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MEMBERSHIP RIGHTS IN UNION REFERENDA TO RATIFY COLLECTIVE BARGAINING AGREEMENTS

*Paul Alan Levy**

Three years ago, Alan Hyde published *Democracy in Collective Bargaining*.¹ Professor Hyde was upbeat about the desirability of applying democratic rights in collective bargaining controversies,² and he expressed the view that the law should be construed both to require democracy and to enforce democratic rights nominally granted by internal union rules in membership referenda.³ Nevertheless, his discussion of the cases displays a deep pessimism about the courts' willingness to enforce union members' democratic rights in referenda pertaining to collective bargaining agreements: either the courts ignored the fine principles enunciated in cases involving other kinds of membership votes,⁴ or they were unwilling to award effective relief for violations of the members' democratic rights.⁵

Recent cases, however, give greater reason for optimism for the future enforceability of democratic principles in contract ratification disputes.⁶ In a series of cases, members of the International Brother-

* B.A., 1973, Reed College; J.D., 1976, University of Chicago. Attorney, Public Citizen Litigation Group. The author was lead counsel for the plaintiffs in the *Bauman* and *Carothers* cases, and was co-counsel for plaintiffs in the *Harmon* case; he also participated in some of the other cases discussed in this paper. Moreover, Teamsters for a Democratic Union and its members constitute a major portion of the author's client base. Having included this caveat concerning interest in the subject matter of the article, the author also notes that the views expressed are his own, and not necessarily those of the clients or of the Litigation Group. Indeed, some of the analysis here departs in some significant respects from his clients' views.

1. Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984) [hereinafter Hyde].

2. *Id.* at 833-54.

3. *Id.* at 811-12, 815, 833-36.

4. *Id.*

5. *Id.* at 808-10, 812-14, 816-19.

6. Although I regard Hyde's discussion of this issue as overly pessimistic, I wish to emphasize at the outset my appreciation for his contribution to the law of democratic bargaining. Along with other members of the plaintiffs' union democracy bar, I have both been inspired by his article and taken great advantage of his research and his analysis. I am also grateful for his comments on this article.

hood of Teamsters successfully raised claims about the ratification procedures for each of that union's three major national contracts. In the first case, the court compelled the union to rerun the referendum.⁷ In two later cases, the referendum itself was sustained, but democratic guidelines were established, through settlement or through declaratory judgment, to govern future contract referenda.⁸

This article will explain why these union reformers have been successful in affecting the contract ratification procedure and where the law still needs to be developed. The article begins by considering the legal basis for members' democratic rights in contract ratification referenda, and the doctrinal objections that plaintiffs have had to overcome along the way.⁹ Next, the article will discuss the particular rights that have been recognized in the three Teamster cases, and then conclude with a discussion of problems of relief.

I. THE RIGHT TO A FAIR CONTRACT RATIFICATION VOTE

In his article, Professor Hyde identified five discrete sources of democratic rights in the bargaining context, ranging from the union's own constitution and bylaws to the duty of fair representation and the fiduciary duties of union officers.¹⁰ Although each of these theories may provide special advantages in particular cases,¹¹

7. *Bauman v. Presser*, 117 L.R.R.M. (BNA) 2393 (D.D.C. 1984), *appeal dismissed*, 119 L.R.R.M. (BNA) 2247 (D.C. Cir. 1985) (United Parcel Service Agreement).

8. *Harmon v. Presser*, No. 85-1556 (D.D.C. 1985) (National Master Freight Agreement); *Carothers v. Presser*, 636 F. Supp. 817 (D.D.C.), *appeal docketed*, No. 86-5476 (D.C. Cir. 1986) (National Automobile Transporters Agreement).

9. Hyde also discussed the need for democracy in the formulation of contract demands and in the negotiating process itself. Hyde, *supra* note 1, at 819-28. That subject is beyond the scope of this article, except insofar as the prospect of a truly fair referendum, in which rank-and-file opponents of the union leadership have an effective opportunity to campaign against ratification, may well encourage the leaders to create opportunities for members to express their views and to adhere to those expressed views in their negotiations with the employers.

10. See Hyde, *supra* note 1, at 796. See also 29 U.S.C. § 501(a) (1982) (the representatives of a labor union have a fiduciary duty to the union).

11. An exception is the fiduciary duties created by 29 U.S.C. § 501, because most courts have taken the position that that section does not govern decisions made by union officials about collective bargaining. *Postal Workers Union, Local 6885 v. Postal Workers Union*, 665 F.2d 1096, 1108 (D.C. Cir. 1981). *But cf. Erkins v. Bryan*, 785 F.2d 1538 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 455 (1986) (section 501 was applied to allegations that strike funds had been diverted). In some respects, section 501 has simply been used as a means of enforcing provisions of union constitutions. However, the Supreme Court has recently determined that an international union's constitution *is* an agreement between the union and its component locals, which is therefore enforceable under section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185 (1982), *Plumbers Local 334 v. United Ass'n of Plumbers*, 452 U.S. 615 (1981) and the prevailing view since *Plumbers* has been that, just as members as well as unions may invoke section 301 for suits against employers under collective bargaining agreements, *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), so may members as well as

these theories have significant weaknesses that normally outweigh their strengths.¹² In our right to vote cases, union dissidents have relied primarily on the Bill of Rights of Members of Labor Organizations, Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).¹³ They have successfully argued that, read together, the provisions of Title I guarantee to all union members a right to a meaningful vote on proposed collective bargaining agreements (assuming that the union constitution provides for contract ratification), and the right to campaign against leadership proposals by effectively presenting opposing views to the electorate.

The greatest advantage to using Title I is that the LMRDA represents a clear congressional mandate that union affairs be conducted in a democratic fashion. The LMRDA is thus unlike a union constitution or bylaws, which represent only the judgment of the union leaders or the members who promulgated it. The statute is also unlike the duty of fair representation, which the Supreme Court invented by construing the Wagner and Railway Labor Acts to avoid constitutional questions.¹⁴ If the source of democratic rights is the

locals invoke section 301 for suits against unions under a union constitution. *E.g.*, *Kinney v. IBEW*, 669 F.2d 1222, 1229 (9th Cir. 1981); *Davis v. Postal Workers*, 582 F. Supp. 1574 (S.D. Fla. 1984); *Doby v. Safeway Stores*, 523 F. Supp. 1162, 1166 (E.D. Va. 1981). *Contra*, *Petrowski v. Kilroy*, 119 L.R.R.M. (BNA) 2816, 2818-819 (E.D. Pa. 1985) (collecting cases). Thus, the significance of the debate about applicability of section 501 to contract ratifications is likely to subside.

12. The duty of fair representation, although most commonly applied to substantive decisions, or the failure to make a substantive decision, about the grievances or rights of a particular individual worker or group of workers, *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), has also been applied to the procedures by which unions have decided whether to approve a contract. *E.g.*, *Teamsters Local 310 v. NLRB*, 587 F.2d 1176 (D.C. Cir. 1978); *Teamsters Local 860 v. NLRB*, 652 F.2d 1022 (D.C. Cir. 1981) *Alvey v. General Electric*, 662 F.2d 1279 (7th Cir. 1980). *See also* *Bolt v. Dining Car Employees*, 50 L.R.R.M. (BNA) 2190, 2194 (S.D. Fla. 1961), *aff'd*, 50 L.R.R.M. (BNA) 2194 (5th Cir. 1962). Insofar as the complaint is about a denial of the right to vote or the right to campaign, the duty of fair representation effectively incorporates the requirements of the union members' bill of rights in the LMRDA. Such incorporation may or may not be needed if the claim is that a contract was *changed* without a fair ratification vote, or without any vote at all. But if that is the only basis for the duty of fair representation claim, the LMRDA claim has to be established anyway. The duty of fair representation proved to be a more powerful claim than the LMRDA in *Livingston v. Ironworkers Local 812*, 647 F. Supp. 723 (W.D.N.C. 1986). In *Livingston*, a union failed to give what the court regarded as adequate notice, *id.* at 728, and made an "unusually aggressive attempt to persuade approval," *id.* at 729, before taking a vote to ratify the first contract negotiated following NLRB certification of the union. The union argued that the LMRDA did not apply because, under standard union practice, none of the workers are admitted to union membership until the first contract is executed. Judge Sentelle ruled, however, that the duty of fair representation did apply, and incorporated LMRDA standards into his analysis in deciding that the duty had been violated.

13. 29 U.S.C. § 411 *et seq.* (1982).

14. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Wallace v. NLRB*, 323

union constitution, then it makes sense for the courts to defer to the union leadership's construction of its constitution.¹⁵ If, on the other hand, the source of authority is a federal statute, which expressly creates a federal cause of action and gives the courts the authority to construe the statute there is no reason to apply a rule of judicial deference or non-interference with union affairs.¹⁶

Title I of the LMRDA provides union members with an additional advantage in opposing unfair contract ratification procedures. Unlike such doctrines as the duty of fair representation, collective bargaining is not the primary focus of Title I. Although this author does not share Professor Hyde's pessimistic reading of the courts' willingness to enforce members' rights in the context of collective bargaining, there is merit to the argument that the courts have been reluctant to become too deeply involved in collective bargaining controversies. This reluctance is partly based on the belief that economic disputes should be settled by bargaining among the parties involved,¹⁷ and that the law should not dictate bargaining outcomes.¹⁸ Another reason for judicial reluctance is the deference given to the National Labor Relations Board (NLRB) which Congress created to

U.S. 248 (1944). See Klare, *The Quest for Industrial Democracy and the Struggle Against Racism*, 61 OR. L. REV. 157, 185-98 (1982).

15. Inasmuch as the constitution is a contract between the member and the union, whether under state law, see Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 179 (1960), *Machinists v. Gonzalez*, 356 U.S. 617, 618-19 (1958), or federal law, *Plumbers Local 334 v. United Ass'n of Plumbers*, 452 U.S. 615 (1981), it may seem odd that any deference be given to the interpretation placed on the constitution by one side or the other. Rather, one might expect the courts to make a *de novo* interpretation of the constitution, as they would of any other contract. 3 CORBIN ON CONTRACTS § 558, at 254-55 (1960). Indeed if anything, a contract is normally construed against the drafter. *Id.* at § 559. But most constitutions provide that a particular officer or governing body is entitled to construe the constitution when disputes arise, and even say that that decision is "binding." There is usually no express authorization for enforcement by judges or by any means other than the political processes from which the constitution arose and through which it can be amended. Thus, although the courts are willing to provide some protection to individual members who have been victimized by a clear violation of the constitution, much as they would protect consumers or others who have effectively been forced to agree to contracts of adhesion, courts tend to defer to a construction rendered by the authorized officer or body so long as it is a reasonable one. *English v. Cunningham*, 282 F.2d 848 (D.C. Cir. 1960). This hurdle, although not insurmountable, *Parish v. Legion*, 450 F.2d 821 (9th Cir. 1971); *Papianni v. Ironworkers Local 11*, 622 F. Supp. 1559 (D.N.J. 1985), can be formidable. *Monzillo v. Biller*, 735 F.2d 1456 (D.C. Cir. 1984).

16. *But see* non-intervention legislative history, discussed *infra* note 32.

17. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *NLRB v. Insurance Agents*, 361 U.S. 477 (1960).

18. *H.K. Porter v. NLRB*, 397 U.S. 99 (1970).

regulate the conduct of the parties in the collective bargaining process. Many judges not only feel out of their depth in the area of labor relations, but also, in the case of district judges, do not even have frequent occasion to review NLRB decisions.¹⁹ Cynics might also say that the reluctance is partly based on the fact that judges, because of the political process by which they are selected and the stratum of the Bar from which they usually come, are far more likely to be sympathetic to employers whose interests are implicated in collective bargaining controversies than to unions who are the only defendants in most union democracy cases. Whatever the reasons, a doctrine such as the duty of fair representation, which is developed solely with reference to collective bargaining controversies, is likely to provide union members with rights that are relatively circumscribed.²⁰

Title I, on the other hand, applies to a wide variety of intra-union controversies, only some of which directly implicate collective bargaining disputes. Furthermore, it creates political rights which are closely analogous to the civil rights and civil liberties created by the United States Constitution and by various federal statutes that the courts are frequently asked to enforce. Judges have few self-doubts about their competence to protect such rights and, indeed, they are likely to be sympathetic with the rights involved, at least in principle. Thus, the doctrines which are developed under Title I to govern union decisions about the total spectrum of matters which arise within the union's political processes are unlikely to be confined by the reluctance to interfere which characterizes judicial decision-making in the area of collective bargaining.²¹

19. Cases arising under sections 10(e) and 10(f) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(e), (f) (1982), go to courts of appeals. District judges get cases arising under NLRA section 10(j) and 10(l), 29 U.S.C. §§ 160(j), (l), but the number of cases is small. The Board filed briefs in 331 cases before the courts of appeals during fiscal 1983, while seeking only 118 injunctions in 10(j) and 10(l) cases before the district courts. 48TH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FY 1983 (1986), at 220. Very few of these cases involved issues of collective bargaining procedures.

20. *But see* Smith v. Hussman Refrigerator Co., 619 F.2d 1229 (8th Cir.), *en banc*, cert. denied, 449 U.S. 839 (1980); Teamsters Local 618 v. Gelco Corp., 758 F.2d 1272 (8th Cir. 1985).

21. In *Carothers*, the defendants suggested that the principles of Title I do not apply to votes pertaining to collective bargaining. 636 F. Supp. at 825. They were, however, unable to present any cogent reasons for excluding such referenda from the Act's coverage, and, of course, the statute contains no such distinction. In fact, numerous courts have routinely applied Title I to referenda and meetings about collective bargaining agreements and disputes. *See, e.g.*, Postal Workers Local 6885 v. Postal Workers, 665 F.2d 1096, 1101 n.12 (D.C. Cir. 1981); Knox County Local v. Rural Letter Carriers, 720 F.2d 936 (6th Cir. 1984); Aguirre v. Teamsters Local 165, 633 F.2d 168 (9th Cir. 1980); Bauman v. Presser, 117 L.R.R.M. (BNA)

The application of Title I to contract ratification votes should be considered in the context of the events and concerns which led to the enactment of Title I of the LMRDA. The LMRDA, and particularly Title I, was the product of hearings conducted in the later 1950's by the Senate Select Committee on Improper Activities in the Labor-Management Field, chaired by Senator McClellan.²² The McClellan Committee investigations revealed many different ways in which corrupt union leaders had dominated unions and remained unaccountable to their members. The committee's hearings specifically addressed the problem of union officers who negotiated contracts in disregard, or even in defiance, of their members' interests and wishes.²³

By mid-1959, it was generally accepted that any new labor law would include provisions to guarantee union democracy. Some bills introduced in Congress contained detailed provisions for the protection of particular rights in particular contexts at different levels of the union. For example, one bill contained a Bill of Rights thirty pages long.²⁴ Instead of taking that approach, Congress chose to write a broad charter for union democracy in general terms, such as the "equal right to vote in referendums [and] to particular in deliberations on the business before [union] meetings"²⁵ and "the right to meet and assemble freely [and] to express views, arguments and opinions"²⁶ subject to "reasonable" union rules. Congress' approach was not based on any desire to deny the "broadest possible right," but rather Congress recognized that a precise bill addressing numerous specific problems could not possibly anticipate and provide for every eventuality, and so would not do justice to the many aspects of such basic rights as freedom of speech.²⁷ Thus, rather than write a detailed charter of democracy, Congress left deference to the courts to decide how the broad statutory protections should be implemented

2393 (D.D.C. 1984); *Parker v. Teamsters Local 413*, 501 F. Supp. 440 (S.D. Ohio 1980), *aff'd*, 657 F.2d 269 (6th Cir. 1981); *Christopher v. Safeway Stores*, 644 F.2d 467 (5th Cir. 1981).

22. S. REP. NO. 187, 86th Cong., 1st Sess. 2 (1959).

23. E.g., MCCLELLAN COMMITTEE HEARINGS, 86th Cong., 1st Sess. 5532, 5844, 5848 (1959). See also H.R. REP. NO. 741, 86th Cong., 1st Sess. 6 (1959).

24. H.R. 4473. See *Labor-Management Reform Legislation: Hearings on H.R. 3540, H.R. 3302, H.R. 4473 before a Joint Subcomm. of the House Comm. on Education and Labor*, 86th Cong., 1st Sess. 1475 (1959).

25. 29 U.S.C. § 411(a)(1) (1982).

26. 29 U.S.C. § 411(a)(2) (1982).

27. 2 NLRB, LEGISLATIVE HISTORY OF THE LMRDA 1623 (1959) (Rep. Teller) (hereinafter, LEGISLATIVE HISTORY).

in practice.²⁸

Accordingly, in construing this broad charter in order to decide how it applies to a particular case, the courts do not give undue weight to the fact that Congress did not specifically address a particular problem, such as a particular unfair practice in a particular kind of referendum, or to the fact that an analogous right was provided elsewhere in the Labor Management Reporting Disclosure Act.²⁹ Instead, Title I of the LMRDA should be construed to effectuate its purpose of guaranteeing “the independence of the membership and the effective and fair operation of the union as the representative of its membership.”³⁰ In short, a fundamental objective of the Act is to promote “the members’ rights to determine the course of their organization.”³¹ Although the courts must consider the countervailing institutional interests of the union when applying Title I, they do so in light of the legislative history and congressional purpose of remedying abuses of power by union leaders.³²

The provisions of Title I on which union members rely to enforce their right to fair ratification referenda are section 101(a)(1), which guarantees equal rights to vote and to deliberate on union business,³³ and section 101(a)(2), which guarantees the right of free speech and assembly.³⁴ When the union actually refuses to provide

28. 2 LEGISLATIVE HISTORY 1238 (1959) (Sen. Javits).

29. *Hall v. Cole*, 412 U.S. 1, 10-11 (1973).

30. *Id.* at 8. *See also* *Musicians v. Wittstein*, 379 U.S. 171, 182-83 (1964) (objective is to achieve “full and active membership participation in the affairs of the union”).

31. *Navarro v. Gannon*, 385 F.2d 512, 518 (2d Cir. 1967).

32. Unions commonly invoke language in the Senate Report to the effect that Congress intended to minimize intrusion into union affairs. However, that language was included in the Senate Report to justify the decision of the committee majority to omit a Bill of Rights which had been proposed by Senator McClellan. The adoption of Title I on the floor amounted to a repudiation of this aspect of the Senate Report. This legislative history is discussed in Levy, *Legal Responses to Rank-and-File Dissent: Restrictions on Union Officer Autonomy*, 30 *BUFFALO L. REV.* 663, 684 n.118 (1982) [hereinafter Levy].

33. Section 101(a)(1) of the Act states:

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization’s constitution and bylaws.

29 U.S.C. § 411(a)(1) (1982).

34. Section 101(a)(2) of the Act states:

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization’s established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the

ballots to some of the members covered by the contract, or when the union conducts votes on some contracts but refuses to hold votes on others, few questions of statutory construction are likely to arise, although the court must still decide whether the exclusion is a "reasonable" one.³⁵ Similarly, if a union actually brings disciplinary proceedings against members who oppose the leadership position in collective bargaining, or threatens oppositionists with violence, there can be little question that the statutory right of free speech and assembly has been denied.³⁶ By and large, unions have learned not to be so blatant in forcing the rank and file to accept proposed contracts although a number of cases still arise where the essential questions are the "reasonableness" of a union rule or the balancing of institutional interests against individual rights.

The protections of Title I extend to prevent more subtle forms of tyranny. Unions do not comply with their statutory obligations simply by sending ballots to every member and refraining from punishment of members who state dissenting views. The voting rights conferred by section 101(a)(1), and the free speech right conferred by section 101(a)(2), are complementary—neither can be exercised in the manner intended by Congress without the other, and neither can be construed in isolation from the other.³⁷ The naked right to

right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Id. § 411(a)(2).

35. *Harmon v. Presser*, No. 85-1556 (D.C. Cir. 1985); *Postal Workers Union, Local 6885 v. Postal Workers*, 665 F.2d 1096 (D.C. Cir. 1981); *Alvey v. General Electric Co.*, 622 F.2d 1279 (7th Cir. 1980). As Professor Hyde indicates, however, union leaders are likely to be far more successful at gerrymandering the electorate by including unaffected members, than by excluding affected one. Hyde, 93 *YALE L.J.* at 816-17 n.87. Obviously, courts are far more likely to be sympathetic to arguments by members protesting their inability to vote than to claims that the right to vote should be denied to particular groups of members, although in union officer elections the principle is well established that fair election rights are violated when officers bring ineligible voters to the polls. See Note, *The Election Labyrinth: An Inquiry into Title IV of the LMRDA*, 43 *N.Y.U.L. Rev.* 336, 340-46 (1968).

36. *E.g.*, *Keubler v. Cleveland Lithographers*, 473 F.2d 359 (6th Cir. 1973); *Parker v. Steelworkers*, 642 F.2d 104 (5th Cir. 1981).

37. Indeed, the overlap between the rights is apparent from the text of section 101(a)(1), which speaks of the equal right to participate in "deliberations" on business properly before a union meeting. The cases generally do not rely on this portion of the statute, but the equal right to deliberate plainly includes the right to express views and the right to hear the views of others before voting. Nor is the "deliberation" guaranteed by the statute limited by the terms of the statute to deliberations that occur at the union meeting itself; the right is guaranteed so long as the subject is one which properly comes before the meeting. This right to deliberate is itself a basis for the right to a fair campaign which the courts have found in Title I.

cast a ballot is by itself no guarantee of democracy. Even the most totalitarian of nations conduct elections and referenda, but the absence of alternate candidates or proposals, and of the opportunity for effective debate, makes those elections a sham. Thus, it has been generally recognized that the right to vote guaranteed by section 101(a)(1) "is not a mere naked right to cast a ballot,"³⁸ and that the right of free speech guaranteed by section 101(a)(2) is not the mere right to talk without punishment but includes an affirmative right of access to the channels of communication with fellow members.³⁹ Taken together, these two provisions of Title I guarantee the right to a vote that is "meaningful."

Several different factors make a vote "meaningful." A vote is meaningful when the proper procedures are followed and there is a fair count.⁴⁰ A vote is meaningful when the proposal is not forced on the members, but the members have a fair opportunity to hear all viewpoints, and to express their own views, before casting their ballots.⁴¹ A vote is meaningful when the union leaders conform their conduct to the expressed will of the membership.⁴² In summary, the right to vote is "meaningful" when the referendum process is allowed to work as it was intended: as a meaningful check on the exercise of leadership discretion.

In defending their conduct of ratification referenda, unions commonly attack the doctrinal basis of the right to a meaningful vote, on the ground that this right is not expressly guaranteed by either section 101(a)(1) or by section 101(a)(2). They argue that section 101(a)(1) only forbids the denial of the "equal" right to vote, which means that some members are afforded ballots and others are not. Unions also contend that section 101(a)(2) is limited to a prohibition of reprisals against speakers.

38. *Young v. Hayes*, 195 F. Supp. 911, 976 (D.D.C. 1961); *Aguirre v. Teamsters, Local 165*, 633 F.2d 168, 173-74 (9th Cir. 1980).

39. *See, e.g., Bhd. of R.R. & Airline Clerks Lodge 1380 v. Dennis*, 625 F.2d 819 (9th Cir. 1980); *See also Daniels v. National Post Office Mail Handlers*, 454 F. Supp. 336 (E.D. Va. 1978).

40. *Aguirre v. Teamsters Local 1165*, 633 F.2d 168 (9th Cir. 1980); *Stettner v. Int'l Printing Pressman*, 278 F. Supp. 675 (E.D. Tenn. 1967); *Sertic v. Carpenters District Council*, 423 F.2d 515 (6th Cir. 1970).

41. *Bauman v. Presser*, 117 L.R.R.M. (BNA) 2393 (D.D.C. 1984); *Blanchard v. Johnson*, 532 F.2d 1074 (6th Cir.), *cert. denied*, 429 U.S. 869 (1976); *Sheldon v. O'Callaghan*, 497 F.2d 1276 (2d Cir.), *cert. denied*, 419 U.S. 1090 (1974). *See also Pawlak v. Greenawalt*, 713 F.2d 972 (3d Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984).

42. *Bunz v. Moving Picture Machine Operators*, 567 F.2d 1117 (D.C. Cir. 1977); *Pignotti v. Sheet Metal Workers Local 3*, 343 F. Supp. 236 (D. Neb. 1972), *aff'd*, 477 F.2d 825 (8th Cir.), *cert. denied*, 414 U.S. 1067 (1973).

Neither argument is well founded. The argument about the word "equal" is based on a narrow reading of a passage in the Supreme Court's decision in *Calhoon v. Harvey*,⁴³ where the Supreme Court rejected a challenge to an election of union officers in which the union had applied both an eligibility rule forbidding the nominations of members with fewer than five years in the union and a rule that candidates could only nominate themselves. The Court decided that the former rule, regarding qualifications for union office, could be challenged only by the Secretary of Labor under Title IV of the LMRDA,⁴⁴ and that Title I may not be used as a vehicle to circumvent the Secretary of Labor's exclusive jurisdiction, where the members' real complaint is with a violation of Title IV. In the course of reaching these conclusions, the Court said that section 101(a)(1) is "no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote."⁴⁵

One may join most courts in assuming that, in this dictum, the Supreme Court intended to limit section 101(a)(1) to cases of discrimination,⁴⁶ without accepting the argument that a union can be held liable for discrimination with respect to the right to vote only if it denies the right to vote to some members while affording it to others.⁴⁷ After all, if a union arranges the election procedures in a way that unfairly facilitates the ratification of the leaders' proposals, the union gives a meaningful right to vote to the supporters of the

43. 379 U.S. 134 (1964).

44. Section 401(e) of the Act, 29 U.S.C. § 481(e) (1982), requires unions to allow members to be candidates, subject only to "reasonable qualifications uniformly applied." Sections 402 and 403 provide that only the Secretary of Labor may seek to overturn union officer elections which have already been conducted. *See also* *Teamsters Local 82 v. Crowley*, 467 U.S. 526 (1984).

45. 379 U.S. at 139.

46. That is not the only reasonable interpretation of this sentence. In *Calhoon*, the union was plainly engaged in some form of discrimination, because it was discriminating against some would-be candidates by applying the eligibility rule based on length of union membership. The only question was whether discrimination with respect to candidacy could be attacked under Title I, on the theory that if members could nominate only themselves, those who were ineligible to be nominated were effectively denied the right to nominate anybody. In that context, the phrase "no more than" in the sentence was apparently meant to limit the "right to nominate and vote" (as opposed to the right to *be* nominated as a candidate, which is protected solely by Title IV), and not the phrase "shall not be discriminated against." *Calhoon* is best understood as a case governing the construction of Title I as it applies to union officer elections, in light of potential overlap with Title IV, and not as a case limiting the scope of Title I in other contexts.

47. Of course, even if it were valid, this argument would only preclude relief under section 101(a)(1), because section 101(a)(2) forbids limitations on free speech, whether or not they are "equally" applied. 29 U.S.C. § 411(a)(2) (1982).

leadership, but not to the opponents of the leadership. Just as the prohibition against discrimination has been held in other contexts to forbid acts with discriminatory effects as well as those with discriminatory intent,⁴⁸ so the mere fact that a union has employed a subtle device which effectively improves the leaders' chance of success should not immunize it against charges of discrimination.⁴⁹ Thus, the denial of a meaningful vote to opponents *is* a form of discrimination with respect to the right to vote, and any limitations that *Calhoon* may impose are satisfied.⁵⁰

The argument that section 101(a)(2) cannot support the right to a fair campaign preceding a ratification vote is based on *Steelworkers v. Sadlowski*.⁵¹ Unions argue that *Sadlowski* limits section 101(a)(2) so that it only protects members against reprisals for exercising free speech rights, but confers no affirmative rights on union members. Like the argument based on *Calhoon*, the argument based on *Sadlowski* seeks to transform the factual context in which the case arose into the sole context in which any free speech case may arise. There is no question that the Supreme Court said in *Sadlowski* that section 101(a)(2) provides protection against reprisals, because the claim in that case was that the union was punishing candidates for accepting campaign contributions from nonmembers.⁵² But there was no question in *Sadlowski* about whether section 101(a)(2) *also* provides affirmative rights to free speech, and so the reference to protection against reprisals cannot reasonably be taken as limiting the scope of that provision. Indeed, far from requiring a narrow construction of Title I's free speech guarantee, *Sadlowski* endorsed "a flexible interpretation" of section 101(a)(2).⁵³

Nor does section 101(a)(2) on its face limit the guarantee of free speech to protection against reprisals. To be sure, section 609 of

48. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

49. *Bunz v. Moving Picture Mach. Operators, Local 224*, 567 F.2d 1117 (D.C. Cir. 1977). Judge Wilkey's opinion in *Bunz* nicely summarizes the "meaningful vote" cases and provides the most thorough account of their doctrinal basis. *Id.* at 1121-22.

50. *Crowley* contains a reaffirmation of the validity of the holding in *Calhoon*, but it in no way expands any limits that *Calhoon* placed on the substantive scope of section 101(a)(1). The issue in *Crowley* was under what conditions the exclusivity of the Secretary of Labor's jurisdiction in union officer elections takes effect. The Court held that Title I cannot be used to obtain relief that would block or substantially delay the conduct of such an election, or to set aside and rerun such an election. 467 U.S. at 551. The Court assumed, without deciding, that the facts in the case presented violations of the substantive rights afforded by Title I. 467 U.S. at 533 n.7.

51. 457 U.S. 102 (1982).

52. *Id.* at 106.

53. *Id.* at 111 n.4.

the Act forbids "discipline" for exercising rights under the Act, and therefore only prohibits reprisals.⁵⁴ Section 102 of the Act, however, is not so limited; rather, it forbids "infringe[ment]" of the rights provided by Title I generally. As the Supreme Court recognized in *Finnegan v. Leu*,⁵⁵ which was decided nearly contemporaneously with *Sadlowski*, that protection is broader than a mere prohibition against discipline.⁵⁶ In short, *Sadlowski* does not provide a basis for refusing to follow the many appellate decisions which recognize that section 101(a)(2) provides affirmative rights as well as protections against reprisals.⁵⁷

II. RECENT TEAMSTER CASES INVOLVING UNFAIR RATIFICATION VOTES

In order to understand the litigation conducted against the contract ratification procedures of the International Brotherhood of Teamsters (IBT), it is first necessary to sketch the rough details of the ratification procedure required by the IBT constitution and of the political context in which ratification votes are conducted. The first, and perhaps the most important point to note is that, unlike some other major internationals,⁵⁸ the IBT does in fact require membership ratification of collective bargaining agreements.⁵⁹ It may seem anomalous that a union whose other governing procedures are so undemocratic,⁶⁰ and which enjoys such a bad reputation for autocratic rule and even corruption,⁶¹ nevertheless conducts referenda on each and every contract and takes other steps to involve members in

54. 29 U.S.C. § 529 (1982).

55. 456 U.S. 431 (1982).

56. *Id.* at 439.

57. *Carothers v. Presser*, 636 F. Supp. 817, 824 (D.D.C.), *appeal docketed*, No. 86-5476 (D.C. Cir. 1986).

58. For example, the Steelworkers conduct ratification votes among representatives of the local unions involved. *E.g.*, HERLING, *RIGHT TO CHALLENGE: PEOPLE AND POWER IN THE STEELWORKERS UNION* 318-20 (1972). Because this union was organized, and the collective bargaining relationships conducted, on a national basis in the first place, there was no question of surrender of local autonomy when the national leadership obtained the right to negotiate contracts.

59. Ratification of contracts involving more than one local is required by article XII, section 2. Ratification of building trades contracts is submitted to representatives of locals unions, and a majority vote of local unions involved is required. article XII, section 3. Finally, local unions are also required to obtain membership ratification of single-union contracts. article XII, section 1(b).

60. For a discussion of the IBT's method of electing international officers, *see* TDU v. Secretary of Labor, 629 F. Supp. 665 (D.D.C. 1986), *aff'd*, 810 F.2d 301 (D.C. Cir. 1987). *See generally* PROD, *TEAMSTER DEMOCRACY AND FINANCIAL RESPONSIBILITY* 1-45 (1976).

61. *See* PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *THE EDGE: ORGANIZED CRIME, BUSINESS AND LABOR UNIONS* 89-143 (1986).

the negotiating process.⁶² The origins of the Teamster practice are apparently to be found in a compromise struck in the process of national consolidation of the bargaining procedure in the trucking industry. As local unions and areas surrendered their autonomy, ratification by a majority vote of the membership was substituted for ratification by the local unions themselves, voting as individual units.⁶³

A national Teamster contract typically consists of both a national master agreement that is negotiated between the union's national negotiating committee and the national association of employers, and which contains the basic terms and conditions of employment, and a set of supplementary agreements for various areas of regions and for different job classifications.⁶⁴ The IBT has construed its constitutional ratification provisions to authorize it to submit both the national agreement, and all of its supplements, to all members affected by all agreements as a single package.⁶⁵ Members in each area vote not only on the supplements which govern their own working conditions, but also on all the other supplements governing the working conditions of other employees in other parts of the country and in other job classifications. This is unlike the United Auto Workers, for example, which reserves the right to disapprove local supplements and strike to obtain better terms even after the national agreement has been negotiated and approved.⁶⁶ The con-

62. As explained in *Bauman*, each local union with members covered by a national contract conducts pre-negotiations meetings of the affected members to solicit non-binding proposals for possible inclusion in the agreement. After the contract proposal has been negotiated, the leaders of the involved locals are called to a meeting at which the proposal is explained, and a vote taken on whether to recommend the contract to the members. The local leaders then return home and call meetings of the affected members at which the contract is explained and members have an opportunity to ask questions and, at least in theory, to express dissenting views. Finally, the texts of the changes in the national agreement and each applicable supplement, and a letter highlighting improvements over expiring agreement and explaining why the proposal is the best that could be obtained, are mailed with a secret ballot and a business reply envelope to all eligible voters. A cynic might regard each of these steps as merely a means for building union solidarity and preparing the members to support the leadership's position by the widest possible margin, and it is likely that is at least part of the motivation for proceeding in that manner. However, the Teamster process does provide at least some opportunity for the expression of dissident views, at least at the local level. As we shall see, the thrust of the litigation discussed in this article has been to make effective debate possible at the national level.

63. See PROCEEDINGS OF THE 17TH CONVENTION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS 378-97 (1957); REPORT OF GENERAL PRESIDENT DAVE BECK TO THE 17TH CONVENTION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS 19, 21-22 (1957).

64. E.g., Dock workers, drivers, and special commodities workers.

65. *Davey v. Fitzsimmons*, 413 F. Supp. 670 (D.D.C. 1976).

66. W. SERRIN, *THE COMPANY AND THE UNION* 191-201 (1973). The difference may be

struction of the IBT constitution which permits ratification of all supplements as a single package is a matter of great controversy among Teamster reformers, but it was approved in *Davey v. Fitzsimmons*,⁶⁷ and as a practical matter it is unlikely to be challenged again in the foreseeable future.⁶⁸

The second key factor in the Teamster ratification process is the existence of Teamsters for a Democratic Union (TDU). TDU is a national organization of Teamsters who seek to reform and democratize their union, to eliminate corruption, and to make the union more responsive to their needs in collective bargaining. TDU members who work under each of the major Teamster national contracts—the United Parcel Service (UPS) Agreement, the National Master Freight Agreement (NMFA), and the National Automobile Transporters Agreement (carhaul contract)—have formed committees which encourage membership participation in the negotiation and administration of the agreements. Both during the term of each contract, and more particularly during the negotiations and the ratification referenda, these members try to reach a consensus among themselves about what they believe the union should seek to accomplish, and then make every effort to communicate their conclusions, and their recommendations for action, to the entire affected membership.⁶⁹

more apparent than real, however, because once the national contract has been approved, enormous pressure is placed on supplemental negotiators by their respective superiors to reach an accommodation and thus to keep all the interrelated parts of the industry running. *Id.* at 210, 286-87.

67. 413 F. Supp. 670 (D.D.C. 1976). *See also* *Trail v. Teamsters*, 106 L.R.R.M. (BNA) 2930, 2934 (E.D. Mich. 1980).

68. There is, indeed, good economic sense behind the *Davey* rule when applied to industries whose local unions and job classifications are closely integrated. If scattered local areas or job classifications in the trucking industry were to go on strike, the result might well be to prevent employees in other areas and job classifications, which had approved their supplements, from continuing their work and thus enjoying the benefits of their contracts. And the economic pressure which would be placed on the struck employers would be based, in part, on the economic harms which they were suffering nationwide due to the breakdown of their system. Assuming that there are to be supplemental agreements instead of just a single national agreement, it is unlikely that employers in an integrated industry will agree to national terms, including no-strike clause to protect against work stoppages, unless they believe that all parts of the agreement, including the supplements, will be approved. By the same token, it is rational for the union to conclude that members who work under one supplement will be affected by the vote on all other supplements, and thus that they should be afforded the right to vote on the whole agreement as a single package. However, the fact that members are permitted to vote on supplements about which they have no independent knowledge increases the need for fair campaign procedures which allow members working under one supplement to communicate their views to members covered by other supplements.

69. These efforts are also described in *Bauman*, 117 L.R.R.M. (BNA) at 2399.

The final key event, which sets the stage for the leadership attempts to manipulate the voting procedures and the series of cases which followed, was the defeat of a proposed amendment to the NMFA in September 1983. Shortly after his selection to fill the unexpired term of IBT General President Roy Williams,⁷⁰ Jackie Presser attempted to respond to severe economic dislocations in the trucking industry by offering employers substantial reductions in the requirements of the recently ratified NMFA which, he contended, would encourage them to preserve jobs and recall union members who had been laid off.⁷¹ TDU members employed under the NMFA agreed that urgent steps were needed to save jobs, but were skeptical that the concessions proposed by Presser would achieve that result absent guarantees that the savings would in fact be used to recall employees on layoff; that employers would respond to the economic incentives in the agreement by laying off more current employees so that they could be recalled at lower wages.⁷²

The IBT constitution requires that mid-term modifications, like the original contracts themselves, be submitted for membership ratification.⁷³ Ballots were mailed to all members involved, both those who were currently working and those on layoff, who stood to gain the most from possible recalls. Despite the inclusion of the large group of members that would be thought to be sure "yes" votes, the reaction was overwhelmingly negative. TDU members were joined by many local union officers in campaigning against ratification, and the proposal was defeated by an overwhelming 8 to 1 margin. It seems likely that the results of this vote provoked Presser to make a series of procedural changes to which TDU members reacted by filing suit to guarantee fair referendum procedures.⁷⁴

70. Williams resigned from office as a condition of remaining out of prison pending appeal of his conviction for bribery.

71. See, e.g., the TDU newspaper, *Convoy Dispatch*, Nos. 36 (July/August 1983), 37 (September 1983), and 38 (October 1983).

72. *Id.*

73. 1981 constitution, article XVI, section 4(a). In 1986, these provisions were moved to article XII, section 2(b).

74. Presser had never been elected by the members to any union position, and still has not been. He was put in charge of Teamsters Local 507 by his father, a senior Teamster official, and although triennial elections are required by law for local union officers, 29 U.S.C. § 481(b) (1982), he never faced electoral opposition. He gained the presidency of the IBT by a vote of the union's General Executive Board, and retained that office by the vote of a convention composed of local union officers, who were not even themselves selected as delegates by the membership. See *TDU v. Secretary of Labor*, 629 F. Supp. 665 (D.D.C. 1986), *aff'd*, 810 F.2d 301 (D.C. Cir. 1987). He has also held a variety of intermediate union positions filled by appointment.

The first case, *Bauman v. Presser*,⁷⁵ arose in the summer of 1984. The existing UPS contract had been negotiated in 1982 and ratified by the narrow margin of fifty-two percent to forty-eight percent, and was not due to expire until 1985.⁷⁶ During the summer of 1984, however, Presser alone conducted negotiations with UPS and called a meeting on August 16 for officers from locals with UPS members, without announcing its purpose.⁷⁷ When the officers arrived, they were presented with a proposed contract with UPS, extending the terms of the existing UPS contract until 1987, in exchange for a \$1,000 one-time bonus payment and some wage increases.⁷⁸ The following day, Friday, August 17, 1984, ballots were mailed out to the voters, including a multi-color pamphlet which urged ratification by stressing the bonus and showing a hand holding a fistful of green-colored hundred dollar bills. The ballots were received by most voters on August 20, 1984, before most local unions had had a chance to hold meetings. Those locals which did hold meetings did not have enough time to notify all the affected members and so attendance at those local meetings suffered. Finally, the evidence established that, as one might have expected, most members returned their ballots almost immediately after receipt, thus casting their votes before opponents of the Presser proposal had an effective opportunity to circulate their arguments against ratification.

Plaintiffs sued to have the referendum overturned on the ground that the "quickie ballot" had denied them the right to a "meaningful" vote and the right to effectively communicate their views to their fellow members.⁷⁹ District Judge William Bryant indicated that he was prepared to enter a temporary restraining order to forbid the counting of the ballots unless the IBT agreed not to count them pending a prompt hearing on plaintiffs' motion for a preliminary injunction. Because the IBT had argued that plaintiffs were simply engaged in a political stunt in which they hoped to build their reputations within the union by being able to brag about having beaten the union in court in the injunction proceeding, it was compelled by

75. 117 L.R.R.M. (BNA) 2393 (D.D.C. 1984), *appeal dismissed*, 119 L.R.R.M. (BNA) 2247 (D.C. Cir. 1985).

76. The major Teamster contracts, like most collective bargaining agreements, have terms of three years. That is the maximum period of time during which the National Labor Relations Board will allow the contract to bar the filing of a petition for decertification of the union or certification of a different union as the employees' collective bargaining representative. *General Cable Co.*, 139 N.L.R.B. 1123 (1962).

77. *Bauman*, 117 L.R.R.M. (BNA) at 2395.

78. *Id.*

79. *Id.* at 2393.

Judge Bryant's indication of his leanings to make the agreement without necessity of a formal order.⁸⁰

At the preliminary injunction hearing, defendants argued that plaintiffs' statutory rights had not been denied because they had been permitted to attend local union meetings, to speak at the meetings and to disseminate leaflets to their fellow workers. Plaintiffs argued that in a national referendum, it was not sufficient for individual plaintiffs to be able to campaign in their local areas. Rather, they had to reach out to their fellow members across the country in order to assemble a majority in opposition to a proposed contract. Plaintiffs showed that their committee's normal means of campaigning against leadership proposals was to send leaflets to its most active members, who would then disseminate them in their own workplaces and carry them in their trucks to be left in as many as possible of the local areas where TDU had no active members. By denying plaintiffs an adequate time in which to campaign, the union had effectively prevented them from conducting a fair campaign and so had rendered the formal procedure of ratification "meaningless" for the dissidents.

Plaintiffs also argued that the facts strongly suggested that the IBT's motive for secrecy and for fast voting was to get a jump on the dissidents and sneak a bad proposal by the members by emphasizing the immediate cash bonus. Defendants argued that there were various technical reasons why there was usually a substantial period of time between announcement of the proposals and transmission of the ballots, and that those technical reasons did not cause delay in this case.⁸¹ Happily for the precedential value of the decision, Judge Bryant found it unnecessary to resolve the question of the union's intent. Instead he decided that the union had violated the members' right to a meaningful vote, because its actions had prevented the opponents from effectively presenting their views to the nationwide electorate.⁸²

One key piece of reasoning in Judge Bryant's decision was his reliance on a case under Title IV, concerning the election of union officials, as precedent for the conduct of union referenda under Title I.⁸³ Plaintiffs had argued that there was far more authority about fair and unfair election procedures under Title IV, given the resources which the Secretary of Labor, unlike individual members who must hire their own lawyer to bring a Title I suit, has to actu-

80. *Id.* at 2401.

81. *Id.* at 2399.

82. *Id.* at 2400.

83. *Id.*

ally bring cases, and that Title IV precedents thus afford a rich source for reasoning by analogy. One of plaintiffs' principal authorities was a case in which an election was overturned because the incumbents had suddenly rescheduled the balloting and sent out the ballots virtually without warning, eliminating the normal period for campaigning between the nominations meeting and the actual election.⁸⁴ In *Marshall v. Teamsters Local 468*,⁸⁵ the Ninth Circuit recognized that, unless insurgent candidates have enough time to mount to a campaign, and explain to the members why they should reject the incumbents, the incumbents are likely to be reelected by virtue of their name-recognition, membership familiarity with their positions, and their very ability to exercise the powers of incumbency.⁸⁶ Judge Bryant reasoned that the same principles apply to contract ratification referenda, and he relied heavily on *Teamsters Local 468* in granting plaintiffs' motion for a preliminary injunction against the counting of the ballots in the referendum or the implementation of the proposed agreement absent ratification in a referendum preceded by a fair period of time for campaigning.

At this point, the case took a decidedly bizarre turn. On the one hand, Presser dropped the normal union approach to TDU, which was to completely ignore it in the union magazine.⁸⁷ Instead, there appeared a series of vitriolic articles in which TDU and the lawsuit were denounced for interference with the members' right to vote for the proposal and the receive the \$1,000 bonus and the wage increases. The magazine claimed that the preliminary injunction would cost the union \$100,000, and promised that the union would vigorously prosecute and win an appeal, and then force TDU to pay the money back to the union.⁸⁸ On the other hand, the IBT pursued

84. *Marshall v. Teamsters Local 468*, 643 F.2d 575 (9th Cir. 1980).

85. *Id.*

86. *Id.* at 577.

87. In addition to the political considerations underlying this policy, the union is undoubtedly concerned that attacks on TDU could lead a court to require the union to afford TDU itself access to the magazine in order to reply. Such access might be awarded under Title IV, compare *Hodgson v. UMW*, 344 F. Supp. 17, 22-23 (D.D.C. 1972) with *Camarata v. Teamsters*, 478 F. Supp. 321 (D.D.C. 1979); or under Title I, *Knox County Local v. Rural Letter Carriers*, 720 F.2d 936 (6th Cir. 1984); *Murphy v. Operating Engineers*, 774 F.2d 114, 129-32 (6th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1201 (1986). See also *Fitzgerald v. Nat'l Rifle Ass'n*, 383 F. Supp. 162 (D.N.J. 1974) (access to magazine granted under common law of voluntary associations). See generally *Jacobs & Spring, Fair Coverage in Internal Union Periodicals*, 4 INDUS. REL. L.J. 204 (1981) [hereinafter *Jacobs & Spring*]; Note, *Free Speech and Union Newspapers: Internal Democracy and Title I Rights*, 20 HARV. C.R.-C.L.L. REV. 485 (1985).

88. *International Teamster*, November 1984, at 16-18; December 1984, at 10-11.

a legal strategy which seemed to be calculated to avoid the possibility of an appeal by rendering the controversy moot. To be sure, a notice of appeal was filed, but not until the thirtieth day following its entry. No effort was made to have the preliminary injunction stayed or to have the appeal expedited. In the meantime, the IBT complied with the injunction by conducting a new referendum, counting the ballots, and then implementing the proposed agreement when it received a substantial majority in the second referendum. Once the agreement was properly implemented, there was no longer any relief which the union could obtain by succeeding on its appeal of the preliminary injunction, and so the court of appeal dismissed the appeal as moot.

TDU's attorneys have always had a sneaking suspicion that the union wanted to create the appearance of pursuing the appeal, while avoiding the possibility that the case might actually be reviewed in the court of appeals in light of the decidedly bad facts, from its perspective, and indeed, weakening the force of the precedent by virtue of the fact that it could *not* be appealed. On the other hand, there are indications that the mootness ruling caught the union by surprise. First, it argued vigorously against mootness on the ground that the controversy was capable of repetition, yet evading review.⁸⁹ Second, after the appeal was dismissed, the IBT protested vigorously in seeking rehearing, and indeed undercut any future arguments it might make about the precedential force of Judge Bryant's decision by arguing that one reason to hear the appeal was that, even if the case was moot, the opinion could always be cited against it in another litigation.⁹⁰ Finally, the union seems to have accepted *Bauman* as a sound statement of the law; its counsel have repeatedly referred

89. The problem with this argument was that the union's elimination of a campaign period was a departure from the ordinary ratification procedure. Thus, although the shortness of the time for the litigation might well make it "evade review," the union could scarcely assert that it would again face a repetition of the same controversy. Instead, it was reduced to asserting that other disputes about ratification procedures were likely, in which the same or similar parties would disagree about the applicable principles of law. However, the mere possibility that the parties would have philosophical disagreements about the law's requirements with respect to various ratification procedures was not enough to make the *Bauman* controversy "capable of repetition," and so the appeal was dismissed as moot.

90. In *Bauman*, the union also appealed several collateral orders that were issued after the second referendum, including an attorney fee award and an order restraining the union from invading the secrecy of the ballots in the first referendum. The union took the position that the alleged invalidity of the preliminary injunction was itself one basis for overturning the collateral orders. However, in light of the scant likelihood that a court reviewing the collateral orders would reopen the question of the preliminary injunction, the IBT dismissed both appeals as part of a package settlement of several outstanding attorney fee controversies with Public Citizen.

to its requirements of a fair campaign in arguments of other cases.⁹¹

The union's acceptance of the *Bauman* decision, however, did not prevent it from trying a very different procedural manipulation during the 1985 referendum for the ratification of the proposed NMFA contract. Instead of trying to eliminate TDU's ability to campaign, the union tried to gerrymander the electorate by denying the right to vote to those workers who were the most disadvantaged by the proposed agreement. Under the agreement, employees who enjoyed seniority status with the employers were given a wage increase of approximately \$1.50 per hour. Employees who did not have seniority, known colloquially as "casuals," were not only denied various fringe benefits,⁹² but also had their wages cut by more than \$2.00 per hour. TDU opposed several aspects of the contract proposal, particularly this system of two-tier wages. In the dissidents' view, a two-tier system was not only unfair to the "casual" employees,⁹³ but also threatened the jobs of seniority employees. TDU believed that employers were already abusing the limited right which they had under the contract to hire non-seniority employees who would not receive full contractual protection, by routinely using casuals to fill jobs which could be done by seniority employees. The right to pay casuals lower wages as well would drastically increase the employers' incentives to lay off seniority employees in order to hire casuals instead.

The IBT never made a general announcement of its decision to exclude casuals from the referendum, which was based on the belief that such employees did not have enough stake in the contract's terms to be considered "affected" members who were entitled to vote. When TDU's non-seniority members eventually ascertained that they had not been sent ballots, and that the omission was intentional, they tried to settle the matter within the union by arguing that the IBT's position was incorrect. When this effort was unsuccessful, the members filed suit on May 15, 1985,⁹⁴ the day after the

91. *E.g.*, Oral Argument, *Teamsters Local 175 v. NLRB*, (D.C. Cir. 1985) (No. 84-1584); Transcript of Oral Argument at 17, 19, (D.D.C. 1985) (No. 85-2645). Indeed, if anything, the union may be giving *Bauman* a broader reading than is warranted.

92. Examples are vacations, sick leave, and regular schedules.

93. Many commentators have suggested that unions which negotiate two-tier wage structures, which provide higher wages to the employees who are working at the time of the contract itself, violate their duty to fairly represent the new-hires whose wages are lower and who have no say in the union at the time of the negotiations. *E.g.*, Note, *Two-Tier Wage Discrimination & The Duty of Fair Representation*, 98 HARV. L. REV. 631, 632 (1985). In *Harmon*, however, the plaintiffs questioned only the procedures used to decide this question, not the merits of the provision.

94. *Harmon*, No. 85-1556 (D.D.C. 1985).

union had picked up the ballots and had begun to count them. The theory of their case was that, whether or not truly occasional employees could be denied the right to vote on the contract, many union members work as non-seniority employees as their primary or even exclusive source of income.⁹⁵ Thus, because of the many companies which had gone bankrupt or closed down facilities and laid off hundreds of employees, individuals who had made their careers as truck drivers continued that career by working first for one company, then for another, without ever accumulating seniority. An informal survey taken by TDU indicated that, in the locals where information was available, almost fifteen percent of the workforce were "casuals" who earned most of their income from that work.⁹⁶ Thus, plaintiffs' principal claim was that the IBT had deprived casuals of the equal right to vote on a contract in which they had a substantial stake. Plaintiffs further claimed that the exclusion was not justified by any "reasonable rule" under the proviso to section 101(a)(1).⁹⁷

Plaintiffs asked the court both to enjoin the implementation of the proposed contract pending a new referendum in which the casuals were permitted to vote, and the entry of declaratory and injunctive relief protecting the right of casuals to vote in the future. Although the suit was filed only against the union, the employer associations intervened to defend the validity of the referendum, for the obvious reason that their economic interests would be adversely affected if the union were required to return to the bargaining table or even strike as a result of the defeat of the referendum. As it turned out, the employers proved to be the principal catalyst for settlement of the case.

The case got off to a rocky start when a hearing on plaintiffs' request for a temporary restraining order, barring implementation of the contract until a decision on the preliminary injunction, could not be convened until the afternoon of May 17, 1985. The union took the position that such an injunction would not maintain the status quo, because by the terms of the agreement it became effective immediately upon announcement of a favorable vote tally, and the union had completed its count at noon and announced that the contract

95. For example, the annual earnings for each of the plaintiffs from their "casual" employment in 1984 was in excess of \$24,000. *Harmon*, Joint Stipulation of Facts, ¶¶ 2-4, No. 85-1556 (D.D.C. 1985).

96. *Harmon*, Motion for a Temporary Restraining Order, Plaintiffs' Exhibit 4 No. 85-1556 (D.D.C. 1985).

97. Plaintiffs also contended that the denial of the right to vote violated the IBT constitution and the duty of fair representation.

had been ratified by a vote of 62,296 to 54,873.⁹⁸ District Judge Charles Richey agreed that an injunction would be inappropriate, but he made clear his displeasure that the union and employers had rushed ahead to put the contract through in order to avoid judicial scrutiny. He warned them that because they were on notice of plaintiffs' claims, such implementation would be "at your own risk."⁹⁹ He also established an expedited discovery and briefing schedule and required counsel to make special efforts to stipulate as much as possible.

Although defendants managed to avoid a restraining order, there was a real chance that they might end up having won a pyrrhic victory. After all, not only did the employers now have to implement the contractual wage increases for seniority employees, but they were left with a distinct possibility that they might have to repay the casuals for their wage cuts if the contract were ultimately set aside.

As the case proceeded, however, it turned out that plaintiffs' legal argument for the casuals' right to vote was much stronger than their argument for overturning the referendum. To the extent that casuals actually did spend a substantial number of days each year working in that capacity, they obviously had a strong interest in voting on the contract, and it seemed likely that a court would hold that their exclusion violated the LMRDA and/or the duty of fair representation.¹⁰⁰ Moreover, although the union might well be able to establish the reasonableness of a rule denying the franchise to casuals who only occasionally worked in the industry, the union had excluded all casuals, not just those whose work in the industry was truly sporadic. The failure to establish a reasonable cut-off undercut any defense based on the fact that certain casuals could have been excluded by a reasonable eligibility rule.¹⁰¹

On the other hand, it became equally apparent that plaintiffs would be hard-pressed to prove that the number of union members, who had been denied the right to vote on the ground that they were

98. In addition, 2,100 ballots had been disqualified because, among other reasons, some had been mistakenly sent to and cast by casuals who, according to the IBT, were ineligible to vote. *Harmon*, Joint Stipulation of Facts, ¶ 22, No. 85-1556 (D.D.C. 1985).

99. At a status conference the following week, the employers accepted Judge Richey's "suggestion" that they establish an interest-bearing escrow account to hold the difference between the casuals' old and new pay rates.

100. *Alvey v. General Electric Co.*, 622 F.2d 1279 (7th Cir. 1980); *Turner v. Dempster*, 569 F. Supp. 683 (N.D. Cal. 1983), *aff'd*, 743 F.2d 1301 (9th Cir. 1984); *Acevedo v. Bookbinders Local 25*, 196 F. Supp. 308 (S.D.N.Y. 1961). *Cf. Williams v. Int'l Typographers Union*, 423 F.2d 1295 (10th Cir. 1970).

101. *E.g., Wirtz v. Carpenters Local 559*, 61 L.R.R.M. (BNA) 2618 (W.D. Ky. 1966).

casuals, was greater than the margin of 7,423 by which the contract had been ratified.¹⁰² Both the employer associations and the union conducted surveys of their affiliates to determine how many workers were employed as casuals, how many union members were employed as casuals, and how many casuals worked more than a few days each year.¹⁰³ The results of these surveys suggested that although many employers use casuals heavily, a relatively small number of casuals (fewer than 7,400) worked frequently in that role and belonged to the union. Although this date contradicted TDU's own information, it seemed likely that plaintiffs would be unable to establish the truth in the short time permitted before the preliminary injunction hearing. Indeed, it was doubtful that plaintiffs would have had the resources to bring the necessary proofs to trial in Washington, D.C., even if more time were available.¹⁰⁴

Nevertheless, the stakes riding on the outcome were substantial, not only for the union, which faced a possible political defeat riding close on the heels of the *Bauman* decision, but also for the employers who might have a very large monetary liability to the casuals if the contract were set aside. Moreover, there remained a possibility that plaintiffs might succeed in overturning the referendum.¹⁰⁵ Equally

102. See *Jt. Stip.*, *supra* note 95. Although the Teamster Constitution requires only a majority to pass a proposed contract, article XII, section 2(b), it requires a two-third majority to call a strike. *Id.*, section 2(d). The reason for this distinction is, presumably, that a strike is unlikely to be successful unless it enjoys very strong support among the employees, especially given the ability which strikers currently have to avoid union discipline by resigning their membership in the union. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985). The union takes the position that, whenever the leadership declares that a proposed agreement represents the employers' "final offer," rejection is tantamount to a strike vote, and thus the contract would be approved so long as one-third of the votes cast favored ratification. *Cf. Machinist Dist. 8 v. Clearing, Inc.*, 807 F.2d 618, 620 (7th Cir. 1986). TDU, by contrast, takes the position that although employers often refer to their offers as "final" as a bargaining tactic, a contract can be defeated, sending the union back to the bargaining table, without necessarily calling a strike. The settlement of the case made it unnecessary for the court to resolve this dispute.

103. *Jt. Stip.*, *supra* note 95, at ¶¶ 26-35.

104. Assuming that the normal LMRDA standard for overturning union officer elections, that the outcome "may have been affected" by the violation, would be applied to determine whether the ratification referendum should be set aside, defendants would have the burden of proving, by concrete and non-speculative evidence, that the violation did not change the result. See R. GIBBS, P. LEVY & D. SIEGEL, *EMPLOYEE AND UNION MEMBER GUIDE TO LABOR LAW*, § 9.04[4] (1986). But although plaintiffs could have taken potshots at the union and employer surveys, trying to establish their unreliability, as a practical matter they would have been compelled to bring their own contrary evidence to trial in order to contradict the numbers contained in the surveys. It would have been difficult to conduct such a trial in the context of a preliminary injunction hearing.

105. At least one court has refused to consider a union's defense that the exclusion of a class of members from a referendum should not invalidate the referendum if the number of

important, the employers were concerned that the issue would come up again in future referenda, and that unless the reasonableness of a rule had been firmly established, they would be faced with the possibility of a similar suit, with similar uncertainties, at that time. For all of these reasons, there was some sentiment in the union for concluding a settlement instead of litigating,¹⁰⁶ and the employers prodded the union to try to do so.

The result was that plaintiffs conceded the validity of the 1985 vote in return for the establishment of an eligibility rule to govern the ratification of the next NMFA, with a provision for nine months' advance notice if the union wishes to change the standard.¹⁰⁷ Moreover, and perhaps equally important, the settlement required unions to make available to its members working as casuals a variety of information revealing the extent to which employers were using casuals, so that TDU could determine whether employers were abusing their right to hire casuals. The union's counsel conceded (off the record) that they had not realized the problem of casual abuse was so widespread, and expressed the determination to try to get a better handle on the problem during the term of the contract.

The final case in the Teamster contract trilogy, *Carothers v. Presser*,¹⁰⁸ arose during the carhaul contract referendum in the summer of 1985. The first contract proposal negotiated by the IBT leadership, and submitted for ratification in June 1985, made so many concessions to the employers that even some local union officers

excluded members was smaller than the margin by which the proposal was approved. *Turner v. Dempster*, 743 F.2d 1301, 1303 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). Moreover, it is arguable that the denial of the franchise to a substantial minority interest could affect more than just the number of excluded votes, insofar as the minority would have been discouraged from participating in the debate that led up to the vote. *UFCW Local 881 v. NLRB*, 774 F.2d 752, 764-65 (7th Cir. 1985), *vacated on other grounds*, ____ U.S. ____, 106 S. Ct. 1787 (1986). It has been suggested that, inasmuch as elections serve as a barometer of membership dissatisfaction, to which leaders will respond if they are compelled to recognize its extent, the courts should be willing to correct distortions of the electoral process that significantly affect the margin of victory. C. SUMMERS, H. WELLINGTON and A. HYDE, *CASES AND MATERIALS ON LABOR LAW* 134-35 (2d ed. 1982). That reasoning provides ample support for an award of declaratory relief, but may not justify imposing the costs of a new election, not to speak of postponing implementation of a new collective bargaining agreement.

106. Unions tend to fight to the bitter end when sued by dissidents, especially if the case has political significance. See Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 222, n.276 (1960). Cf. *Mallick v. IBEW*, ____ F.2d ____ (D.C. Cir. 1987).

107. Briefly stated, the agreement required that casuals who had worked for at least 80 days in the calendar year preceding the year of the referendum, and who were members of the union in good standing, would be permitted to vote in the referendum. *Harmon v. Presser*, Settlement Agreement No. 85-1556 (D.D.C. 1985).

108. 636 F. Supp. 817 (D.D.C.), *appeal docketed*, No. 86-5476 (D.C. Cir. 1986).

joined with TDU in opposing it. Consequently, the proposal was defeated by a 4 to 1 margin. The parties returned to the bargaining table, and the union ultimately went on strike. Recognizing that any new contract might not be much of an improvement, plaintiffs wrote the IBT in early July to ask it to permit them to send a mailing expressing their views on the next contract to the full voting membership or to that portion which they believed could not be reached by other means. Because plaintiffs assumed that the leadership would, as it invariably had done in the past, include a letter with the ballot materials arguing in favor of ratification, they asked that their contrary statement be included with the ballots as well. In the alternative, plaintiffs asked to use the IBT's computerized mailing list of names and addresses of all 23,000 carhaul members in order to do their own mailing, at their own expense.

Immediately after the announcement of the second proposed contract, defendants denied plaintiffs' request on the ground that, for the first time, no cover letter from the IBT would be included with the ballots. Defendants' counsel explained that, in his view, absent such an affirmative campaign letter, defendants could lawfully refuse to include plaintiffs' materials or to provide access to the names and addresses needed to do their own mailing.

When it was originally filed in August, 1985, the suit sought both a declaration that plaintiffs had the right to communicate with their fellow members by use of defendants' mailing list, and an injunction specifically directed to the carhaul contract referendum which was about to begin. Plaintiffs moved for a temporary restraining order and a preliminary injunction to prevent defendants from mailing out the ballots for the ratification referendum until plaintiffs were permitted to mail their views to the voting membership. Plaintiffs were prepared to show that, despite the union's omission of the customary cover letter from the ballot package, the leadership and its allies, including the employers, were successfully spreading their pro-ratification messages by a variety of other means, both at the local union level and also at the workplace. They also prepared to prove that, although they were making their best efforts to communicate their own contrary views to as many members as possible, there were so many holes in their distribution network and inefficiencies in their distribution methods that they could not be confident of reaching a large portion of the electorate. Plaintiffs planned to argue both that the lack of alternative means of communication and the union's and employers' various other communications supported their right to conduct a campaign mailing, and that

they were entitled to do a mailing no matter how many other communications were abroad and no matter how many members they could reach otherwise.

Defendants argued that there were a "multitude of evidentiary problems" that required a lengthy hearing to determine exactly how many of the eligible voters could be reached without a mailing, and that an extended trial would be required on the preliminary injunction. In the meantime, counsel warned, the very pendency of the suit and the delay in the resolution of the ratification referendum would create economic uncertainty in the auto industry, which depends on car haulers to get the product to market.¹⁰⁹

District Judge Louis Oberdorfer, who only presided over the hearing on the restraining order, agreed with defendants' argument, and denied temporary relief.¹¹⁰ He concluded that the evidence would likely show that, through TDU, plaintiffs had "direct access to 8,000 of the 23,000 IBT members." The judge also conceded that the rest of the membership could only be reached by means such as paid advertisements, the public press and pamphlets.¹¹¹ However, he denied the relief because of a concern that a delay in balloting, "even for a few days, will obviously disrupt an important national election and could risk exacerbation of labor management relationships in a key national industry."¹¹²

In light of this ruling, plaintiffs decided not to seek further relief with respect to the 1985 carhaul contract, because that, too, would have left the industry in uncertainty,¹¹³ potentially placing a very large weight on the scale for the balancing of equities, which is normally the crucial element in a preliminary injunction proceeding.¹¹⁴ After very careful consideration, the plaintiffs decided to per-

109. Transcript of Oral Argument at 14, *Carothers v. Presser*, No. 85-2645 (D.D.C. Aug. 21, 1985).

110. *Carothers v. Presser*, No. 85-2645 (D.D.C. Aug. 21, 1985).

111. *Id.* at 2. In this regard, Judge Oberdorfer apparently confused the fact that TDU has 8,000 members who work in various industries (as compared to almost 2,000,000 members of the union as a whole) with the much smaller number of members TDU has working as car haulers (out of 23,000 members of the union who are in carhaul).

112. *Id.*

113. For example, they could have contested the validity of the referendum after the ballots were received, as in *Bauman*; indeed, Judge Oberdorfer relied on that possibility in concluding that plaintiffs would not be irreparably injured by denial of a TRO barring the mailing of the ballots. *Id.* Yet the delay in determining whether the proposed agreement had been ratified that would have been caused by such a preliminary injunction would have been even longer than the delay occasioned by the TRO, because the entire balloting period would have to be repeated, and at a time when the automobile companies were sending their new models out to the market.

114. *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Hamilton Watch*

severe, so that during future contract votes the law would be clear. They also decided, however, to de-emphasize the particular facts, such as the extent to which they could get their leaflets out in other ways, or the extent to which, even in the absence of a campaign letter, Presser could get out his message by other means. Emphasizing these facts would play right into Presser's hands, they decided, for two reasons. First, the factual questions would require a lengthy trial and pretrial discovery. But even more important, if the victory depended on the particular facts, Presser could argue in the next referendum that the facts had changed slightly, and plaintiffs would be right back where they had started, trying to get a preliminary injunction in the face of a possible strike. Thus, instead of forging ahead based on their previous set of theories, they amended their complaint to seek only a declaratory judgment that would establish the ground rules for future carhaul ratification referenda.¹¹⁵

The basic proposition which plaintiffs sought to establish was that, when a leadership proposal is being considered by union members all over the country, the only way in which opponents can have a fair chance to communicate with the entire electorate and try to persuade them is by mailing a statement of their views to the electorate. However, because only the union has a complete list of names and addresses of the members, an opponent must be able to obtain access to that list in order to do such a mailing. Because union leaders enjoy a virtual monopoly over the normal channels of intra-union communication,¹¹⁶ a number of courts have either held,¹¹⁷ or indicated in very strong dictum,¹¹⁸ that sections 101(a)(1) and 101(a)(2)

Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953).

115. Defendants argued that the case had become moot, and apparently saw their chance to get sweet revenge by citing the court of appeals' decision in *Bauman*, our own case, back at us. Imagine the union's frustration to learn that, not only was *Bauman* not good precedent because the mootness ruling was unreported, but it proved to be inapposite. *Bauman* did not meet the "capable of repetition yet evading review" exception to the mootness doctrine because the union actions which plaintiffs had challenged were a departure from the norm which the union made no indication of a desire to repeat. In *Carothers*, by contrast, plaintiffs were challenging a standard practice: the union had never allowed members to do such a mailing, and it was plainly unprepared to do so in the future. Judge Gasch gave the mootness argument short shrift, 636 F. Supp. at 821-22, and defendants did not pursue it on appeal.

116. Hartley, *The Framework of Democracy in Union Government*, 32 CATH. U.L. REV. 13, 78-79 (1982) [hereinafter Hartley].

117. *Bhd. of R.R. & Airline Clerks, Lodge 1380 v. Dennis*, 625 F.2d 819 (9th Cir. 1980); *Blanchard v. Johnson*, 532 F.2d 1074, 1078 (6th Cir.), cert. denied, 429 U.S. 869 (1976); *Sheldon v. O'Callaghan*, 497 F.2d 1276, 1281-82 (2d Cir.), cert. denied, 419 U.S. 1090 (1974). See also *Knox County Local v. Rural Letter Carriers*, 720 F.2d 936 (6th Cir. 1983) (holds that statute accords right of access to union journal to debate contract proposal).

118. *Murphy v. Operating Engineers Local 18*, 774 F.2d 114, 131-32 (6th Cir. 1985),

entitle union members, at their own expense, to use union mailing lists both to communicate with their fellow members about why they disagree with proposals supported by the union leadership and to advance proposals of their own.¹¹⁹ As the court said in *Blanchard v. Johnson*:¹²⁰

A meaningful vote is not a deliberately uninformed vote, because as such there is no choice, no selection, but merely a shot in the dark. In the view of this Court it would be chimerical to hold that Congress guaranteed an equal right to vote on union affairs without also guaranteeing that the processes of enlightenment be kept open.¹²¹

Defendants were of two minds about the best way to deal with these cases. On the one hand, they really wanted to say that the doctrinal basis for the mailing cases was faulty, to avoid conceding that dissidents might ever be entitled to do mailings. On the other hand, the body of cases supporting a Title I right to do membership mailings was quite large, and some of them had been approvingly cited in the leading case in the D.C. Circuit on the right to a "meaningful" vote.¹²² Thus, the other way to litigate the case was to accept the mailing cases, but to distinguish all of them on their facts. Rather than choosing a single approach, defendants decided to make both arguments.¹²³

The doctrinal attack on the mailing cases, and plaintiffs' response, is elaborated in the first part of this article. The distinctions

cert. denied, ___ U.S. ___, 106 S. Ct. 1201 (1986) (denying claim of access to union journal because no request had been made, but noting that some means of reaching members must be provided, such as mailing literature to union members at the dissidents' expense); *Pawlak v. Greenawalt*, 713 F.2d 972 (3d Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984) (consent decree guaranteeing absolute right to do mailings, and equal right to a union subsidy for such mailings on bylaws proposals, held to have created common benefit to union membership under Title I).

119. As it happened, District Judge Oliver Gasch, to whom the case was assigned, had also ordered a union to mail to the membership a statement of dissidents' reasons for challenging a referendum to ratify the 1981 Greyhound contract after the union had misrepresented the dissidents' position in a statement mailed with the ballots. Judge Gasch ordered that the expense be shared equally by the dissidents and the union. *ATU Local 1202 v. ATU*, 92 Lab. Cases (CCH) ¶ 12,930 (D.D.C. 1981).

120. 388 F. Supp. 208 (N.D. Ohio 1975), *aff'd in relevant part*, 532 F.2d 1074 (6th Cir.), *cert. denied*, 429 U.S. 869 (1976).

121. *Id.* at 214.

122. *Bunz v. Moving Picture Mach. Operators*, 567 F.2d 1117, 1121 (D.D.C. 1977).

123. A brief that combined both approaches would have contained inconsistent statements (as well as exceeding the page limitation). Defendants solved their quandry by the simple expedient of filing two separate motions for summary judgment, one on behalf of Presser individually, and one on behalf of the IBT.

defendants sought to establish between the carhaul case and the other mailing cases were, essentially, the mirror image of the factual assertions plaintiffs made when they first filed suit. First, defendants argued that in previous mailing cases, the union leadership had explicitly argued in favor of the proposal that had been submitted for a vote, and had misrepresented the facts, thus entitling the dissidents in effect to a right of reply. Because no explicit recommendation of ratification had been included with the carhaul ballots, there had been no "discrimination" and there was no reason to permit members to use the mailing list to respond. Second, defendants argued that in the other mailing list cases, plaintiffs had had no other way to communicate their views to the voters; in the carhaul referenda, by contrast, plaintiffs had distributed "tens of thousands" of leaflets and had a fair chance to get their views across.¹²⁴

Plaintiffs countered the defendants' distinctions by discussing the facts of the mailing rights cases. Plaintiffs' emphasis, however, was placed on the policy reasons for rejecting the distinctions. First, with respect to the "discrimination" argument, plaintiffs noted that when leaders send out a contract for ratification, the members know, unless otherwise advised, that the leaders are not indifferent to the outcome, but rather that the proposal represents the fruit of their labors in negotiation and is the best the leaders believe they can do.¹²⁵ Moreover, whether or not the leaders include an explicit recommendation with the ballot, they know that they can count on, and may well orchestrate, a campaign in favor of ratification by the local union officers, the vast majority of whom will, by the very nature of union politics, be closely aligned with the national leadership in most cases.¹²⁶ Employers also tend to conduct campaigns in favor of ratification.¹²⁷ After all, it is in the employers' interest to have the mem-

124. As previously noted, they also argued without success that Title I rights should not apply to contract ratification referenda. See *supra* note 42 and accompanying text.

125. In unions, as in public life, many members are inclined to accept as authoritative their leaders' statements about facts, their predictions about what can be accomplished, and their recommendations for action. See, e.g., J. BARBASH, *LABOR'S GRASS ROOTS: A STUDY OF LOCAL UNION LEADERSHIP* 204 (1961); Slichter, *Forward* to LEISERSON, *AMERICAN TRADE UNION DEMOCRACY* at x.

126. Levy, *supra* note 32, at 671; Hartley, *supra* note 116, at 62-92. Indeed, Presser was understood to have proclaimed that if the members of the carhaul negotiating committees were not successful in securing a vote in favor of ratification, the committees would be replaced with more effective political operators.

127. United Parcel Service, Case No. 7-CA-20759 (NLRB complaint alleging unlawful interrogations and threats to induce employees to vote in favor of a contract); General Store No. Two, 273 N.L.R.B. 415 (1984) (employees threatened with plant closing unless contract amendments accepted).

bers accept what has been offered to them, rather than returning to the bargaining table to ask for more and perhaps even conducting a strike. Thus, whether or not the leaders include a specific recommendation with the ballot,¹²⁸ the dissidents need to be able to communicate their views as widely as possible to have a fair chance to see their side prevail.

But the most compelling reason not to make the right to do a mailing depend on the leaders' own exercise of their right of free speech is that it would encourage union leaders to adopt a "dog in the manger" attitude to the mailing list. The union leaders' decision whether or not to mail their own views to the members will be based on a tactical calculation about whether the dissidents' views might, if also disseminated, be too persuasive. A rule requiring proof of discriminatory use of the mailing list would simply encourage union leaders to keep their constituents in the dark, a result which is plainly inconsistent with the thrust of the LMRDA, which seeks to increase the information available to members and encourage debate about union affairs.¹²⁹

A rule requiring members to prove that they could not otherwise communicate their views, without the right to do a mailing, would similarly be contrary to good policy and good sense. First, union members are unlikely to seek to use the mails to communicate their views, given the expense involved¹³⁰ and the greater effectiveness of communicating in person,¹³¹ and the likelihood that unions will resist a mailing unless they believe that the members could not otherwise be reached. Moreover, unless the election is being held within a single local union all of whose members work on regular shifts in a small number of readily located plants, it is fair to assume that the dissidents will in fact be uncertain whether their leaflets will reach all eligible voters before they cast their ballots. Additionally, no one broadcaster or newspaper will serve all members of the union;

128. The ballot materials can also be arranged to favor ratification. For example, in the second referendum, the improvements negotiated during the strike were highlighted in red ink.

129. *E.g.*, Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 825 (1960). The mere fact that the IBT leaders chose, for the first time, not to include an explicit recommendation with the ballots, after receiving plaintiffs' demand letter for the right to do a mailing and citations of the relevant cases, strongly suggests that their motives was to deny plaintiffs a forum to express their own dissenting views.

130. If sent first class, the cost of mailing is likely to be upwards of \$.25 per letter.

131. Studies of campaign techniques generally show that an in-person solicitation is the most effective means of persuading voters, and that impersonal delivery of a written message (such as by mail or by a newspaper advertisement) is likely to be the least effective. *E.g.*, Levy, *The Effect of Amateur Precinct Organization on Voting in a Presidential Election 125-61* (May 4, 1973) (unpublished thesis).

therefore, buying space or time in all media markets in which the members live becomes both inefficient and prohibitively expensive.¹³²

For these reasons, the mailing of campaign statements has become a standard technique in other kinds of elections, and the law protects the right of campaigners to conduct such mailings. In a contest over corporate policy, it would be obvious that dissident shareholders could only be confident of delivering their message to all of the electorate in a contest over corporate policy if they could mail a proxy solicitation to each shareholder.¹³³ Or if members of the general public seek to oppose a bond issue or other matter in a public election, they would have access to the voter rolls so that they could mail their views to the entire electorate.¹³⁴ And, in an analogous labor law context, when a union seeks certification as the representative of a group of workers, it is entitled to a list of names and addresses of the eligible voters to aid its campaign.¹³⁵ By the same token, in a debate over ratification of a union proposal, the most efficient way for dissenters to communicate with the full electorate is by sending a statement of views to the same mailing list to which the ballots will be sent.¹³⁶ Inasmuch as the union democracy provisions of the LMRDA are modeled in part on the law of corporate democracy and public elections,¹³⁷ the analogous rights of dissenting shareholders and public election candidates provide additional support for the decision of the court below that the LMRDA affords plaintiffs the right of access to the IBT's mailing list in order to communicate their views, without requiring any proof on the question of alternate means of communication.¹³⁸

132. The union newspaper goes only to members, but even that audience may be substantially larger than the electorate for a particular contract. In any event, the union paper is controlled by the incumbents. Jacobs & Spring, *supra* note 87, at 205.

133. See SEC Rule 14(a)(8), 17 C.F.R. § 240.14a-8 (1986).

134. The voter rolls are normally open for public inspection, and campaign mailings are commonly sent to all registered voters. Or, because a large percentage of the public is eligible to vote, it is cost-effective to campaign by sending canvassers to visit voters on a door-to-door basis or by sending a carrier-sorted bulk mailing to every address. See also GAO, *Release of Service Members' Addresses to a Political Campaign Committee*, GAO/NSIAD-86-61 (Letter Report, February 21, 1986) (Reagan campaign obtained addresses of members of armed services in order to send leaflets by mail).

135. Excelsior Underwear, 156 N.L.R.B. 1236 (1966).

136. A union does have significant interests in maintaining the confidentiality of its membership list, and so, unlike the case of voter rolls, it is sensible for the union to insist that, rather than simply handing the lists over to a reform caucus, the list be given to a mailing service which then does the mailing.

137. See *Steelworkers Local 3489 v. Usery*, 429 U.S. 305, 309 (1977); *Mallick v. IBEW*, 749 F.2d 771, 778 (D.C. Cir. 1984).

138. There is one respect in which the absence of alternate means of communication

If the rank-and-file's right to do a mailing depended on the extent to which the members can actually communicate their views by other means, the right would be so fact-specific that neither unions nor members could be sure in advance how the rule would apply to them. Instead, it would be necessary to apply to the courts in each instance, under the same time pressures that are inevitably present in a preliminary injunction proceeding, to determine whether a mailing had to be, or should have been, permitted.¹³⁹ In subsequent contract referenda, it could be argued that the dissidents' strengths had grown or shrunk, thus requiring relitigation of the facts concerning the "other means" of distribution. That rule of law is in nobody's interest—not the courts, not union members, and not even unions or employers. To the contrary, everyone needs clear rules, whose application can readily be ascertained in advance.

One final source of law cautions against holding that the right of union reformers to do a mailing to the union membership at their own expense is dependent on the absence of other means of communication. In Title IV of the LMRDA, Congress gave members running for union office an absolute right to have the union mail their literature to the electorate, at their own expense.¹⁴⁰ If incumbents choose to transmit their views at union expense, the union must also pay for the insurgents' literature. However, the insurgents' right to

might become critical. If the members seek the right to do a mailing, but for some reason fail to sue early enough to enforce their rights until the referendum has been completed, then the question becomes, not only whether plaintiffs' rights were violated, but also whether the referendum results should be set aside because the violation may have affected the outcome. See *supra* note 105. In those circumstances, the union may be able to prove that, although plaintiffs did not do a mailing, they did communicate their views to all the voters by other means, and thus argue that it should not be put to the expense and inconvenience of a second referendum despite its wrongful conduct.

139. Unions would no doubt argue, as defendants did in *Carothers*, that they are entitled to identify the plaintiffs' contacts throughout the country, so that they could test the assertion that the plaintiffs were unable to distribute leaflets in all local areas. Although there is a qualified privilege under the first amendment against discovery of names of supporters of a dissident group, *NAACP v. Alabama*, 357 U.S. 449 (1958), as well as of other files revealing intra-organization deliberations and the like, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1159-72 (7th Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 1327 (1985); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388-89 (D.C. Cir. 1980); *Johnson v. Roadway Express*, Misc. No. 86-0529 (E.D. Mich. April 3, 1987) (applying privilege to bar disclosure of dissident group's files), the union would at least have had an argument for compelling disclosure of some such materials. Thus, the effect of requiring that the issue of "other means" be litigated in order to secure the right to do a mailing could be to force dissidents to expose their colleagues to possible retaliation. Obviously, if a rank-and-file group has to disclose the confidential details of its internal operations in order for its members to assert their rights under the LMRDA, those rights are less likely to be asserted.

140. 29 U.S.C. § 481(c) (1982).

have a mailing done at their *own* expense is dependent upon neither the absence of alternate means, nor the fact that the incumbents find it unnecessary to campaign by mail. There is no more reason to make the right to campaign in contract referenda dependent on such factual circumstances than there is in union officer elections.

In *Carothers v. Presser*, the IBT argued that because Congress specified this right in union officer elections, it must have meant to deny it in other kinds of votes, such as contract referenda. Title IV of the LMRDA contains so many detailed provisions because it was the product of a lengthy drafting process and committee debate, and was further fine-tuned on the floor. In Title I, by contrast, which was offered on the Senate floor shortly before the passage of the bill, Congress decided not to include detailed rules, not because it wished to deny the "broadest possible rights," but rather to enact a broad charter for union democracy in general terms.¹⁴¹ As the Supreme Court recognized in *Hall v. Cole*,¹⁴² the authors of Title I concluded that they could not address every eventuality that might arise, and left it to the courts to fill in the details of this broad charter.¹⁴³ Indeed, in *Hall* the Court rejected a similar *expressio unius*¹⁴⁴ argument, holding that attorney fees could be awarded under Title I despite the fact that, unlike other Titles, it did not expressly refer to their availability.¹⁴⁵ In filling in the details of Title I's broad charter, it is only natural that the courts have looked to other titles, especially Title IV, as a fertile source of analogies.¹⁴⁶ Thus, the analogy to section 401(c) ultimately supported plaintiffs' claim in this case, not the union's.

On the basis of these arguments, District Judge Oliver Gasch decided that in future carhaul referenda, plaintiffs and other union members should be afforded the right, at their own expense, to mail a statement of their views on proposed contracts, before or at the time the ballots are mailed.¹⁴⁷

141. Levy, *supra* note 32, at 683-84.

142. 412 U.S. 1 (1973).

143. *Id.* at 10-11.

144. "*Expressio unius est exclusio alterius*. A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY (5th ed. 1983).

145. *Hall v. Cole*, 412 U.S. 1, 10-11 (1973).

146. E.g., *Bauman v. Presser*, 117 L.R.R.M. (BNA) 2393, 2400 (D.D.C. 1984); *McGinnis v. Teamsters Local 710*, 774 F.2d 196, 200 (7th cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1638 (1986); *Thompson v. Flight Attendants*, 109 L.R.R.M. (BNA) 2870, 2874 (C.D. Cal. 1982).

147. *Carothers*, 636 F. Supp. 817 (D.D.C.), *appeal docketed*, No. 86-5476 (D.C. Cir. 1986).

III. RELIEF FOR VIOLATIONS OF THE RIGHT TO A FAIR REFERENDUM

In each of the three cases discussed above, the plaintiffs managed to get into court by the end of the referendum, and the relief they sought was either the invalidation of the referendum and an injunction against implementation of a contract which had not yet gone into effect, or the entry of a declaratory judgment whose effect would be to promulgate rules to govern future elections. In that event, the questions of relief are relatively straightforward. In the case of the declaratory judgment, there is always, of course, the problem of mootness, but, as in *Carothers*, that problem can be overcome. In the case of the preliminary injunction overturning a referendum, there is of course the balancing of the equities and the question of whether the violation "may have affected" the outcome.

These tests may require some thought and may not be satisfied. But they are simple by comparison to the questions which arise when plaintiffs do not sue until after the contract has gone into effect. That may happen because the plaintiffs were unable to secure counsel or did not think to sue until that time, in which case they may well be confronted with severe problems of laches, as well as the other problems which will be discussed. Additionally it may happen because plaintiffs were not aware of the violations of their rights. For example, the union leaders simply lied about the contents of the contract, and the members did not find out the truth until the employer told them of the new contract terms; or the union may simply have implemented newly negotiated items without conducting a ratification vote which was required by law.

The union member who seeks to vindicate the right to a fair contract vote at this stage faces thorny questions of relief. If the member seeks injunctive relief against the *further* implementation of the contract, the strongest objection is likely to come not from the union but from the employer, which is not obligated to comply with the LMRDA and probably cannot be joined as a defendant in a LMRDA case. The employer will also claim that it has been acting in reliance on the new terms of the contract and cannot be expected to give up the benefit of its bargain.¹⁴⁸

Members are most likely to be able to secure effective relief if they can show that the employer had a duty to continue to implement contract terms for a set period of time. Thus, for example, the

148. These arguments will also be made, of course, if the member seeks damages against the employer.

claim may be that the union improperly negotiated a midterm modification in the contract without holding a fair vote.¹⁴⁹ The employer in that case can presumably be sued under section 301 of the Labor Management Relations Act (LMRA) for having violated the original contract. A defense claiming that the contract has been changed is unavailable if the plaintiff can establish that the change was not accomplished in a lawful manner.¹⁵⁰ If the employer is barred by the National Labor Relations Act from varying the terms, that too may provide a standard for granting injunctive relief against the union. However, it may be impossible to proceed directly against the employer because the NLRB would have exclusive jurisdiction over that claim.¹⁵¹

Even if a LMRA section 301 claim may be pursued because the ratification process was defective, employers will commonly argue that they relied on the union's apparent consent to changes adverse to the employees in granting other concessions, or taking steps that they were not contractually obliged to do. Accordingly, they suggest, it would be unfair to deprive them of the benefits of their bargain. However, insofar as the union member plaintiffs seek prospective relief, the employer is not unduly prejudiced by its previous reliance because, if the changes adverse to the employees are nullified for lack of ratification, presumably the employer will also be released from its commitment to any changes favorable to the employees and adverse to the employer. However, the employees will need to sue virtually as soon as they learn of the improper changes, in order to minimize the employer's reliance arguments.¹⁵² Otherwise, it may

149. *E.g.*, *Day v. Teamsters*, No. 86-3157 (D.D.C. 1986), in which Teamster members claim that the union agreed to change their contract to permit involuntary drug-testing, without holding any vote of the affected members, despite the ratification requirement in the Teamsters constitution. *See supra* note 59 and accompanying text. The union and employers reacted by rescinding the negotiated drug-testing program in order to moot the members' claims.

150. *See Schultz v. Owens-Illinois*, 696 F.2d 505, 514 (7th Cir. 1982) (action against employer fails unless union breached duty of fair representation in approving change).

151. 29 U.S.C. § 160(a) (1982). *But see* *Carpenters Local v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

152. One obstacle to suing immediately is the general rule requiring exhaustion of internal union remedies before filing suit. *E.g.*, *Clayton v. UAW*, 451 U.S. 679 (1981), for duty of fair representation suits; 29 U.S.C. § 101(a)(4), *construed in* *NLRB v. Marine Workers*, 391 U.S. 418 (1968), for LMRDA suits. There is, however, an exception to the requirement where the plaintiffs would suffer irreparable injury if they waited until the union ruled on their appeals. GIBBS, LEVY & SIEGEL, *supra* note 104, at § 8.17[2][b] (1986). The possible loss of the right to sue, or of the right to recover damages for a period of time, due to an employer's argument based on detrimental reliance, constitutes injury that cannot be redressed by a later award of money, and is therefore irreparable.

well be impossible to obtain meaningful injunctive relief.

The Sixth Circuit's recent decision in *Central States Pension Fund v. Kraftco*¹⁵³ contains language that might make it more difficult for union members to obtain effective relief when their right to vote has been violated. In *Kraftco*, the pension fund sued to enforce a provision of the collective bargaining agreement requiring employers to make certain contributions. Kraftco defended on the ground that, during the 1969 negotiations, it had entered into a "side agreement" with the union, pursuant to which it did not have to begin making pension contributions on behalf of any employee until that employee had been employed for three years. Although the amendment had never been physically included in the agreement, Kraftco argued that, because it was never expressly rescinded, it was necessarily carried over into each succeeding triennial agreement. Neither the pension fund nor, apparently, the employees learned about this agreement until 1978. At this point, the union compelled Kraftco to begin making contributions for all employees immediately after their probationary period, as provided by the collective bargaining agreement itself, and the pension fund sued to collect past-due contributions.¹⁵⁴

The fund argued that the side letter was not valid because the local bylaws conditioned the union's right to make agreements on ratification by the membership. The district court accepted this argument, but the Court of Appeals reversed. It first noted that a former union official, who later joined management, had testified that in 1969 the contents of the side letter had been presented to the

Because we prefer to give unions an opportunity to resolve disputes in-house, notwithstanding the possible availability of an exception to the exhaustion requirement, our practice in such situations is to advise our clients to initiate exhaustion immediately. We then contact both the union and the employer to ask whether we need to file suit immediately, or whether they are willing to forswear any arguments based on our failure to sue during the period of time it took to finish exhaustion of intra-union remedies. In some cases, we ask instead that the disputed conduct be suspended pending completion of the appeal.

153. 799 F.2d 1098 (6th Cir. 1986) (*en banc*).

154. *Central States Pension Fund v. Kraftco*, 589 F. Supp. 1061, 1068 (M.D. Tenn. 1984). Although these facts are not discussed in the *en banc* opinion, it appears from the district court's decision that the principal purpose of the side agreement may have been to evade pressure from the International, not to avoid a ratification vote. Thus, the local had apparently been willing to go along with a three year rule, but a representative of the International who was present at the negotiations insisted upon its deletion. The local's president, Don Vestal, then met secretly with the company and agreed to the three year rule in a side letter, which was not presented to the union membership for ratification along with the remainder of the agreement. *Id.* at 1065-66. Vestal, a long-time opponent of Jimmy Hoffa, was ultimately ousted by the International on charges of financial irregularities. *Vestal v. Hoffa*, 451 F.2d 706 (6th Cir. 1971).

membership and ratified, and that no other union official testified to the contrary.¹⁵⁵ But the Court of Appeals went on to say that, even if the district court had discredited the former official's testimony, the company was entitled to rely on the union president's "apparent authority" to negotiate side agreements, particularly because the company officials had testified that they were unaware that side agreements, like collective bargaining agreements themselves, had to be ratified by the membership.

Even apart from the uncertain precedential effect of the court's discussion of the issue of apparent authority, there are at least three distinguishing features in *Kraftco* that substantially limit its significance. First, and more important, the issue of the side agreement's validity was not raised for almost ten years after it was entered;¹⁵⁶ because a six year statute of limitations was held applicable,¹⁵⁷ damages could only be sought from 1972 forward. Notwithstanding the possible validity of the contractual claim, it would plainly be disturbing if, many years after the parties to a contract had agreed to a new provision in the agreement,¹⁵⁸ and acquiesced in its application, one party could challenge that lengthy course of conduct on the ground that an amendment on which the employer had relied had never been authorized. Indeed, given the limitations problem, the pension fund could challenge, not the side agreement's application during the term of the original contract for which it was negotiated, but only its implicit incorporation into successive agreements.¹⁵⁹

Second, the challenge was filed, not by the members themselves, but by a pension fund that is managed by an equal number of union and employer representatives. Although the fund was, in effect, seeking to enforce the members' right to have contributions made on

155. 799 F.2d at 1112.

156. Although the court of appeals spent more than two pages on this issue, it is unclear why it was required to reach out to decide this question of law, inasmuch as it had already held that "the district court erred in not concluding that the letter had been ratified . . ." *Id.* Judge Engel disagreed with the rejection of the district court's decision on factual grounds, *id.* at 1114, as did Judge Guy, who properly characterized the agency portion of the opinion as no more than an "alternative theory." *Id.* at 1115.

157. *Id.* at 1106-07.

158. At one point, the court characterized the side agreement as "not an alteration or modification of the terms of the collective bargaining agreement, but merely a memorandum of understanding . . . about the meaning of [certain terms] used in the labor contract." *Id.* at 1114 n.21. Other portions of the opinion treat side agreements as comparable to "substantive changes" or "agreements modifying" the contract. *Id.* at 1114.

159. The statute allowed damages only back so far as April 1972, *id.* at 1103, but the original agreement into which the side agreement was incorporated expired on December 31, 1971. *Id.* at 1102.

their behalf, as a practical matter its interests lie with the union as an institution, and to some extent with the employers. Neither of these two parties can equitably be allowed to invoke the ratification issue to vitiate agreements which they had willingly undertaken.¹⁶⁰ To be sure, there is a certain lack of symmetry in permitting employees to raise an objection to a contract whose validity cannot be challenged by the parties themselves, and who are thus legally obligated to act in reliance on the agreement's validity. That is simply the consequence of the fact that only the employees, not the employer or union, have the right to ratify.

Indeed, the same lack of symmetry exists when other bargaining compromises, such as grievance adjustments, that are final and binding between the parties, are subject to challenge by the employees if they can show that the union breached its duty of fair representation.¹⁶¹ Such challenges cannot be filed by the union or the employer, who can only challenge a grievance resolution after they have exhausted their contractual remedies by proceeding to arbitration,¹⁶² and then only if the arbitrator's decision does not draw its essence from the contract.¹⁶³ Thus, even assuming that the pension fund had standing to contest the validity of an agreement based on the denial of a right to vote guaranteed by the local union's bylaws,¹⁶⁴ a court

160. Both the courts and the NLRB are properly skeptical about attempts by employers to refuse to recognize the validity of contracts to which they have agreed on the ground that they were not properly ratified. *Id.* at 1113 n.19. These decisions have their genesis in concern that employers may seek to string unions along by sending negotiators who have no authority, thus bargaining in bad faith, e.g., *NLRB v. Nettleton Co.*, 241 F.2d 130, 134 (2d Cir. 1957); *Great Southern Trucking Co. v. NLRB*, 127 F.2d 180, 185 (4th Cir. 1942), or may interfere in unions' internal affairs by insisting that the union obtain its members' approval. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 350 (1958). Although neither of these considerations applies when it is the union which insists on ratification, a union may also be held to an unratified contract which it has negotiated, unless it can show that its constitution or other binding, public rules required it to obtain ratification, *Kraftco*, 799 F.2d at 1113 n.19. *See generally* Hyde, *supra* note 1 at 801-04.

161. The potential for damage to employer reliance interests is minimized by the application of a six-month limitations period adopted in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) (two contract modification claims); *Adkins v. Electrical Workers*, 769 F.2d 330 (6th Cir. 1985) (statute of limitations extends to actions stemming from layoffs).

162. E.g., *Drake Bakeries v. Bakery Workers Local 50*, 370 U.S. 254 (1962).

163. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The award may also be set aside on the traditional grounds set forth in the United States Arbitration Act. *See Hines v. Anchor Motor Freight*, 424 U.S. 554, 575 (1976). *See also* 45 U.S.C. § 153 First(q) (1983) (grounds for setting aside Adjustment Board decision under Railway Labor Act).

164. The *Kraftco* court recognized that the pension fund was suing, at least in part, as a third-party beneficiary of the contract, 799 F.2d at 1107, but appears not to have considered whether that plaintiff had standing to object to the validity of the contract based on a violation of the voting rights of different third-party beneficiaries, i.e., the employees who had a right to

should be more sympathetic to objections to a contract based on the denial of the right to vote when it is the voters themselves who are seeking to invalidate the contract.

The final aspect of *Kraftco* which limits its impact is that the court relied heavily on the fact that Kraftco lacked notice that side agreements, as opposed to collective bargaining agreements themselves, were also subject to the ratification requirement.¹⁶⁵ Indeed, even the courts which have held unions to unratified contracts have emphasized that there was no notice to the employer, in the union constitution or otherwise, that ratification would be required.¹⁶⁶ The problem of lack of notice is unlikely to arise if the union's constitution plainly requires ratification, especially if measures are taken, by the dissidents if not by the union, to bring the provision to the employer's attention.¹⁶⁷

The problems in obtaining injunctive relief in cases where the breach was not discovered until long after the new contract terms had been implemented has forced litigants to seek damages for loss of contract terms for which they thought they were voting.¹⁶⁸ But, unless the employer had a duty not to change the terms and conditions of employment,¹⁶⁹ the problem in determining damages remains. It is sheer speculation, at least in most cases, to predict what would have occurred had the membership refused to ratify the terms

vote under the union bylaws.

165. *Id.* at 1113-14. Kraftco had shown that it had made numerous side agreements, none of which had been ratified. Although the local bylaws apparently required ratification of both agreements and "amendments", *id.* at 1103, the court also noted that side agreements can simply define the terms of a contract. *Id.* at 1113-14 n.21.

166. *E.g.*, *NLRB v. Elevator Constructors Local 8*, 465 F.2d 974, 975 (9th Cir. 1972). *See also NLRB v. Painters Local 1385*, 334 F.2d 729, 731 (7th Cir. 1964) ("long-dormant provision" in union constitution had never before been invoked in thirty years of bargaining).

167. The Teamsters constitution avoids later claims of surprise by requiring that the article governing contract negotiations and ratification be presented to the employers at the outset of negotiations. article XII, section 2(e).

168. As in the case of injunctive relief, damages can be recovered from the employer only if the employees have a viable remedy against it, such as under § 301, 29 U.S.C. § 185(a) (1982). Even if there is a cause of action against the employer, it may have a strong claim of reliance on the union's consent, unless it participated in the union's breach of duty, *Gocłowski v. Penn Central Transp.*, 571 F.2d 747 (3d Cir. 1977); *Parker v. Teamsters Local 413*, 501 F. Supp. 440 (S.D. Ohio 1980), *aff'd*, 657 F.2d 269 (6th Cir. 1981), or it had notice of the fact that the lawfulness of the union's consent has been called into question. *Bowen v. Postal Service*, 459 U.S. 212 (1983).

169. *E.g.*, *Postal Workers Local 6885 v. Postal Workers*, 121 L.R.R.M. (BNA) 3406 (D.D.C. 1984). In *Postal Workers*, the court decided that the employer's departure from the terms of a contract without union consent would have violated section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1982), and thus assessed damages against the union in the amount of the differences between the nonratified contract to which the union consented and the previous contract.

as accurately presented: would they in fact have gone on strike over the issue, would the employer have caved in, and precisely what compromise would have been reached in further negotiations?¹⁷⁰ As Judge Reinhardt noted in his concurring opinion in *Acri v. Machinists*,¹⁷¹ the practical effect of the rule barring economic damages is to make it impossible to enforce a cause of action based on misrepresentations about the contents of a proposed collective bargaining agreement.¹⁷²

The courts' refusal to award economic damages against unions based on lost contract terms, as compensation for union officers' misrepresentations in the contract ratification process, seems to be basically a correct one. The principal danger of denying such "compensatory" damages is that it may leave the members without an effective remedy, and thus eliminate the deterrent effect that litigation might otherwise have created.¹⁷³ Allowing such damages, however, would subject unions to the equivalent of punitive damages in cases where basis for punishment, malice or wanton disregard of the members' rights, had not been established.¹⁷⁴ Moreover, the award would normally be made against the union treasury, and thus against the plaintiffs' fellow members, or, in the case of a single-employer union where the plaintiff class comprises the full membership, the award may effectively be against the plaintiffs themselves.¹⁷⁵

170. *Anderson v. Paperworkers*, 641 F.2d 574 (8th Cir. 1981).

171. 781 F.2d 1393 (9th Cir. 1986).

172. *Id.* at 1399-1400. Judge Reinhardt reasoned that unions ought to be protected against such suits, and that members could protect themselves against union officer misrepresentations by including provisions in the union bylaws to require that the text of an proposed contract be furnished to the membership in advance of any vote. But he did not explain what relief would be available if the provisions were violated, such as by the furnishing of inaccurate terms, or by a union officer's misrepresentations about how the employer had agreed to construe certain ambiguous terms. The members would still be confronted with the difficulty of proving their damages, and the union could still avoid liability because of the speculative nature of the damages.

173. Because such misrepresentations are likely to be one-time events, which cannot be shown to be likely to recur, members will not be able to obtain injunctive or declaratory relief against repetition of the misrepresentations.

174. *See Quinn v. DiGiulian*, 739 F.2d 637, 648-52 (D.C. Cir. 1984). This decision contains a sound discussion of the standards for punitive damages under the LMRDA and the need to keep careful control over possible runaway juries. *Id.* Damages may be awarded for emotional distress if the union's "extreme" and "outrageous" conduct intentionally or recklessly caused that distress, a standard that is similar to punitive damages. *Baskin v. Hawley*, 807 F.2d 1120, 1133-34 (2d Cir. 1986).

175. The award may, instead, be made against the union officers themselves. Nevertheless, the officers may well turn to the local union for reimbursement of any damages awarded, which the plaintiffs may be unable to prevent politically or legally. *Cf. Bartosic & Minda*,

If compensatory damages cannot be awarded for lost contract terms, then the award of modest "presumed" damages,¹⁷⁶ or nominal damages might be an alternate form of relief.¹⁷⁷ If presumed or nominal damages are available, the plaintiffs would have a live controversy despite the speculative nature of the damages and the impossibility of obtaining equitable relief. Therefore, the action could not be dismissed, but the union would be protected against insolvency.

But even if union members are willing to undertake the risks of a lawsuit only to obtain little more than a declaration that their rights were injured, it is debatable whether, despite the reliance on symbolic remedies in other areas of labor law,¹⁷⁸ and in constitutional law cases,¹⁷⁹ the courts ought to be used to obtain such symbolic victories, which ought to be won politically. To be sure, plaintiffs' lawyers have strong incentives to obtain such relief, even if it is primarily symbolic, because they can rely on such victories to support an award of attorney fees.¹⁸⁰ But a militant unionist ought to think long and hard before filing suit for a symbolic victory in which only the lawyers will obtain tangible benefits. Even if there are some rare cases in which it may make good sense for supporters of the labor movement to pursue such cases, it is difficult to conceive of a line which permits recoveries in such cases and forbids them elsewhere. Therefore, if there is no basis for truly compensatory or sound equitable relief, the better rule may be to forbid merely nominal or presumed damages.

Union Fiduciaries, Attorneys & Conflicts of Interest, 15 U.C. DAVIS L. REV. 229, 307-20 (1981) (discussion of the law of reimbursement of legal expenses of union officials: when unions may do it, and when they must).

176. See *Memphis Community School District v. Stachura*, ____ U.S. ____, 106 S. Ct. 2537, 2545-46 (1986).

177. *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978).

178. For example, unions frequently seek from the NLRB the symbolic value of having an employer post a notice in which it confesses error and promises not to do it again. See Levy, *Unidimensional Perspective of the Reagan Labor Board*, 16 RUTGERS L.J. 269, 289 & n.119, 297 n.155 (1986).

179. *Carey v. Piphus*, 435 U.S. 247 (1978).

180. Attorney fees may be awarded against the union if the plaintiff has conferred some "common benefit" on the membership as a whole. *Hall v. Cole*, 412 U.S. 1 (1973). Inasmuch as fees may be awarded against a corporation for the establishment of liability in a shareholder democracy case, even if no relief has been obtained, *Mills v. Electric-Auto Lite*, 396 U.S. 375 (1972), it seems likely that union member plaintiffs can obtain a fee award for establishing a breach of their democratic rights under the LMRDA, even without obtaining any substantive relief.

IV. CONCLUSION

Experience in litigating right to vote cases in the Teamsters union suggests that, consistent with Professor Hyde's aspirations if not with his prognostications, courts are in fact willing to provide union members with effective legal protection for their right to fair procedures for the ratification of collective bargaining agreements. It is difficult to be certain why these cases have been successful, but I would single out three factors as the most significant — mediocre union leadership, fair-minded judges, and a dedicated rank-and-file movement.

The first factor, which has created an environment which compelled the litigation in the first place, is the poor quality of leadership at the helm of the Teamsters union. It is probably inevitable that there will be some disagreement about bargaining goals and some dissatisfaction with bargaining outcomes no matter how capable the union. However, the Teamsters union simply failed to inspire the confidence of its membership, at least among its core constituency in the trucking industry. It is scarcely the role of lawyers or judges to second-guess the terms of union-negotiated contracts, but when union leaders are repeatedly unable to persuade members to accept contracts the former have negotiated, as Presser has twice failed to do,¹⁸¹ it is difficult to avoid the conclusion that the leaders are doing an inadequate job.¹⁸² In Presser's case, inadequate leadership has been compounded by serious errors of judgment whereby he has sought to win, by trickery, votes which he was afraid, rightly or wrongly, that he could not win by being straightforward. In particular, the "quickie ballot" which he attempted to use to obtain ratification of the UPS contract simply had the effect of persuading many members that he was contemptuous of their role in union decision-making, and produced a serious legal defeat whose effects are still unfolding.

The second factor in the series of Teamsters cases is the dissidents' good fortune in drawing three excellent judges. In terms of the standard political spectrum, Judges Bryant, Richey and Gasch are by no means atypical, and their assignment would not produce either exultation or despondency on the part of most labor litigants. But what they had in common was a strong sense of fairness and

181. The first was the mid-term modification of the NMFA in 1983, and the second was the initial proposed carhaul contract in 1985.

182. The courts have not explicitly referred to the fact that the Teamsters leadership is so closely linked to organized crime, but an observer cannot help speculating whether that fact nevertheless plays a role in judicial treatment of Teamster defendants.

belief in democratic values, and a willingness to call the shots as they saw them, without undue concern about how their decisions might be received by the powers that be. When the union dissidents are appealing to core notions of fairness and democracy, and the leadership is so plainly acting with the primary objective of preventing effective opposition at the ballot box, a good judge is all that the plaintiffs need to prevail.

The final factor in the Teamster cases is the existence of TDU. This is true not only in the obvious sense that TDU members have been the plaintiffs, but even more important in that the existence of a vibrant dissident group gives the protection of democratic rights a practical significance. TDU's existence encourages lawyers to lend their assistance and encourages the courts to take democratic rights seriously, because they know that a favorable ruling will not simply be an academic expression of high ideals, but will be used by union members to advance Congress' objective of putting control of union affairs in the hands of the rank-and-file. It is, indeed, groups such as TDU that make the LMRDA, the principles of union democracy, and the litigation of contract ratification cases worthwhile. One can only hope that, with time and occasional assistance from the law, the reformers in the Teamsters union can serve not only as a barometer of dissatisfaction, as they now do so effectively, but can go on to wrest control from the corrupt, undemocratic and ineffective leaders who have made their struggle necessary.¹⁸³

183. As we go to press the Court of Appeals reversed Judge Gash's decision in *Carothers v. Presser*, holding that the LMRDA does not guarantee an unqualified right of access to a union's mailing list in a national contract ratification referendum, absent a particular finding of a violation of the LMRDA. *Carothers v. Presser*, 636 F. Supp. 817 (D.D.C.), *rev'd*, No. 86-5476, slip op. at 19 n.18 (D.C. Cir. May 12, 1987). The court left open the question whether denial of such access might contribute to the violation of the Act. *Id.*

