employees. See Humphrey v. Moore, 375 U.S. 335 (1964). Had such a dovetailing provision entered the collective agreement through procedurally correct steps, employees would have had a right to its enforcement. See Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Lucas v. Bechtel Corp., 633 F.2d 757 (9th Cir. 1980); Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507 (9th Cir. 1978); Summers, The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?, 126 U. Pa. L. Rev. 251, 258-63 (1977). Only because the dovetailing agreement was entered into secretly, without notice to affected employees even at intervening district meetings and without the required approval of the Joint Council, did it vest no rights in employees and provide no basis for a fair representation suit.

101. Farmer v. Hotel Workers, Local 1064, 96 L.R.R.M. 2166, 2168-69, 2186 (E.D. Mich. 1978). The members' demands were for the dismantling of sexually discriminatory job structures favored by the leadership; query the applicability of the case to other leadership rejection of members' demands.

102. Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808 (D.C. Cir. 1979). The pertinent national agreement left specified issues for local negotiation, including whether weekly days off would be on a fixed or rotating basis. The branch representing letter carriers at approximately 110 Post Offices instructed stewards to negotiate for "[w]hatever the membership in your station desire." The exclusion of voluntary nonmembers from the referendum was found by the NLRB to violate the duty of fair representation. 232 N.L.R.B. 263 (1977).

In the view of the court of appeals, the "delegation of the decisionmaking function to the union membership" became a denial of fair representation only because it was understood that "each union member would vote his personal preference," 595 F.2d at 812. Under this view, the interests of nonmembers would simply be ignored. Although fair representation requires some consideration of their interests, the court in this case appeared indifferent to whether the consideration is undertaken by the union membership or leadership.

Branch 6000 seems the only case actually to hold that the duty of fair representation imposes procedural obligations on the union's formation of demands other than those imposed by the union's own constitution and by-laws. Removed from the rather unusual setting of a referendum that will bind employer and union, the case does hold that fair representation during negotiation requires—and may require a consistent procedure which necessitates—"communication access for employees with a divergent view." 595 F.2d at 813. Nevertheless, the holding rests on assumptions that this Article aims to question and supplant. The case regards democratic collective bargaining as deviant. Indeed, only by equating elitist governance with normality could the court derive such a strange concept as the "delegation of the decisionmaking function to the union membership." Id. at 812. More significantly, however, the court's emphasis on accountability militates in favor of elitist bargaining. The court could reserve the question of bargaining policy referenda because "the bargaining responsibility remains with an individual or committee charged with the obligation of fair representation" and benefiting as well from a "presumption" of "good faith." 595 F.2d at 812. On the other hand, democratic formation of demands by the whole membership, while not a violation of the duty of fair representation "under all circumstances," would have to include "appropriate safeguards" to reflect the interests of nonmembers of the union. 595 F.2d at 812.
adequate opportunity for consideration of their position,” does not violate fair representation by reversing its previous bargaining position without formal notice to the affected group.\textsuperscript{103} Nor are any particular “formal procedures” for the consideration of the subgroup’s interests required.\textsuperscript{104}

Since the duty of fair representation originated in the need for effective intraunion representation of minorities, that duty is perhaps an unattractive vehicle for requiring that formation of bargaining demands respond generally to the needs of the majority. Breach of the union’s own internal procedures (as in \textit{Bolt}) should in any case constitute a breach of the duty. On the whole, I would prefer that democratic formation of bargaining demands be safeguarded under LMRDA’s rights to equal participation. Despite one cursory holding that the Act applies to referenda on bargaining policy, however,\textsuperscript{105} there has been little doctrinal development in this direction.

\textbf{2. Enforcing Democratically Derived Substantive Limitations on Negotiator Autonomy}

A few unions have gone beyond regulating the procedures of demand formation and have substantively bound their negotiators as well.\textsuperscript{106} The legal effect of such provisions is unclear. Suppose, for example, that a union’s constitution or policy statement requires that, in the event seniority units are merged, all employees are to be “dovetailed”—that is, ranked by length of service for whichever employer. Suppose further, however, that the union succeeds in negotiating an “endtailed” agreement whereby

\textsuperscript{103} Waiters Union, Local 781 v. Hotel Ass’n, 498 F.2d 998, 1000 (D.C. Cir. 1974). From the perspective of democratic bargaining, the court would have been better advised to avoid resolving whether the union had a duty to communicate the progress of negotiations to affected members, and to hold instead that the neglect of such a duty caused no harm in the waiters’ case. Indeed, the court’s subsequent decision in Warehouse Union, Local 860 v. NLRB, 652 F.2d 1022 (D.C. Cir. 1981), supports the existence of such a duty of communication of employer plans to close a department if employee wage increases were obtained. It is hard to see why fair representation should require the union to keep members apprised of the employer’s negotiating positions but not of its own. Under such an interpretation of \textit{Waiters Union}, employees victimized by a secret shift in the union’s negotiating position should be permitted to show in appropriate cases that they were harmed by the shift, in the sense that they would have acted differently had they known. Cf. Robesky v. Qantas Airlines, 573 F.2d 1082 (9th Cir. 1978) (applying harm standard to evaluate union noncommunication with individual grievant).


Collective Bargaining

all of company A’s employees are ranked ahead of those of company B, even though some of B’s employees are more senior. Thus, A’s employees may bump employees of B with greater seniority. Suppose finally that the union could have negotiated either agreement. What can the bumped employees do?

When the employees sue, they typically assert that the union officials who negotiated the unauthorized agreement breached a contract with the membership, violated fiduciary obligations owed the membership, violated the equal rights provision of LMRDA, and violated the duty of fair representation. While dicta, and one holding, support the existence of these causes of action, I have been unable to locate any reported case in which employees have successfully enjoined a collective agreement because of its substantive violation of internal union rules.

In theory, the simplest cause of action would be to allege that the union by-law, policy, or referendum represented a contract among the members or between the leaders and the members that the leaders violated. Such claims have resulted in formidable instances of judicial evasion. One prominent if somewhat unsavory avoidance which denied federal jurisdiction in suits based on union constitutions unless federal intervention against a strike was necessary, has recently been choked off by the Supreme Court. Other evasions exist, however, including the bizarre recent holding that contractual claims under union constitutions or by-laws are preempted by the National Labor Relations Act.

107. Obviously a different situation is presented when an employer adamantly, although in good faith, refuses to concede the demand found in the union’s by-laws. While such situations present difficult problems, the courts’ analytic approach is nevertheless troubling. In Deboles v. Trans World Airlines, 552 F.2d 1005 (3d Cir.), cert. denied, 434 U.S. 837 (1977), the union claimed falsely that it was attempting a seniority merger to which management was opposed. The truth was that the union was not even raising the demand, although it appeared that, if raised, management would have resisted. In Brotherhood of Locomotive Eng’rs v. Folkes, 201 Va. 49, 109 S.E.2d 392 (1959), the union apparently tried, but failed, to negotiate the agreement on compulsory retirement which the members had required through referendum. In both of these cases, the unions persuaded the courts to dismiss the memberships’ suits for breaches of the duty of fair representation. Although there are obvious problems with subsequent judicial scrutiny of the efficacy of a union’s unsuccessful negotiating efforts, one still wonders if, in a suit alleging the union’s failure to represent manifest employee instructions, the fact that the union was acceding to employer desires must always represent a complete defense.

108. See Baker v. Newspaper & Graphic Communications Union, Local 6, 628 F.2d 156, 163-64 (D.C. Cir. 1980) (denying federal jurisdiction and relying on 1199 D.C., Nat’l Union of Hosp. & Health Care Employees v. National Union of Hosp. & Health Care Employees, 533 F.2d 1205 (D.C. Cir. 1976)). The 1199 D.C. doctrine, which in its heyday enjoyed considerable popularity in other circuits, generally denied federal jurisdiction to suits by a union to enforce the union’s constitution or by-laws but made an exception where the alleged violation of internal union rules harmed the employer’s interests by presenting “actual threats to industrial peace.” 533 F.2d at 1208. This cynically transformed a jurisdictional statute—LMRA § 301, 29 U.S.C. § 185 (1976), creates federal jurisdiction for suits to enforce “agreements among unions”—into a strike-control measure.


110. Baker, 628 F.2d at 160-63. The merger agreement between the two unions formerly repre-
In cases dealing with union referenda other than those concerning bar-

senting pressmen and stereotypers provided that, if the stereotyping department were eliminated, ste-

reotypers could retrain for pressroom jobs but would go to the end of the seniority roster. The stere-

otyping department was eliminated. The union acceded to the employer's demand for dovetailing the

stereotypers without raising the issue of the contrary requirement of the union's internal merger

agreement. Pressmen whose seniority was adversely affected sued to enforce the merger agreement and

the international and local constitutions.

The Court held that this cause of action was preempted under San Diego Bldg. Trades Council v. Gar-

mon, 359 U.S. 236 (1959). The holding is preposterous. In the first place, Garmon preemption, in

the era of its most expansive interpretation, applied only to conduct “arguably” protected by NLRA § 7,


at 245. The Baker court made no real effort to show that the union's conduct was either arguably

protected or prohibited. Although the Court correctly suggested that the union's bargaining con-

duct was “protected” by § 7, this section protects against employer interference and is irrelevant when

the claim is that the union's conduct has trampled members' rights. See Farmer v. United Bhd. of

Carpenters, Local 25, 430 U.S. 290 (1977) (no federal preemption of state-law tort suit concerning

union's tortious administration of hiring hall, despite general doctrine that § 7 protects hiring hall

administration).

Second, the Court gave insufficient weight to the recent substantial modification of Garmon in


Sears, judicial process against arguably prohibited conduct is constitutional unless the judicial pro-

ceeding is “identical” to an NLRB proceeding available to the plaintiff. Id. at 197. Since the Baker

court did not identify any such NLRB proceeding at all, it was in no position to show that such a

non-existent proceeding was “identical” to the claimed violation of the merger agreement. Sears also

held that judicial proceedings against protected conduct are constitutional where judicial proceedings

would create no “significant risk” of prohibition of federally protected conduct. Id. at 207. The Baker

court, not surprisingly, did not attempt to make the finding of “significant risk” required by Sears.

In support of its preemption holding, the Baker court discussed only one other case, Amalgamated

Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). The case is

inapposite. In Lockridge, an employee improperly suspended from union membership for asserted

dues arrearages sued for reinstatement in state court. The union conduct was not only a well-estab-

lished unfair labor practice, as the Lockridge Court established with considerable care, id. at 292–93,

but NLRB action had actually been invoked by at least one fellow employee of Lockridge who was

identically situated. Id. at 280 n.3. Lockridge thus represents the category—a category clearly identi-

fied by such subsequent Supreme Court decisions as Farmer and Sears—of judicial proceedings

“identical to” proceedings which might have been presented to the NLRB. See Local 926, Int'l Union


Finally, preemption was inappropriate under LMRA § 301 in which collective agreements were enforced, the

Supreme Court has held that LMRA § 301, where applicable, represents a pro tanto lifting of the

preemption doctrine. That is, LMRA § 301 represents a precise congressional determination—the

“ultimate touchstone” in preemption analysis, Retail Clerks Int'l Ass'n, Local 1625 v. Schermherhorn,

375 U.S. 95, 103 (1963)—to permit concurrent lawsuits in state and federal court even though an


Evening News Ass'n, 371 U.S. 195, 197–98 (1962); Local 174, Teamsters v. Lucas Flour Co., 369

U.S. 95, 101 n.9 (1962).

At one time, however, the Supreme Court distinguished the two jurisdictional clauses of § 301(a),

which create jurisdiction in suits for violation of “contracts between an employer and a labor organi-

zation” as well as “contracts . . . between any such labor organizations.” 29 U.S.C. § 185(a) (1976).

While the former suits could proceed in state or federal court even when they alleged unfair labor

practices, the latter could not. See Lockridge, 403 U.S. at 292–94 (NLRB in hypothetical § 8(b)(2)

proceeding would interpret union constitution; thus state court action to enforce constitution would

conflict with NLRB proceeding); Local 100, United Ass'n of Journeymen & Apprentices v. Borden,


This difference in preemptive (hence constitutional) effect between two parallel clauses in the same

statute is not easy to explain. Since preemption normally rests on the intent, legislatively expressed or

implied, of Congress, it is difficult to explain why a Congress which on the same day and in the same

statute (the Taft-Hartley Act or LMRA) gave the NLRB general jurisdiction over union restraint or


824
Collective Bargaining

gaining policy, courts have found a duty in the union leadership to comply with the results of balloting, derived from the fiduciary obligations of LMRDA § 501.111 Yet disregard by a union’s leadership of its members’ adopted standards for collective agreements has been held nonactionable.112 There are, however, exceptions. Three courts, while finding particular expressions of bargaining policy nonbinding on negotiators, have been more careful not to reject the idea of such a suit.113 Finally, one

and the federal courts express jurisdiction over suits to enforce agreements among unions (LMRA § 301(a), 29 U.S.C. § 501(a) (1976)), meant mysteriously to have the former stand silently preempt the latter. If there is to be a difference in the preemptive effect of the two jurisdictional grants of § 301(a), it is, if anything, the sphere of internal union affairs as to which Congress subsequently expressly approved the concurrent exercise of authority by state and federal courts, LMRDA §§ 105, 603, 29 U.S.C. §§ 413, 523 (1976).

The Supreme Court’s recent decision in United Ass’n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v. Local 334, United Ass’n, 452 U.S. 615 (1981), goes a long way toward eliminating any supposed difference between the parallel grants of jurisdiction over collective agreements and union constitutions. The next step is to reject any implication that the fortuitous coexistence of NLRB proceedings preempts either congressional grant of jurisdiction.


112. Baker v. Newspaper & Graphic Communications Union, Local 6, 628 F.2d 156, 166 (D.C. Cir. 1980) (fair representation claim: “[W]e know of no case which has held that an internal union agreement can restrict the union’s power to negotiate with respect to seniority in collective bargaining.”); Acker v. Brotherhood of Locomotive Eng’rs, 95 L.R.R.M. 2327 (D. Minn. 1977) (holding no violation of LMRDA § 101(a)(1) occurred when local members’ preferences not followed in seniority merger case). The Acker court said:

Apparently this claim is based on the assumption that once the union decided to poll the members for their preferences, it was bound to observe strict standards and to follow the wishes of the membership. This claim must be rejected. This union has plenary discretion in determining whether to poll the membership on the seniority consolidation issues. Since a referendum is not required, the union can conduct the poll in any manner whatsoever without bringing § 101 (a) (1) into play. Union officials can even decline to follow the preferences of the membership, although of course, they do so at the peril of being ousted from office in the next election.

95 L.R.R.M. at 2333. For a state court’s view of these problems, see Witherspoon v. Grand Int’l Bhd. of Locomotive Eng’rs, 260 S.C. 117, 194 S.E.2d 399 (1973) (negotiation of seniority merger contrary to union constitution, even if proven, would not permit injunction against collective agreement).

113. Vincent v. IBEW, 622 F.2d 140, 143 (5th Cir. 1980) (fiduciary obligation; union international offices and staff not obligated to negotiate for pension plan favored by members where members’ vote was subject to approval by international, and international’s preference for local’s inclusion into a pre-existing plan was justified: “At worst, the decision to go with the Chattanooga plan was an attempt to forge a compromise among all interested parties . . . .”); Bright v. Taylor, 554 F.2d 854 (8th Cir. 1977) (LMRDA and fiduciary obligation; union not obligated to bring back seniority proposal for separate membership approval where membership motions asking for such approval ambiguous, union leaders not secretive about fact that seniority being negotiated, eventual contract submitted for ratification, no false or misleading statements made during ratification; contract was ratified, and defendants had no interest or ulterior motive in negotiation of eventual seniority plan). If the union conduct in Bright could be depended on in all unions, there would be little need for concern about the enforceability of pre-bargaining restrictions on negotiators’ autonomy.

Laturner v. Burlington Northern, Inc., 501 F.2d 593, 598–603 (9th Cir. 1974), reserved decision on whether negotiation of a collective agreement in conflict with the union’s constitution would represent a breach of the duty of fair representation, finding that the constitutional provision, when read in the context of the debates at the adopting convention, had as its primary purpose “to give the union officers great flexibility in formulating methods to integrate seniority rosters [and] that no single method was intended to be proscribed.” Id. at 600.
The court of appeals has found that a suit (apparently founded on a fair representation theory) alleging negotiators' disregard of internally adopted union standards stated a cognizable claim.\(^{114}\)

There are, of course, obvious difficulties with stringent enforcement of restrictions on negotiators, although in many of the cases the claim was made that the employer had left the particular matter in controversy entirely to the union, which makes the leadership's deviation from majority rule more questionable. Several of the cases suggest that ratification by the membership cures any deviation by the negotiators from previously adopted standards.\(^{115}\) In theory, such ratification ensures fairness if the ratifying constituency is the same as the constituency which adopted the restrictions lest the members bind themselves against any subsequent education, or even against their changing their minds.\(^{116}\) The ratification vote that approves the deviation from union standards should also be informed and reasoned, with adequate opportunities for opposing views. The refusal of the courts to enforce minimal integrity in ratification\(^{117}\) or even to enforce a ratification at all,\(^{118}\) makes somewhat opportunistic any reliance on ratification as a defense to claims that negotiators ignored democratically-adopted standards.

3. *Trusteeships in the Service of Elitist Bargaining*

One court of appeals has apparently held that trusteeships are available to a union enforcing a uniform, elite-determined bargaining stance, though such a trusteeship could not be imposed generally for other union purposes.\(^{119}\) Another court of appeals has apparently rejected the distinc-

---

114. Frederickson v. System Fed'n No. 114, Ry. Employees Dep't, 436 F.2d 764 (9th Cir. 1970) (employees endtailed in face of union "policy statement" favoring adjusted seniority, subsequent convention amendment to constitution, and by-laws requiring dovetailing). The question of specific relief was not decided. Apparently plaintiffs sought declaratory relief against the endtailing. There is no further report of Frederickson, which is rarely cited; the cases cited supra notes 112–13 all ignore it.


116. A different situation is obviously presented if the restriction on autonomy in negotiation is adopted by the union as a whole and is ignored by a particular subdivision. The strongest case for such relief occurs when the union policy is expressly adopted to favor a particular minority group, and the local ratifying a contrary agreement is voting its own self-interest. This was allegedly the situation in Frederickson, where the senior employees, the precise object of protection by the international, were assertedly endtailed as a result of political pressure from the members of a more numerous and politically powerful seniority district. 436 F.2d at 767.

117. See supra pp. 815–19.

118. See supra pp. 807–14.

119. Gordon v. Laborers' Int'l Union, 490 F.2d 133 (10th Cir. 1973). The International ordered Local 612 in Oklahoma City to affiliate with the other Oklahoma locals in a district council. Local 612 refused and reached a separate agreement with the Associated General Contractors which "did not contain the health, welfare, and pension benefits obtained for other Oklahoma locals by the Dis-
Collective Bargaining

tion. The conflict is one that cries out for a policy favoring democratic collective bargaining. This is not necessarily the same thing as local bargaining. A union might decide, democratically, to negotiate a national or other large-scale agreement, and thus by implication commit itself to preventing breakaway locals from settling for less and going back to work. A court that would here refuse to permit a trusteeship on the local is not vindicating democracy. It is (at best) vindicating a sort of sterile "local autonomy" and (at worst) seriously interfering with union's bargaining power and democracy.

Such a court would also lack a statutory basis for its policy. American labor law is indifferent to whether unions and management agree to bargain in single-plant, multi-plant, or even multi-employer structures.181 Nor does the LMRDA in general, or Title III on trusteeships, adopt a

120. Benda v. Grand Lodge of the Int'l Ass'n of Machinists, 584 F.2d 308 (9th Cir. 1978), affirmed an injunction granted against the imposition of a trusteeship imposed on District Lodge 508. As in Gordon, the lodge had resisted the International's attempt to coordinate bargaining; here, the coordination was among all IAM locals negotiating with Lockheed Aircraft or any of its subsidiaries. And, as in Gordon, the lodge had attempted to place before its members a contract proposal that other lodges' negotiators would not even take to their members. At this point, the International suspended all officers at Lodge 508 and took control. The court affirmed an injunction against the trusteeship, despite a 1958 International Circular which gave the International's President the right to combine bargaining units to deal with "the same employer." The court held that "the same employer" might only mean each subsidiary, without explaining its failure to defer to the obvious contrary determination by the International in this case. Additionally, the court held that the history of separate voting in each subsidiary forbade the International from "interfering with the bargaining process." 584 F.2d at 317.

principle of "local autonomy." It is a statute that seeks to introduce democracy at all levels.\textsuperscript{122}

From this perspective, the general limits on trusteeship in Title III of the LMRDA implement union democracy, not local autonomy. The only question in the cases imposing trusteeships to enforce bargaining unity should be one of union democracy: Is the bargaining stance as to which unity is sought the product of democratic formation of demands, taken after rank-and-file participation? If so, then the trusteeship serves the LMRDA's purposes of "assuring the performance of . . . duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization" and is not unlawful.\textsuperscript{123} If, by contrast, bargaining unity is imposed by an unresponsive elite, the trusteeship should be suspect, for the bargaining position might benefit the leaders at the expense of the membership and thus raise the possibility of breach of their duty of fair representation. In short, in the area of trusteeships as elsewhere, ongoing collective bargaining is no reason to limit union democracy. Yet these questions on bargaining democracy are just the questions not asked in the trusteeship cases.

II. THE INDUSTRIAL RELATIONS SCHOOL'S ATTACK ON DEMOCRATIC COLLECTIVE BARGAINING

The paradox of this Article may now be stated. Legal decisions, under an articulated norm of democracy in collective bargaining, generally presuppose and frequently reinforce elitism in bargaining. What accounts for this choice for elitism in situations in which democracy might as easily have been fostered?

The cases, as we have seen, rarely even mention the double standard


\textsuperscript{123} LMRDA § 302, 29 U.S.C. § 462 (1976). Judged by this standard, it appears that the trusteeships in Benda v. Grand Lodge of the Int'l Ass'n of Machinists, 584 F.2d 308 (9th Cir. 1978), and Gordon v. Laborers' Int'l Union, 490 F.2d 133 (10th Cir. 1973), both sought to achieve greater benefits for the members and should not have been enjoined. One might want to know a bit more about the democratic basis of the International Circular in Benda, and the constitution in Gordon, which assertedly authorized the trusteeships. One might also want to be certain in Gordon that the benefit plans into which the laborers wanted Local 612 merged were in the members' interest rather than imposed because of greater elite control over the relevant benefit plan. Absent considerations of this kind, which implicate union democracy, a union should be allowed to decide democratically to bargain in larger units and to enforce local compliance with the will of the greater number. For a contrasting example of national control of local bargaining, which survived attack under current standards but might not survive the proposed "democracy" standard, see Local 472, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v. Georgia Power Co., 684 F.2d 721 (11th Cir. 1982), in which the international leadership, on request of the employer, transferred the counties of particular interest to the employer out of the jurisdiction of the local. 

828
Collective Bargaining

that divides collective bargaining from other areas of union democracy; they seldom articulate any policy supporting this double standard. Recent critical scholarship suggests that the legal system in such situations is most probably adopting silently the assumptions of the dominant school of industrial relations scholarship.124

A leading industrial relations textbook, after informing its readers of the “almost universal” practice of ratification of collective agreements,125 adduces several “advantages” to this practice. Among these are that ratified agreements, particularly covering national unions or large locals, are more likely to be acceptable to union members, and that union members are more likely to comply with agreements which they themselves have ratified.126

The textbook continues: “Despite the validity of these arguments, significant objections may be raised to the policy of limiting the authority of union negotiators by requiring a majority membership approval of the agreements which they conclude.”127 The authors identify three such ob-

tial when incompatible with limited set of “values and assumptions” fundamental to capitalism generally and specifically to managerial ideologies associated with capitalist factory production). Elitist bargaining fits neatly into both liberal industrial relations scholarship and capitalist managerial ideology, so it is unnecessary here to identify a set of values consistent with one but not the other.

125. N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 61 (2d ed. 1965). As we have seen, the presence of a ratification requirement in some union documents scarcely guarantees that the practice of ratification will result. See supra notes 33, 37, 73. Moreover, union constitutional provisions requiring ratification are considerably less than “universal.” See supra note 45.

126. N. CHAMBERLAIN & J. KUHN, supra note 125, at 62. This discussion exemplifies the strangely divided quality of discussions of democracy in the collective bargaining process. The two “advantages” referred to have entirely different forms. The first appears to be an invocation of the principle of democracy, both for its own sake and as a guarantor of substantive fairness in terms of employment. The second is strictly an argument of policy—an empirical claim that strikes and work stoppages will diminish if agreements are ratified. The “interests” of working people in procedural and substantive fairness, and the “interests” of managers and consumers in the control of strikes, are lumped together as “advantages” of a reified system in which all interests are in harmony and an advantage to the system is an advantage to all.

The empirical-policy claim of the second advantage is unsupported. I am unaware of any general attempt to correlate the incidence of strikes or other stoppages in contravention of contractual prohibition with the ratification or non-ratification of the underlying agreement. There may of course be particular examples of the phenomenon that Clyde Summers described: “When negotiators try to bind employees with an agreement that the latter find unacceptable, the employer may obtain neither the productivity nor the peace for which he bargained.” Summers, Ratification of Agreements, in FRONTIERS OF COLLECTIVE BARGAINING 75, 84 (J. Dunlop & N. Chamberlain eds. 1967). Counterexamples, however, are obvious. Agreements of the United Mine Workers (under which, in the last decade, wildcat strike activity has been endemic) are ratified by the membership. P. CLARK, THE MINERS’ FIGHT FOR DEMOCRACY: ARNOLD MILLER AND THE REFORM OF THE UNITED MINE WORKERS 62-74 (1981). The national Basic Steel Agreement (under which strike activity is almost unheard of) is not ratified by the rank and file. See supra note 64.

127. N. CHAMBERLAIN & J. KUHN, supra note 125, at 63. Note the reliance on the elitist model. Union negotiators, even under an “almost universal” practice of ratification, are assumed to have “authority” to “conclude” agreements except where “limit[ed]” by the membership.
jections. First, union negotiators have more information than the membership. Second, they will lose the respect of the employer if the agreement is voted down. Finally, rejection puts "'both the company and the union committee in a very embarrassing position and results either in a serious strike or in a better settlement.'"\[128\]

These countervailing considerations do not, according to the authors, stand in equipose. Ratification, they conclude, may have its place in small units in which all workers may be assembled.\[129\] They are less enthusiastic about ratification in other situations:

But in negotiations involving not only large numbers of employees but also those employees scattered in more than one plant of the same company or in more than one company, the arguments against the requirement of membership approval attain almost conclusive force . . . . Under these conditions it is probable that collective bargaining would profit from a placement of full authority in the hands of union negotiators. [Negotiators should be appointed, not elected, and should educate the members as to the] economic conditions in which bargaining is to take place.\[130\]

This is a typical defense of elitist bargaining, and I take issue with its assumption and conclusions. It would, however, be an enormous mistake to take this defense at face value and to attempt to refute it by addressing each argument. The arguments are risible; they assume the very points contended—as if the goal of national labor policy were nothing more than to spare union leaders and management "embarrassment." The defense acquires whatever force it has—and I suggest that the law in the area reflects its enormous force—by virtue of its ideological assumptions, which we shall see are shared, by most industrial relations scholarship on collective bargaining.\[131\]

128. Id. (quoting a company negotiator). The last sentence would be much clearer (as a matter of syntax) if the union's "embarrassment" were distinguished from the employer's, and each attributed to its proprietor. Such a construction would, however, miss the central ideological tenet of the industrial relations school that "the union" (defined here, as usual, to mean the leadership and staff) and the employer share the same interests, so that if one is embarrassed, the other must be as well.

129. Id. at 63-64.


131. Since I will hereafter address my remarks solely to the issue of democracy in collective bargaining, it is worth pointing out, in the excerpt from Chamberlain and Kuhn cited supra note 130, the continuing assault on industrial unionism. Presumably even in craft unions negotiators have rela-
Collective Bargaining

Industrial relations scholarship on the subject of collective bargaining is informed by four basic assumptions concerning elitism and democracy: (1) elitism in bargaining is inevitable; (2) democracy is unnecessary since there is no conflict of interest between union leadership and membership; (3) democracy is inflationary; and (4) democracy is excessively inefficient and cumbersome. In this section I will demonstrate the centrality of these assumptions; in the following section, I will attempt to refute them.

The assumption that elitist bargaining is inevitable merely reflects the general insistence of the industrial relations scholarship of the 1950's that elitist structures were inevitable in industrial relations and that industrial relations scholarship was therefore properly concerned primarily with the identification and taxonomy of such elites. This reflected a more general assumption of political science in the 1950's that elitism was both desirable and inevitable. The most sweeping of such industrial relations analyses argued that a universal trait of industrializing societies “is the inevitable and eternal separation of industrial men into managers and the managed.”

As applied to the internal organization of unions, this straight-line use of Michel’s Iron Law of Oligarchy yielded obvious results:

As for contract negotiations and important strike actions, the worker must rely on the intelligence and honesty of persons delegated to represent him, and these delegates in turn must authorize a still smaller group (usually the national officers) to act for the union . . . . Power in many unions tends to gravitate to the top.
A second dominant—but undemonstrated—assumption of both cases and industrial relations literature is that collective bargaining is already as democratic as possible in two senses, given the constraints of inevitable elitism. First, negotiators are responsive to the dictates of internal union political processes. Second, these processes are democratic because all viewpoints within the union have a chance to be heard that is proportionate to their numerical strength among the rank and file. This model, too, represents a great model of 1950’s political science writ small. Just as the model of a general and inevitable elitist collective bargaining reflected assumptions of a general and inevitable political elitism, this model of representative democracy in collective bargaining reflects the then-dominant ideology of political pluralism. Without analysis of actual union political processes concerning collective bargaining, it was easy to assume that abstract pluralism told the whole story. The members could all express their views; the leaders would reflect those views or be voted out of office.186

The preference for elitist bargaining rested on more than the beliefs that extant elites were representative and that further representation was infeasible. The status quo was affirmatively desirable. Many felt that union leaders were considerably more reasonable and conciliatory than the insatiable rank and file. As Archibald Cox put it (attributing the insight to “the sophisticated exponents” of “one view”): “[S]ince union officials have better training and more experience than rank and file members, those officials who are given the power will act more responsibly in enforcing the union’s obligations to employers, will present fewer preposterous or impractical demands and, if allowed the power, will enforce their decisions.”137 Consequently, the argument ran, a decision for democratic collective bargaining was a decision for wage inflation. Cox quoted John T. Dunlop on the enactment of the LMRDA: “The country has chosen on the grounds of morality and democracy to make wage stability more difficult to achieve.”138

period tended to conflate. I will argue that collective bargaining in the late 1940’s and 1950’s did indeed see an enormous concentration of bargaining authority into the hands of union elites. See infra pp. 837–40. Those who, like myself, believe that democratic unionism is possible argue that the remedy for this elitism is democracy. In contrast, much of the industrial relations scholarship just discussed assumed that the growth of elitism was inevitable and that democracy was consequently infeasible (an assumption which the courts have internalized). One influential work, for example, attempted to prove, through analysis of a “deviant” case, that unions, for various far from unalterable reasons relating largely to the sociology of work organization and the resultant limited opportunities for employees to form social groups or even communicate, could never be democratic. See S. Lipset, M. Trow & J. Coleman, Union Democracy: The Internal Politics of the International Typographical Union (1956).


138. Id. For works arguing that union officials are more reasonable than the membership, see D.
Collective Bargaining

Finally, democracy and broad participation in the collective bargaining process "usually entails delays."139 At the bargaining table, the strong political pressures within the union create obvious problems whenever the wishes of the majority collide with the public interest in avoiding unnecessary strikes or inflationary wage settlements.140

While I cannot demonstrate the direct influence of these four assumptions on the course of judicial decisions concerning democracy in collective bargaining, I hope the reader will be convinced, as I have become, how much they explain the curious, inarticulate refusal of the courts to extend recognized norms of union democracy into collective bargaining. If democracy is only granted to workers as a policy decision, as a means of advancing greater national interests, courts will let the burden rest on those who advocate the extension of democracy. If the courts are convinced that democratic bargaining is infeasible, unnecessary, inflationary, and cumbersome, they would be reluctant indeed to help foster democratic bargaining. Since these assumptions are indeed widely shared, the proponent of democratic bargaining must be prepared to challenge them.

III. A Plea for Democratic Collective Bargaining

A. Democratic Collective Bargaining Is Required by the LMRDA

The primary legal guarantor of union democracy is the LMRDA's Bill of Rights of Members of Labor Organizations.141 Section 101(a)(1) grants union members "equal rights and privileges . . . to participate in the deliberations and voting upon the business of [membership] meetings . . . ."142 Section 101(a)(2) grants members the rights of speech and as-
These sections have supplied the basis for the line of cases mentioned above, which require internal union referenda to be fair, clear, unmanipulative, and in accord with the union’s constitution and bylaws. The sections contain no exemption for meetings or referenda on collective bargaining issues or on contract ratification. Indeed, § 101(a)(1) speaks generally of “the business of such meetings,” and § 101(a)(2) guarantees the right to express views “upon any business properly before the meeting.” Some courts have held that these sections apply to collective bargaining in the same way as they do to any other union business. Nevertheless, in practice, as we have seen, the norms applied are not the same; elitism in bargaining is more readily tolerated than in other areas. One possible justification for this distinction would be that the Congress which enacted the LMRDA desired such a distinction. Examination of the legislative history, however, reveals that Congress was aware of the existence of elitist bargaining, feared its association with union crime and corruption, and enacted the LMRDA to address the problem.

The LMRDA was in fact largely a response to the sordid incidents of corruption in some unions revealed by the Senate Select Committee Investigations on Improper Activities in the Labor Management Field (the McClellan Committee). Although much of this corruption concerned matters outside collective bargaining, such as misuse of members’ dues, a good deal of the evidence before the McClellan Committee exposed the corruption from elitist bargaining. The Committee heard accounts of union elites entering into sweetheart contracts that were highly disadvantageous to employees. Committee members repeatedly noted the absence of democratic bargaining procedures, implicitly suggesting that such procedures

---

144. See supra p. 816.
145. See supra note 59.
146. See supra pp. 808–29.
147. See, e.g., Investigation of Improper Activity in the Labor Management Field, Hearings Before the Senate Select Committee on Improper Activities in the Labor Management Field, 85th Cong., 1st Sess. 5841 (1957) (statement of Iris Jensen, Secretary-Treasurer of Local 449, Bakery & Confectionary Workers Union, Webster City, Iowa) (after recognition of union favored by employer, contract signed providing only five cents annual wage increase); id. at 5532 (testimony of Clinton Lewis) (union contract for sole purpose of having union dues sent to teamster officials; no union contact with affected employees or improvement in working conditions).
148. See id. at 5844–45 (statement of Iris Jensen):

Senator McNamara. You say that they did vote on the approval of the contract at this rank and file meeting?

Mrs. Jensen. A number of people did sign a paper accepting the contract. I believe that is what it was.

Senator McNamara. Who signed the contract in the original instance for the employees? Do you know? ... It is signed by International Vice President George Stuart.

Mrs. Jensen. That is right.

Senator McNamara. But he did this without taking it up with you people who were the employees of the plant, apparently. This was all done before you held this union meeting
Collective Bargaining

might stop corrupt bargaining. Other abuses of elitist bargaining also figured prominently in the testimony. Committee members heard, for example, how individuals' exclusive authority to negotiate contracts under elitist structures had been misused for personal financial gain. As is well known, the legislation that emerged from these hearings, the LMRDA, attempted to end such corruption, in part through the device of guaranteeing union members the right to participate in union affairs. In view of the weight of the testimony showing that elitist bargaining was frequently associated with personal corruption, one can assume that Congress intended that the guarantees of equal rights and freedom of speech and assembly extend to bargaining and ratification meetings and referenda.

The statement by one of the bill's chief sponsors that it was not about collective bargaining must be seen in context. This position served as an argument against what became Title VII, dealing with union unfair labor
practices such as organizational picketing and secondary boycotts; the argument against the provision failed and Title VII became part of the LMRDA. Conservatives expressly wanted to extend democracy to such aspects of collective bargaining as strike votes; their views were rejected. Other members of Congress simply assumed that the legislation would open up collective bargaining to membership participation.

There is thus nothing in the LMRDA’s legislative history that provides any comfort for the latent judicial assumption that elitist bargaining might be a permissible exception to union democracy.

B. Democratic Collective Bargaining Is Necessary

The reader who bore with me during the long trek through the case law may marvel at the purpose of this section. It is true that the collection of cases seeking democracy in collective bargaining reveals a sorry spectacle of appointed business agents and remote officers agreeing to contracts already rejected by affected workers, unacceptable to them, or rushed past them in secrecy or mendacity. However, it is important to remember that appellate cases are deficient even as reports about what happened in the particular case; as a representative sample of a social practice, they are utterly useless. Indeed, the reports can give no indication of whether the shocking displays of elitism in these cases are the norm for the American labor movement or merely a small sample of deviant cases. I would therefore like to survey what little is known about normal levels of democracy in the collective bargaining process. I hope to show that the average employee is significantly disadvantaged by the bureaucratic elitism of the normal process of collective bargaining and that these employees would

151. At least four Congressmen introduced union democracy bills during the 1958 session that would have required votes before strikes: S. 1002, § 2, 85th Cong., 2d Sess. (Mundt); H.R. 4473, § 102(c)(5) (Barden); H.R. 7265, § 109 (Kearns); H.R. 1103 (Bentley). The advocates were conservatives, and the rationale was the same as that of LMRA §§ 203(c) and 209(b): that reasonable rank-and-file members were being forced into striking by voracious union leaders. The bills were justified by their supporters on grounds of both principle and policy, sometimes in the same speech. E.g., 105 Cong. Rec. 6688-89 (1959) (remarks of Sen. Eastland), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LMRDA 1215-16 (1959). The proposal finally came to a vote as an amendment by Eastland and was defeated 28-60; the votes recorded in favor were cast by ordinarily conservative Senators. See 105 Cong. Rec. 6690 (1959), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LMRDA 1217 (1959).

152. The only reference to contract ratification that I have been able to locate in the LMRDA’s legislative history is the concern of Senator Lausche that what became NLRA § 8(f), 29 U.S.C. § 158(f) (1976), would permit a contractor and union business agent to make an agreement without the consent of the employees. 105 Cong. Rec. 6398 (1959). Senator Lausche was apparently unaware that the right to ratify a collective agreement was guaranteed neither in existing federal labor law nor in any legislation before Congress that year.

Collective Bargaining

benefit from the use of the law to encourage democratic collective bargaining.154

It seems clear that the dominant social trend of postwar collective bargaining has been toward greater concentration of authority in the hands of the few. Local bargaining gave way to national bargaining in the 1950’s and seems never to have regained any of the vitality it lost.155 But one must interpret this fact with care. National control does not totally preclude democracy (except in some highly participatory Rousseauist sense); local control hardly guarantees it.156 As I argued above, there has been no congressional policy to favor or oppose the growth of national bargaining,157 and it would therefore be improper to attempt to use union democracy law opportunistically to roll back the institution of national bargaining.158 Nevertheless, it is undeniable that one effect of bargaining in large units is to make the process less participatory and less democratic. As a general matter, political life in union locals is considerably more vibrant, with greater participation by union members and more frequent turnover in office than at the national level.159 Thus, a move from local to national

154. This discussion is necessarily general, and I have, perhaps unfairly, combined examples from many different unions. This reflects both a lack of detailed attention by social scientists to how individual unions actually bargain, see infra note 181, and the modesty of my project here, which is merely to establish that courts should generally treat seriously charges of undemocratic bargaining, and that such practices are not confined to a mere two or three unions. Specific elitist bargains and specific remedies should be addressed judicially on a case-by-case basis. In my view, the existing evidence certainly would not support, for example, detailed congressional imposition of uniform union bargaining procedures.


156. See F. Neumann, The Democratic and the Authoritarian State: Essays in Political and Legal Theory 224 (1957). The assumption of such a relationship would be a good example of what Neumann called “constitutional fetishism, the attribution of political functions to isolated constitutional arrangements which have meaning only in a total cultural, and particularly social setting.” Neumann, The Concept of Political Freedom, 53 COLUM. L. REV. 901, 926 n.87 (1953).

157. See supra notes 121–22.

158. One questions the spirit behind the recent call of the Heritage Foundation for “new legislation that would enable workers at the local union level to veto nationwide, multi-employer bargaining agreements and to opt instead for collective bargaining over which they would exert direct control.” Antosh, Workers Rights in Labor Law, in Agenda ’83 (Heritage Foundation 1983), summarized in 112 LAB. REL. REP. (BNA) 91 (1983). I see this as a classic example of an unprincipled concession to “democracy,” intended solely to achieve some other policy goal. Like other efforts in this direction by political conservatives, see supra pp. 797–98, there is good reason to doubt that this would have the effect its sponsors hope for. See Local 472, United Ass’n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v. Georgia Power Co., 684 F.2d 721 (11th Cir. 1982) (international, at employer request, breaks up jurisdiction of militant local).

bargaining is necessarily a move from relative democracy to relative elitism. The cure for this elitism is not necessarily more local control, but rather the use of the law to encourage democratic bargaining at every level.

The concentration of bargaining power in the few instead of the many has occurred even in locals, draining power from elected representatives to paid staff.160 Bargaining only by appointed or national officials obviously precludes participatory democracy. A believer in the feasibility and desirability of representative democracy, with union officers and staff as representatives, would be less concerned. Not as much is known as one might suppose about the attitudes of union officers.161 What is known, however, suggests that contemporary collective bargaining is a very far cry from even representative democracy.

In the first place, union officers are imperfectly representative of their constituencies. Union leaders generally come disproportionately from older, more experienced, more skilled, and more highly paid workers.162

160. Staff experts in America appear to play a role in contract negotiations unique to this country. See J. Edelstein & M. Warner, supra note 155, at 12; Barbash, Rationalization in the American Union, in ESSAYS IN INDUSTRIAL RELATIONS THEORY 147 (G. Somers ed. 1969); Shirom, Union Use of Staff Experts: The Case of the Histadrut, 29 INDUS. & LAB. REL. REV. 107, 118-120 (1975) (comparative study); see also Cook, Dual Government in Unions: A Tool for Analysis, 15 INDUS. & LAB. REL. REV. 323, 331 (1962) (describing tension in locals administering multiple contracts between elected officers and appointed business agents, who frequently run collective bargaining, negotiate, file grievances, and thus become true leaders of local in members' eyes). The willingness of appointed construction union staff to grant employees ad hoc relief from ratified agreements is so widespread as to have a name, "business agent concessions." D.Q. Mills, Speech to Nat'l Convention, Mechanical Contractors' Ass'n, Feb. 9, 1984 (reported at 115 LAB. REL. RPR. (BNA) 193-94 (Mar. 5, 1984)).

Some cures for this problem may be as bad as the disease. Cook attributes the common practice in the International Brotherhood of Teamsters—under which one individual simultaneously holds multiple positions as local business agent, president of a district council, member of a statewide bargaining conference, and international vice-president—to the need to "find a meeting place between national direction of bargaining and regional negotiation." Id. at 338. For the truly nauseating piling-up of multiple salaries, fringe benefits, and perquisites that the elite reaps in this search for a "meeting place," see TEAMSTER DEMOCRACY AND FINANCIAL RESPONSIBILITY: A PROD REPORT (1976), or almost any issue of Convoy Dispatch, the newspaper of the Teamsters for a Democratic Union (particularly the regular column "Your Dues Pay For This?").


162. Leonard Sayles and George Strauss provide a vivid example:

Lower-paid workers are sometimes completely unrepresented [in union leadership]. In one manufacturing plant, the coalheavers were without a steward of their own, although many smaller groups had separate representation. The steward who had jurisdiction over them made no reference to their grievances until directly questioned by the interviewer, when he said, "Oh, yes, I'm in charge of them too, but they don't cause me any trouble." When asked how he found out what their grievances were, since he worked in a different part of the plant, he said, "Well, I suppose they'd get a message to me somehow. I don't know—it hasn't come up yet."

The underrepresentation of black, female, and other ethnic minority workers is well known.\(^{163}\) This skewed representation has consequences beyond the self-evident ones. American labor markets can best be modeled as discrete "internal labor markets." Once a worker gains entry into a particular "internal" market, intermarket mobility is rare;\(^{164}\) initial job entry thus brings with it highly correlated conditions. Workers underrepresented in union leadership will on the whole be those who receive lower pay, and who face more disagreeable working conditions. For example, these workers are most likely to be injured in an industrial accident. As a result of their underrepresentation, union members’ concern with health and safety issues are unlikely to be accurately reflected by union negotiators.\(^{165}\) Perhaps because of this inadequate representation, union negotiators often do not reflect the aspirations and priorities of their constituents.\(^{166}\) Since this information is readily accessible to these officers, their ignorance is largely self-imposed and in many cases stems from elitist and hostile attitudes toward the union’s members.\(^{167}\) Moreover, appointed staff negotiators are necessarily responsive only to union leadership since they may be easily replaced.\(^{168}\)

---


166. The text of Lawler & Levin, Union Officers’ Perceptions of Members’ Pay Preferences, 21 Indus. & Lab. Rel. Rev. 509 (1968), reports close agreement among officers’ predictions, officers’ preferences, and members’ preferences. Examination of their data, however, id. at 514, reveals some very wide gaps. "The officers tend to greatly overestimate the members’ desire for additional cash . . . ." Id. at 515. The members’ actual preference was half the predicted level; members actually ranked increased wages below sick leave. Officers overestimated the members’ preferences for a shorter workweek by a factor of two and underestimated members’ preferences for increased vacations and increased holidays by a factor of three. Not a single officer predicted members’ significant preference for early retirement.

Another study revealed similarly poor predictions by union officers of their members’ preferences: [Although officers and members of our samples seemed in basic agreement concerning union goals, there was a particularly interesting and perhaps significant difference between them. Higher wages ranked second in relative importance as a perceived goal among the officers, as revealed by the number of times officers mentioned it; higher wages ranked only ninth in relative importance as a goal which members thought should be sought. R. Miller, F. Zeller & G. Miller, The Practice of Local Union Leadership: A Study of Five Local Unions 54 (1965).

167. Miles and Ritchie found that union leaders do not believe that participation will improve decisions, and see participation as valuable only in potentially improved morale and greater rank-and-file acceptance of leadership decisions. Miles & Ritchie, Leadership Attitudes Among Union Officials, 8 Indus. Rel. 108, 110-11 (1968). Union officials tend to rate rank-and-file members lower in capability than do the managerial counterparts of the officials. Id. at 115.

While union officials have a low view of members, they have a much higher view of fellow officers. Landsberger & Hulin, A Problem for Union Democracy: Officers’ Attitudes Toward Union Members, 14 Indus. & Lab. Rel. Rev. 419 (1961).

168. See Finnegan v. Leu, 456 U.S. 431 (1982). For an example of replacing elected with appointed bargaining representatives in order to further the leadership’s goals at the expense of the
Bargaining with management exacerbates the effect of union officers’ unrepresentativeness, ignorance, and hostility. As a general matter, negotiators who work on a continuing basis with counterparts from the other side become less aggressive than their principals.\textsuperscript{169} In addition, “negotiators may on occasion be effective in achieving intergroup resolution by employing various tactics for limiting the role of group members in intergroup decision making.”\textsuperscript{170} While these truisms suggest an inevitable conflict of interest between negotiators and members, there are many techniques for handling this conflict. The resolution takes very different forms under democratic and elitist bargaining. Under democratic bargaining, the negotiator has an incentive to be honest from the beginning about what might be attained, to use superior knowledge and rational argument to persuade members to adopt attainable demands, and to permit intraorganizational opponents to participate in policymaking so as to win them over to the leadership’s view. The elitist bargainer, who need not answer so directly to constituents but who must face periodic elections,\textsuperscript{171} has other techniques at his disposal. The members may be kept in the dark;\textsuperscript{172} they may actually be lied to about the contents of the tentative agreement;\textsuperscript{173} their demands may be silently dropped and nothing put into writing;\textsuperscript{174} or they may be met with appeals to the personal prestige or power of the leadership or actual payoffs to influential members of the rank and file.\textsuperscript{175}

Industrial relations scholars have not done sufficient empirical work to reveal which of these models is more common, or in what proportion they may be found in typical collective bargaining.\textsuperscript{176} In the absence of such membership’s goals, see 97 LAB. REL. REP. (BNA) 259–60 (March 17, 1978) (suit by bricklayers in New York to block contract, cutting their pay, that was signed after union president replaced elected representatives on negotiating committee with business agents).

\textsuperscript{169} R. WALTON & R. McKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 286 (1965).
\textsuperscript{170} Id. at 286 n.8.
\textsuperscript{171} LMRDA § 401(a)-(b), 29 U.S.C. § 481 (a)-(b) (1976).
\textsuperscript{172} See Warehouse Union, Local 860, Int’l Bhd. of Teamsters v. NLRB, 652 F.2d 1022, 1023 (D.C. Cir. 1981) (union fails to inform members of employer’s plans).
\textsuperscript{173} See Anderson v. United Paperworkers Int’l Union, 641 F.2d 574, 576 (8th Cir. 1981) (misrepresenting existence of paid fund for severance pay).
\textsuperscript{174} See Hidden Changes in Kroger Master Language, Convoy Dispatch, Nov.-Dec. 1982, at 10: When the Kroger master contract was extended earlier this year, everyone working for Kroger believed there was not going to be a single change in the master language . . . . Well, guess what. Members who have scrutinized the new contract have discovered that language was added to Article 25 (Subcontracting) to the master contract—the addition of the date May 31, 1979—which limits who is protected by the subcontracting clause. Not a single Business Agent or union official will claim any knowledge of or responsibility for how this date got in the contract.
\textsuperscript{176} The most detailed study is limited to written union constitutions and does not examine actual
work, I would like to reprint an account of a strike vote that I have reason to believe (though cannot prove) is typical. The setting is the United States Steel Corporation's Gary Works, one of the nation's largest steel plants, in July 1971:177

I only learn about the strike vote meeting from a radical friend who works in the coke ovens. No one else in Merchant Mills seems to know a thing about it, so I call up the union, and a voice says impatiently, "Yes the strike vote is Tuesday. Everybody's been informed." I tell her that not a damn person in Merchant Mills knows about it, and she promises that the union will look into this. That night I see there's one dim leaflet tacked up in the glass case by the foreman's office. I try to talk the meeting up, but nobody cares. One older black guy sums up the feeling pretty well: "What difference? Meeting, no meeting. Strike, no strike. They going to do it just like they want anyhow." By "they" he means the union and the company.

Tuesday. The union hall of Local 1014 of the United Steelworkers of America is packed by the time I arrive, and I have to sit in the front. (I'm told later that my picture is on the cover of the union newspaper. But I've never seen our union newspaper.) About 400 people are at the meeting, out of 15,000 members.

Harry Piasecki, the union president, starts by announcing in a tough and determined voice that the company is going to be real scared to hear of the big militant turnout at this strike meeting. From what I hear, this meeting is about eight times bigger than most local meetings, which means that Piasecki is probably just as scared as the company right now.

He and other union officials give long empty reports about the strike talks, and it's obvious they want to drag this thing out until we practice. Lahne, Union Constitutions and Collective Bargaining Procedures, in TRADE UNION GOVERNMENT AND COLLECTIVE BARGAINING 167 (J. Seidman ed. 1970). In 1970, Herbert Lahne reviewed the national constitutions of 73 national unions with membership above 40,000; these unions contained roughly 90% of America's unionized workers. While most constitutions specified who was to authorize, continue, terminate, and finance strikes, fewer specified who was to negotiate and approve settlements. Fewer than 40% of the constitutions studied, covering just over 40% of the union members, required any sort of ratification. Fewer constitutions yet said anything about how to formulate and agree upon demands. The very vagueness of constitutional provisions of course increases the interpretive authority of union officers. See Black v. Transportation Workers' Union, 454 F. Supp. 813 (S.D.N.Y.), aff'd mem., 594 F.2d 851 (2d Cir. 1978) (discussed supra note 95); Stelling v. IBEW, Local 1547, 587 F.2d 1379 (9th Cir. 1978), cert. denied, 442 U.S. 944 (1979), discussed supra note 65. It also gives the lie to repeated judicial suggestions, see supra p. 810, that democracy in collective bargaining might meaningfully come about through members' common law suits to enforce union constitutions.

177. The United Steelworkers of America did not in 1971, and does not now, submit contracts for membership ratification. See Aikens v. Abel, 373 F. Supp. 425, 432 (W.D. Pa. 1974). As correctly stated by the union officials quoted, even the strike vote was purely advisory; strikes may be called only by the international president. Constitution of the International Union, United Steelworkers of America, AFL-CIO-CLC art. XVI (discussed in L. ULMAN, THE GOVERNMENT OF THE STEEL WORKERS' UNION 49-51 (1962)).

841
become confused and bored and hopefully we'll go home. After a half-hour some of the guys on the floor start to yell out. Piasecki can see that people want something to happen, so he takes a big sheaf of papers out of his briefcase and shouts, "Brothers! I hope we are going to register a big strike-vote here tonight, to give our union leadership the backing they deserve.

"You men know the company is stalling and won't cooperate. And I'd bet you are wanting to know just how these negotiations stand."

"Yeah. Yeah. Tell us," the shouts ring out.

He begins. "I have a copy of our bargaining position right here. It has fourteen categories of demands on it, and the company has only agreed to talk about six of them. That's the kind of bad faith we are up against."

"What is it?" "What are they offering?" the cries go up.

"Right. Right," says the president. "And I'm going to tell you exactly what these categories are." He shuffles through these papers some more, while we wait. Finally he says loudly and decisively, "Number three!" Then silence, and after more paper shuffling and a brief consultation with another official sitting at the microphone-covered table, "Number five! Number six!" Then more silence and more shuffling, and heads out in the audience are looking back and forth, and asses are shifting around in their chairs. Eventually he gets out the rest of the six numbers. Nothing more, just the numbers. This is union democracy in action. Most of the audience is looking passive, but a few start to yell out again. "Hey, what's with these numbers?!" "What are they offering?!" "What's the old age benefit?!" "Come on! What's going on?"

The gavel goes rap rap rap and Piasecki says, "O.K. brothers, let's keep it orderly, every man will have a chance to speak." But the uproar continues and finally he shouts, "Do you men want to know what's in those categories?!" Obviously they do. So he consults, and shuffles more papers, and then begins to read out the answers. "Wages and Hours! Retirement Plans!" He goes on like this, with the category titles. That's all. Confusion and passivity increase. Some men yell. Some leave. Most just sit.

Now the microphone on the floor is opened up, but those who ask good questions don't get answers, and many of the speakers are minor union officials. They remind us that the union charter doesn't allow us to vote on the terms of the contract; it only allows us to authorize Piasecki to call a strike. They talk drivel, but use tough, labor-movement language: "Brothers and sisters!" "Standing bravely on the picket line," "We're not going to knuckle under to the god-dam company until Motherfucking Hell Freezes Over, excuse me if there are ladies present."

It's getting late, and more people leave. Those who thought this meeting was actually going to mean something are frustrated and disappointed. At just the right point, Piasecki calls the vote. "All right men, how many are in favor of authorizing a strike against this
Collective Bargaining

company, if the negotiators feel it is necessary? Let's hear it!” There is a thunderous “Aye.” How could you vote anything else? Does anybody here want to vote in favor of the company? That's what he seems to ask as he shouts, “Those opposed?” We all look around, but no hands are raised. How could they be? This is union democracy.¹⁷₈

My guess is that the vast majority of the minority of American workers fortunate enough to be granted the chance to participate in the process of forming demands or ratifying agreements do so under similar practices as to notice, information about union and company provisions, meeting procedure, and voting procedure.¹⁷⁹

I will show in the next section that some American unions have adopted something more like the model of democratic bargaining. Many have not, however. The failure of the law to require, let alone enforce, democratic collective bargaining has left union members subject to the manipulation of union leaders and negotiators with interests sharply different from theirs. All too frequently they work under agreements vastly different from what they would have chosen, without even having been given the opportunity to voice or implement contrary proposals. The effects of this process cannot be conclusively demonstrated. One can be certain that, at


¹⁷⁹It is difficult to find reported examples of ratification proceedings with anything like adequate explanation of the issues, reasonable opportunity for opposition, or ballots which permit a fair sounding of opinion. The ratification procedures of the United Automobile Workers are probably neither more nor less democratic than those of most unions. McKersie, Perry & Walton, supra note 175, analyzed the bargaining conduct of the UAW in its negotiations with International Harvester in 1961, and though their perspective is the negotiator's rather than the worker's, their fundamental conclusions were not dissimilar from Packard's:

Union leaders anticipated numerous demands for a more equitable wage structure, which the company would be unwilling to pay for. In this situation, and given the strong pressure from within the international union and the company's negotiator for a peaceful negotiation, the union negotiator adopted the strategy of structuring aspirations so as to minimize conflict from the outset.

The primary tactic involved limiting the role of the rank and file and local union leaders in the formulation of classification objectives and proposals.

Id. at 466–67. Ironically, within this basic orientation, bargaining delegates who solicited the views of their constituencies and adopted a “militant” posture achieved far more of their bargaining objectives than those who had acted passively at the time of submissions and who adopted a moderate approach posture during negotiations.” Id. at 477. For a thorough overview of UAW bargaining procedures, which include some showy democratic elements (rank-and-file representation on the bargaining team) but are essentially quite elitist, see W. SERRIN, THE COMPANY AND THE UNION: THE “CIVILIZED RELATIONSHIP” OF THE GENERAL MOTORS CORPORATION AND THE UNITED AUTOMOBILE WORKERS (1973). See also Cehaih v. International Union, UAW, 710 F.2d 234, 236 (6th Cir. 1983) (benefits representative removed from office for opposing tentative collective bargaining agreement).
best, significant rank-and-file interests—disproportionately the interests of poorer, younger, and racially disfavored workers—are underrepresented in collective agreements. At worst, elitist bargaining facilitates the sort of sweetheart agreements and union-business collusion and corruption, that so angered the McClellan Committee.

C. Democratic Collective Bargaining Is Feasible

The advocate of union democracy, like any critic of existing institutions, is easily placed in a double-bind. To demonstrate a need for change, she must show the world as it really is, with all the faults of existing institutions. Only this can possibly shake the reader out of the complacency and inertia that unjust institutions so sedulously cultivate. Having performed the critique, the critic then frequently finds that she has cut off her own feet. For has she not also demonstrated that nothing better is possible? If we think that only if a thing already exists can we be certain that it is possible, how is change ever achievable?

I have tried to avoid this problem in this Article, through the strategem—an inherently conservative and accommodationist strategem to be sure—of limited aims. My model of democratic collective bargaining is an ideal type. I cannot be certain, and it is indeed unlikely, that any union anywhere conforms perfectly to the model of democratic collective bar-

180. Several readers have suggested to me that national union leaders during the postwar period have been substantially more committed to the eradication of employment discrimination and the creation of job opportunities for minority workers than have been local officials or the rank-and-file generally. I would concede that, if true, this would be an argument for elitist bargaining. I am unaware, however, of any empirical evidence for the proposition apart from the unpublished study cited in D. Bok & J. Dunlop, supra note 18, at 134.

One purported example of this disparity in attitude, which has been cited to me more than once, fails to demonstrate it at all. The sweeping alteration of seniority structures in the steel industry effected by the consent decree approved in United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976), is claimed to demonstrate the commitment of the Steelworkers' leadership to equal opportunity. Three points need to be made. First, Steelworkers' bargaining has been elitist since the creation of the union. See L. Ulman, supra note 64, at 10-13, 51-54. The elite that takes credit for the 1974 decree must also take credit for the "sorry picture" of years of segregation of black workers into the worst jobs. United States v. Bethlehem Steel Corp., 446 F.2d 652, 655 (2d Cir. 1971). Second, the 1974 consent decree was not prompted by the social conscience of union leaders. It was not a response to the Montgomery bus boycott, the March on Washington, and the passage of the Civil Rights Act of 1964. It was a response to the jolt of decisions like Bethlehem Steel, 446 F.2d at 659-66, which made it appear for a time that federal courts would order "rightful place" seniority in employment discrimination cases, and United States v. United States Steel Corp., 371 F. Supp. 1045, 1057-63 (N.D. Ala. 1973), modified, 520 F.2d 1043 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976), which awarded substantial back pay awards. Third, while International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (seniority system not unlawful simply because it perpetuates pre-Civil Rights Act discrimination), makes the Steel Industry Consent Decree unusually generous relief for victims of employment discrimination, it did not appear that way in 1974. The reported legal proceedings, as the certiorari petition implies, were entirely devoted to attack on the consent decrees as inadequate relief by attorneys for individual Title VII plaintiffs and for civil rights organizations such as the NAACP Legal Defense Fund and the National Organization for Women.
Collective Bargaining

gaining. Yet, the model of democratic collective bargaining is a very far cry from a utopian or totalistic critique of American labor relations. Every element of the ideal model of democratic collective bargaining derives from some feature of the best existing union practice. While no union may combine the elements just as the model would have it, democratic collective bargaining is feasible. Elitist bargaining is not inevitable.181

The first requirement of democratic bargaining is that members have an opportunity to express their views on prospective bargaining demands. From the standpoint of democracy, the best way to do this is in relatively unstructured meetings in groups small enough to permit even the shy to participate, conducted in a way that encourages members to be honest about their preferred demands. Meetings are preferable since they allow interaction among members and thus reinforce the idea of wants as social rather than private. Such meetings are part of the practice of some unions.182

There are other mechanisms for ascertaining the views of members, though if relied on exclusively they are less satisfactory insofar as they adopt the elitist practice of the members informing the elite, rather than the democratic practice of the members jointly creating their own demands. This criticism, for instance, applies to the practice of Local 770 of the Retail Clerks International Association, which sent a questionnaire to the entire membership. The questionnaire was based on an analysis by the union’s research department of the most important economic problems, and was tabulated and used by the union’s executive board.183 While this is more democratic than not polling the members, it contains elitist elements. “The questionnaire itself weights the direction of the an-

181. Research on this topic has been crippled by the dearth of attention in the industrial relations and sociological literatures to how unions actually bargain. Thirty years ago, Arthur Ross bemoaned the fact that most supposed studies of union bargaining practice reported only on the formal, i.e., constitutional, procedures. A. Ross, TRADE UNION WAGE POLICY 37 (1948). It is depressing that, thirty years later, some of the studies which Ross cites are still leading studies, and the newer work in the area, such as that cited supra note 176, continues to be obsessed with formal union constitutional procedures. The empirical work cited in this section is generally around twenty years old. Since I have been unwilling merely to swap anecdotes, it is difficult to assemble a picture of how unions actually bargain. While this rather takes the wind out of the sails of the constantly repeated assertion that elitism is inevitable, it does not provide much of a basis for arguing that democracy is possible.

182. See A. COOK, UNION DEMOCRACY: PRACTICE AND IDEAL 104 (1963) (describing meeting procedures in Local 6, Hotel and Restaurant Workers, called by author “Local 200”). Such a meeting is more likely to play the role advocated here if the negotiating committee has not yet been selected. One union does elect the negotiating committee first, which then holds open meetings for the receipt of membership demands. Id. at 163.

183. M. HARRINGTON, THE RETAIL CLERKS 49-50 (1962). Local 770 in Los Angeles was then the “strongest” local in the Retail Clerks. That international union has since merged with the Meat Cutters to form the United Food and Commercial Workers.

A similar questionnaire has been employed by the International Union, United Automobile Workers. Summers, Ratification of Agreements, in FRONTIERS OF COLLECTIVE BARGAINING 94 (J. Dunlop & N. Chamberlain eds. 1967).
More importantly, the give and take of public debate is eliminated as individuals make private choices in isolation. Ideally, the democratic union should combine face-to-face meetings between negotiators and members with referenda.

The second requirement of democratic bargaining is to amalgamate the membership's demands and form them into priorities for the organization. This, too, need not be an elitist maneuver. The union's bargaining policy committee, a mix of top union officers and rank-and-file workers can draw up a program from the recommendations made at an open national bargaining conference, and thus present the program to the membership for a vote. One local variant has an elected negotiating committee draw up proposals based on discussion at open meetings. The membership then approves the proposals at the same meeting that authorizes the committee to bargain. In short, while a mass process for combining many membership expressions into a unified list of priorities may not be practicable, whatever process is used can be significantly informed, both before and after, by membership participation.

The selection of negotiators is a third area that offers significant opportunities for democracy. As indicated, there are unions which elect negotiating committees or require rank-and-file representation. It is not necessary to rely exclusively on officers or, worse yet, staff.

There is also no excuse for the anxiety and confusion with which union members generally await the results of negotiations, except an elitist desire to keep members in the dark and to slip something by them at the end. Obviously there are intermittent moments in any negotiation in which a deal could evaporate on premature notification of a principal, but such moments are not the whole of negotiation, and in the meantime dem-

184. M. Harrington, supra note 183, at 50.
185. Eileen Willenborg made this point to me.
186. The proper mix of face-to-face meetings and referenda is a complex question that depends upon the extent to which members' interests actually conflict. See J. Mansbridge, Beyond Adversary Democracy 270-77 (1980). It is unlikely that any one such mix would be appropriate for all unions or that the law could appropriately be used to resolve such finely tuned questions.
187. This is the recent practice of the oil bargaining sections of the Oil, Chemical and Atomic Workers, which appoints the union's top four officers and eight rank-and-file members to the bargaining policy committee. Oil Workers Begin Preparations for 1982 Contract Bargaining, Daily Labor Report (BNA) No. 95, at A-3 (May 18, 1981). Approval is defined as the assent of three-fourths of the bargaining units, and simultaneously constitutes strike authorization. As the bargaining program traditionally receives over 90% approval, this procedure can hardly do anything but strengthen the union in its own eyes and in management's.
188. A. Cook, supra note 182, at 163 (Local 32B, Service Employees Int'l Union).
occlusive collective bargaining requires information for the membership about management’s demands, priorities, concessions, and attitudes.\textsuperscript{189}

Finally, democratic collective bargaining culminates in approval by the membership of the proposed settlement, following full and honest disclosure of its provisions, strengths, and weaknesses. This means a ratification process of somewhat longer duration and more careful preparation than is customary. There seems no really good reason for the speed generally thought necessary, except possibly where the ratification vote ends a strike. In that case, for unions whose negotiators have earned and deserve members’ trust, it should be possible for an initial back-to-work vote to be clearly understood as pending the full and complete discussion which true ratification would ultimately entail. While I cannot cite an example of a union that currently conducts this kind of careful informing of the membership, certainly the canard that the membership is incapable of understanding such a process is easily dispelled.\textsuperscript{190}

In short, democratic collective bargaining is feasible. The best union practice provides ample models for procedures for members to articulate demands, form bargaining proposals, elect negotiating committees, receive information, and ratify settlements.\textsuperscript{191}

\textsuperscript{189}. In the Hotel and Restaurant Workers local described by Cook, negotiators reported regularly to an elected Wage and Policy Committee, which in turn had discretion to call general membership meetings for reports to the membership and approval by the membership of appropriate action, such as a strike. A. Cook, supra note 182, at 104. It is obvious that, far from weakening the union, this communication would strengthen it; indeed, that is exactly the conclusion that Cook drew, describing the repeated meetings as “a persuasive display of union power.” Id.

Contrast the apathy and confusion that attended even the overwhelming strike call by the manipulated and poorly informed Steelworkers, supra p. 841–43. Plainly the members want this information, as opinion surveys reveal. Summers, supra note 183, at 94; see also Kochan, How American Workers View Labor Unions, 102 MONTHLY LAB. REV., Apr. 1979, at 23, 29 (union members asked to rate how much effort union should put into various areas chose as most important “handling members’ grievances,” “providing more say in union,” and “providing more feedback from union” over even “higher wages” or “improved working conditions”).

\textsuperscript{190}. Clyde Summers has concluded:

[There is scant evidence that members have voted down a collective agreement because they were unable to understand either its underlying problems or its complexity . . . . The issues that most often cause rejection are not the complicated ones which members do not understand, but the simple ones which they understand all too well.

Summers, supra note 183, at 98.

\textsuperscript{191}. I am not, of course, equating democratic bargaining with these formal democratic procedures, but am merely pointing out that the latter exist. The forms do not guarantee democracy; they make democracy possible but can be manipulated into its opposite if leaders and members lack a will to be democratic.

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

A. Ross, supra note 181, at 41.
D. Democratic Collective Bargaining Does Not Have the Adverse Effects Claimed

If I am correct, judicial reluctance to require the same levels of democracy in collective bargaining as in other union actions stems only partly from a sense that democracy is unimportant, though surely its full importance is not appreciated, and only partly from a sense that democracy is infeasible. Courts prefer elitism mainly because they think that democratic collective bargaining would be cumbersome, inefficient, inflationary, and destructive of fair representation. This case, however, has not been made. Nor, I will argue, are those considerations relevant.

1. Democratic Collective Bargaining Is Not Inflationary or Inefficient

I mentioned above the consensus among industrial relations observers that unions which bargain democratically tend to be more militant and to achieve higher wage settlements than elitist unions. If universally true, this would collapse the debate about democratic bargaining into a pure question of the distribution of wages. Partisans of workers would favor democracy; partisans of employers would favor elitism.

I am reluctant, however, to rely on this easy case for democracy. The empirical evidence for the relationship is much weaker than commonly supposed. For one thing, there simply are no studies attempting to correlate union bargaining achievements with internal structure, so we are forced to rely on anecdotes. The relationship between high democracy and high benefits could not be linear; there are too many prominent counterexamples. To mention two which have figured prominently in this Article, few American international unions are as democratic in their internal bargaining procedures as the Oil, Chemical, and Atomic Workers and few are as elitist as the United Steelworkers. Yet, anecdotally, the Steelworkers until recent years negotiated wages on the high end of what most thought possible, while the Oil Workers have negotiated relatively inept contracts in an industry that could easily have afforded more.

It is thus hard to imagine that greater democracy in collective bargaining would have had any but the most marginal effect on the rate of inflation. In the first place, the standard economic accounts of the effect of

192. See supra notes 138, 140, 179.
193. See supra note 187.
194. The Steelworkers have never permitted members even to ratify agreements, see Aikens v. Abel, 373 F. Supp. 425 (W.D. Pa. 1974), let alone to express their demands or negotiate the contract. The Steelworkers have recently limited even further those with the right to approve settlements. Ratification will no longer be by the Basic Steel Industry Conference of over six hundred local leaders. Rather, smaller groups of presidents of locals directly affected by each agreement will ratify it. Bargaining Goals for Steelworkers, 112 LAB. REL. REP. (BNA) 68, 69 (Jan. 24, 1983); see supra note 64.
unionism on wages attribute to unionization only the most modest effects on wages.\textsuperscript{195} Furthermore, combating inflation by limiting wage increases may lead to the far worse consequence of diminished industrial growth,\textsuperscript{196} particularly since unionism may result in increased productivity through increasing returns to age, experience, and even merit.\textsuperscript{197} And in this inconclusive debate, it seems far-fetched to suggest that the slight effect of a shift from elitist to democratic bargaining would have clearer or greater effects than unionization itself.

Certainly the data I have been able to present on democratic collective bargaining offer no support for such a theory. It is true that a deafening consensus among industrial relations scholars holds that national union leaders, insulated from rank-and-file pressure, are more "reasonable" than local leaders or the rank and file itself.\textsuperscript{198} The problem lies in defining "reasonable." One would expect democratic collective bargaining to be more responsive to workers now underrepresented in the bargaining process: the young, the poorly paid, minorities, females, and those in hazardous jobs. Yet it is possible that these workers could be accommodated by shifts within labor's share of national income. In this regard, it is instructive to recall the studies in which leaders overestimated the membership's desire for wage increases and missed its desire for other, perhaps less costly, benefits.\textsuperscript{199} In short, it is by no means far-fetched to argue that democratic collective bargaining might result in increased productivity and diminished inflation.\textsuperscript{200}

In a larger sense, this inconclusive debate is irrelevant as well. A nation committed, for whatever reason, to limiting inflation should proceed along


\textsuperscript{198} See supra notes 138-39. Dean Wellington criticized this conclusion twenty-six years ago:

Their skepticism [about union democracy] is grounded in a suspicion that undemocratic unions are likely to be more responsible to the community than democratic ones, or that nonresponsible union officers are as likely to know labor's best interests as directly responsible ones. Both of these theories are usually—and quite properly—advanced tentatively. As reflections of empirical data, they lack evidentiary support; as naked assertions, persuasiveness.


\textsuperscript{199} See supra note 166.

\textsuperscript{200} "When negotiators try to bind employees with an agreement that the latter find unacceptable, the employer may obtain neither the productivity nor the peace for which he bargained." Summers, \textit{supra} note 183, at 84.
the same democratic lines I have advocated here. That means securing the consent of those whose income is to be limited, and doing so as part of an open and democratic participatory process in which all interests are represented and in which a national consensus may emerge.\footnote{201} I deny utterly that there can be a meaningful distinction between a public and private sphere of employment relations, or that domination and hierarchy in the latter can appropriately be pressed into the service of deceit in the former.\footnote{202} In short, even if elitist bargaining were some magic institution that effectively dampened wage demands, in the public interest, it would still be wrong. More importantly, there is no evidence that this happens; and it is quite implausible to suppose that it does happen—as conservatives are fond of saying, "There is no free lunch." Thus, there is no case for elitist bargaining as a weapon against inflation.

The same analysis applies to the fear that democratic collective bargaining is lengthy, inefficient, and leads to strikes. While there is more evidence for this latter claim than for the assertion that elitism reduces inflation,\footnote{203} elitism may also lead to strikes.\footnote{204} The much-studied upsurge in contract rejections in the late 1960’s was initially blamed by the industrial relations community, with striking unanimity, on the changed bargaining climate following the LMRDA.\footnote{205} On further analysis, however, the rejections seemed to be closely correlated with an expanding economy experiencing inflation.\footnote{206} When demand for labor dropped in the late 1970’s

\footnote{201. There is considerable mainstream evidence that this is the only efficacious way to run a wage control program. H. CLEGG, HOW TO RUN AN INCOMES POLICY AND WHY WE MADE SUCH A MESS OF THE LAST ONE (1971); Dunlop, Wage and Price Controls as Seen by a Controller, 26 LAB. L.J. 457, 458–60 (1975).


204. See Packard, supra note 178, at 7–14.

205. Yet the LMRDA said nothing about bargaining. At the time the analysis was made, the LMRDA had never been applied to a ratification vote. Still, many blamed the "spirit" or "changed climate" of LMRDA for contract rejections. See, e.g., Macdonald, Collective Bargaining in the Postwar Period 20 INDUS. & LAB. REL. REV. 553, 566–67 (1967); Seldin, The Law and Practice of Contract Ratification, 22 N.Y.U. CONF. ON LAB. 253 (1959); Shister, The Direction of Unionism 1947–67: Thrust or Drift?, 20 INDUS. & LAB. REL. REV. 578, 593–94 (1967); Simkin, Refusals to Ratify Contracts, 21 INDUS. & LAB. REL. REV. 518, 530 (1968).


General theories of union wage behavior emphasizing the importance of members' comparison of themselves with other employees include W. ATHERTON, THEORY OF UNION BARGAINING GOALS (1973); H. LEVINSON, DETERMINING FORCES IN COLLECTIVE WAGE BARGAINING (1966);
Collective Bargaining

and early 1980's, contract rejection dropped also, despite the continuing existence of formal procedures for rejection by the membership and despite increased legal protection for ratification. Thus, the existence of democratic bargaining procedures can have only the most marginal effect on membership aspirations or rates of striking. A general policy of grudging enforcement of democratic union constitutions can hardly be thought to target the most strike-prone unions, or to exert any real control over propensity to strike. Once again, one might argue further that employing union elitism to control strikes is wrong, and that restrictions on strikes should rise or fall on their own merits. But surely it is an illusion that elitist bargaining makes a cheap and functional contribution to some kind of national policy of strike control.208

2. Democratic Collective Bargaining Does Not Deny Fair Representation

There is no reason to think that, as a general rule, democratic collective bargaining would be more likely than elitist bargaining to deny fair representation. In most cases, democratic representation will be fairer; in others, irrelevant. Of course, in the absence of studies comparing the fruits of democratic and elitist negotiations, we are left swapping anecdotes. Certainly the black employees victimized by union discrimination, who were the original class to be protected by the duty of fair representation, are poorly represented in and by union elites.209 One hope of democratic collective bargaining is greater reflection of the needs of minority groups, although this hope will not always be realized. In Steele itself, it seemed irrelevant whether the racist union, which denied blacks admission, was democratic or not. Under the circumstances, neither union officers nor the membership would have been likely to represent the black employees. It cannot be shown, however, that democratic bargaining necessarily causes


Other scholars have advanced even narrower explanations for the increase in contract rejections, attributing any increase to poor communication in a handful of unions, though the definition of "communication" was a loose one (including such substantive matters as lack of unanimity on the bargaining committee). Burke & Rubin, Is Contract Rejection A Major Collective Bargaining Problem?, 26 INDUS. & LAB. REL. REV. 820 (1973); see also Shair, The Mythology of Labor Contract Rejections, 21 LAB. L.J. 88 (1970) (contract rejection can be reduced by more "communication" between management and employees); cf. Odewahn & Krislov, Comment, 28 INDUS. & LAB. REL. REV. 439, 440 (1975) (disputing notion of "communications breakdown" as cause of most contract rejections); Burke & Rubin, Reply, 28 INDUS. & LAB. REL. REV. 441, 443 (1975) (adhering to opposite view).


208. See Simkin, supra note 205, at 537 (eliminating ratification "would simply channel those dissatisfactions toward more frequent changes of union leadership with implicit instructions to be tougher at the next negotiations").

209. See Klare, supra note 50, at 163 & n.17.
Steele, or even that the union there was democratic. I would call open union admissions policies part of union democracy.210

Two kinds of cases that might be thought to present a conflict between democratic representation and fair representation do not actually present the problem at all. First, there are the cases in which employee referenda have been held to be a breach of the duty of fair representation—for example, those in which employees affected by a seniority merger vote their individual interests.211 These do not present any substantive problem of fair representation; fair representation does not require either dovetailing or endtailing of employees.212 Fair representation problems would be raised only when the majority's voting of its own interest seems to disadvantage a minority which had some expectation, based on past union practice or union policy documents, of better treatment.213 Here, there has been an unfortunate tendency to treat the decisions of union elites as the "real" union decisions, and to view the results when the elite "delegates" decisionmaking to the membership as the breach of the duty of fair representation.214 This indeed creates a conflict between union democracy and fair representation, but it is a false and unnecessary conflict.

For example, it has been suggested that union members' decision to bargain for a new allocation of compensation should be scrutinized more closely for unfair treatment, while the identical substantive decision, made by union leadership "removed . . . from political influence," should be free from "judicial interference."215 This obviously stands democracy on its head. Has this distinction anything to recommend it?

If the union has a national policy, or consistent national practice, on the allocation of such compensation, the courts should normally give it deference. Not, however, because this policy is "removed" from "political influence" in any comprehensible sense, but because it is the result of democratic politics. If the union's membership has carefully studied and then adopted a proposal after full debate at a representative national convention, then those deliberations should not be subordinate to the ad hoc judgment of a single national officer.216 There may be a substantive case

211. See NLRB v. General Truck Drivers' Local 315, 545 F.2d 1173, 1175-76 (9th Cir. 1976).
213. Finkin, supra note 51, at 215-31, meticulously reviews the variations. "A majority may not expropriate a benefit or interest currently enjoyed by the minority solely to benefit itself." Id. at 215.
215. Finkin, supra note 51, at 229 (discussing Waiters Union Local 781 v. Hotel Ass'n, 498 F.2d 998, 1000 (D.C. Cir. 1974)).
216. There may be a case for the officer's judgment, of course, but it has to be made. Perhaps the union has long been bedevilled by such disputes and, after full and open debate, has democratically delegated such decisions to a sort of internal umpire. Deference to the officer's decision may well be
Collective Bargaining

for the small and unpopular minority group, but I see no reason to treat elite decisionmaking as presumptively normal and proper. The elite is just as likely to be paying or establishing a political debt: "removed" from politics hardly seems an apt description of a union elite. There is just no escape from the problem that differential treatment of constituent groups may create difficult problems of fair representation, requiring evaluation of the basis for the unequal treatment. An automatic deference to the decisions of the leadership will, by definition, solve these problems; but it sits poorly with national policies on union democracy and extracts an extravagant price in autocracy for a modest diminution in caseload. Autocracies as well as majorities may be tyrannical; when they are tyrannical inside a union, courts must review their actions. Democratic bargaining necessarily conflicts with fair representation only if the latter is defined as elite benevolence.

The second class of cases in which democratic processes have been held to violate the duty of fair representation concern majority decisions to squash or to swap an individual's grievance under the collective agreement. These do constitute violations of the duty, but not because of any inherent problems with democracy. Rather, democracy may not triumph over vested individual rights, and these include all the provisions of the collective agreement.

I agree that the duty of fair representation plays an important role in protecting union members from arbitrary union action, whether by demo-

217. NLRB v. General Truck Drivers Local 315, 545 F.2d 1173, 1176 (9th Cir. 1976); Local 13, Int'l Longshoremen's & Warehousemen's Union v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

218. See Finkin, supra note 51, at 236; Leffler, Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling, 1979 U. Ill. L.F. 35; Summers, supra note 98. Despite some disagreement along the way, Professor Finkin and I end up in the same place: that "a referendum reflective only of a conflict of interest within the unit" does not necessarily impeach the duty of fair representation. See Finkin, supra note 51, at 236. I agree with Professor Finkin that a hypothetical fair referendum by the union in Truck Drivers Local 315, setting layoff policy for this and all future layoffs, should have been accorded judicial deference. There were two vices, however, in the actual referendum in that case, which decided layoff policy for only one employer at a time when specific jobs had already been designated for elimination. The first, emphasized by the Board majority and the court of appeals, was a strong flavor that the process was not contract-making for the future but rather contract interpretation for the instant case only. General Truck Drivers Local 315, 217 N.L.R.B. 616 (1975). In such a case, Professor Summers' analysis comes into play, and majority rule may not deprive an individual of her contractual rights. See Summers, supra note 98, at 266-70. The second vice, emphasized by Professor Finkin, was that the referendum denied some the right to bump while leaving the resolution of the rights of others open. This distinction rested upon no consideration relevant to bargaining other than the majority's desire to favor itself by not allowing Holman to bump while hedging its bets against the possibility of more widespread layoffs in the future.

Finkin, supra note 51, at 235-36. The fact, however, that a union can manipulate an apparently democratic form to reach an unfair result, as in Truck Drivers, hardly shows that true democracy would be likely to have similar effects.

853
cratic or authoritarian unions. This implies some scope for finding some union bargaining procedure "unfair," and this occurs, as I showed above, when certain autocratic actions (such as stuffing ballot boxes or ignoring constitutional procedures) can confidently be described as arbitrary or unfair. The regulation of internal union processes is, however, primarily the function of the LMRDA, which clearly supports union democracy. The theme of some cases on the duty of fair representation, beginning with the first, is that fair representation in contract negotiation may require a little union elitism. This assertion has no empirical support and should be abandoned. The members, not the elite, are the unions; the solutions to union unfairness, if any, are fairness and more democracy, not elitism.

CONCLUSION: IMPLEMENTING DEMOCRATIC COLLECTIVE BARGAINING

The policy prescriptions that follow from the foregoing are obvious, but should perhaps be summarized. Most generalize from existing precedent; only one might require statutory change.

A. The General Principle of Union Democracy

Courts, the NLRB, and other policymakers ordinarily should assume that collective bargaining is the democratic process of involving employees in the self-determination of their working conditions. Formulations like the "delegation" of bargaining power to the leadership are solecisms.

B. Formation of Bargaining Demands

1. Union members have equal rights with the leadership to participate in the articulation and formation of bargaining demands. A union that does not solicit membership views violates both the equal rights and free speech provisions of the LMRDA.

2. Meetings and referenda on bargaining policy are subject to the

219. See supra pp. 820-22. All conflicts between collective bargaining and fair representation disappear if one accepts the recent contention that there simply is no "intelligible general rule of distributive or procedural fairness that may be interposed by a court to overrule the discretionary decisions made by a union in bargaining for its constituents." Freed, Polsky & Spitzer, Unions, Fairness and the Conundraums of Collective Choice, 56 S. Cal. L. Rev. 461, 463 (1983). Unfortunately for this easy solution and fortunately for the duty of fair representation, the authors have not established their claim. See Hyde, Can Judges Identify Fair Bargaining Procedures?, 57 S. Cal. L. Rev. 415 (1984) (arguing that the few reported cases in which judges apply the duty of fair representation to union bargaining procedures represent uncontroversial theories of fairness).

220. See Klare, supra note 50, at 189-90 (commenting on Steele v. Louisville & N.R.R., 323 U.S. 192 (1944)).

Collective Bargaining

same level of judicial supervision as other meetings and referenda. Meetings must be orderly enough to permit statements of opposing views; ballots must not be one-sided but must genuinely permit expression of membership views.

C. Ratification

Ratification of proposed agreements should be seen as a right of the membership. While this arguably would require statutory change, the best argument for such a right, absent such change, follows.

1. Union officials have a fiduciary obligation to secure to the extent possible, the substantive bargaining goals of the membership. Of course, some disappointment of the members is inevitable. As noted above, however, courts have held that ratification of settlements by the membership cures the failings of their leaders. To this end, the union's negotiators must submit all proposed contracts to the membership for ratification. Moreover, refusal to submit contracts to ratification denies the membership rights equal to the leaders to participate in deliberations on union business, in violation of LMRDA § 101(a)(1) and (2).

2. Ratification must be accompanied by adequate, accurate information. Material misrepresentations render any ratification null and void and require resubmission.

3. Opponents of ratification must be permitted an opportunity, equal to the leaders', to make their views known.

4. Ratification votes should include only those affected by the contract.

222. There are no cases holding that members must ratify, and a great many cases rejecting the claim. See supra notes 52 (fair representation), 57 (LMRDA). Secondly, the House of Representatives in 1947 did adopt a provision that would have given union members the right to vote on various union decisions, H.R. 3020 § 8(c)(8), 80th Cong., 1st Sess., in 1 NLRB LEGISLATIVE HISTORY OF THE LMRA 55, 616 (1949), but this guarantee did not become part of the LMRA as enacted. (Professor Norman Cantor drew this fact to my attention). Thirdly, in the LMRDA, Congress expressly required balloting to raise dues, LMRDA § 101(a)(3), 29 U.S.C. § 411(a)(3) (1976), and to elect officers, LMRDA § 401, 29 U.S.C. § 481 (1976); this supports interpreting LMRDA § 101(a)(1) and (2) as not requiring unions to hold any votes that they do not choose to hold, but merely requiring equal extension of the franchise among union members, Calhoon v. Harvey, 379 U.S. 134, 139 (1964) (discussed supra note 86). This interpretation is difficult to square with LMRDA cases holding that deprivation of a democratic institution to everyone in the union does violate the LMRDA. See, e.g., Christopher v. Safeway Stores, 644 F.2d 467, 470 (5th Cir. 1981) (equal deprivation of rights under union constitution); Wade v. Teamsters Local 247, 527 F. Supp. 1169, 1174–75 (E.D. Mich. 1981) (union held no meetings at all); cf. Monborne v. UMW, 342 F. Supp. 718, 723 (W.D. Pa. 1972) (trusteeship may be found despite union contention that local arms never had any autonomy to lose).

These theories in the text attempt to be consistent with the Supreme Court decision in Calhoon without creating a paradoxical union compliance with "equal rights" founded on universal despotism. There are no cases of which I am aware that adopt either Clyde Summers' theory that the "equality" protected is that of members as against leaders, see supra note 86, or my theory that ratification should be a universal cure for the inevitable failings of union negotiators as fiduciaries, see supra note 115.

223. See supra note 115.
(This may include employees who, while not actually working under the contract in question, are significantly affected by it.)

5. Submission of a contract to ratification, or such a demand, is never a failure to bargain in good faith unless used to surprise the other side, or as a pretext to avoid reaching agreement.

6. The NLRB's contract bar rules should preclude employees' organizational activity only when the employees themselves have ratified the contract claimed to bar activity.

7. The normal remedy on a finding that employees have been deprived of their right under statute or the union's constitution to ratify a contract should be an injunction against enforcement of the contract pending ratification under judicial supervision. Employees who prove monetary loss from an unratified agreement should be able to recover damages jointly from the offending union and management.

These prescriptions require, with the exception noted, no legislative change. They follow from the text of the LMRDA, the demonstrated congressional concern with elitist bargaining, and the persistent failure of union self-correction as seen in the continuing cases brought by employees victimized by elitist bargaining.

Adoption of these principles would hardly ensure industrial democracy. They do not address problems of work reorganization, democratic job structures, varieties of workers' participation, or union social and political action. At most, they make collective bargaining somewhat more responsive to employees.

Failure to adopt these prescriptions would not prevent unions from adopting these methods voluntarily. It would, however, reveal the shallowness of the national commitment to union democracy, the weakness of any principle of union democracy, and the cynical use of limited grants of democracy to advance particular public goals otherwise compatible with elitist bargaining. Continued judicial confrontation with democracy in the collective bargaining process will thus reveal a great deal about the democratic potential of labor law.