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A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights

Professor Atleson focuses on sections 101(a)(1) and 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 and their effect in providing a Bill of Rights for union members. Examining the legislative history of these sections and their present interpretation by the courts, the author concludes that the act's attempt to preserve the institutional interests of the union while insuring union members considerable freedom in the areas of speech and assembly has received insufficient analysis and appreciation. The author attempts to develop standards to accommodate institutional concerns about libel, factionalism, and dual unionism with Congress' concern about individual rights.

James B. Atleson*

I. INTRODUCTION

Individuals can find the security and protection that are prerequisites for freedom only in association with others—and then the organization these associations take on, as a measure of securing their efficiency, limits the freedom of those who have entered into them.1

Joint undertakings by individuals in face-to-face associations are necessary to control or offset the impersonal economic forces affecting individual freedom. As Dewey implied in the quotation above, however, private associations demand a measure of individual surrender to the established aims of the organization. Although some surrender of individual whims and desires is required, the extent to which associations can demand subservience is a serious and continuing question. When the private organization begins to take on the importance and power of public governments in the lives of its members, a new conflict develops. The loss of individual freedom within private associations creates a threat to the freedom-producing goals of pluralism itself, and establishes the basis for governmental intervention to protect private democratic rights in the name of pluralism.

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1. DEWEY, FREEDOM AND CULTURE 166 (1939).
The irony of this intervention should not obfuscate its inevitability.

The tension between the ideal pluralistic society in which independent power centers exist to counterbalance the power of the state and the interests of the state in guaranteeing fair play within these power centers is reflected in the long debate concerning union democracy. Those advocating the error, as well as the futility, of governmental intervention into intra-union affairs were rebuffed by those feeling that intervention was required to protect democratic rights in those private institutions exerting great economic power over the lives of men. This long debate need not be repeated here, for federal intervention to protect democratic, participatory rights in union affairs became a reality with the passage of the Labor Reform Act of 1959.²

Participatory rights in internal union affairs, as in governmental affairs, consist of a number of different rights and involve the entire decision making process. Speech and assembly are crucial, but so are the right to vote and the right to hold the governing body accountable to the membership.

The Labor Reform Act of 1959 provided union members with rights considered necessary for democracy in unions, and there is a marked parallel between the rights granted and the federal Bill of Rights. This Article will focus upon the scope of freedom of speech and assembly protected by sections 101(a)(1)³ and 101(a)(2).⁴

Each section will be analyzed in terms of its scope and purpose. Given the paucity of judicial decisions and lack of meaningful legislative history, many of the problems raised, both theoretical and practical, have not arisen in the course of litigation. Since ambiguity and uncertainty tend to deter members from seeking legal counsel, and counsel from advising litigation, the lack of judicial activity is not a reflection of the importance of the endeavor.

The right to question and criticize union officers must be protected to guarantee democratic functioning. The right to vote is hollow without the supporting right to communicate, debate union policies and criticize officers' conduct, and, of

course, the right to meet with those holding similar views and form opposition groups. Because emphasis will be placed upon the interpretation of statutory provisions, and judicial decisions are limited, reference to cases dealing with other rights granted by sections 101(a)(1) and 101(a)(2) will be necessary.

Title I was not considered by Congress to be a comprehensive code of rights for union members, but, rather, a statement of minimum standards. Furthermore, Congress was aware that the act supplemented an existing body of state law and expressly considered this extensive development a concurrent source of rights and remedies.5

Although the Taft-Hartley amendments of 1947 sought to regulate internal affairs, controls were indirect and their effect upon the union-member relationship was slight.6 Congress was primarily concerned with protecting employment rights, especially the right to work as a non-union member.7 The doctrine of fair representation provided protection against grosser forms of discrimination, but only state law regulated intra-union conflict and democratic participation.

The LMRDA approached specific labor problems in a manner radically different from that taken by prior legislation. The rights granted are stated in terms of a citizen's democratic rights, and each member's rights under Title I are to be enforced by private litigation. Protection of these rights was felt to be the minimum necessary intrusion into union self-government. By analogy of private to public governments, it is recognizable that it no longer suffices to protect individual rights solely from governmental power because the concentration of economic power in our society dictates individual protection whether that power


7. Id. at 281. Although NLRA section 8(b)(1)(A), 61 Stat. 136 (1947), 29 U.S.C. §§ 151-66 (1964), proscribed union restraint or coercion of employees, the section expressly does not “impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.” Thus, union discipline was not hampered by the NLRA, and common law standards provided the only guarantees of fair treatment. The NLRA did, however, separate union membership from the employee's retention of his job. Under sections 8(b)(2) and 8(a)(3), expulsion from union membership in a union shop situation may not lawfully result in the employee's loss of his job as long as he is willing to tender uniform and nondiscriminatory fees and dues.
is held in the public or private sphere. This analogy is more than an analytical tool, for private decisions often are as critical as public ones. Indeed, "the interests which are the subject of determination and regulation within the union organization are among those which come closest to home."

II. A BRIEF LEGISLATIVE HISTORY

The legislative history of Title I has been discussed in depth elsewhere, and thus will only be summarized here. Legislative debates, unfortunately, shed little light on the questions and problems raised by the statute. Even the humorous admonition to look at the statute only if legislative history is ambiguous is not helpful since the statute itself is vague and contradictory.

In the late 1950's, the initial bills for internal union reform focused primarily on election and financial controls. The serious disclosures of the McClellan special committee hearings dealt with the misuse of union funds for private gain, conflicts of interests, and "sweetheart" arrangements between union officials and employers. The subversion of democratic practices in unions

12. The Select Committee on Improper Activities in the Labor Management Field was composed of members of the Senate Subcommittee on Labor of the Labor and Public Welfare Committee, the proper investigator of union affairs, and McClellan's Permanent Subcommittee on Investigations, which had made preliminary forays as early as 1956. Teamster opposition to the Investigations Subcommittee and static from the Subcommittee on Labor, assumed to be more sympathetic to labor, prompted McClellan's Solomon-like proposal to form a new committee composed of members of the two standing committees.
was a "wholly subordinate theme." 13  "[E]vidence pointed to but a handful of irregular or fraudulent union elections, and only scattered instances of arbitrary expulsions, unfair trial procedures, or encroachments on the democratic rights of union members." 14

After the subcommittee hearings on related bills had terminated, Senator McClellan introduced a comprehensive measure including, as Title I, a bill of rights for union members. Because of McClellan's prestige in the field, the subcommittee reconvened to consider the measure. 15 A bill was reported out of committee, but without the guarantees of individual rights. 16 During the Senate debate on the proposal, Senator McClellan offered as an amendment a "Bill of Rights" embodying the rejected first title of his bill. 17 The combination of McClellan's prestige, the difficulty of voting against a "Bill of Rights," presidential aspirations of various senators, and ignorance of the significance of McClellan's amendment led to its passage by one vote. 18

Opponents of the bill met during the next two days to prepare a substitute. They feared that lower courts would give the sweeping language of the Bill of Rights its full literal mean-

14. Id. at 274.
15. See Rothman, supra note 10, at 205.
16. S. REP. No. 187, 86th Cong., 1st Sess. (1959); reprinted in 1 LEGISLATIVE HISTORY OF THE LMRDA or 1959, at 397. [Hereinafter cited as LEG. HIST.] Indeed, the committee rejected extensive guarantees and detailed procedures which would interfere with union self-government. Id. at 7.
17. 105 CONG. REC. 6476 (1959).
18. 105 CONG. REC. 6745 (1959). The breadth of McClellan's proposals are exemplified by the following three sections:

Sec. 101. (a) (1) EQUAL RIGHTS.—Every member . . . shall have equal rights and privileges . . . including identical voting rights and equal protection of its rules and regulations.

Sec. 101. (a) (2) FREEDOM OF SPEECH.—Every member . . . shall have the right to express any views, arguments, or opinions regarding any matter respecting such organization or its officers, agents, or representatives, and to disseminate such views, arguments, or opinions either orally or in printed, graphic or visual form, without being subject to penalty, discipline, or interference of any kind by such organization.

Sec. 101. (a) (3) FREEDOM OF ASSEMBLY.—Every member . . . shall have the right to meet and assemble freely with any other members for the purpose of exchanging views and reaching decisions with respect to matters pertaining to such organization or its officers, agents, or representatives, without being subject to penalty, discipline or interference of any kind by such organization.
They were joined by chagrined southern supporters who feared that giving the Secretary of Labor authority to protect private rights would provide an embarrassing precedent in future civil rights debates. Although Kennedy supporters probably had the votes to remove the Bill of Rights provisions, political realities suggested a modified substitute. Thus, one vote had successfully changed the whole thrust of labor reform legislation from regulation of financial practices to protection within unions.

The substitute was introduced by Senator Kuchel. “The draftsmanship left much to be desired, perhaps because of the haste and stress, the number of participants, and the priority of tactical acceptability over nicety of expression.” Nevertheless, the amendment in substance was enacted into law as Title I. The substitute specifically enumerated subjects of federal protection and recognized reasonable rulemaking and disciplinary powers of unions.

Senator McClellan’s bill had guaranteed equal rights and privileges without detailing the rights included or their scope except that the rights were to include “identical voting rights and equal protection of the union’s rules and regulations.” In contrast, the Kuchel substitute limited the equal rights provision to four specifically named rights and recognized the right of unions to pass reasonable rules and regulations limiting those rights. No explanation was given for narrowing the range of the provision or for limiting the provision to the rights specified. Although a number of Senators stated that enumeration of rights did not exclude other rights, these “other rights” can only refer to rights protected by state law under section 103. The Kuchel substitute removed the broad immunity from penalty, discipline, or interference of any kind, recognized a union’s authority to pass reasonable rules for the conduct of meetings, and permitted union discipline for conduct violating obligations owed to the union or interfering with the union’s legal or contractual obligations.

“[T]actics also triumphed over sound draftsmanship” in the House. The Landrum-Griffin bill, which eventually passed

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19. See Cox, supra note 10, at 832.
20. Id. at 832-33.
21. See Summers, supra note 13, at 274.
22. Cox, supra note 10, at 833.
24. 2 LEG. HIST. 1294.
25. See 2 LEG. HIST. 1231-34 (remarks by Senator Kennedy).
the House, incorporated the Senate-passed "Bill of Rights." The final House bill was approved on the floor as a substitute to a committee-approved bill, and the report of the house committee contained almost no discussion concerning the basic provisions of its bill. Thus, in neither house was careful committee consideration given to the problems of internal union democracy or the wording of appropriate federal legislation.

Reading the unenlightening debate in both houses supports the analysis of Professor Smith:

The record of the debate in Congress reveals a deliberate, if not extraordinary, effort to becloud, or clarify, or prejudge, as the case may be. The report filed by the house managers of the conference [House conferees] contains much that is confusing as well as clarifying. Thus, resort to legislative history will at best be difficult, and may serve more to obscure than to illuminate legislative intent.

Turning to the statute for assistance is similarly frustrating. Since Title I was presented from the floor, it contains the purposeful ambiguities and technical compromises thought necessary to insure passage. Moreover, it was hastily drawn to modify what had become an inevitable individual rights section of the act. Consequently, the "courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words."

The known problems of statutory interpretation take on gargantuan proportions when attempting to find the underlying rationale in sections passed by diverse groups with varying purposes and interests. Common denominators turn out to be those pleasant sounding general principles which cannot decide concrete cases.

III. SPEECH AND ASSEMBLY RIGHTS UNDER SECTION 101(a)(1)

Section 101(a)(1) has been assumed to be an equal protec-

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27. Since the two versions of the Bill of Rights were identical, the conferees had no acknowledged power to alter the language.
29. Smith, supra note 10, at 197-98.
30. Cox, supra note 10, at 852.
31. Equal Rights.—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.
tion provision, guaranteeing equal application of union bylaws and constitutional provisions. The purpose of the section is to provide each member with an equal voice in the decisions which so vitally affect his working life. Thus, the section outlaws second-class citizenship—class A and B members, junior and senior members, or auxiliary and associate members. Furthermore, the right to participate in the decision making process is granted. However, some difficult, basic questions exist which have either not been faced or, if faced, not adequately analyzed.

There is no doubt that Congress primarily conceived of section 101(a)(1) as an equal protection clause. Thus, the section probably does not grant any of the enumerated substantive rights, but merely guarantees equal application of certain rights granted by union laws. Those rights are limited to the four specifically mentioned in the section and are subject to reasonable limitations.

In one of the most striking cases to date, Ragland v. UMW, the District Court of Alabama held that members of United Mine Workers, District 50, had no right to vote or otherwise participate in the United Mine Workers Convention because their charter specifically denied them the right. Although the case primarily dealt with voting and participatory rights, the approach of the court to the statute is instructive.

The significant portion of the District 50 charter reads:

Said district, its members and subordinate divisions shall acquire no rights in the funds, or to participate in the election or conventions of the United Mine Workers of America, but shall have their own autonomy with respect to their elections, conventions and wage negotiations.

In 1960 plaintiffs complained that the international constitutional convention of the mine workers would soon be held and, as members in good standing of local unions affiliated with District 50, section 101 conferred equal rights within the international to nominate candidates and vote, to attend membership meetings, and to participate in the business of such meetings. The Ragland court rejected the plaintiff's position on a number of

34. 188 F. Supp. 131 (N.D. Ala. 1960).
35. See id. at 132.
grounds. In the course of its opinion, the court specifically pointed out that the equal rights provision was not intended by Congress:

[to] ... change the internal organizational structure of unions but granted rights and privileges to certain locals and members that were not conferred by the constitution and charter under which the unions and locals operate. It is the opinion of the Court that this Act was intended for use in those instances where 'members' as opposed to 'provisional members' are threatened with a deprivation of their rights that were previously afforded or granted to them under the unions' constitution and under their charter. In other words, the Act is designed to protect the right to vote and participate where that right exists and not for the purpose of conferring the right to vote and participate in cases where it has not previously existed or should have existed.36

The act, however, does contemplate modifications in the existing "internal organizational structure" of some unions. As mentioned earlier, many unions arbitrarily segregate members by various designations and euphemisms. One purpose of the section is to prohibit such arbitrary classifications which operate to deny basic democratic rights to members.37

The court's emphasis on the fact that rights were never "given" is regrettable because plaintiffs often have never been given the right allegedly possessed by other persons similarly situated. Thus, a typical equal protection situation is one in which the union grants a right to A but not to B. Surely the section must operate in this case. There is no significant difference in a situation in which a union bylaw gives a particular right to A and B but the union officials refuse to permit B to exercise that right, and a situation in which a right is given to A alone. The operative effect in both situations is the same: plaintiff is denied a right granted to or possessed by other persons similarly situated.

The court may well be referring to another aspect of the problem in rather abstruse language. If the equal rights section is read literally, there would be no violation in Ragland because all District 50 members are treated alike—no discriminatory classification scheme was employed. Thus, although there

36. Id. at 133.
37. Cox, Law and National Labor Policy 102-03 (1960). The court's somewhat related view that members had "acquiesced" in their inferior status for twenty years is also unpersuasive. Prior to the LMRDA, state court or internal union appeals would have been futile. Indeed, the LMRDA was passed to remedy many long-standing practices. Section 401(d), for instance, requiring periodic elections for officers of intermediate union bodies, effectively ends the traditional appointment process used for UMW districts and Teamster conferences.
may be a denial of rights in some sense to all members of District 50, there is no denial of equal rights to the plaintiffs under section 101(a) (1). This problem, however, could have been avoided quite handily in the Ragland case, because, as members of the United Mine Workers, plaintiffs are arguably entitled to the same rights as other UMW members. Since these rights were given under the UMW International constitution and by-laws to other members in other locals, there is a clear problem of discriminatory classification. Although plaintiffs may have equal rights with other members of District 50, they certainly do not have equal rights in relation to other members of the United Mine Workers. The lawmaking body is not District 50 but the International, and, therefore, relevant plaintiffs should be compared with other members of the United Mine Workers and not simply with members of District 50. Although a heterogeneous membership may necessitate some classification, election of International officers affects District 50 members as directly as other Mine Worker members.

The equal rights problem is not so easily skirted when the challenged provision is found in the local's constitution or by-laws. In this situation, no group of members under the same regulation is treated differently. The courts have taken two distinct approaches. Some courts limit the statute by requiring classification within the constituent group, while others apply the section in similar situations without even referring to the question.

The former approach is reflected by the Cleveland Orchestra Committee case. Plaintiffs, calling themselves the Orchestra Committee, brought a class action on behalf of the Cleveland Orchestra musicians. They claimed a denial of equal rights because they were not allowed to vote on collective bargaining agreements entered into by the union's executive committee with their employer. No right of ratification was granted by the union's constitution or by-laws, although these governing documents could be amended by a majority vote at any regular meeting.

Since many musicians are employed by a variety of employers for short periods, traditional collective bargaining is impractical. These members are governed by a wage scale, a

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38. Labor organization as defined in § 3 of the act includes locals as well as nationals and internationals. Thus, an international can violate Title I as can a local labor organization.
unilateral statement of the basic, minimum terms under which musicians will not work. The wage scale was agreed upon by the general membership of the Cleveland local. Symphony musicians, on the other hand, were regularly employed and subject to collective bargaining agreements made by the union officials.

On these facts, the district court held that the statute does not grant the right to vote on collective agreements unless the agreement becomes the business of a membership meeting. The obligation to submit contracts to the membership for approval or rejection, the court found, was not specifically granted by the section. Thus, like Ragland, the court held that the right claimed to be violated was not protected by section 101. The court also implied, in apparent agreement with Ragland, that the right alleged must stem from the union bylaws and in this case no such right was granted. Plaintiff, of course, was arguing that the right was granted to some members but not to members of the symphony orchestra.

The district court decision was affirmed on a slightly different ground. The Sixth Circuit found no parallel between the wage scale and the contract because the latter was not a collective agreement negotiated by the union on the members’ behalf. Furthermore, the musicians may make individual contracts with the orchestra management as long as such contracts provide at least for the minimum scale for symphony musicians provided by the contract. Thus, the court seemed to hold that the symphony members suffered no harm or injustice.

It seems odd, however, to say that members suffer no harm by not being able to vote on a contract because they can individually modify the contract with their employer. Yet, the court points out that a member may make a separate contract for higher pay than that provided in the contract, and a symphony musician and one who has performed only under the wage scale may both change the categories under which they work. All this sounds very strange and hearkens back to an earlier age in labor’s history. Plaintiffs, however, were not arguing that their contract or the method of its negotiations neces-

40. Although members may participate in the deliberations of a meeting, they would not necessarily have the right to act upon a collective agreement even though the subject were made part of a meeting’s agenda. Union rules may still prevent expression of support or rejection by members.


42. See also Fogg v. Randolph, 52 L.R.R.M. 2215 (S.D.N.Y. 1963).

43. 303 F.2d 229 (6th Cir. 1962).
sarily damaged them financially or discriminated against them by creating poor working conditions; they desired a significant opportunity to affect their working conditions. Since symphony musicians no doubt represent a minority of union members, their ability to influence negotiations may be limited.

The court's approach echoes the traditional notion, implemented by the common law as well as Congress, that democratic, participatory interests, if worthy of legal protection at all, deserve a much lower position on the hierarchy of values than protection of an employee's economic interests.

Finally, almost as an afterthought, the circuit court mentioned that the equal right to approve or reject a contract is not specifically given under section 101(a)(1). It is not unusual for contracts to be negotiated without membership approval. This is merely an extension of the analogy of union government to representative government. The bargainers are essentially lawmakers creating with the employer the laws under which the members will work. The key point in the case, however, is that the right to vote upon a collective bargaining agreement is not protected by section 101(a)(1). Therefore, even if there were a distinction or difference in treatment, the distinction would not relate to any one of the four specific rights granted by the section. The act does protect equal rights in "elections or referendums," but no referendum was held on the symphony contract. The court, however, overstates the issue by finding no statutory right to ratify collective agreements, for this right, as an equal right, is protected if other union members can vote upon the agreement. That no substantive right is given by sec-

44. In a concurring opinion, Circuit Judge O'Sullivan found that musicians in Cleveland were denied equal rights and were discriminated against. He concurs in affirmance, however, because the section on which plaintiff relied did not provide protection against such discrimination. Judge O'Sullivan pointed out that for all practical purposes the term "wage scale and directory" became a part of the contract between the union musician and his employer, and such an arrangement was equivalent in substance to a collective agreement. Accordingly, all union members other than musicians during their performance in a symphony orchestra, have some control over the terms and conditions of their employment. Id. at 233.

45. Whether or not members can properly evaluate a collective agreement without having participated in the negotiations is a serious question. A vote taken with no real understanding of the contract terms is of no benefit to members. In explaining the overwhelming rejection by airline machinists of a negotiated agreement in July, 1966, IAM officials stated that only "terse telegrams were sent to the locals and the vote was taken less than two days after the agreement was announced." Washington Post, Aug. 16, 1966, p. 1, col. 1.
tion 101(a)(1) except the right to equal treatment in relation to the four specified rights is a literal, although probably correct, interpretation. The opinion implies, however, that the opportunity to participate in a referendum on a collective bargaining agreement is not protected because it is not specified as a right in the statute. Yet the act prohibits discriminatory treatment in any election or referendum; there is no limitation as to the subject matter of the referendum. The question under the act is whether plaintiffs have been arbitrarily denied a right to vote upon a contract while other members possess that right. Moreover, it should not be important that two different referendums are involved, i.e., the wage scale and the collective bargaining agreement.

A clear violation is presented when unskilled workers, for instance, cannot vote upon a contract which applies to all members, unskilled and skilled. The violation is no less clear if two contracts are customarily negotiated, one for each group of employees, but only skilled workers may vote to ratify or reject the contract applicable to them. Thus, it is not sufficient for the court to find no violation because no member could vote on the collective bargaining contract. There is another group of members in the same local, the nonorchestra musicians, who do have control over the wage rates and other working conditions which apply to them. This would seem to be a classification, although not necessarily an unreasonable one.

Admittedly, the wage scale represents a necessary approach for musicians working for short periods for different employers. The crucial fact, however, is that the scale and the contract establish wages and working conditions for musicians. In one case musicians work under conditions unilaterally agreed upon, in the other they work under a contract with an employer. Although each arrangement is dictated by industry demands, one group of members may not vote upon the conditions regulating their economic life. The rationality of the two different approaches does not answer the equal protection claim raised by plaintiffs.

Since the court assumed that the right to reject or approve a contract was not protected by the section, the reasonableness of the rule was not considered. However, no rule could be reasonable and yet deny equal rights. Considering the proviso, "equal rights" must refer only to a difference in treatment relating to a specified right set out in section 101(a)(1). This seems present in the Cleveland Orchestra Committee case. Thus,
the proviso is relevant, and the question becomes whether the denial represents a reasonable regulation. A rule which denies equality of voting is not necessarily invalid, and the proviso recognizes that some classification may be necessary. For example, it may be necessary in a local representing employees from different plants to limit a strike vote or a vote involving a collective bargaining contract to only those employees directly affected. In a mixed member union, containing skilled and unskilled workers, or industrial and construction workers like the IBEW, classification may be necessary. Pure equality would actually weaken self-determination by adding the voting power of workers with little interest in the merits.\textsuperscript{46} Although unions are often viewed as unified bodies designed to promote common aims through collective action, many unions are confederations of competing interest groups seeking individual goals.\textsuperscript{47} The serious clash of interests represented by jurisdictional disputes are masked, although still present, by the industrial union structure. Thus, "direct concern" provisions in bylaws and constitutions may be reasonable, although general voting and nonvoting classifications, for instance, will be invalid.

In summary, a classification scheme was present in Cleveland Orchestra because one group of employees was not allowed to reject or approve a binding agreement dealing with their wages and working conditions. The rationality of the two approaches is granted, but the rationality of denying only symphony musicians the right to vote on their collective agreement is doubtful. The "reasonable rule" question was not reached by the court, however, because the court read section 101(a)(1) to exclude the right to participate in a referendum on a collective agreement. Yet, the equal right to vote in any referendum is protected, and that right was infringed. To argue that no referendum was held on the contract merely stresses form over substance.

Suppose, however, that no member of a local may vote on the collective bargaining contract.\textsuperscript{48} There would be no viola-
tion under the *Ragland* approach since plaintiffs were not given a right to vote and, more to the point, no other members were given this right either. Is there any less a denial of rights when particular members can vote than when no members can vote? The infringement is present in both cases. In either case, it is no consolation to the member harmed that others similarly situated may have a right which he is denied.

If the section is solely an equal protection provision, then it guarantees equal application of rights provided in union constitutions and bylaws, rather than by a federal statute, and permits reasonable differentiation among members in regard to those specific rights. If the right has been denied to every union member, then there has been no invidious classification and, thus, no denial of equal rights. The majority of lower courts have taken this position. Thus, the section does not say that all members have the right to participate in a union meeting, but only provides that if the right to participate is given, it must be given to every member of the union. It is probably in this sense that the *Ragland* court said the right must first exist before it can be enforced.

To apply the section when all members are treated alike, on the other hand, implies that the section creates external standards. In other words, the section grants the right to vote, for example, even if the right is not granted in union laws and even

bylaws" is suspended. Thus, reasoned the court, members had no right to participate in a referendum. Indeed, precedents would have permitted the court to say even a clear violation of the union's constitution passes muster since no member voted on a referendum. Even if a right existed, § 101(a) (1) is inapplicable since there is no loss of equality.

Although the lack of classification might well have spelled plaintiff's defeat in any case, the court's use of a statutory definition is open to question. The statute does not say that every trusteeship suspends all of a local's autonomy, although this is permissible in certain cases. Surely, a union would be permitted to limit the loss of local autonomy. Thus, the court should have discovered the degree of autonomy suspended in this situation by a trusteeship. Indeed, since the reasons for imposing a trusteeship are limited by statute, it would seem reasonable to permit the loss of only those participatory rights which have been so abused as to justify a trusteeship.

Some courts, however, have found violations of section 101(a)(1) even though all members of the local were treated alike. By implication, these courts have added the words “rights and” to the “equal rights” phrase, thus protecting the rights mentioned in section 101(a)(1) even though all members of the local suffer the same infirmity. Under this approach, the section is really a grant of rights rather than merely an equal protection provision, and no classification scheme is necessary to create a violation of the section.

In Young v. Hayes, the court granted an injunction restraining the union from putting into effect amendments to the International constitution approved by the general membership. The proposed amendments had been accompanied by a circular which included a statement by the International's president to the effect that the amendments were necessary because of the LMRDA. The ballot was divided into Part I, containing forty-seven amendments listed under Proposition Four, and Part II, consisting of 549 amendments separately listed for voting. As to Part I, Proposition Four, plaintiff alleged that the membership was not afforded opportunity to vote upon each of the forty-seven amendments separately as required by article 23, section 4, of the International constitution.

Article 23, section 4, requires that a ballot be printed in the

50. One writer has assumed that this is obviously the proper interpretation of the statute. Rosenberg, Interpretive Problems of Title I of the Labor-Management Reporting and Disclosure Act, 16 IND. & LAB. REL. REV. 405 (1963). “Concern of Congress, however, was to insure that certain rights be granted to all union members, not just to insure equal treatment of all members.” Id. at 408. But see Aaron, The Union Member's 'Bill of Rights': First Two Years, 1 IND. REL. 47, 55 (1962); Dunau, Some Comments on the Bill of Rights of Members of Labor Organizations, N.Y.U. 14TH CONF. ON LABOR 77, 81 (1961).

51. See, e.g., Young v. Hayes, 195 F. Supp. 911 (D.D.C. 1961). Furthermore, courts have protected against infringements when only individual members were involved. Thus, § 101(a)(1) was held to have been violated where officers failed to keep order at a meeting in which plaintiff had the floor, was invited to fight, and was threatened with punishment. Allen v. Local 92, Iron Workers, 47 L.R.R.M. 2214 (N.D. Ala. 1960). The court could justifiably have assumed, however, that all members would not receive the same treatment.


53. Id. at 914-15. Plaintiffs also alleged that the delegates to the convention, who had initially approved the amendments, were unaware that the forty-seven amendments would not be submitted individually. The report of the Committee on Law of the international prefaced the body of the ballot by stating that several propositions had been grouped “for the convenience of the membership.”
form of a referendum ballot and arranged in such a manner that shall permit each subject to be voted upon separately. The court, finding that more than one subject was included in Proposition Four, stated that

the spirit, if not the exact wording of the Landrum-Griffin Act, contained in the so-called Bill of Rights of Members of Labor Organizations, section 101(a)(1), would seem to require the submission of the amendments believed to be needed in order for the Union to conform to the provisions of the Act, on a separate amendment basis... or some other grouping less comprehensive than trying to encompass the entire legislation in one proposition.\textsuperscript{54}

The court also found that the use of the word “mandatory” and “necessary” in the ballot’s preface constituted an erroneous interpretation of the LMRDA and imparted an almost forced choice method of voting. For this reason alone the court considered the ballot not to be in accordance with the union’s constitutional article 24, section 3: “compiled in the form of a ballot suitable for submission for the membership through the referendum.”

The law used by the court is obviously the union law, but the court interpreted union law to protect democratic interests. By interpreting and enforcing the union bylaws, the court followed an approach used by state courts under the common law. Section 101(a)(1), however, does not empower federal courts to enforce constitutional and bylaw provisions as such; rather, it empowers courts to require equal application of certain specific rights.

The court apparently agreed with other federal courts that the rights enforced under section 101(a)(1) arise from union constitutional provisions or bylaws, if at all, and not from the federal statute. By finding that section 101(a)(1) was violated in this case, however, the court interpreted the section to protect the right to vote, rather than merely the equal right to vote. The court veered sharply from the proposition that the section is only applicable when there are invidious classifications.

One objection to this approach is the language itself: “every member shall have equal rights.” Congressional reference to the section, although hardly illuminating, stresses the equal rights phrase. Furthermore, if an affirmative grant of rights were intended, section 101(a)(2) provides an appropriate model. The difference in wording strongly suggests a difference in meaning. There is some statutory overlap, as infringements

\textsuperscript{54} 195 F. Supp. at 915-16.
of speech under section 101(a) (2) may also infringe the section 101(a) (1) right to "participate." But the sections are not completely coterminous. Limiting section 101(a) (1) to equal rights implies congressional design to provide significantly greater protection to speech and assembly under section 101(a) (2) than to the rights to vote, nominate, and participate in meetings under section 101(a) (1). Why this should be so is unclear, and counsel may be expected to attempt to broaden the scope of section 101 (a) (1) by stressing the limiting impact of literal interpretation.

Under an equal protection analysis the "reasonable rules and regulations" clause does not permit restriction of the specific rights mentioned in the section. Rather, the clause permits limitations on the equal rights obligations. The function of the proviso is to permit some differentiation among members in certain situations. The proviso in section 101(a) (2), on the other hand, is a limitation on the rights themselves, because the section grants substantive rights. Thus, the function of each proviso is quite different. A plaintiff under either section may claim he has been denied a right. To violate section 101(a) (1), other members must possess that right; section 101(a) (2) may be violated, however, even though all members are similarly affected. The proviso in section 101(a) (1) may require a greater burden of proof to sustain a restrictive rule since, presumably, the right in question is granted to some members and not others. Rationality depends upon the function served by the application of that test in a particular situation. Thus, the scope of each "reasonable limitation" clause may not be the same.

In a sense, section 101(a) (1) does create substantive rights. Assume a bylaw which grants a specific right to A but denies the right to B. Irrespective of whether the rule is reasonable, there is clearly a denial of equal treatment.\(^5\) The right denied is in a sense a union right, a right given by the union to A. However, the courts will probably require the union to give B the same right that A has been given. Requiring equal application compels the union to expand the right or remove it alto-

\(^5\) Ragland, however, implies that there is no violation in this case because B was never given a right; therefore, B could not be denied a right. But this assumes that the action under § 101(a) (1) is merely to enforce the union constitution and bylaws, in other words, merely a repetition of existing rights under the laws of nearly all states. However, it is clear that the section is aimed at more than merely enforcing union bylaw provisions. The fact that the section assumes that some bylaws will be struck down implies an extension from the common law contract approach.
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tgether. If it chooses the former, B in reality is granted a right by section 101(a)(1).

The Supreme Court has apparently put to rest the notion that section 101(a)(1) grants affirmative rights in addition to equal protection. In *Calhoun v. Harvey*, the Supreme Court was faced with a section 101(a)(1) challenge to two union rules: a self-nomination requirement and a rigorous eligibility requirement for union office.

The self-nomination rule fell well within the scope of the rights protected by section 101(a)(1), but the Court found that the rule was not discriminatory. Thus, the question of the rule's rationality was not raised. The Court held that the eligibility requirement could only be challenged under Title IV, if at all, thus limiting the reach of section 101(a)(1) in regard to subjects clearly within its literal scope. The section guarantees the right to nominate candidates, but the Court held that that section did not give a right to nominate *any person*. Although it would seem reasonable to argue that eligibility requirements may infringe the right to nominate by severely limiting the class of those who may be nominated, the Court decided on a more simplistic interpretation.

In discussing the equal rights provisions, the Court said that it is:

... no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote. And Congress carefully prescribed that even this right against discrimination is "subject to reasonable rules and regulations" by the union. The complaining union members here have been ... denied no privilege or right to ... nominate which the union has granted to others. They have indeed taken full advantage of the uniform rule limiting nominations by nominating themselves for office. It is true that they were denied their request to be candidates, but that denial was not a discrimination against their rights to nominate, since the same qualifications were required equally of all members. Whether the eligibility requirements set by the union's constitution and bylaws were reasonable and valid is a question separate and distinct from whether the right to nominate on an equal basis given by § 101(a)(1) was violated.

Thus, the section seems to apply only when rights are

58. Self-nomination was the only manner in which a name could be placed before the membership. The eligibility rule, enacted seven months before the election, required that candidates for office, except the president, must have belonged to the union for five years and served 180 or more days of sea duty in each of two years during the three-year period before the election.
59. 379 U.S. at 139. (Emphasis added.)
granted to some and denied to others, rather than when the limitation applies to all members of the union. Yet, this would provide a handy means to accomplish what would otherwise be done by "class" legislation. The Court assumed that the self-nomination rule was possibly a limitation on the right to nominate, but, because the rule applies to all members, there was no violation of the section. Similarly, since all members were faced with a proposal containing forty-seven amendments in Young v. Hayes, no members were denied rights granted to others.

However, the Court may have left the door slightly ajar for future backtracking. Referring to the court of appeal's combination of the two rules to find a violation of section 102, the Court stated that it did not agree that "jurisdiction under section 102 can be upheld by reliance in whole or in part on allegations which in substance charge breach of Title IV rights." Of course, the Court had to test the self-nomination rule by itself under section 101 (a) (1), but its disagreement with the lower court and its finding that the rule was not unreasonable may have had a substantial impact upon the Court. Plaintiffs had used the self-nomination rule, and no direct harm stemming from this rule was apparently shown. The Court, furthermore, was dealing with the right to nominate, also protected by Title IV. It is open to the Court to limit its decision in relation to the self-nomination rule to a holding that the right to nominate, since it is also protected by Title IV, is deserving of less protection in a Title I section than the rights granted exclusively by section 101 (a) (1).

A. Scope of Section 101 (a) (1) Speech and Assembly Guarantees

Assuming that section 101 (a) (1) guarantees equal treatment as to certain basic rights under union law, the next inquiry focuses on the scope of these rights. Even if unequal treatment is present, the denial must fall within the "rights" section of the statute. The provisions can be narrowed almost to the vanishing point by limiting plaintiff's claim to its precise factual contours. In Horn v. Amalgamated Ass'n of Street Ry. Employees, for instance, plaintiff alleged that the union accepted or caused a change of seniority provisions in an existing bargaining agreement without membership approval, that the union

concealed this fact at a subsequent meeting when a vote was taken to ratify such change, and the union misled the members as to the import and effect of the proposition voted upon. In denying the claim, the court noted that the plaintiff did not allege a deprivation of *equal rights* and also failed to allege any specific *rights* granted by the section. Although the holding could have been limited to pleading deficiencies, the court went further to hold that the acts did not violate a right specifically set forth in the statute. It would seem, however, that an allegation that officers misled voters as to the effect of a proposal would be sufficient to allege a denial of the right to vote. The right to vote is empty indeed if members do not know what they are voting upon. Again, a court has added gratuitous statements which have the effect of limiting the statute.61

A broader view of the statute was taken in *Young v. Hayes*, already discussed in relation to the classification question. The district court found the right to vote violated when forty-seven amendments were grouped under one proposition for voting. Interestingly, the court referred primarily to the union's constitution, rather than the statute. Plaintiffs' claim was very similar to that in *Horn*: members were confused or misled and, because of that, their right to vote was infringed. Although the court referred to the "spirit, if not the exact wording of the Landrum-Griffin Act," it seems clear that serious misrepresentation can infringe a member's right to vote. In *Young*, the misleading nature of the ballot "imparted an almost forced choice method of voting." Although the court found that the union had not complied with its constitution, it did add that the right to vote extended in the act is not a mere naked right to cast a ballot. Thus, the court relies to some extent on the statute which gives it jurisdiction.

The niggardly interpretation of Title I given by many federal courts is interesting in light of congressional concern. Principles of autonomy and self-regulation which restrained the hand of state courts for so long have received great deference by federal courts despite clear statements of public policy in the statute. Although Congress was indeed concerned with minimum intervention into union affairs, institutional interests were recognized in sections 101(a)(1) and 101(a)(2). Institutional interests are overemphasized, however, when employed to limit

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61. Note that the alleged infringement of rights affected each member of the union, thereby removing the action from the scope of § 101(a)(1) because no classification was involved.
the scope of the rights granted. Indeed, before the court tests
the rationality of the restriction under the "reasonable rules"
clause, plaintiff must hurdle imposing obstacles: the denial of a
101(a)(1) right must involve a classification scheme.

Even if a court does consider the rationality of a union's
restrictive rule, interpretative issues pose uncomfortable prob-
lems. Assume a member has been rebuffed in his attempt to
place a motion before the membership. Without more, a prima
facie case would seem established that his right to participate
has been denied. Suppose a member has had no other opportunity
during the meeting to obtain the floor because the agenda has
been stacked? This could violate section 101(a)(1) in a par-
ticular case.

The important point is that a literal meaning of section
101(a)(1) provides no opportunity to balance legitimate union
interests against individual interests. Individual interests are
not of great significance if their only operational value is to place
a burden on the union to show that valid institutional interests
are represented by the restricting rule. Congressional purpose
would seem to dictate that a finding that a rule is reasonable
in the abstract be followed by an inquiry into the reasonableness
of the rule's application to plaintiff's conduct. Thus, the context
in which plaintiff's conduct occurred, the nature of his remarks
or actions, and other opportunities for expression should be con-
sidered. Although such an approach is neither novel nor radical,
the necessity to state the proposition demonstrates the lack of
congressional care taken in drafting the act.

B. ENFORCING THE UNION'S CONSTITUTION AND BYLAWS

Common law courts generally assumed that the union's con-
stitution and bylaws formed a contract between the union and

62. Most courts require more. Plaintiff must allege that an equal
right was infringed and, apparently, that no reasonable rule barred his
motion.
Although the contract was one of adhesion at best, the formula permitted the courts to enforce the union's own rules, thus minimizing judicial interference. Official action might be declared invalid because it was inconsistent with the union's constitution or bylaws. Although some rules were struck down as inconsistent with natural justice or public policy, the contract approach restrained courts from openly declaring and protecting substantive rights. Congress chose a different path, however. Whether an officer could validly impose a restriction under the union's own rules was not critical. If a restriction is imposed, section 101(a)(1) requires it to be uniformly imposed. Even the affirmative grant of specific rights in section 101(a)(2) operates whether or not the challenged restriction is a reasonable interpretation of the union law.

A number of federal courts, however, have assumed the power to interpret and enforce a union's constitution and bylaws under section 101(a)(1). One case will perhaps be sufficient to illustrate. *Vestal v. International Bhd. of Teamsters* arose from an internal dispute stemming from work-oriented interests. Out of approximately 5,000 members in Local 327, 2,100 are employed in the freight industry. A petition requesting a separate charter for freighters was received by the General Executive Board of the International in March, 1965. The Board directed that a mail referendum be conducted among the freighters. Plaintiffs, nonfreighter officers and members of the local, challenged the decision to limit the referendum to freighters. President Hoffa replied that since the Board could issue a charter without a referendum, there could surely be no objection if those directly concerned made the decision. When the Board rejected the appeal, plaintiffs instituted an action in the federal court alleging an infringement of their equal right to vote. Meanwhile, the referendum was held, and freighters favored a separate charter by a three-to-one margin.

Since an election was held, and all members could not participate, the resulting lack of equality would seem to involve 101(a)(1). The serious question would revolve around the reasonableness of the decision to limit the vote. Absolute equality

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64. 245 F. Supp. 623 (M.D. Tenn. 1965).
65. Although the election had been held, Title IV did not preempt this action. This Title, providing for complaints to the Secretary of Labor as the exclusive remedy after an election, applies only to the election of officers.
in this context might well deny the minority freighters the right to be represented by officers reflecting their narrow job interests. Since it would be reasonable to permit only freighters to vote on a collective bargaining contract affecting them, it would seem reasonable to limit a question of representation to those to be represented. As in local government annexation, however, the entity which stands to lose area or taxpayers also has an interest in the outcome of the referendum. The court, obviously sympathetic to nonfreighters, stated that the proposal "vitaly affects [the union's] structure, its size and strength and its bargaining power." The conflict of interests suggests that at a minimum either the actual decision or a decision that the entire membership should vote on the question would be reasonable. Legitimate interests are adversely affected under either approach.

The executive body's decision, however, was not a rule by itself. Assuming the right to vote guaranteed by 101(a)(1) is involved, a limitation must be reasonable and be found in the union's constitution or bylaws. The decision that only members who would be covered by the separate charter could vote was based upon the union president's interpretation of article 6, section 1(h), of the International's constitution:

The General President shall have the authority at his discretion to direct that a referendum vote or a vote by membership in meetings assembled, be held by the membership of any Local Union or subordinate body on any matter, issue or proposition when, in his opinion, the welfare of the membership, the subordinate body, the Local Union, or the International Union, will be served thereby.67

The vast amount of power and discretion given to the executive is a startling but common phenomenon. In any event, a rule existed under which the president reached his decision. The court, however, turned the question of the reasonableness of the limitation on the right to vote into the question of whether the executive's interpretation was a reasonable one.

The two questions are not the same. A reasonable interpretation of a constitutional provision might nevertheless result in the infringement of protected rights. Even though a provision clearly supported the limited vote decision, the reasonableness of that limitation would have to be determined by the court under section 101(a)(1). Conversely, an unreasonable interpre-

67. 245 F. Supp. at 626. (Emphasis added.)
68. Article 6, § 2(a), gives the president the authority to interpret the constitution.
tation might not infringe the right to vote. Assuming the president is clearly in error, the right of nonfreighters to vote under section 101(a)(1) is not necessarily infringed. The question of deprivation of protected rights, then, is independent of the propriety of an official's interpretation of applicable law.

The court's approach, however, does not necessarily violate congressional concern for minimal interference, for state courts have long had the power to interpret union law. The danger in this situation is that federal courts will stray from their proper function under the act.71

The opinion in Vestal demonstrates that the danger is not hypothetical. The court stated that its role was merely to determine if the general president's interpretation was reasonable. If it was, the court would not substitute an interpretation of its own. Without boundaries on the court's ability to determine reasonableness, however, it would seem difficult to prevent just such a substitution.

The court found that "by the membership" meant nothing other than a vote of the entire membership. The court's finding is stated as an obvious fact. It is not obvious, however. In a sense the court had read "by the membership" as "by the entire membership," rather than "by the directly concerned membership." Principles of construction would suggest that since a primary purpose of the provision is to promote self-determination, that purpose may be better served by the president's interpretation. Moreover, although the equation that "membership" equals "entire membership" seems reasonable, the language does not foreclose the president's interpretation as also

69. The reasonableness of an interpretation of union law, even if a proper inquiry, can only properly be before the court in a narrow range of cases. The reasonableness of a bylaw interpretation holding that Jones may not receive strike pay, for instance, cannot be reviewed under § 101(a)(1) because none of the specified rights granted by that section is involved. Of course, the section would be violated if the denial was actually punishment for the exercise of a Title I right.

70. See, e.g., Summers, supra note 63, at 178-87 (1960).

71. Thus, in a case where plaintiff charged that he was unable to have a motion placed before the membership, the court found that the decision of the chair holding the motion out of order was based on a reasonable interpretation of union laws. McFarland v. Teamsters Union, 180 F. Supp. 806 (S.D.N.Y. 1960). The determination that the interpretation was reasonable, however, does not answer the statutory question.

72. The court also held that freighters were not a subordinate body because that phrase in other provisions refers only to a formally "chartered body directly subordinate to the International Union, such as a Joint Council or a Conference." 245 F. Supp. at 637.
being reasonable. The defendants would seem to have met their judicially imposed burden of showing that their view is reasonable.\textsuperscript{73} The court need not find the correct interpretation. Indeed, this task could well be impossible. In Vestal, for instance, the court treated the union's past practice lightly, surely a guide to reasonableness. Moreover, there is probably no legislative history in the statutory sense. Thus, the court does not have the tools to complete the task it set for itself.

The criticism only strengthens the belief that the court did not choose the proper task. The court held that since the president's interpretation was "clearly unreasonable, we need not consider whether, if the interpretation were reasonable, a constitutional provision authorizing a referendum limited to freighters would be a reasonable rule or regulation." But the latter determination is the one required by the statute! A violation of union law, assuming the court is correct, does not necessarily violate section 101(a)(1). The court's jurisdiction is based upon section 102 which grants a federal cause of action when Title I rights are infringed. The court does find that nonfreighters have been denied rights, but the reason is that such a limitation, since unauthorized by the union's constitution or bylaws, constitutes "a clear violation" of section 101(a)(1). If plaintiffs' equal right to vote is violated, however, it is violated even though such action is clearly authorized.

Criticism of the result reached is less serious than doubts about the avenue traveled. The court has erroneously assumed that section 101(a)(1) grants a general power to determine whether interpretations of union law are reasonable. The court's holding voids a self-determination election by those directly interested. Since the court declined to face the statutory question, plaintiffs might well have to bring another suit to finally end the dispute. Indeed, the court states that the International constitution might well give the executive the power to issue a separate charter without conducting a vote. Since no

\textsuperscript{73} What may be reasonable in a court of law may take on a far different coloration outside the court. Local 327 is an anti-administration local and has recently urged that Teamster President Hoffa's bond in his jury tampering case be revoked. Five members of Local 327 have filed suit against Hoffa charging him with "harassing and threatening the local in an effort to obtain a new trial of his 1964 jury tamper case." Washington Post, Aug. 17, 1966, p. 3, col. 1. As harassment, the president of the local lists "splitting Local 327 with freight workers forming Local 480 in Nashville." Financial records of the local have recently been stolen under mysterious circumstances. N.Y. Times, Aug. 24, 1966, p. 29, col. 2.
one would be given a vote in this situation, most courts would hold plaintiffs' equal right to vote was not infringed.

The power to interpret union constitutions permits a substantial amount of intervention into internal affairs of the union behind the cool mask of legislative interpretation. Such an approach is most useful to state courts because of reluctance to explicitly set substantive standards. Congress has provided substantive standards, however, and it would seem preferable for federal courts to apply those standards.74

Unfortunately, the problem is not as one-sided as presented above. Officers should not be able to penalize conduct by provisions which seem obviously inapplicable. Of course, the limitation may not be a reasonable restriction, or the conduct may be the type which is protected in any case. However, a range of situations does exist where an inapplicable provision could be employed to limit speech which could be limited by a proper provision. The following example is illustrative. Member Bluster disrupts a membership meeting by shouting, speaking at will and out of turn, and acting generally nasty. Surely Robert's Rules of Order would come to the rescue in this situation, permitting the chair to silence or pacify Bluster with an arsenal of polite weapons. But what if the union has failed to adopt rules of order? If Bluster is silenced, has his equal right to participate been infringed? Suppose that in court the presiding officer, now a defendant, justifies the removal of Bluster from the meeting by referring to a rule relating to the public disclosure of union secrets. Barring an ingenious explanation, the rule obviously does not apply. Of course, the court may find that Bluster's conduct was not protected by the act in any event, as his conduct went beyond participatory conduct. Thus, even if others were permitted to act in a similar fashion, or even if section 101(a)(1) were read to grant the affirmative right to participate, no right has been infringed. Similarly, under section 101(a)(2)'s right of free speech, the court could hold that Bluster's speech was not within free speech, and, therefore, the proviso is not relevant. However, decisions indicate the speech

74. Were Vestal the only opinion seeking to avoid the statute's thrust by asking a threshold question, the problem would not be serious. Other courts, however, have assumed the same prerogative. See Gurton v. Arons, 339 F.2d 370 (2d Cir. 1964). See also McFarland v. Teamsters Union, 180 F. Supp. 806 (S.D.N.Y. 1960). In neither of these cases, however, has the court's standard of reasonableness been as high as in Vestal. See also Young v. Hayes, 195 F. Supp. 911 (D.D.C. 1961), where the court stresses § 101(a)(1), and a violation of union procedures.
guarantee is to be read broadly, and limitation, if at all, must be justified under the proviso of section 101(a)(2). Thus, even section 101(a)(2) raises the "inapplicable provision" dilemma. Excluding the equal rights problems for the moment, and assuming Bluster's conduct falls within the broad ambit of protection afforded by the statute, discipline can only be justified by an established union rule.

All this, of course, was merely a pedagogical digression to illuminate the Vestal question in a new light. The situation in which an official's interpretation of union law is debatable or dubious shades into the situation in which the interpretation is pure fantasy because the provision relied upon obviously does not apply to the member's conduct.

Two alternatives seem to be presented. The court could ignore the applicability of a provision, and exclusively analyze whether a limitation was reasonable in that situation. The reasonableness of the limitation will surely depend on the importance of the individual interest involved. Thus, it could be argued, a finding in favor of discipline would not offend justice. The plaintiff, however, would seem justified in arguing that section 101(a)(2), for instance, permits all speech unless limited by a rule which falls within the proviso. This right cannot be restricted, either by an unreasonable rule or an inapplicable rule. Since an inapplicable rule does not represent the institutional interests justifying restriction, and Congress has required that these interests be spelled out in a rule or regulation, the application of this kind of rule is not reasonable.

Reasonableness does not depend on any abstract standard of propriety, but includes a balancing of conflicting interests. A rule reasonable on its face must nevertheless be reasonable in application. A reasonably applied rule must be a rule designed to deal with the situation, thus reflecting certain institutional interests.

The argument seems overwhelming, suggesting another approach. Perhaps the court should look at the proposed limiting provision only to determine if it can plausibly be applied to the facts. This limited review would seem warranted in the interest of permitting members to be fairly warned of the boundaries of

permissible activity. As mentioned above, courts would nor-
mally find it difficult to determine if a rule applied because of
lack of information. Thus, no union rule exists permitting dis-
cipline for Bluster’s conduct, no matter how reprehensible it
may be. In Vestal, however, the scope of suffrage was based
upon the proper provision, and the reasonableness of the inter-
pretation of that provision is not relevant to the section 101(a)
(1) inquiry.

In conclusion, then, the court’s power to require that lim-
iting provisions apply to the conduct receiving discipline or that
interpretations of these provisions be reasonable, may well be
implied. The danger is that this threshold step will lead courts
away from the proper statutory determinations. For instance, a
court may find an interpretation reasonable without continuing
to the next question—has the statute nevertheless been violated?
Perhaps the two situations can be satisfactorily treated in dif-
ferent ways. In Vestal, there was no real question of appli-
cability; the constitutional provision related to the problem of
the scope of a referendum, and interpretation of the section
could not lead to discipline. Thus, deference should be accorded
the official interpretation. In disciplinary cases, on the other
hand, problems of notice and abuse of authority are more serious.
Members should know what possible sanctions exist and should
not have to fear sham proceedings.

Perhaps the problem should be handled in a different way.
Plaintiff’s argument that the offense provision with which he
has been charged is inapplicable basically avers an infringement
of procedural rights and perhaps section 101(a)(5) provides
another solution. State courts have voided disciplinary proceed-
ings on the ground that challenged conduct could not conceivably fall within the offense provision. Such a holding, of
course, involves an inquiry into the facts, and some courts have
frankly stated that no evidence, or insufficient evidence, was
introduced to place conduct within the offense. Section 101(a)
(5)’s protection of a full and fair hearing should be read to
guarantee at least a minimal review of union trial proceedings.
Some evidence to support the union trial board’s findings of
fact should be required, and the facts as found should plausibly
fall within the union offense provision. If the procedure fol-

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76. “No member of any labor organization may be fined, . . . ex-
pelled, or otherwise disciplined . . . unless such member has been (A)
served with written specific charges; (B) given a reasonable time to
prepare his defense; (C) afforded a full and fair hearing.” 73 Stat. 522
lowed satisfies section 101(a)(5), including some standard of applicability of offense provisions, the court should face the substantive question squarely.

IV. FREEDOM OF SPEECH AND ASSEMBLY UNDER SECTION 101(a)(2)

On first impression, section 101(a)(2) appears to be a straightforward grant of rights. Yet, the grant of rights is stated in broad terms, and the structure of the provision creates internal puzzles. Structurally, the section is divided into four parts consisting of three provisions granting rights, and an overall proviso. Union members are given the right to:

1. Meet and assemble freely with other members.
2. Express any views, arguments or opinions.
3. Express at meetings of the labor organization their views, upon candidates in an election or upon any business properly before the meeting, subject to established reasonable rules pertaining to the conduct of meetings.

The above rights are limited by a proviso permitting unions to adopt reasonable rules relating 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 and contractual obligations."

The most obvious question involves the scope of the guarantees in relation to the valid institutional interests recognized by the proviso. Less obvious and wide-sweeping, however, are a number of perplexing problems lurking in the background.

Questions arise as to the scope of the granted rights exclusive of the proviso. The first-mentioned right, for instance, grants a seemingly absolute right of assembly. The language, however, would seem to exclude meeting with nonmembers of the union. The presence of some union members, however, should afford

77. 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 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.

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protection despite the presence of nonmembers. However, suppose the group substantially or exclusively consists of nonmembers. Since the rights are given to protect democratic activity within the union, should a member have a right to discuss union problems with nonunion members?

Union plans, if made public, may substantially weaken a union's bargaining position in the thrust and parry of labor-management relations. Furthermore, since the right of assembly is considered indispensible to the creation of political groups within unions, a desideratum of Congress, members may be on weak ground in justifying the presence of nonmembers under section 101(a)(2). Thus, the members' interest in relation to the statute's purpose is relatively weak, while the union's interest may be relatively strong.

It is precisely this balancing of individual interests and institutional interests, however, which should be considered under the proviso. The language of the act rather forcibly suggests that the balance in relation to this question has already been made. The interest in institutional security can be said to have outweighed the interest in a broader right of assembly. A strict rule also forecloses questions of the propriety of the application of union sanctions when varying numbers of nonmembers are present, thus simplifying the administration of the act.

In contrast to the assembly provision, the expression of views provision is stated in absolute terms. Legislative history indicates that the purpose of this broad statement was to guarantee expression in nonunion forums. This differentiation

78. In Johnson v. Local 58, IBEW, 185 F. Supp. 734 (E.D. Mich. 1960), a group of union members joined by nonmembers, sought to persuade the international to grant them a local charter covering a geographical area which overlapped that of Local 58. Plaintiff alleged that defendants threatened their job rights and disturbed their meetings. A motion to dismiss on a number of grounds was denied. Whether the presence of nonmembers foreclosed the protection of § 101(a)(2) was either not raised or rejected without comment.


Members may have substantial interest, however, in meeting with nonunion members of the bargaining unit. Such action may lead to the filing of a decertification petition. Although the NLRA protects this conduct, the protection does not extend to union expulsion. See text accompanying notes 235-44 infra. Thus, neither the LMRDA nor the NLRA protects assembly with nonmembers.

80. Originally, commas followed the words "members" and "opinions." A semicolon after "members" was added from the floor of the Senate. 2 Leg. Hist. 1260. This change was described as "clerical."
among forums suggests that the limitation in the assembly provision may be nonoperational. A permissible sanction in regard to the assembly provision would seem to violate the broader speech provision. Thus, the union may charge a member with disclosure of union secrets or dual unionism in a meeting with nonmembers without necessarily violating the assembly provision. The charge, however, may infringe the guarantee of free speech by punishing the exercise of that right in a particular forum.

The problem would be avoided, of course, by limiting the broad speech provision by the narrower assembly guarantee. Thus, although speech in relation to topics of union interest is generally protected, it will not be protected when uttered at a meeting which is outside the perimeter of the assembly provision. If the speech provision is not limited by the assembly provision, then the limitation “with other members” becomes in reality surplusage. Such a lawyer’s gambit seems reasonable, however, only if congressional concern that the speech provision be extremely broad is overlooked. Senator Goldwater, for instance, was adamant that speech be protected in all forums, and the insertion of the semicolon after “opinions” strongly suggests that Congress accepted this concern.Senator Cooper rose to ask whether it was proper to assume the purpose of the amendment was “to assure . . . that the constitutional safeguards of free speech shall be preserved outside the union hall.” Senator McClellan replied, and Senator Kuchel agreed, that “the purpose is to make certain that union members shall have freedom of speech not only in a union hall, but outside.” The dilemma cannot be avoided by permitting union disciplinary proceedings relating to assembly, such as dual unionism, but not speech, such as libel or disclosure. These offenses usually consist of speech and assembly, and it would be impossible to separate the speech and assembly aspects of each offense.

Subsequently, Senator McClellan indicated that the semicolon had been misplaced and received unanimous consent to place it after the word “opinions” instead of after the word “members.” Id. at 1234. Inserting a semicolon after the word “members” could give rise to the argument that the expression of opinion, unlike assembly, was protected whatever the composition of the audience. However, when the semicolon was shifted to the end of the word “opinions,” combining the first two rights in one expression, the communication protected by the act was impliedly limited to other union members. The double use of semicolons first appeared in the ultimately approved Landrum-Griffin Bill, H.R. 8400, 86th Cong., 1st Sess. (1959).

81. See 2 LEG. HIST. 1236, 1270, 1280.
82. Id. at 1230.
In light of the expressed concern with free speech, creating a presumption in favor of a rights oriented interpretation of Title I, the most practical solution would be to ignore the "members" limitation of the assembly provision. As mentioned earlier, niceties of statutory interpretation may have to give way to general congressional purpose because of the lack of precise draftsman-ship. Of course, speech falling within the grant of free speech may in a proper situation be limited by the operation of the proviso. The problem here, however, is whether a particular type of speech or assembly is outside the grant itself. If so, the statute provides no bar to disciplinary action for such conduct. Such a result argues for an inclusive reading of the grant of rights, permitting unions to apply limiting regulations when reasonable under the proviso. Excluding activity from the grant of rights eliminates federal scrutiny of the application of substantive offenses for speech and assembly. Yet, it is important to repeat that a member's interest in speaking to nonunion members may not be statutorily significant, since Congress was primarily concerned with making intraunion political activity possible. A member's interest in speaking to nonunion groups, meeting with nonmembers, and writing to or for magazines and papers is less significant than direct intraunion activity.

A. THE RIGHT OF ASSEMBLY

A question which has not received adequate attention involves the right of assembly in union meetings. Congress correctly assumed that the right to meet informally was essential for the creation of opposition groups and that punishment for such activity was common. Yet, the right of assembly argu-

83. In Graham v. Soloner, 220 F. Supp. 711 (E.D. Pa. 1963), plaintiffs were charged with picketing union offices and displaying signs containing disparaging remarks of specific officers. The court rejected defendant's contention that the act protected speech among union members only, stating that "to demand confinement of such criticism within the meeting-room walls would, or could, rob it of vitality and efficacy." Id. at 714. For a companion case, see Gartner v. Soloner, 220 F. Supp. 115 (E.D. Pa. 1963).

84. The right of an opposition group within the union to organize, to raise necessary funds, and to reach the union membership with a program of action was rarely recognized in most union constitutions. See Seidman, Lecture Sponsored by the Institute of Industrial Relations, University of Michigan-Wayne State, 47 L.R.R.M. 63 (1960). Out of ninety-three union constitutions studied in 1959, covering a combined membership of more than seventeen million workers, only two unions, the Ladies Garment Workers and the Typographical Union, explicitly
ably includes a member’s right to attend meetings, to have meetings called when scheduled, and to have special meetings called according to procedures set out in the union’s constitution or bylaws.\textsuperscript{85} 

Section 101(a)(1) protects the equal right to attend and participate in membership meetings. Thus, a member may not be physically barred from a meeting or arbitrarily prevented from speaking or offering motions at the meeting. Suppose members are prevented from meeting at a normal meeting time, e.g., the union hall is locked, officers do not appear, or officers do not even schedule a meeting. Such tactics may be employed before an election, for instance, to head off adverse criticism from the floor. The classification question arises again—since all members are denied the opportunity to meet, no one has been denied an equal right to meet. Assuming this is the proper interpretation of that section, does this situation fall under the umbrella of the broader section, 101(a)(2)? Since the two sections clearly overlap, there is no need to specially justify inclusion of activity under 101(a)(2).

Congress desired to protect assembly outside meetings, but there is nothing to suggest that the assembly provision was designed exclusively for unofficial meetings. Again, the wording of the statute may suggest a narrow approach. Speech and assembly are protected in fairly broad terms; speech in meetings is limited to rules pertaining to the conduct of meetings. Since freedom of speech is divided into a meeting and a nonmeeting context, it is possible to argue that the assembly provision refers only to unofficial meetings.

A narrow reading of the provision, however, jeopardizes important rights. If meetings are not called, the right to attend, participate, and express views given in both sections becomes meaningless. Although the administration may not arbitrarily muzzle a member wishing to call officers to account from the meeting floor, the objective could conceivably be obtained simply by not calling the meeting.

\textsuperscript{85} Cox suggests that assembly means meeting for the purpose of organizing the opposition. This is clearly essential for the formation of effective opposition groups. Whether the author feels this represents the extent of the statutory right is unclear. See Cox, \textit{Internal Affairs of Labor Unions Under the Labor Reform Act of 1959}, 58 Mich. L. Rev. 819, 834 (1960).
In most cases the question will be whether the court can enforce union constitutional provisions or bylaws relating to meetings under the statute. Conduct mentioned above would normally violate the union's constitution or bylaws. Since section 101(a)(1) accepts union provisions as a source of substantive rights, and enforces equal application of particular rights, it would not be unreasonable to consider section 101(a)(2) as creating two sources of rights—one arising solely from the statute and one arising from union law. The section, however, does not specifically refer to rights stemming from union law. This suggests that the federal rights granted do not include the enforcement of rights provided by union constitutions and bylaws. Section 103, furthermore, guarantees retention of all rights under union constitutions and bylaws, expressly preserving enforcement of union constitutions and bylaws in state courts. Yet, section 103 refers to all of Title I, including section 101(a)(1), which in a sense makes union laws a source of federal rights. Even if union rights as such are not protected under the statute, however, abridgement of union rights may nevertheless constitute a violation of section 101(a)(2) rights.86

The problem is not hypothetical. In 1960, twenty-four employees of a division of Hooker Chemical Corporation in North Tonawanda, New York, were discharged for participation in a strike which allegedly violated a no-strike clause. The dismissals were upheld by a tripartite arbitration panel. Under New York law, a union may petition to set aside an arbitration decision if it acts within ninety days. Plaintiffs, believing they had valid grounds to set aside the decision, took steps to have a proceeding commenced for this purpose. When the president of the local refused to take action, plaintiffs, pursuant to the union constitution, obtained a sufficient number of signatures on a petition calling for a special meeting. The union president again refused to call a meeting, although the union constitution arguably gives the president no discretion when proper procedures have been followed.87 Time was of the essence; a special meet-

86. This approach would not be inconsistent with the previously stated argument that a general power to interpret and enforce union constitutional provisions and bylaws was not granted. Although the argument here would permit the enforcement of union rights, the analysis stems from the rights granted by the act. Whether provisions of union law may be interpreted and enforced outside of the rights granted by the act is a different question.

87. Nearly all unions provide for the calling of special meetings. The majority specify who may initiate the calling of a meeting. In a substantial number of unions, no provision is made for special meetings called by the membership. BARBASH, LABOR'S GRASS ROOTS 31-32 (1961).
In rejecting plaintiffs' claim under section 101(a) (2), the district court found that the division of freedom of speech into a meeting and a nonmeeting context implied that the right of assembly referred only to assembly outside of regular or special meetings. The court thus interpreted the right of assembly as a "parallel or corresponding right to free speech." Why the court implies a narrow assembly provision from the two speech clauses is unclear. A more reasonable implication is that the single assembly provision covers official as well as unofficial meetings. Not only is the court's statutory interpretation dubious, but no policy appears to justify the narrow interpretation.

All unions hold their meetings within the framework of their constitutions. Membership meetings serve a number of functions. Members see meetings as a forum for decision making and a channel in which information is funneled from the top. More significant here, however, is the potential for upward communication. The union meeting is a member's forum for raising and airing grievances, and, except for election, meetings provide the most effective forum for challenging official policies or conduct.

The right to meet and assemble freely certainly should not be limited to regularly scheduled meetings. When time is of the essence, as it was in this case, special meetings are critical to guarantee democratic rights and procedures. The right to meet should not mean simply that union members may meet with other members, but should include the right of assembly guaranteed by the union's own constitution. To include the right to attend regular or special meetings under section 101 (a) (2) would not seem to stretch the language of that provision unreasonably. Legislative history is of little assistance except for relatively clear evidence that Congress was primarily concerned with unofficial meetings. Since the court would merely

89. Quoted from counsel's copy of opinion.
91. This ideal role of the meeting may not be realized in practice. Union members often lack political acumen, knowledge of parliamentary procedure, and self-assurance, all necessary to make meetings a forum for registering grievances. See Lipset, Trow & Coleman, Union Democracy 11-13 (1956); Sayles & Strauss, The Local Union: Its Place in the Industrial Plant 181 (1963).
be requiring the union to abide by its own constitution, there is no problem of overextending the act.92

If union officers, in an attempt to prevent plaintiffs from raising the arbitration question, prevented plaintiffs from attending a meeting or from speaking at a meeting, there would be no question that plaintiffs’ rights under the federal statute would be violated. When time is of the essence, the effect of a refusal to call a special meeting is really indistinguishable.

The assembly provision, which is not limited by its own terms, should not be read in an analogous fashion to the speech provision. Certainly, some form of speech would be improper inside a meeting and it is for this reason the section permits the union to establish reasonable rules for the conduct of meetings. But, within those rules, members may still speak. Rules which create a total ban on speech are probably not reasonable rules. In this case, however, no meeting was called and no question of orderly meetings was involved.

The narrow and broad rights of free speech in section 101 (a) (2) stem from an attempt to insure that union members have freedom of speech outside the union hall as well as inside.93 Nothing in the section’s structure suggests that the right to meet outside of regular meetings is protected, but the right to meet at regularly scheduled meetings or special meetings is not. The reasons for separating speech into union and nonunion forums are simply not applicable to any reasoned distinction between official and unofficial union meetings.

Thus, the parallel breaks down. The scope of freedom of speech may well depend upon the forum or context. However, the right to assembly is crucial because it itself creates the forum or context. Indeed, the right of free speech at meetings would be meaningless if union officers could arbitrarily decide not to hold a meeting or to exclude certain members from attendance. Neither of these two situations is explicitly protected by the section; however, it is difficult to argue that they should not be

92. I have taken this position in the appeal brief in the Yanity case. Although I feel objectivity and advocacy coincide on this issue, readers should be aware of the potential conflict.

93. The Senate’s analysis of the section is that the assembly provision protected the right both “in and out of union meetings.” 1 Leg. Hist. 949. Thus, the purpose of the semicolon after “opinions” is to make certain that speech outside of union meetings is protected. See Rothman, Legislative History of the “Bill of Rights” for Union Members, 45 Minn. L. Rev. 199, 211 (1960); Sherman, The Individual Member and the Union: The Bill of Rights in the Labor Management Reporting and Disclosure Act of 1960, 54 Nw. U.L. Rev. 803, 819 (1960).
Two basically different situations can arise in which the suggested interpretation could be applied. In the case discussed above, the question was whether the statutory right extended to cover a violation of the union constitution. The danger of over-extension is not present because the court is merely requiring compliance with the union's own law, not applying an abstract, external standard. Thus, the danger of federal interference, recognized by Congress, would be minimal. The approach presented here would not necessarily make union constitutions a source of rights. Rather, the right of assembly would be read to cover official as well as unofficial assemblages.

Danger arises if the statute is read to cover assembly rights outside of union constitutional provisions or bylaws, however. If no procedure exists for calling or scheduling required meetings, or if scheduled meetings are far apart, can section 101(a) (2) provide a right to have meetings called? The application of any external standard interferes to some extent with self-regulation and administration, yet section 101(a)(2) is a grant of rights creating external standards. Questions of when meetings should be called and the reasonableness of periods between meetings should only be judicial questions in extreme cases for the statute provides no real guidelines. Thus, courts should be wary of extending the assembly right in regard to official meetings beyond union constitutional provisions and bylaws.

94. The district court also found that the president's act was merely a technical violation of the union constitution. However, the special meeting was the only way the member could raise a critical question, the correctness of an arbitration decision.

95. State courts have traditionally enforced provisions of union laws by analogizing union constitutions and bylaws to contracts. Since these rights still exist under § 103, it is perhaps not essential that federal courts provide similar remedies. State courts may also be geared for quicker action than federal courts. Furthermore, uniformity of decision was not thought a crucial problem since Congress specifically provided for the retention of concurrent state jurisdiction. Even if one claim is federal in nature, pendant jurisdiction may exist for the state claim.

96. A third situation exists wherein procedures for calling meetings exist, but they are thought to be unreasonable or impractical. The judicial process is no different than in the previous situation in which no right is spelled out in the union laws. The court in each case must set standards of propriety when no normative standards have been established by Congress. Although courts are no doubt competent to act in extreme cases, as when faced with a rule clearly designed to frustrate member-initiated meetings, there are few benchmarks for determining which rules present extreme situations.
B. Freedom of Speech

As previously discussed, freedom of speech under section 101(a)(2) is divided into a meeting and a nonmeeting context. Because the former right can be limited by "reasonable rules relating to the conduct of meetings," it is generally thought that this right is more limited than the right of free speech outside of meetings. Any difference in the scope of speech, however, is based on practicality and not principle. No one would expect speech in the formalized context of a meeting to be completely unregulated. Even without express union authority to regulate speech at meetings, the courts would no doubt interpret the broad right to permit union enforcement of rules of order and propriety. These rules would no doubt have been permitted under the proviso permitting "reasonable rules relating to the responsibility of a member to his union as an institution."

The grant of free speech during meetings demonstrates the lack of careful draftsmanship in the act. The right relates to the expression of views upon candidates or upon any business properly before the meeting. The union's right to limit speech to business properly before the meeting assumes the same kind of reasonable rules included in "reasonable rules pertaining to the conduct of meetings." The former phrase could only have an independent effect if the organization's established rules relating to meetings did not contain a relevancy rule. The word properly suggests that the chairman may rule on the relevance of a speaker's topic to the agenda even though there may not be an established rule governing this situation. Although this reading makes both phrases meaningful, it would ironically undermine congressional desire to permit limitation of speech only by established rules.

The right to speak about candidates is no doubt effective only when election affairs are business properly before the meetings. A literal reading, however, suggests that members may speak on candidates even though elections or candidates may not be business properly before the meeting. Such a reading would also be ironic in light of clear congressional intent not to interfere with a union's attempt to properly regulate order and propriety in membership meetings. The right to speak on candidates is probably limited by relevancy rules also, the expression being no more than unnecessary insurance that the election process be democratic.

Rules of order, such as Robert's Rules, are expressly permitted. Writers have argued that these rules may be unneces-
sarily complex and difficult for many persons. Indeed, such rules have distinct disadvantages in groups where few members study parliamentary rules in detail. Such rules are designed to let the majority act and a minority speak only if all of the members act with full knowledge of all relevant provisions. In the union context, knowledge of these rules often permits the knowledgeable minority to control the majority.97

Since the speech guarantee is limited to business properly before the meeting, control over a meeting’s agenda becomes crucial.98 Criticism of union officers may only be properly before the meeting under new business. Must there be a new business portion of the meeting? The union’s rules may well explicitly or implicitly require such a portion. Again, the need to extend the granted rights to enforcement of union constitutional provisions and bylaws is apparent. Even if union rules are enforced, however, union rules may be unclear or nonexistent. The power of the chairman to control a meeting is immeasurably strengthened by the power to control the agenda.99 There is little difference between the member who is purposely not recognized or shouted down and one who is not allowed to speak because at no time is his subject properly before the meeting. As stated above, however, the chairman’s power to limit speech to that properly before the meeting is not required to be based upon established rules. Thus, action taken against a member out of order does not literally have to be based upon an express rule. The statute permits the court to decide if a speaker’s topic was relevant to union business, but the power to establish union business resides in the officers. To properly carry out congressional purpose, it will be necessary in some cases to limit the union administration’s authority to control the meeting’s agenda. The right to speak is empty, indeed, if there is no proper time in which the right can be exercised.100

99. For an account of a “managed” meeting, see McFarland, Leadership in a Local Labor Union Undergoing Organizational Stress, N.Y. State School of Industrial and Labor Relations 48 (unpublished dissertation 1952).
100. In Scoville v. Watson, 338 F.2d 678 (7th Cir. 1964), plaintiff attempted to move that the union arbitrate the propriety of her dismissal from employment. While she had the floor, the chair entertained a successful motion to adjourn. The court held that plaintiff had failed to allege that the motion to reconsider the union’s failure to arbitrate her discharge was in order and proper for consideration at that time.
Unions should carefully review their rules of order so that necessary rules are expressed, thereby making use of the statutory preferences for established rules. Such specificity may be required because courts may well ignore the implications of the phrase "business properly before the meeting" mentioned above. In any event, unions will have to make certain that speakers have had an opportunity at some time during the meeting to express their views.

Control of a meeting or its agenda is much less of a threat than other factors beyond the reach of the law. Floor debate is often vigorous and uninhibited, and many leaders rely solely upon personal prestige or oratory to carry a point. But members must attend meetings in order to speak. The attendance rate of union meetings, estimated at two to eight per cent, is a reminder that law serves primarily as a protector of rights, and not as an insurer that those rights will be exercised.

C. SPEECH AND THE PROVISO

Most of the litigation under section 101(a)(2) will probably involve the proviso which constricts all rights given by the section. The proviso is a statement of the institutional interests.
which are to be weighed and balanced by individual rights. The fact that the proviso limits a grant of rights indicates Congress' overriding concern with individual political and civil rights within unions. The structure of the provision, in addition to the repeated analogy to the federal Bill of Rights, suggests that institutional interests must be strong indeed to overcome the interest in protecting individual rights. The "presumption of constitutionality" has given way to a preferred position of individual rights. Thus, not all reasonable rules may limit freedom of speech and assembly, but only reasonable rules relating to the two broad subjects in the proviso:

A member's responsibility to his union, however, could be read to permit almost any discipline. Nearly all union offenses are justified on this ground, and even the reference to legal and contractual obligations would seem to fall within a member's obligation to his union.\(^1\) It is hard to imagine conduct which interferes with a union's performance of its legal and contractual obligation which would be consistent with a member's responsibility to the union as an institution.

Although direct conflicts of organizational and individual interests may not be common, the cases have substantial impact upon members when they arise. Similar conflicts can be found in any complex organization, and our increasing concern with

\(^1\) "Adopt" suggests that the creation of ad hoc rules to meet a particular sanction are proper. An ex post facto concept, however, may well be employed to strike down rules adopted after the speech or conduct affected by the rule.

\(^{104}\) Although the second portion of the proviso relates only to conduct, incitement of unlawful behavior may be considered conduct within the proviso. Advocacy of a strike in breach of a collective bargaining agreement is no less reprehensible than the act of striking itself. Conduct does not necessarily imply that speech cannot be sanctioned under the proviso. Even writers who feel that conduct does not include speech in general feel compelled to prohibit speech which raises an immediate danger that illegal conduct would result. See Rosenberg, supra note 103, at 418. Compare Dunau, Some Comments on the Bill of Rights of Members of Labor Organizations, N.Y.U. 14th Conf. on Labor 77, 86 (1961). In any event, the responsibility proviso is broad enough to cover speech which advocates action in breach of legal or contractual obligations. Of course, the interference with legal obligations must be more than fanciful.
these problems no doubt relates to the increasing amount of bureaucratization and organization of our lives.

The most significant case interpreting the grant of free speech and the proviso is *Salzhandler v. Caputo*. Solomon Salzhandler, financial secretary of a union local, discovered what he considered to be financial malpractices by union officers. Two checks had been drawn to cover the expenses of Webman, the president and business agent, and one Max Schneider at two union conventions to which they were elected delegates. Each check was endorsed by Webman and his wife, but Schneider's endorsement did not appear on either check. About the same time, two checks, each for six dollars, were drawn as refunds of dues paid by deceased members. Although such checks were ordinarily made out to the widows, Webman brought the two checks to Salzhandler and told him to deposit them in a special fund for the benefit of the son of one of the deceased members. Salzhandler refused to do this because the checks were not endorsed. Thereafter, trustees of the local endorsed each check and Salzhandler made the deposit as Webman had requested.

Thereafter, Salzhandler distributed a leaflet which accused Webman of improper conduct with regard to union funds and of referring to members in derogatory terms. Attached to the leaflet were photostats of the four checks. With regard to the convention check, Salzhandler stated that the delegates presented their credentials at the convention and then disappeared. Furthermore, the leaflet branded Webman as a petty robber in relation to the two refund checks.

Webman filed charges against Salzhandler with the New York district council of the union, alleging Salzhandler had violated various sections of the union constitution. The trial board decided that Salzhandler had falsely accused Webman of the crime of larceny thereby violating the union's constitutional provision against libel and slander. Salzhandler was suspended from participation in the affairs of the local for five years. He could not attend meetings, vote on any matter, have the floor at any meetings, or be a candidate for any position. With a trace of humor, the notice concluded that "in all other respects, Brother Salzhandler's rights and obligations as a member of the Brotherhood shall be continued."

Salzhandler thereupon commenced an action in federal

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105. 316 F.2d 445 (2d Cir. 1963).
106. Id. at 448.
district court alleging violation of his freedom of speech under section 101(a)(2).107 The district court dismissed the complaint, finding that the board’s decision was warranted by the evidence. Additionally, the court made an independent finding that Salzhandler’s charges were libelous and as such were not protected by section 101(a)(2).108 Before the Second Circuit, the parties apparently focused on whether libel fell outside of the grant of free speech in section 101(a)(2) rather than the question of whether libel could be sanctioned under the proviso to section 101(a)(2). Supporting their position that free speech under the act was not all inclusive, defendants urged an analogy to the first amendment to limit the scope of the right. Indeed, early pressures for reform legislation stressed paralleling the Bill of Rights,109 an equation which was to carry over to congressional debates,110 and even the name given to Title I of the LMRDA. Sponsors of legislation were no doubt aware that libel and slander were generally thought to be beyond protection of the first amendment. Defendants relied upon Beauhar-

107. Plaintiff also requested reinstatement with back pay, damages due to discrimination in job referrals, and pain and suffering caused by his ejection from a meeting.
109. In 1941, the American Civil Liberties Union formed a committee on trade union democracy to study rights accorded individual union members. Two years later, in a report entitled Democracy in Trade Unions, the committee reported that freedom of speech was inadequately protected and recommended protection of the right to criticize union officers and the right to protest outside the union. See ACLU, DEMOCRACY IN TRADE UNIONS 53 (1943). The committee proposed a Bill of Rights for union members to be guaranteed by the union constitution with limited state and federal legislation as an additional safeguard. Id. at 66. The proposal was submitted as a draft amendment to the NLRA in 1947. Hearings Before the House Committee on Education and Labor on Bills To Amend and Appeal the National Labor Relations Act, 80th Cong., 1st Sess. 3633-43 (1947). The ACLU spokesman, Mr. Fraenkel, equated the freedom of speech sought by the ACLU with freedom of speech under the Constitution. Id. at 3641-42. See also ACLU, DEMOCRACY IN LABOR UNIONS (1952). This position was later repeated. Hearings Before the Senate Subcommittee on Labor on Union Financial and Administrative Practices and Procedures, 85th Cong., 1st Sess. 1115-16 (1957).
110. See, e.g., 2 LEG. HIST. 1566 (remarks of Rep. Griffin); id. at 1645 (remarks of Rep. Landrum); id. at 1104 (remarks of Sen. McClellan).
nais v. Illinois\textsuperscript{111} which held that the protection of the first amendment did not extend to libel:

It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.\textsuperscript{112}

The court, however, rejected the parallel to the first amendment, holding that the grant of free speech in section 101(a)(2) was absolute, and Congress designed the proviso to provide the only limitation to free speech. Thus libel and slander, as forms of expression, were not meant to be excluded from the grant itself. The court stated that:

In Beauharnais the Supreme Court recognized the possibility that state action might stifle criticism under the guise of punishing libel. However, because it felt that abuses could be prevented by the exercise of judicial authority, ... the court sustained a state criminal libel statute. But the union is not a political unit to whose disinterested tribunals an alleged defamer can look for impartial review of his "crime." It is an economic action group, the success of which depends in large measure on a unity of purpose and sense of solidarity among its members.\textsuperscript{113}

Although the court rejected a first amendment analogy, recent Supreme Court pronouncements make clear that the analogy, if proper, works against discipline for libel of union officers. In New York Times v. Sullivan,\textsuperscript{114} the Supreme Court imposed a constitutional limit on the power of states to award damages to public officials defamed by critics of their official conduct. A comparison of Sullivan and Salzhandler is instructive, as similar considerations motivated each court.

In Sullivan, the Supreme Court first looked at the speech itself and found that the statement alleged defamatory dealt with one of the critical problems of the day. The Court held that the nature of the statement created a prima facie case for first amendment protection. The question then became whether the statement forfeited protection by the falsity of its factual statements or by its defamatory injury.

The statement by Salzhandler parallels in a sense the statement in Sullivan. Criticism of official conduct is a matter of interest to all members of the relevant community, in this context the union membership. Criticism of official conduct

\begin{itemize}
\item \textsuperscript{111} 343 U.S. 250 (1952).
\item \textsuperscript{112} Id. at 256-57.
\item \textsuperscript{113} 316 F.2d at 449-50.
\item \textsuperscript{114} 376 U.S. 254 (1964).
\end{itemize}
in the public sphere can be analogized to criticism of union officials in this private sphere. Union governments have long been compared to public government, and a member's statements about a union official's action may be as essential and important to the membership as statements made about official conduct or public issues.

The nature of the expression was also considered important by the Salzhandler court. The court reasoned that criticism relating to mismanagement of union funds should be protected in part because congressional concern was primarily directed toward preventing this type of mismanagement. The court's emphasis should not be employed, however, to limit rights protected by this act. Many expressions should be protected because the content relates to matters of legitimate concern of union members, despite the fact that they may not refer to subjects upon which Congress expressed particular concern. Actually, congressional concern was directed basically toward three areas: election of officers, trusteeships, and financial reporting. Indeed, bills introduced during the Eisenhower administration dealt only with these areas.115

The Supreme Court's protection of freedom of expression in Sullivan is especially significant because in state damage actions an impartial tribunal will decide questions of falsity and defamatory effect. In Salzhandler, the court realized that union tribunals were composed of laymen with little knowledge of the law and who may well be interested in the outcome of the dispute. Salzhandler, however, assumed that a trial de novo would not be possible in district courts, ignoring the possibility of using a lesser standard of review for decisions of union tribunals.

The Court in Sullivan rejected the test of truth: "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error."116 Similarly, injury to official reputation and the combination of injury and factual error were also rejected as bases for possible limitation of speech. Good faith error was deemed protected; actual malice was made the test of actionable libel. The failure to create an absolute right of criticism, as advocated by Justices Douglas, Black, and Goldberg, may indicate a recognition of competing interests.

In the Landrum-Griffin context, those interests are institu-

116. 376 U.S. at 272.
tional interests and are recognized in the proviso. The Salz- handler court rejected the defense that members have a responsibility to the union as an institution not to libel officers, by finding that, to the contrary, they had the duty to speak out "in the interest of proper and honest management of union affiars . . . ."\(^{117}\) Similarly, the Supreme Court has stated that a citizen not only has the right but the duty to criticize governmental policies and official conduct.\(^ {118}\) False statements are inevitable in fair debate and must be protected if the freedoms of expressions are to have the breathing space they need to survive.\(^ {119}\) Punishment tends to generate self-censorship, deterring what in fact is true "because of doubt whether it can be proved in court or fear of the expense of having to do so."\(^ {120}\) As Professor Kalven has stated, speech is in a sense overprotected in order to assure that it is not underprotected.\(^ {121}\) Echoing this concern, the Salzhandler court felt that each union member could not be expected "at the peril of union discipline" to draw the "thin and tenuous line between what is libelous and what is not."\(^ {122}\) The Supreme Court may well have been aware of the "difficulty of proving truth" and of "putting the speaker to the risk of proof before fallible judges, juries, or administrative officials."\(^ {123}\) This recognition of judicial incapacity to make nice discriminations strengthens the view of the Salzhandler court that even laymen cannot be expected to make these nice discriminations.

Turning to the statutory language, the Second Circuit concluded that Congress intended only the two exceptions set out in the proviso. The court's presentation of legislative history is a model of simplicity. The McClellan Bill of Rights contained a

\(^{117}\) \(316\) F.2d at 450.

\(^{118}\) The Court may well expand official conduct to other areas. It has already been broadened to include criticism which might "touch on an official's fitness for office." Garrison v. Louisiana, 379 U.S. 64, 77 (1964). The Court's concern with issues in which the public has legitimate concern would not seem confined to references to officials or official conduct. See Comment, 75 YALE L.J. 642, 644-45 (1965). Whether or not one of the participants is an officer, open debate is still necessary. Similarly, the protection afforded by Salzhandler should not be limited to criticism of official conduct, but should include discussions of union policy.


\(^{120}\) Id. at 279.


\(^{122}\) 316 F.2d at 451.

\(^{123}\) Kalven, supra note 121, at 212.
free speech clause "absolute in form." Upon "reconsideration," the "free speech section was amended to include the two express exceptions." The McClellan provisos "took away the power of the union to punish for expression of views" and the Kuchel substitute "restored the power in only two situations."

In an opinion marked by real insights, the abuse of logic and legislative history reflected in the prior paragraph is striking indeed. The court first assumed that the McClellan proposal absolute in form was absolute in fact. Second, the court assumed that the guarantee in the substitute measure was no different than that in McClellan's bill. Senator Kuchel, however, substituted a whole new bill of rights, not simply a speech section. Therefore, the court's use of the word "amended" is very misleading. Third, the court assumed that the proviso "restored" powers removed by the McClellan Bill, rather than merely clarifying implied exceptions to the grant of rights to protect against undue judicial interference in internal union affairs. The language used by the court, "absolute in form," "section was amended," "took away power to punish for expression of views," and "restored the power in only two situations," represent a high order of judicial deck-stacking. The result, however, is probably a wise one, but for different reasons, and despite legislative history.

The court is correct in referring to Senator McClellan's free speech provision as absolute in form:

Sec. 101(3)—FREEDOM OF SPEECH—Every member . . . shall have the right to express any views, arguments, or opinions regarding any matter respecting such organization or its officers, agents, or representatives, and to disseminate such views, arguments, or opinions either orally or in printed, graphic, or visual form, without being subject to penalties, discipline, or interference of any kind by such organization.

It is erroneous, however, to assume that the section was absolute in fact. Courts would no doubt have permitted reasonable limitations, at a minimum permitting "reasonable rules relating to the conduct of meetings." Furthermore, there is no reason to believe that Senator McClellan envisioned a broader right of expression than that granted by the first amendment. Indeed, the Senator explicitly analogized his bill to the Bill of Rights:

If this bill should be enacted into law, it will bring to the

125. 316 F.2d at 450, n.8; 105 Cong. Rec. 6715-27 (1959).
126. 316 F.2d at 450, n.8.
conduct of union affairs and to union members the reality of
some of the freedoms from oppression that we enjoy as citizens
by virtue of the Constitution of the United States, which in-
cidentally does not make an exception for union members.128

The most damaging evidence of the court's oversimplification
is an explicit reference by Senator McClellan to implied limits in
his bill. Although he was replying to hostile criticism of the AFL-
CIO, there is no reason to believe that the Senator was mislead-
ingly deemphasizing the scope of his provision:

AFL-CIO contends that sections 101(a)(1) and (2), which
provide equal rights and privileges and free speech and assem-
bly, are too broad. They observe, however, that unions are-ob-
viously entitled to make reasonable rules and regulations with
respect to the rights of members relating to the conduct of
business at union meetings.

The answer: This limitation, that the unions might make
reasonable rules relating to equal rights and free speech and
assembly was implicit in the bill of rights as originally drafted,
just as it is implicit in the Bill of Rights in the Federal Constitu-
tion to prevent abuses.129

The Senator's colleagues were well aware that his amend-
ment contained implied restrictions. Their reason for insisting
on a change in language was the fear that the absence of express
restrictions altogether would induce courts to overlook the im-
plied power of unions to make reasonable rules necessary for
the union's protection.130

Finally, there is Senator Kuchel's own statement in relation
to the substitute concerning libel and slander:

[It] seemed to us that the language in the amendment of the
able Senator from Arkansas . . . was too broad, and that there
are in this land of ours, for example, reasonable laws governing
libel and slander . . . . By the language of our amendment . . .
we attempt to provide for the rule of reason with reasonable
restraints on the right of free speech.131

The court is correct in referring to this quote as ambiguous.
Even before Salzhandler, this particular phrase had caused diff-
culties.132 Senator Kuchel referred to libel and slander only
as examples of reasonable restraints of the constitutional right
of free speech. The "language of our amendment," which pro-
vides for such reasonable rules, is obviously the proviso, the
only relevant addition to the original McClellan language. The

128. 2 LEG. HIST. 1098. See also 2 LEG. HIST. at 1104.
129. 2 LEG. HIST. 1294.
130. See 2 LEG. HIST. 1231 (remarks of Senator Kuchel).
131. 2 LEG. HIST. 1231.
132. See Thatcher, Rights of Individual Union Members under Title I and Section 610 of the Landrum-Griffin Act, 82 GEO. L.J. 339, 349
(1964).
sentence implies that if libel and slander are unprotected, they are so because of the operation of the proviso and not because these limits are implied in the grant of the right of free speech itself. The reference to libel and slander indicates that Senators were aware of this limit of first amendment rights, although the statement also implies that the McClellan proposal protected defamatory utterances. As shown above, however, McClellan's bill was not absolute, and evidence suggests that Senator Kuchel and others were aware of this. If so, the reference may have been aimed merely at drumming up support.

Hypothetical analysis of this statement made in debate leads to a number of different interpretations and perhaps is of little value. The reference to slander and libel, if anything more than a reference to a type of reasonable restraint, suggests that if this exception is to be made at all, it is to be based upon the proviso.

The Senate accepted the Kuchel substitute in place of the McClellan proposal. In so doing, the Senate did more than make two exceptions to section 101(a)(2), rather, it made a number of significant changes. The assumption that free speech meant the same thing under each bill is unsupported. Even if true, however, evidence suggests that the McClellan Bill was more limited than the court presumed. Thus, a strong case can be made that drafters of the McClellan and Kuchel bills did not mean to protect libelous statements.

Furthermore, there is no evidence that the Kuchel substitute broadened the grant of speech in the McClellan Bill. Indeed, the drafters were concerned to expressly state a countervailing body of institutional interests to the individual right of free speech. Although the bill as enacted was basically the House-passed Landrum-Griffin Bill, the free speech section of the House Bill was modeled after the Senate-passed version. Although a fairly strong case can be made that libel and slander are not included in the grant of free speech, there are important reasons for assuming that the exception can only be found in the proviso.

The court's analysis of the statute is also open to criticism. A decision that libel does not fall within the responsibility proviso, and therefore cannot be penalized, appears to be based upon the structure of the provision. A right is given, and a proviso permitting certain types of reasonable rules limits that right.

133. See 2 Leg. Hist. 1231 (statement by Senator Kuchel).
134. See 2 Leg. Hist. 1230.
The court assumes that Salzhandler’s speech falls within section 101(a)(2)’s free speech grant, and they are no doubt correct. Since a member has an obligation to speak out, even if remarks are defamatory, the court reasoned, defamation violates no responsibility owed to the union as an institution.

Analyzing the situation in this fashion, the court overstates the individual interest. The court assumes that no defamatory statement can violate a reasonable obligation owed to the union. Although the court correctly analyzed the nature of plaintiff’s statements in terms of statutory purpose, there is no explicit recognition that section 101(a)(2) creates countervailing interests. Though plaintiff’s conduct should be protected, this can be accomplished without prohibiting discipline for all libel. It was the nature and context of plaintiff’s expression which led to its protection and not the mere fact that the union’s discipline was based on libel.

If libel was excluded from the grant of rights, then the substantive aspects of union imposition of libel sanctions could not be scrutinized under the act. This result suggests that the court was correct in permitting review of the application of the union’s libel provision. Of course, even without Salzhandler, union discipline for libel would still be subject to scrutiny for procedural regularity. Short of de novo judicial determinations, however, the court’s ability to protect speech might prove inadequate in some cases. The prospect of an adverse initial determination might deter expression of opinion by members whose right to free speech would have been vindicated upon review.\(^\text{135}\) While this objection would be somewhat lessened by postponing the operation of discipline pending judicial review,\(^\text{136}\) such discipline might still be objectionable since the stigma attached to an initial adjudication of guilt might similarly deter legitimate criticism. Furthermore, since judicial intervention may require exhaustion of internal remedies for a period not to exceed four months,\(^\text{137}\) courts could not compel immediate sus-

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135. In Deacon v. Operating Eng’rs, Local 12, 59 L.R.R.M. 2706 (S.D. Cal. 1965), the court refused to enjoin forthcoming disciplinary proceedings upon charges that plaintiff libeled the union in statements made to a newspaper reporter.

136. In Nelson v. Brotherhood of Painters, 47 L.R.R.M. 2441 (D. Minn. 1961), the court suspended union imposed discipline until the case could be heard, finding reasonable belief that plaintiffs’ rights were violated. Plaintiffs’ suspension had rendered them ineligible to run for office in a forthcoming election.

pension of the penalty, and a member's protection would depend solely upon the beneficence of union officers. On the other hand, by reading libel and slander out of the proviso, the court has foreclosed any union discipline for libelous statements.

Given the broad protection granted by Salzhandler, two possible limitations can be considered. Although the court stressed that Salzhandler's statements referred to alleged financial irregularities, and thus touched an area of prime congressional concern, the court would probably protect libelous utterances related to union affairs even if the subject was not of the type which "motivated the enactment of the statute." Another possible limitation on the protection given to libelous utterances would be a requirement that the speech relate to internal union affairs. A recent case, following Salzhandler, suggested this limitation by stating that "if the underlying topic of conversation concerns union affairs, then arguments, questions, or accusations relating thereto are protected."

The court's statement cannot be reversed, i.e., speech which does not relate to union affairs may nevertheless be protected because it may have little impact on the union as an institution. Assuming that the grant of free speech is read broadly, the union may penalize speech only when it falls within the proviso, and "nonunion" speech is unlikely to violate a responsibility owed to the union. If the grant only protects speech relating to union affairs, the act would then have the absurd effect of permitting union discipline of speech having no relation to union affairs.

On the other hand, protecting all speech which relates to union affairs would violate the intent of the first proviso—to permit discipline when the speech violates a union responsibility. Thus, the scope of the act cannot be determined simply by whether the speech relates to union affairs. The proper question is whether the speech violates an obligation owed to the union as an institution. Libel as such should neither be excluded from the scope of the act, nor excluded as a sanction in a proper case.

The proviso standard of "responsibility to the union as an institution" provides an altogether different standard for proper discipline which cannot be applied by simply asking whether the union can punish for libel or whether the speech relates to an area of primary congressional concern or union affairs.

138. 316 F.2d at 451.
A member may violate his responsibility to his union by uttering defamatory remarks in a particular situation. Furthermore, even if libelous statements are not punishable as libel, they may still violate an obligation owed to the union. The statement which falsely accuses officers of crimes and urges members to join a rival, violates an obligation to maintain the institution. To protect the libel but permit penalizing the call to resign represents legal unreality. The libel is part of the statement, and it is the part which makes the call to the membership a real threat to institutional stability. Since a nonlibelous call to join a rival union falls within the proviso, there is no reason to protect all libelous statements. Clearly, charges which libel officers do not necessarily constitute irresponsibility to the union or cause damage to the union as an institution. Loyalty to the union like loyalty to one's country does not require subjection to the present administration. Thus, critics who argue that members have a responsibility not to hold officers to false public contempt go too far. On the other hand, some defamatory statements may violate valid institutional interests.

Furthermore, a member may violate his responsibility to his union by nonlibelous utterances just as he can by libelous statements. Thus, urging workers to join a rival union or urging workers on strike to return to work probably violates a responsibility owed to the union. Just as all nonlibelous statements are not protected, all libelous statements cannot be protected. The result of the court's interpretation of the act, ironically, is to protect all libelous speech even though the statute clearly does not protect all nonlibelous speech. The point is, of


141. Those who are angered by union officials' denunciations of critics as traitors, troublemakers or communists, should compare official and unofficial reaction to dissenters and critics of Viet Nam war policies. Especially analogous is the tendency of public officials to take criticism personally.


143. Advocating that a strike be called off, however, is probably protected even though it weakens the union's will to resist and weakens the union's image. This conduct advocates a change in union policy unlike a back to work movement which directly challenges union authority and responsibility. Calls for wildcat strikes in breach of contract or for action in violation of the NLRA are not protected. The responsibility proviso would cover these situations even if the second proviso is read to cover conduct excluding speech. See Dunau, supra note 104, at 65.
course, that responsibility to the union as an institution is the proper statutory formula under which the balancing of institutional and individual interests is to be carried out.

Thus, regulations dealing with member activities which adversely affect the union fall within the proviso. The union must be able to protect itself, for example, against conduct which seriously weakens the union as a collective bargaining agent. Salzhandler's statements probably did not affect the public's view of the union but probably added to the union's almost continuous internal strife. Slander of officers is perhaps most serious when it reaches the public or employers. But the officer libeled is not the union, and the injury to the union is of a different nature.

If a member criticizes bargaining demands, the employer may believe that the union will have difficulty calling and maintaining a strike, and to that degree, bargaining strength is diminished. The expression of hostile views by a member may lessen public support and sympathy for the union. Speech which has an unfavorable impact on bargaining strength is affected by considera-

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144. Professor Cox has stated that § 101(a)(2):
carries the legal protection of dissent a step farther by guaran-
teeing union members freedom of speech both inside and out-
side union meetings, and also by securing the critics an oppor-
tunity to meet for the purpose of organizing their opposition. The latter privilege would seem essential to the formation of effective minorities even though it flies in the face of traditional trade union opposition to any form of caucus or separate assemblage. However, dissent in a union, like treason within a nation, must be suppressed if the purpose is to destroy the union, encourage a rival, or bring about the violation of legal or contractural obligations. Section 101(a)(2) contains an ex-
ception for these cases.

Cox, supra note 140, at 524.

145. See Hall, The Painters Union: Autocracy and Insurgency, New Politics, Spring, 1964; Schimpff, Brotherhood of Painters, District Coun-

146. Union attorneys have argued that libel directed at an officer's handling of funds, for instance, impairs the effectiveness and prestige of the union. Sigal, supra note 142, at 373. It is not surprising that union attorneys reflect the quasi-military and economic views of a union. Representing the union in court actions and before the NLRB, the attorney sees the employer as a monolithic entity and the union's major opponent. Thus, the union's fighting qualities are emphasized—the ability to react quickly to employer thrusts and the need of discipline to insure unity.

Of 152 constitutions of unions affiliated with the federation, 125 make it an offense to libel or slander a union officer and all but three have general punitive provisions with regard to libel. See Sherman, The Individual Member and the Union: The Bill of Rights Title in the Labor-
Management Reporting & Disclosure Act of 1959, 54 Nw. U.L. Rev. 893, 817 (1959); Thatcher, supra note 132, at 347.
tions of national labor policy. The NLRA makes the union the bargaining representative for all members in an appropriate unit, and the minority is bound by the union's decision in bargaining matters. Majority control is necessary because Congress desired to encourage as well as protect collective bargaining. Thus, the protection of bargaining strength is consistent with federal labor policy.147

On the other hand, although membership implies a recognition and acceptance of various obligations, complete freedom to discipline cannot be permitted because a worker's voice in economic decisionmaking which vitally affects him depends upon union membership.

Moreover, congressional purpose would not require the union to maintain as members persons who are actively working for the destruction of the organization.148 Responsibility at a minimum includes the absence of purpose to destroy or weaken the union or intent to encourage a rival. That is, the section clearly permits an institutional interest in survival. Danger to survival, of course, may be of varying degree; some threats are immediate and serious, while others may be clear but not present dangers. The immediacy of the threat is one of the factors to be considered in determining adverse impact upon the union.

Although requiring purpose to harm might be a compromise for courts like Salzhandler which have little respect for union trial tribunals, the difficulty of defining purpose is not substantially less arduous than defining fair comment. The recognition of the validity of union institutional interests by Congress suggests that responsibility should not be limited to a hostile intent but should also include foreseeable circumstances. The purpose to harm could be inferred, of course, and the probable result of a member's conduct could indicate a purpose to harm.149

If the federal constitution is to serve as a guide for the interpretation of rights granted by the act, then limitations on those rights would have to be justified by important needs of the union. Thus, an interest in preventing criticism, even un-

147. See Rosenberg, supra note 103, at 416.
148. In Farovitz v. Local 802, Associated Musicians, 53 L.R.R.M. 2843 (S.D.N.Y. 1963), the court stated that plaintiff did not intend to harm the union by urging members to refuse to pay dues when plaintiff felt collection was ultra vires. See also Cox, supra note 140, at 834. The proviso, however, does not specifically require intent to harm. See Thatcher, supra note 132, at 349.
149. For a similar formulation under the discrimination section of the NLRA, see Radio Officers v. NLRB, 347 U.S. 17, 49 (1954).
founded, would not suffice. Speech interfering with rights of others, however, such as filibusters or disruptions at meetings can be restricted.\footnote{150}

The union was long ago described as a combination town meeting and military group. "Imagine the conflict in the soul of a union official who must have the attitude and discharge the functions at one and the same time of both a general and a chairman of a debating society."\footnote{151} Although Congress has in a sense mooted the question of the wisdom of enforcing democratic rights within unions, Congress was aware that institutional interests limit the scope of the rights protected.

American unionists, extremely security conscious, are intensely alert to dual union movements and other potentially divisive conduct. While many feel that the day of the union as an embattled and weak institution is over, those who have lived through the early difficult battles are unconvinced. Furthermore, the wide diversity of unions and labor-management environments in the United States makes it impossible to lump the teamsters and the textile union, the carpenters and the agricultural workers, in one hypothesis of present union strength. Histories of serious internecine battles with corrupt or communist elements or experience with company spies make it difficult to convince unionists that complete freedom within unions is wise.\footnote{152}

The first part of the proviso to section 101(a)(2), responsibility to the union as an institution, requires an inquiry into possible adverse impact upon the union. Criticism of union officers need not adversely affect the union; if the union is not so affected, then the member has not violated an obligation owed to the union. However, there are instances when statements directed at officers will damage the union. Unions must be able to discipline as a "shield against crippling attacks upon


\footnote{151}{Muste, \textit{Factional Rights in Trade Unions}, in \textit{American Labor Dynamics}, 332-33 (Hardman ed., 1928).}

\footnote{152}{See generally Harris, \textit{Labor's Civil War} (1940); Kampelman, \textit{The Communist Party vs. The CIO} (1957); Saposs, \textit{Communism in American Unions} (1959); Taft, \textit{Organized Labor in American History}, chs. 22, 30, 47 (1964).}
its vital functions.” The collective bargaining function can be seriously harmed by accusations which lessen the confidence of members in their negotiations. The support of the public, important during negotiations or a strike, can be undermined by strategically timed charges. Charges of corruption, immorality, or communism directed at officers during organization, strikes, or bargaining can have disastrous consequences. The confidence of members and the public is necessary if the union is to carry out its congressional role.

As mentioned earlier, the proviso is broad enough to include many kinds of restraints and, indeed, unions would justify all their express sanctions and penalties in much the same language. The statute of course requires a judicial definition of responsibility. No regulations which cannot be justified under

155. The courts may well look to state court decisions reviewing union disciplinary action under common law standards in determining the kinds of conduct which may properly be considered to be inconsistent with a member’s institutional responsibilities. See Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 YALE L.J. 175, 176-77 (1960). State courts have permitted discipline for strike breaking. See Summers, Legal Limitations on Union Discipline, 64 HAW. L. REV. 1049, 1062-72 (1951). State courts have also permitted discipline when a member joins another union and solicits members. Davis v. International Alliance of Theatrical Employees, 60 Cal. App. 2d 713, 141 P.2d 486 (1943); Zalnerovich v. Van Ausdal, 65 N.Y.S.2d 650 (Sup. Ct. 1946). Assisting the company in the dispute with the union or passing confidential information to the employer violates union obligations. Becker v. Calnan, 313 Mass. 625, 48 N.E.2d 668 (1943). Disciplining members for violating decrees and rules which relate to the basic policies of the union and its functions in the collective bargaining system is proper. See, e.g., Schmidt v. Rosenberg, 49 N.Y.S.2d 364 (Sup. Ct. 1944).

State courts have provided significant protection in the area of external political activities. Initially, members were held to be bound by majority decisions. Today, this line of cases has been substantially overruled. See Blumrosen, The Individual and the Union, 86 MONTHLY LABOR REV. 659, 663-64 (1963). State courts have also prevented the imposition of discipline for the exercise of public rights or the performance of public duties not primarily related to internal union affairs. See, e.g., Collins v. International Alliance of Theatrical Employees, 119 N.J. Eq. 290, 182 Atl. 37 (Ch. 1935); Spayd v. Ringing Rock Lodge, 270 Pa. 87, 113 Atl. 70 (1921). But see Harrison v. Brotherhood of Ry. & S.S. Clerks, 271 S.W.2d 852 (Ky. Ct. App. 1954). The cases may underemphasize the
either exception can be employed to penalize speech.156 The Salzhandler court argues that far from violating plaintiff's responsibility to the union, "it would seem clearly in the interest of proper and honest management of union affairs to permit members to question the manner in which the union's officials handle the union's funds and how they treat the union's members."157 Whether or not a member always has a responsibility to speak out when he feels officers have mismanaged or mishandled the union's affairs, it is clear that Congress wanted to protect this kind of expression. Democratic participation is impossible without the freedom to question and criticize. Whether this right extends to false statements is another question, however. The court has apparently excluded union discipline based upon libelous statements.

Since Congress desired to encourage speech as well as to protect it, it is not unreasonable to remove the potential deterrent of punishment for libel and slander. The Supreme Court has protected the criticism of public officers in order to encourage speech in public matters. Perhaps there are valid reasons for going further in the internal union area than the Court has gone in the public officer cases. Since the injured party presumably has a tort action in state court, unions cannot impose a further penalty upon a member for the same injury. Allegedly slander-protection given these rights because the courts, limited by the contract theory, have tended to protect conduct by discovering procedural deficiencies rather than by creating substantive rights. See Wollett & Lampman, The Law of Union Factionalism—The Case of the Sailors, 4 STAN. L. REV. 177, 200 (1952).

While state courts have often departed from the contract theory in protecting rights or the exercise of duties not primarily related to internal union affairs, they have rarely held that union members possess inherent rights to participate in intraunion political activity. See Summers, Legal Limitations on Union Discipline, 64 HARV. L. REV. 1049, 1069 (1951); Wollett & Lampman, supra at 200. Nevertheless, expelled members are usually reinstated when disciplined for such activity. See Summers, Union Democracy and Union Discipline, N.Y.U. 5TH CONF. ON LABOR 443, 478 (1952).

Recent cases, however, are less reticent in explaining frankly the underpinnings of such rulings. The right of fair criticism has been explicitly stated and protected. See Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73 (1958); Crossen v. Duffy, 90 Ohio App. 252, 103 N.E.2d 769 (1951). These cases can provide only guides, however, and the statements of broad policies, although echoed in Congress, do not simplify analysis under the LMRDA.


157. 316 F.2d at 450.
ous remarks are likely to involve officers, often better able than the disciplined member to afford law suits. Because officers are concerned about their status within and without the union, they have an incentive to begin tort suits. Indeed, the imbalance of wealth present in many cases suggests that section 101(a)(2) might well have to be read to modify state tort law to be effective. Professor Summers' suggests that it would "seem inappropriate that a federal definition of the bounds of free speech in an area where national interest predominates, should be ignored by states in defamation actions." Congress, however, was concerned with union imposed penalties and not necessarily with protection under state tort law. If Congress wanted penalties for defamation to be restricted to tort suits, as Salzhandler assumes, then section 101(a)(2) should have no necessary effect on the scope of state libel actions. Yet, a recent Supreme Court decision suggests that the LMRDA might well be read to require proof of malice and damages. In Linn v. United Plant Guard Workers, the Court held that state libel actions were not preempted by the NLRA if the plaintiff could prove that the "statements were made with malice and injured him."

The Court grounded this limitation in part on the threat to free discussion. Thus, the Sullivan standards were imposed by analogy. Indeed, should that decision be expanded beyond public officers, the first amendment may itself limit the scope of state libel actions involving union members.

Although a tort remedy exists, no one has ever advocated that damages are an adequate recompense for the damage done by tortious conduct. Libel may cause harm which cannot even be estimated. Individual harm can be remedied to some extent, but harm to the union often cannot be measured in dollars. For example, it would be impossible to estimate the damage done by slanderous statements during a strike or collective bargaining negotiations. Proof of harm or proof of miscalculation by the employer based upon these statements is not the kind of harm that can be estimated in damages. The Salzhandler reference to the availability of tort actions is thus irrelevant to harm done to the union as an institution.

The impact of statements or activity upon the union as an institution can only be determined by inquiry into a wide vari-

160. Id. at 55.
ety of factors. For example, the context in which the statements were uttered is significant. Did the speaker publish his remarks to other members, e.g., in a meeting or through handbills, or did he speak through a nonunion group or write to a local newspaper?

Timing of remarks is vitally significant. Were the remarks spoken during a membership drive, an organizational campaign, a union election, strike, or during collective bargaining negotiations? Were the remarks spoken during an internal election campaign or a period of relative institutional stability? The timing bears on both a member's intent and the likelihood of institutional harm.

The nature of the remarks and their effect is also significant. If false, were the remarks made in a good faith attempt to correct an alleged injustice? How serious was the complaint? Could the remarks weaken public or member support for the union? How did they affect prospective members? Would the remarks be likely to weaken the union's bargaining position, e.g., by making a strike threat less credible or by raising questions about the union determination to remain on strike?

To whom were the statements addressed—an officer, the union, or another member? If directed at an officer, did the remarks relate to general fitness for office or particular activities alleged to be criminal? Furthermore, the strength and stability of the union is relevant. Adverse impact often will depend upon the industrial environment. Allegations of communism, corruption, or racial bias may not seriously weaken steel or auto workers in northern cities, but may well be disastrous for a textile union in South Carolina.

A union that is struggling to attain status or is fighting for its life as an organization should be permitted to demand from its members a higher degree of solidarity against the "enemy" than a union that enjoys majority support of the employees in a bargaining unit and government protection, under statute, of its exclusive position as the bargaining agent.

Unions with continual, vitriolic internal strife such as Painters District Council 9 in New York City might be expected to produce a host of discipline cases, especially involving libel and slander. In such cases, the history and traditional aims of the

164. Wollett & Lampman, supra note 155, at 213.
union involved would seem to be relevant.\textsuperscript{165} Factional and ideological battles in unions leave a residue of distrust of any opposition. Hardman in 1928 made the following perceptive comment: "The memory of the left-wing administration in New York will most likely, for a long time to come, make impossible any effective orderly opposition in American trade unionism."\textsuperscript{166} Internal cleavages may suggest that some statements have a greater impact in some unions than in others. On the other hand, the more open and long standing internal strife has been in a union, the more likely members are to expect heated or "fighting" words, and the less impact any one statement is likely to have on the union as an institution. This factor, then, is of dubious value. It would be important, however, to know whether the speech was typical of ordinary debate.

It is questionable whether courts are able to make such detailed investigation of the relevant context and develop standards of proper conduct from that context. Doubts concerning the ability of courts to make necessary distinctions have led some writers to urge the creation of impartial, union created trial tribunals.\textsuperscript{167} Professor Summers, however, suggests that judicial capability is demonstrated by what courts do, not what they say. He found that state courts did obtain a complete factual picture, and many demonstrated ability to understand the operations of unions.\textsuperscript{168} Thus, scrutiny of a union trial board's determination, although not a de novo review, may be sufficient to develop workable standards. Clearly, a trial de novo would violate congressional intention to minimize governmental intervention into the internal affairs of unions. There are continual references in the legislative debates to Congress' faith in the principal of pluralism and the need for nongovernmental agencies to be left as free as possible. Statements such as "great care should be taken not to undermine union's self-

\textsuperscript{165} Unions designated as uplift unions by Hoxie, for example, could be expected to be extremely hesitant to place formal restrictions on democratic practices. Restrictions, if present, could be expected to be justified as protecting democracy itself. See \textit{Sayles & Strauss, The Local Union: Its Place in the Industrial Plant} 250-51 (1953). Hoxie described four functional types of unions: uplift, business, revolutionary, and predatory. \textit{Hoxie, Trade Unionism in the United States} 44-52 (1920).
\textsuperscript{166} \textit{Hardman, American Labor Dynamics} 34 (1928).
\textsuperscript{167} See Summers, \textit{Legal Limitations on Union Discipline}, 64 Harv. L. Rev. 1049, 1101 (1951); Comment, 73 \textit{Yale L.J.} 472 (1964).
government” are found throughout the legislative history. Thus, the power of unions to discipline was not removed, but, rather, it was limited by procedural and substantive rules.

Considering all these factors, Salzhandler’s remarks were justifiably protected. The justification, however, is found in the important nature of the remarks and the weak institutional interest in suppressing the statements, not in the absolute protection of all defamatory statements from union libel provisions. It is doubtful whether the union’s bargaining strength was affected. The remarks were apparently not made in the midst of an organizational or election campaign, and certainly the remarks did not relate to any such campaign. Furthermore, it is highly doubtful that Salzhandler, an officer, intended to undermine the union as an institution as opposed to undermining Webman’s position as president. Furthermore, Salzhandler’s remarks related to financial irregularities, which like corruption, were the kind of expression thought crucial by Congress. Whether true or false, a strong showing of institutional harm should be required to justify punishing this kind of expression. “[T]he Act was designed largely to curtail such vices as the mismanagement of union funds, criticism of which by union members is always likely to be viewed by union officials as defamatory.”

A number of factors may have influenced the court in Salzhandler besides those expressly relied upon. As mentioned earlier, internal strife, mingled with charges of corruption or communism, are not new to the Painters Union. The court may have felt that Salzhandler’s comments were not different from ordinary debate between the various factions in District Council 9.

The result may also have been influenced by the penalty

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171. Professor Summers has argued that state courts often decided internal union cases on factors not given prominence in the opinions. Summers, supra note 168, at 175.

172. See French v. Caputo, 53 L.R.R.M. 2417 (N.Y. App. Div. 1963), in which local officers were penalized by District Council 9’s trial board for circulating leaflets criticizing district council officers. Injunction against enforcement of disciplinary penalties was granted as circulation fell within allowable expression. See also Schimpff, supra note 145.

173. Any recent issue of “District Council 9 News” will indicate the vitriolic nature of the debate. Compare with “Painter’s Free Press,” a rebel newspaper,
imposed and the procedure employed. Salzhandler was barred from participating in union affairs for five years, preventing him from attending meetings, nominating candidates, electing officers, and participating in general in union affairs.\textsuperscript{174} Although the act does not deal with the extent to which a member can be penalized for nonprotected conduct, courts can be expected to consider the penalty imposed. The long suspension may be inconsistent with the speech guarantee, for the penalty impaired further speech by Salzhandler—he could not participate in union affairs or agitate for changes in union management. Although speech may be unprotected from particular sanctions, the courts could require that the penalty have some reasonable relation to the offense.\textsuperscript{175} A penalty which prohibits further speech would seem to unduly infringe the speech guarantee. On the other hand, union remedies, especially against libel, may be inadequate from the union's standpoint. Members may not be able to respond to fines or damages, and injunctions against libel do not lie.\textsuperscript{176}

Furthermore, disciplinary procedures, although perhaps not violative of section 101(a)(5), may nevertheless have influenced

\begin{itemize}
\item \textsuperscript{174} In addition, Salzhandler was removed from office. Although the right to be an officer is not granted in Title I, a member's position will be protected when loss of office is the result of a violation of statutory rights.
\item Summary removal of officers, however, is permissible; the procedural standards of § 101(a)(5) do not apply. Grand Lodge of IAM v. King, 335 F.2d 340 (9th Cir.), cert. denied, 379 U.S. 920 (1964). The court in \textit{Grand Lodge} did not read "member" in § 101(a)(5) to exclude officers but, rather, held that summary removal from office did not fall within "otherwise discipline." Although the language is unclear, legislative history supports the court's conclusion. See, e.g., 2 \textsc{Leg. Hist.} 1414-15 (remarks of Senator Morse). The conference report states that the section "applies only to suspension of membership in the union; it does not refer to suspension of a member's status as an officer in the union." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 31 (1959); 1 \textsc{Leg. Hist.} 935. See also Senator Kennedy's remarks: "all the conferees agreed that this provision does not relate to suspension or removal from a union office. Often this step must be taken summarily to prevent dissipation or misappropriation of funds." 2 \textsc{Leg. Hist.} 1433.
\item Summary dismissal, however, may violate common law procedural safeguards, and state rights were expressly retained. Yet, a state injunction would seem to run counter to Congress' intention to permit summary removal. This conflict suggests that section 103, which retains existing remedies under state law, may not carry its full literal meaning. For other examples of this type of unanticipated conflict, see Summers, supra note 158, at 126-28.
\item \textsuperscript{175} See \textit{Near v. Minnesota}, 283 U.S. 697 (1931).
\item \textsuperscript{176} See \textit{Brandreth v. Lance}, 8 Paige 24 (N.Y. Ch. 1839); cf. Pound, \textit{Equitable Relief Against Defamation and Injuries to Personality}, 29 \textsc{Harv. L. Rev.} 690 (1916).
\end{itemize}
the court. The trial was held on February 23, 1961, and the court stated that "not until April 2, 1961, did Salzhandler receive notice of the Trial Board's decision and his removal from office and this was from a printed postal card mailed to all members . . . ."

On April 4, the District Council mailed Salzhandler "only the final paragraph of its five-page 'Decision' . . . ." Salzhandler "did not receive a copy of the full opinion of the Trial Board until after this action was commenced on June 14, 1961." None of the above apparently violated the due process provisions of section 101(a)(5), but the court's use of language suggests its displeasure with the procedures employed. Although it is impossible to insulate such items from judicial review, procedures should be judged solely under the provision enacted for that very purpose.

Perhaps most significant for the court was its distrust of the ability and objectivity of union tribunals. The court rejected the parallel to first amendment speech and Beauharnais v. Illinois, stating that the danger to expression was overcome by the protection afforded by judicial authority. "But the union is not a political unit to whose disinterested tribunals an alleged defamer can look for an impartial review of his 'crime.'" The court's decision on libel was clearly influenced by its feeling that union tribunals were incapable of drawing the "thin and tenuous line between libel and fair comment."

The court's challenge was directed to the fairness as well as the objectivity of union trial boards.

The Trial Board in the instant case consisted of union officials, not judges. It was a group to which the delicate problems of truth or falsehood, privilege and "fair comment" were not familiar. Its procedure is peculiarly unsuited for drawing the fine line between criticism and defamation, yet, were we to adopt the view of the appellees, each charge of libel would be given a trial de novo in the federal court—an impractical result not likely contemplated by Congress . . . and such a trial board would be the final arbiter of the extent of the union member's protection under § 101(a)(2).

The court's approach has support from Professor Summers:

The most difficult problem arises when a member is expelled for "slandering a union officer." Union debates are char-

177. The card stated only the fact of his removal from office. 316 F.2d at 448.
178. Ibid.
179. 343 U.S. 250 (1952).
180. 316 F.2d at 450.
181. Ibid.
182. Ibid.
acterised by vitriol and calumny, and campaigns for office are salted with overstated accusations. Defining the scope of fair comment in political contests is never easy, and in this context is nearly impossible. To allow the union to decide this issue in the first instance is to invite retaliation and repression and to frustrate one of the principal reasons for protecting this right—to enable members to oust corrupt leadership through democratic process.183

The question of bias in union tribunals is not of recent origin. Writers have long pointed out that although state courts provided due process protection in obvious cases of bias, subtle bias was often unprovable.184 The administration often controls the trial board even if the officer slandered is not a member of the board. Patronage is a fact of union life just as in political life. Moreover, the action of the accused may have had some effect upon each member of the union. Many disciplinary cases litigated arise from internal, factional struggles which often involve the entire membership. Thus, even if unbiased, members are not uninterested. Tribunals consisting of union officers, specially elected committees,185 or the entire membership186 may be swayed less by the merits than by the strength of competing factions.187

Critics have called the failure of Congress to require truly impartial, disinterested tribunals perhaps the greatest fault of the act. Some have called for the encouragement of private, impartial tribunals such as the Public Review Board of the United Auto Workers, by creating a presumption of regularity for disciplinary proceedings tried before such impartial boards.188 Presumptions of bias would no doubt place a burden on unions to create impartial tribunals. Such a step, however, seems too great an interference with union autonomy. Title I clearly recognizes the need for discipline in some cases and contemplates

the use of union members as judges and juries. Furthermore, section 101(a)(5) sets out minimal procedural safeguards for procedural due process:

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organizations or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Bias in trial boards is inconsistent with a full and fair hearing. Although the section may only be useful against obvious cases of bias, Congress apparently felt that the section and judicial review provided sufficient protection. Courts are undoubtedly capable of enforcing and creating standards of procedural due process through section 101(a)(5). Indeed, a body of such protection has already been created by state courts. Insistence on procedural protection may insure that the courts will not have to pass on the merits of many cases and may provide a deterrence against the institution of disciplinary proceedings against other dissenters. Insistence on procedural safeguards involves less governmental interference than the creation of substantive rules as in Salzhandler.

The Second Circuit’s opinion radiates far indeed. If union tribunals are inherently biased, as the court assumed, then any disciplinary proceedings would seem to fall within section 101(a)(5). Obviously, however, Congress did not intend to prevent all such proceedings. And, as the court correctly points out, Congress probably did not intend to require a trial de novo in district courts. The court’s estimate of inherent bias cannot be read to prevent all union disciplinary proceedings under section 101(a)(5). The most likely interpretation of the court’s statements, then, is that although bias may not be shown under section 101(a)(5), the probabilities of unprovable bias are sufficiently great enough to affect the court’s resolution of the substantive question. Thus, in a case of internal political activity, for instance, the substantive balance of interests will be affected by a presumption of bias.

The court has at least frankly admitted what could otherwise have only been surmized. Ironically, common law courts often used procedural violations of union constitutions and by-laws to overturn disciplinary proceedings based upon distasteful

190. See, e.g., Summers, supra note 168, at 200-06.
substantive charges.\textsuperscript{191} The Second Circuit has reversed this process—a presumption of bias and interest affects the substantive decision.

The court's admission may be based upon realistic understanding of union life, but it is doubtful whether the court's position is consistent with congressional purpose. A procedural provision was made part of Title I, and if it is not felt sufficient, it would be better to redraft the act than warp other sections of the act to fill the gap. Although the presumption of regularity applying to administrative tribunals may be improper for private proceedings, the reversal of the presumption seems to go further than the act provides.

In light of the precise question before the court, the prime determinant in \textit{Salzhandler} may have been the inability of laymen to draw technical legal lines rather than the disinclination of the court to attempt such delineation. Thus, the court stressed the difficulty of drawing lines between fair comment and slander. There is no question, though, that the court felt that the difficulties are compounded by partial reviewers. As argued above, however, union tribunals may not draw the simple libel-privilege line under the act. The proper standard is provided by the proviso itself. The court overlooked the point, causing it to protect all libelous statements. Furthermore, the court's severe criticism of the union tribunal's partiality and ability ignores congressional intention to permit disciplinary proceedings within the framework provided by the act. Although libel may involve the drawing of fine lines, difficult for lawyers and laymen alike, the scope of a member's responsibility to his union as an institution is no less difficult to determine. The line between dual unionism and responsible criticism of union policies is also difficult, yet Congress was aware that union tribunals are composed of laymen.

The libel-free speech line cannot be drawn by union tribunals, not because they cannot be trusted, but because such a line is irrelevant to the purpose of the section 101(a)(2) proviso. Libelous and nonlibelous statements may or may not have an impact upon a union as an institution sufficient to permit the imposition of union discipline. Moreover, although libel and slander involve legal definitions and principles, the union is permitted to discipline conduct which would interfere with performance of its legal or contractual obligations. Thus, neither

\textsuperscript{191} Id. at 175.
the potential partiality of union tribunals nor their inability to apply legal principles prevents the imposition of union discipline. Although the decision of the court is no doubt correct, the court's interpretation of legislative history is dubious at best, its construction of the act is faulty, and the implications of its statements are disturbing.

The concern of Congress to provide only minimal standards, thereby limiting interference with union autonomy, should not, however, prevent courts from scrutinizing trial procedures with great care. The contract approach did not prevent state courts from preventing discipline for conduct not falling within union offenses or where there was no evidence to support the charge. Section 101(a)(5) should not be read in a narrower fashion. The courts should be assured that the conduct falls at least within the ambit of the provisions alleged to be violated under either section 101(a)(5)'s fair hearing standard or under the substantive rights provision itself. Thus, although a dual unionism provision can be applied for disciplinary purposes in a proper case, a member does not violate this responsibility unless there is some evidence that his conduct can be properly considered dual unionism within the constitutional provision or bylaw. And, even though the conduct falls within the union's definition, the grant of rights in section 101(a)(2) requires the court to go further and determine if the union provision sweeps protected conduct under its prohibition.

The problem is presented most clearly in cases involving substantive offenses with which the court has some sympathy. Although the exercise of democratic rights within unions received substantial judicial protection under the common law, Professor Summers has shown that these rights often evaporate when exercised by alleged subversives. The "very taint may lead to outlawry" and "even due process is less due when claimed

192. In Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931), union members who brought suit against officers to recover misappropriated funds were charged with resorting to the court without exhausting internal appeals. The New York Court of Appeals closely construed the appeals provision and found that no internal appeals were available, and, therefore, there was no violation. The contract approach thus placed the courts in the powerful position to interpret union disciplinary provisions. See Summers, supra note 168, at 181-85. The court's statement that they will not reweigh the evidence before the union tribunal is often "but an apologetic prelude to a full re-evaluation of the evidence . . . ." Id. at 185.

193. See id. at 196-200. See also Summers, supra note 184, at 421-22. A similar lack of sympathy is found in dual unionism cases. See Margo- lils v. Burke, 88 N.Y.S.2d 157 (Sup. Ct. 1945).
by communists. Correspondingly, the Landrum-Griffin Act does not provide greater rights of speech and association in this type of case than provided under New York's common law, for the observation of Professor Summers also applies to a recent case decided under the Labor Reform Act. In *Rosen v. Painters, Dist. Council 9,* Rosen was suspended from union membership for five years under a provision which barred union members from associating with, or giving support to, the Communist Party. Rosen argued that the section was invalid on its face under section 101(a)(2). Although the precise ground for this allegation was not stated in the opinion, it is probably significant that Rosen was not charged with membership in the Communist Party but merely with associating with or giving support to the party. As Professor Summers pointed out in referring to an earlier District Council 9 case involving charges of communism, "the argument that discipline solely for party membership was contrary to public policy was turned bottoms up." Expulsion for communist membership, activities, or associations, apparently is not only permissible, but a moral duty. Thus, the *Rosen* court noted that "the post-war period witnessed a determined and bitter struggle by unions to purge their ranks of those subversive elements subscribing to or supporting causes deemed fundamentally inimical to the genuine interests of American labor." The approach taken by the *Rosen* court is exactly the reverse of the court's decision in *Salzhandler.* The responsibility of the member to speak out, protected in *Salzhandler,* becomes unprotected in *Rosen* because the speaker associates with communists. In contrast to Salzhandler who had the responsibility to speak out, the union has the responsibility to weed out members such as Rosen. Inherent bias or laymen's lack of sophistication is apparently irrelevant. Thus, the communist allegation provides a convenient device with which to

196. The partiality of the Painter's district council for this penalty may suggest that suspension, as opposed to expulsion, is thought less likely to lead to judicial action by the disciplined member.
199. The court's approach in *Rosen* should be compared to a New York Court of Appeals decision which held that the loyalty oath required by the constitution of the Director's Guild was too vague and broad under New York public policy. *Hurwitz v. Directors Guild,* 364 F.2d 67 (2d Cir. 1966). The decision voided the particular oath before it, but permitted oaths in principle.
purge the union of trouble makers.\textsuperscript{200}

Congressional debate clearly indicates that Title I provides no bar to a union's attempt to rid its ranks of communists. Senator Aiken, for example, defended the Kuchel substitute in these words: "It was necessary to change the language so as to enable the unions to expel the known communists and criminals, who might otherwise have been frozen in a position of equality with other members."\textsuperscript{201} This clear congressional policy, however, should not be permitted to sanction the imposition of union discipline upon vague or insubstantial charges of communist affiliation.

As under the common law, the court's emphasis shifts quite radically when faced with a question involving democratic rights without a communist charge, and federal courts have not been hesitant to follow Salzhandler. In Leonard v. MIT Employees Union,\textsuperscript{202} the court upheld plaintiff's claim that his expulsion violated the act. Citing Salzhandler with approval, the court stated that "even if plaintiff had in fact carried his exercise of his right of free speech to the extent of defaming the officers of the union, he could not be disciplined by the union on that ground."\textsuperscript{203} In response to the union's contention that plaintiff's statements weakened the union "at a critical moment in its negotiations with the employer for a new contract," the court replied that no rule existed which limited speech during contract negotiations. Although the proviso requires a rule to discipline speech or conduct, it is not reasonable to expect a union to draft limiting rules covering the myriad of circumstances in which derogatory statements could injure the union. The situations might well be too numerous to contemplate explicit regulations, and broadly stated rules would offer little more assistance than the common "libel," "conduct injuring the union," or "unbecoming a member" clauses.

Ironically, the court's suggestion that only very narrow rules be used would not necessarily carry out the purposes of the

\textsuperscript{200} Such accusations were customarily made by the Rafferty administration of Painters District Council 9 in New York City. There is a communist faction in the union, but the smear is used without discrimination. See Schimpff, supra note 145, at 91; District Council 9 News, March-April 1966, p. 1, col. 1, and May-June 1966, p. 1, col. 1.

\textsuperscript{201} 2 Leg. Hist. 1231.


\textsuperscript{203} Id. at 939-40. Other cases have used Salzhandler as a precedent. See International Bhd. of Boilermakers v. Rafferty, 346 F.2d 307 (9th Cir. 1965); Cole v. Hall, 56 L.R.R.M. 2606 (E.D.N.Y. 1964); Stark v. Twin City Carpenters, 53 L.R.R.M. 2649 (D. Minn 1965).
proviso. A narrowly drawn rule limiting speech during negotiation periods could not be applied to all speech during that period. The timing of the statements is only one of the many factors which must be considered in balancing institutional and individual interests. The approach advocated herein would require the court to see if the libel offense provision could properly be imposed in the precise situation. A libel provision specifically applying to speech during contract negotiations would not significantly aid the balancing process and could, ironically, overstress institutional security interests.

On the other hand, constitutional parallels are available to suggest that overly broad or vague provisions in union constitutions may well deter protected speech. The chance that disciplinary action will be overturned in the federal court may offset deterrence only slightly since initial discipline provides a stigma and members may not desire or be able to begin litigation. Responsibility to the union, however, is likely to be interpreted to permit discipline in only those cases where members should have known their conduct seriously endangered their union's stability. In these cases the fact that broad offenses such as strikebreaking, creating dissension, or disclosing union secrets are used, does not necessarily mean that the member had no notice of the consequences of his acts. Furthermore, the substantive question of whether the union can properly penalize the conduct is only the second step of the analysis. The court must first find that the conduct falls within the penalty provisions of union law.204 The power to interpret broad provisions restrictively or broadly, to allow substantial compliance or impose literal conformity, can determine the outcome. Such power should induce unions to draw offense provisions as narrowly as possible.205

This clash of individual and institutional interests is not expressly recognized in the proviso. As mentioned earlier, section 101(a)(1), if read literally, also omits this critical balance. A rule may be reasonable in the sense that it is necessary to carry out valid institutional interests, yet its application in a particular case may nevertheless be unreasonable. If the rule

204. Such interpretation by state courts often masked a substantive attack on the discipline itself. See Summers, supra note 168, at 181-85.
205. The limits provided by normal contract interpretation rules were not used by common law courts—"the intent of the parties is unsought, even if discoverable; past practice is ignored or rejected; and prior court decisions interpreting similar clauses are not precedents." Id. at 184.
only need be reasonable in the abstract, institutional interests receive a strong bias. The reasonable rules permitted by 101(a)(1) and 101(a)(2), then, should pass a more rigorous test than validity on their face. To pass muster, a rule must also be reasonable in application.\textsuperscript{206} A less rigorous approach would seem to run counter to the basic purpose of Title I.

Although preliminary relief has been granted where the union charged vilification with malice,\textsuperscript{207} another opinion impliedly supports the interpretation suggested. A district court, in\textit{Deacon v. International Union of Operating Eng'rs},\textsuperscript{208} declined to grant a temporary injunction restraining a union disciplinary hearing based upon charges of defamatory statements. Plaintiff's statements to a local reporter were published. The article stated that plaintiff recovered 28,000 dollars in a slander suit against the union. The statement was admittedly false, but the plaintiff alleged that he was misquoted. In any event, plaintiff argued that he should not have to exhaust internal remedies or face a union disciplinary tribunal because of section 101(a)(2). Plaintiff was charged with violating a constitutional provision which provided for the discipline of any member who discredited the international union or any of its subdivisions.

The court rejected plaintiff's argument:

\begin{quote}
\begin{verbatim}
It cannot be said as a matter of law that such a statement is not “an offense discreditable to the International Union . . .” nor can it be said as a matter of law . . . the union is not adopting and enforcing “reasonable rules as to the responsibility of every member toward the organization as an institution.”\textsuperscript{209}
\end{verbatim}
\end{quote}

If\textit{Salzhandler} was correct, why should the court not interfere and prevent a trial proceeding? The union did not even charge Deacon with libel; the charges were directed to Deacon's public disclosure of his opinions rather than their content. Although accusations may damage the union as an institution, the fact that the statements were public would not necessarily designate the statements as unprotected. There would seem to be little value in permitting a union trial. Hope that the union will do the right thing is perhaps offset by the risk that they will not. Relief under section 102 is available when a right is infringed, and perhaps plaintiff should have argued that a trial

\textsuperscript{206} The appropriate standard of rationality is unclear, but congressional concern for the protection of speech suggests the rigorous first amendment standard should be used. In any event, a rule must at least leave some means for the presentation of views.


\textsuperscript{208} 59 L.R.R.M. 2706 (S.D. Cal. 1965).

\textsuperscript{209} Id. at 2708.
UNION MEMBER'S RIGHT

itself based upon protected conduct infringes section 101(a)(2) rights. Indeed, such proceedings may well be a deterrent to speech even though the result is not an imposition of a penalty. The emotional impact of such proceedings may well deter the exercise of rights, and the failure to subsequently impose a penalty would seem to foreclose section 101(a)(1) or (a)(2) relief. "Infringement" under section 102 is no doubt broader than section 609 which refers to the imposition of discipline, but whether a void proceeding is an infringement itself is unclear. Assuming plaintiff has not lost his job or membership rights in the interim, the question narrows to the deterrent effect of this kind of proceeding. Two major underpinnings of the exhaustion rule are present in this case, although this is not an exhaustion case. A union tribunal may decide not to penalize the plaintiff, thus relieving the court of further obligation. Second, the principle of autonomy and self-regulation dictates that unions have an opportunity to correct their own mistakes. Although the court expressly reserved the question of the scope of free speech in section 101(a)(2), the implication is that all libelous statements are not necessarily protected.

Only two cases, however, have significantly analyzed the proviso thus far, Salzhandler,212 and Farowitz v. Associated Musicians.213 The Salzhandler court felt that plaintiff's libel could not violate his responsibility to the union; indeed, "it would seem clearly in the interest of proper and honest management of union affairs to permit members to question the manner in which the union's officials handle the union's funds and how they treat the union's members."214 Since the act was "designed largely to curtail such vices as the mismanagement of union funds, criticism of which . . . is always likely to be viewed by union officials as defamatory,"215 such statements should be protected.

It is difficult to criticize the court's broad statement of pol-


211. In Salzhandler, plaintiff had exhausted intraunion remedies. The court expressly left open the question of whether plaintiff must first exhaust remedies in a case involving free speech. Salzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963).

212. Ibid.

213. 330 F.2d 999 (2d Cir. 1964).

214. 316 F.2d at 450.

215. Id. at 451.
icy. As mentioned earlier, certain types of speech, such as criticism of the handling of finances or charges made in election campaigns, may well deserve preferential treatment. The court's statements, however, in the context of protecting libelous statements from disciplinary action, are too sweeping. Certain statements alleging mismanagement of funds, for instance, may violate a member's obligation to his union. Nor can it be stated as a matter of law that all criticism dealing with subjects of primary congressional concern are protected in every situation. The responsibility to criticize or speak out, for instance, does not exist in a case in which the purpose of the criticism is solely to weaken or undermine the union.

Treatment of the proviso by the courts, however, is likely to be expansionary. In *Farowitz*, the Second Circuit again had the opportunity to analyze the scope and meaning of the proviso. Farowitz was disciplined for distributing leaflets urging the membership not to pay a wage tax (a form of union dues) on the ground that the union constitution and bylaws provided no alternative to collection by orchestra leaders, declared unlawful in *Carroll v. Associated Musicians*. The latter case held unlawful under section 302 of the NLRA the local's practice of collecting through orchestra leaders in the single engagement field the one and one half percent tax assessed to all working members of the local. The executive board of the union in *Farowitz* issued a statement that the court had declared only the leader's collection of the tax unlawful, and the membership was still obliged under union bylaws to pay the tax.

*Farowitz* was thus charged with undermining the local by urging nonpayment of dues after the executive board had assured the membership of the legality of the continued collection. The union's bylaws, the *Farowitz* court found, provided a reasonable basis for the union member's charge and the court found no evidence that plaintiff intended to harm the union. Relying upon *Salzhandler*, the court set aside the expulsion and ordered the member's reinstatement.

It is easy to see why this case has confirmed the fears of

many unionists. The tax in this case represented union dues, presumably necessary for the continued existence of the union. The union's reading of the Carroll case was reasonable, but the court found that Farowitz's contrary interpretation was also reasonable. Although the defendants could not prove that plaintiff designed to undermine the union's very existence, officers of the union naturally took this view.

In language echoing Salzhandler, the court held that a member's responsibility to the union as an institution "surely cannot include any obligation that he sit idly by while the union follows a course of conduct which he reasonably believes to be illegal because of what a court of law has stated." Would the statements made by Farowitz be protected if his view of the union constitution was unreasonable? In Salzhandler, the court stated that a member should not be forced to draw the thin and tenuous line between what is libelous and what is not. If libelous statements are to be protected, Farowitz's statements would probably be protected even if based upon an unreasonable interpretation of the union constitution. Whether reasonable or not, however, the question remains whether the statements significantly weakened the union as an institution. This case treads close to the line as the denial of dues to a union threatens the union as an ongoing institution. Farowitz was not only stating his views, but he attempted to rally other members to withhold tax payments.

The court characterizes Farowitz's leaflets as "one rational method of testing its [the tax's] validity and forcing an alteration in union policy, such as an amendment of the by-laws which might provide for a proper means of collecting the dues or taxes

218. 330 F.2d at 1002.

219. This case reflects a continuing dispute within Local 802 between full time and part time musicians. Local 802 has approximately 28,000 members, but only 5,000 earn their livelihood by playing full time. Full time musicians have understandably felt threatened by the vast majority of members with slight attachment to the industry. Although all members pay the same dues, performing musicians pay an additional $2% tax on their earnings. Thus, they feel they have a greater financial stake in union affairs. Work taxes are paid to slightly exceed dues each year. Thus, the small groups of active musicians are contributing, in addition to dues, an amount greater than total dues paid by the entire membership. See Union Democracy in Action, No. 17, Jan, 1966, pp. 1-2.

The active musicians are said to be the active unionists. Ibid. This might explain the continuing attempt by the actives to elect officers at union meetings or halls rather than by mail referenda. See Gurton v. Arons, 339 F.2d 371 (2d Cir. 1964); Gurton v. Manuti, 56 L.R.R.M. 2307 (S.D.N.Y. 1964).
Perhaps a more rational approach would have been a suit challenging the imposition of dues if, as alleged, no method existed in the union constitution for collecting them. Farowitz was testing the validity of the tax only in the sense that the question of validity could conceivably arise in a disciplinary action against him or in a suit by the union to collect dues.

The court did suggest that there may be some situations in which a union member would not be protected: “All we decide is that a member having such good reasons as here to believe that the collection of taxes or dues runs afoul of the law has the right to call this to the attention of the membership and to urge that they refrain from paying such assessments.”

D. THE PROVISO, DUAL UNIONISM, AND THE NLRA

Analysis of the proviso might be helpful in the context of the most serious challenge to union stability, dual unionism. Faced with jurisdictional challenges from the Knights of Labor in the late nineteenth century, American unions early developed a strong abhorrence to dual unionism. Unionists learned that unions with overlapping jurisdictions inevitably meant rival unions and such competition sapped the strength of the labor movement. Thus, only one union was to have title to particular work. “Only one national union in the territory covered . . . can be a legitimate union. Any rival local, sectional or national union is an outlaw [dual] union.” Every local has a charter setting out its territory or trade boundary and must belong to the national representing that trade or be labeled as an outlaw union. Jurisdiction of a union is considered a property right and the charter is certificate of title. “Given the importance of property rights in American life, it is easy to see why jurisdictional disputes generate the ardor usually associated with religious conflicts.”

220. 330 F.2d at 1002.
221. Ibid.
224. See Whitney, Jurisdiction of the American Building Trade Unions, 32 Johns Hopkins University Studies in Historical and Political Science 100 (1914).
putes is matched by internal efforts to combat treasonous members, and treason from within is always more disturbing than aggression from without.\textsuperscript{227}

The ideal dual union clause is one which is carefully written to apply only to the support of a rival union seeking to replace the organization as bargaining agent. Such a clause may validly be applied in a proper case under the section 101 (a) (2) proviso. A 1959 study, however, revealed that few union constitutions contained well drafted, clearly written clauses which prohibit secession movements or support of a union seeking to supplant the organization as bargaining agent.\textsuperscript{228}

Dual union clauses may properly be used to discipline members for speech or conduct only if the member's action can be said to violate an obligation owed to the union as an institution.\textsuperscript{229}

\textsuperscript{227} Seidman and Melcher distinguish rival unionism, labor organizations with conflicting organizational claims, and dual unionism, unions declared to be in conflict with the union's jurisdiction. Seidman & Melcher, \textit{The Dual Union Clause and Political Rights}, 11 \textit{Lab. L.J.} 797 (1960). Apparently the distinction is between an objective phenomenon and a subjective evaluation. \textquoteright\textquoteright\textsl{[N]ot all rival unions are declared to be dual, whereas factional political groups, not functioning as unions, may be banned as dual unions.\textquoteright\textquoteright Id. at 797 n.1.

\textsuperscript{228} \textit{Ibid.} Only twelve of the ninety-four unions studied possessed well drafted clauses.

One-third of the unions studied punished dual unionism without clearly defining the term or by using closely related language. The possible abuse of clauses referring to joining or assisting organizations which are hostile or detrimental to the union is obvious. Since the officers may state the goals of the union, they may define which organizations have aims hostile to those goals. Eight unions were found with dual union clauses which were readily usable against internal as well as external groups.

\textsuperscript{229} In Johnson v. Local 58, \textit{IBEW}, 181 F. Supp. 734 (E.D. Mich. 1960), a group of union members and nonmembers joined together to persuade the IBEW to grant them a local charter covering a geographical area which overlapped that of Local 58. Plaintiffs alleged that defendants disturbed their meeting and threatened their job rights. The court rejected a motion to dismiss but implied that plaintiffs' conduct was protected by § 101 (a) (2). Since the act was aimed at protecting members, the court dismissed as to those plaintiffs who were not members of the union. On the merits, it would seem that Local 58 could legitimately claim that plaintiffs were engaged in dual unionism since activities seeking to limit the jurisdiction of a union would seem to fall within the term. Yet, plaintiffs' conduct was not dual as far as the international was concerned. From its perspective, plaintiffs were engaged in an internal dispute. The case could be reversed—a group of local members might seek to disaffiliate from a corrupt or ineffectual international. To which union should plaintiffs' actions be determined to be responsible or irresponsible? Requesting a new local charter recognizes the hegemony of the international, although it seriously threatens the institutional stability of the local. On the other hand, such action might be the
Courts following Salzhandler may be less interested in protecting conduct alleged to be dual unionism because, although speech is involved, the speech may not refer to matters central to congressional concern. The line becomes hazy, however, when a member seeks disaffiliation or urges support for a rival local because of alleged malpractices by union officials. In this case a member would seem initially obligated to attempt reform within the union.

Urging members to join another union, seek decertification of the union as bargaining agent, or support a rival union are activities which seem to fall within the area of permissible union discipline. Support for a rival union is not always punishable, however, for such support during a representation election campaign may well be protected.\textsuperscript{230} Since the NLRA grants the right to displace the union from its status as bargaining representative,\textsuperscript{231} perhaps activity which seeks only to displace the union from its status should not be subject to limitation by internal union provisions.\textsuperscript{232} Yet, a member who advocates a change of bargaining representative is challenging the union as an institution—a union has little \textit{raison d’etre} if it has no collective bargaining functions.\textsuperscript{233}

Use of these clauses against internal political groups, of course, is not permissible, since opposition to the current administration is not the same as opposition to the union as an institution.\textsuperscript{234} The use of these clauses to insure a common front


\textsuperscript{231} NLRA § 9(c) (1) (A) (ii), 61 Stat. 144 (1947), 29 U.S.C. § 159 (1964).

\textsuperscript{232} See Rosenberg, \textit{Interpretive Problems of Title I}, 16 IND. & LAB. REL. REV. 405, 418 (1962).

\textsuperscript{233} A separate problem exists when a local committee is formed to disassociate from the international. The international no doubt has some power to protect itself, but the local as an institution is not necessarily affected or threatened. One writer suggests that a member may seek to displace the union from its status as bargaining representative but may not seek disassociation from the international. See Rosenberg, supra note 232, at 418. Yet, each situation is serious, and the fact that the NLRA protects the former does not mean that the latter conduct is a lesser threat to internal security.

\textsuperscript{234} State courts have refused to equate loyalty to the union with loyalty to incumbent officers. Thus, in Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73 (1958), the court protected the right to form an opposition
to management, without factionalism and its accompanying divisiveness, is likewise prohibited despite real institutional interests in unity. Thus, it will be necessary to prove that disciplined members have urged or aided secession or decertification and not simply that members have supported groups hostile to the union administration.

Initially, the application of dual union clauses, especially to those filing decertification petitions, might seem inconsistent with the rights granted by the NLRA. The Taft-Hartley amendment to section 7,235 granting workers the right to refrain from union activities, and the Wagner Act’s right to join and support unions,236 protects union members who wish to change their membership or change the bargaining representative. The NLRA, however, primarily protects workers against loss of employment rather than loss of union membership.237

The NLRB has zealously guarded its own procedures. Despite union constitutional provisions, a union may not expel a member for filing an unfair labor practice charge against the union without first exhausting intraunion remedies.238 The Board thus extended an earlier ruling holding that a union coerces a member within section 8(b)(1)(A)239 when it fines a member for filing a charge without exhausting union remedies.240

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237. The Seventh Circuit, sitting en banc and dividing 4-3, held that union members cannot legally be fined for crossing picket lines. Allis-Chalmers Co. v. NLRB, 358 F.2d 656 (7th Cir. 1966). Reversing its initial decision, 60 L.R.R.M. 2097 (7th Cir. 1965), the court held that fining members who worked during a strike and threatening suit to secure payment coerced members in the exercise of § 7 rights. Thus, the court extended the protection afforded to § 7 rights beyond loss of employment. The decision leads to the dubious result that unions may expel members who cross picket lines but may not impose fines. The decision raises serious questions about a union’s authority to carry out its functions and seems to conflict with the implications of the § 101(a)(2) proviso.
The use of other Board procedures, however, does not receive the same protection. Thus, unions may discipline members who file decertification petitions because such petitions attack the very existence of the union as an institution. The Board reasoned that a decertification petition, unlike an unfair labor practice charge, is an attack on the union itself, and thus, a matter of union concern. Defensive action by the union, such as expulsion, is proper for "to require them to tolerate an active opponent within their ranks would undermine their collective action and thereby tend to distort the results of the election." The Board has distinguished unfair labor practice charges which relate to past events, and involve the public interest in securing obedience to the act, and representational disputes, which affect future elections. Furthermore, the right to invoke Board processes was narrowed to invocation for the sole purpose of compelling obedience to the act. Since both rights are protected by the act, however, the Board has decided the right to bring unfair labor practice charges, necessary to invoke Board responsibility, is more important than the right to seek decertification, especially since the NLRB finds institutional interests significant. Especially significant is the fact that the exercise of rights or procedures under the NLRA will not necessarily be safeguarded from union discipline. Given this result, rights granted by the NLRA are less than perfect indicators of the scope of member freedom and union disciplinary power under LMRDA.

Although the NLRB's distinction may well be dubious, the distinction roughly approximates the permissible scope of discipline under the LMRDA. Indeed, the language used to distinguish the decertification case is probably drawn from section 101(a)(2). Possible conflict could arise when a member files an unfair labor practice charge, protected from disciplinary sanction, which arguably violates a responsibility owed to the union. Although a member's responsibility to his union would not normally conflict with rights granted by federal law, a member could frustrate an election campaign by filing unfair labor practice charges. In this situation the Board holds the election in abeyance until the unfair labor practice charge is resolved. Such delaying tactics, especially when engaged in by members rather than employers, may have an effect on the ultimate election.

Yet the Board will prevent discipline, although it may be permitted by the LMRDA.\(^{244}\)

Whether the Board will protect frivolous charges or charges filed to harass or weaken the union is unclear. Assuming that this conduct is unprotected by the LMRDA, such action by the Board would greatly minimize conflict between the two statutes. It may often be extremely difficult, however, to determine whether charges were filed in bad faith or to undermine the union. The Board might find it administratively wiser to protect all complainants.

Title I is cast in terms of individual rights rather than institutional rights. Thus the union has no statutory right to sanction unprotected conduct. Congress' primary concern to protect individual rights suggests that a liberal accommodation between the two statutes is necessary. Thus, although conduct may be unprotected by Title I, and discipline would not violate the LMRDA, discipline may still be improper under the NLRA. That is, since Title I grants rights to members rather than unions, permissible discipline under the LMRDA is not necessarily proper under other federal statutes.

V. ENFORCEMENT OF TITLE I RIGHTS

Rights under Title I are enforced by civil actions in federal courts brought by individual members.\(^{245}\) A criminal provision partially overlaps section 102. Under section 610\(^{246}\) it is unlawful for any person to use force, coercion or intimidation for the purpose of interfering with statutory rights. Willful violation is punishable by a fine of not more than 1,000 dollars or imprisonment for not more than one year, or both. Unlike sections 102 and 609, section 610 is directed against any person and,

\(^{244}\) Actions under the LMRDA are not preempted even though the conduct involved is arguably subject to the NLRA. It would seem, however, that the two laws should be read so as not to conflict. See Burris v. International Bhd. of Teamsters, 224 F. Supp. 277 (W.D.N.C. 1963); Thomas v. Penn Supply & Metal Corp., 35 F.R.D. 17 (E.D. Pa. 1964).

\(^{245}\) LMRDA § 609, 73 Stat. 541 (1959), 29 U.S.C. § 529 (1964), makes it unlawful to "fine, suspend, expel or otherwise discipline any of its members" for exercising any right granted under the act. The provisions of § 102 are expressly "applicable in the enforcement of this section." As far as Title I is concerned, however, § 102 is sufficient for all violations of rights granted under that Title. Since discipline imposed for exercising Title I rights infringes rights secured by § 102, § 609 adds nothing to the enforcement of Title I. For the legislative history of §§ 102 and 609, see Rothman, Legislative History of the "Bill of Rights" for Union Members, 45 Mnn. L. Rev. 198, 216-19 (1960).

thus, has been held to apply to other union members or officers not acting in their representative capacity.\textsuperscript{247} The courts have rejected the argument that section 610 is merely the criminal counterpart of section 102. Defendants have argued that neither section 102 nor section 610 creates rights, but rather, each merely supplies sanctions for violation of rights protected by the act. In rejecting these claims, courts have stressed the broad language of section 610 vis-a-vis section 102.

Section 610, then, enforces a right which is not given under Title I, that is, a right against members or officers not acting in their representative capacity. The act has been read to provide no civil remedy for vindication of Title I rights against one who is not acting in the capacity of an official or an agent of a labor union.\textsuperscript{248} Thus, the civil remedies under the act focus only on the union-member relationship.

Although the courts seem correct in holding that "any person" in section 610 is broader than the union-member relationship, courts have completely overlooked the absence of any limitation on the source of interference in section 102. Section 101 (a) (2) grants rights to every member, and section 102 provides a federal cause of action for "any person whose rights secured by the provisions of this title have been infringed by any violation of this title." Thus, rights are given to members without limitation as to possible infringers of those rights. Of course, actions by members may be covered if the conduct is requested or ordered by officers or if the aggressor has conspired with officers. Although Congress primarily sought to affect the union-member relationship, such relationship can also be affected by actions of members who are not acting in an official capacity. Furthermore, the principle of union democracy and the concern over individual rights suggests that rights be protected from interference by any member of the union.

Writers have generally assumed that the limited interpretation of section 102 is correct, assuming that the act was not intended to provide a tort remedy. Yet, making sections 102 and 610 parallel in scope would still provide an area of protection narrower than tort because plaintiff would have to demonstrate that the conduct infringed rights secured by Title I.\textsuperscript{249}


\textsuperscript{248} See Tomko v. Hilbert, 288 F.2d 625 (3d Cir. 1961).

\textsuperscript{249} For a similar argument, see Dunau, supra note 230, at 86.
As originally introduced, section 102 would have required an aggrieved union member to file a complaint with the Secretary of Labor, the remedy provided by Title IV. The Kuchel substitute, however, substituted the present provision permitting individual suits.\footnote{250}

When Senator Kuchel introduced this change, he commented:

[H]ere is one of the major changes in the proposal. The amendment of the Senator from Arkansas provided that the Secretary of Labor might, on behalf of the injured or aggrieved member, have the right to litigate the alleged grievance and to seek an injunction or other relief. We believe that giving this type of right to the aggrieved employee member himself is in the interest of justice, and therefore we propose to eliminate from the bill the right of the Secretary of Labor to sue in his behalf.\footnote{251}

Senator Clark stated the amendment "takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts."\footnote{252} It is naive, however, to assume that union members are perfectly free to bring suits in federal district courts against their union. Social pressures, as well as serious economic ones, deter such suits. Furthermore, the strict interpretation given to Title I by the courts deter lawyers from recommending litigation. The paucity of cases under 101(a)(1) and 101(a)(2) suggests that few union members have been motivated to litigate.

The cost of suit is likely to be heavy, and workers have little money to pay lawyers' fees and prepare records. Even if the suit is successful, there are relatively few situations in which an attorney can secure compensation. "Most men are reluctant to incur financial expense in order to vindicate intangible rights."\footnote{253}

Furthermore, there is a great disparity in financial resources, and time is always on the side of the defendants. In internal union cases, defendants usually have the financial resources to stall or finance costly procedural maneuvers and extended appeals, thus causing plaintiff to incur further expense.\footnote{254} The

\footnotesize\textsuperscript{250.} The only exception in Title I is the right to receive a copy of the collective bargaining contract, a right granted by § 104 and enforced by civil actions by the Secretary of Labor under § 210.
\footnotesize\textsuperscript{251.} 2 Leg. Hist. 1232.
\footnotesize\textsuperscript{252.} Id. at 1233.
\footnotesize\textsuperscript{254.} See Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L.J. 175, 221 (1960); Summers, The Usefulness of
resolution of motions and appeals may take years.\textsuperscript{255} This delay drains the financial resources of the member as well as his resolve to continue the action. During this time, his participatory rights in union affairs are limited or nonexistent unless, of course, disciplinary penalties are stayed. Even attorneys who willingly accept cases with little chance of renumeration may begin to doubt the worth of the undertaking.

As far as social pressures are concerned, some members have nothing to lose. Plaintiffs tend to be members who have been expelled, heavily fined, or removed from union office. Those suffering lighter penalties, receiving small fines for instance, or those objecting on principle to some undemocratic practice, will not be induced to bring suit. Perhaps this was envisioned by the drafters since any suit drains union funds, takes time and expense, and may cause hostility and rifts within the union. However, Congress apparently wanted members to sue if they had a meritorious claim, and many claims are meritorious even though the harm to the plaintiff is not particularly great.

The original McClellan proposal, stated in broad terms, might not have placed the government too firmly in internal union affairs. Realistically, the Secretary of Labor is not a person one would assume would interfere in internal union affairs with relish. The Secretary is susceptible to many political pressures, including those from officers of large and important unions whose cooperation he needs.\textsuperscript{256} However, just as it is not difficult to imagine union officers being threatened with civil rights suits or the withdrawal of federal highway funds if they do not modify their wage demands to meet administrative wage-price guidelines, so it is not difficult to imagine the Secretary of Labor threatening Landrum-Griffin actions unless officers conform to Washington's idea of normative behavior. Yet, private enforcement probably discourages the filing of civil actions by members who might be willing to file a charge with an administrative agency.

Certainly, at a minimum, the act should provide counsel fees in successful actions out of the union treasury. This would not necessarily increase the number of capricious suits, but would


\textsuperscript{255} The author is acquainted with a case which has been before a district court for over six years and, although still at the pleading stage, is being appealed.

\textsuperscript{256} For a skeptical view, see Lipset, supra note 253, at 32.
aid the member who has a meritorious claim but cannot afford the time and expense of hiring a lawyer and fighting a case against an opponent with vast financial resources. Such a remedy is provided under Title V, providing for civil actions to rectify financial misdeeds. Of course, Title V is similar to a stockholder's derivative suit. Plaintiff's suit is brought in the name of the union itself; therefore, it is proper to reimburse the member for attorney's fees. The recovery of funds benefits the union as a whole rather than any individual member. The action is not for damages because of peculiar harm suffered by any member, but for injury to the union. However, plaintiffs who are successful in Title I actions are acting for the interest of all of the members of the union, although they are basically protecting their own interest. The plaintiff could be considered as protecting rights belonging to all members and, if his claim is upheld, he should be reimbursed for all legal costs incurred in protecting common rights. Each successful action encourages expression and questioning by other union members, and, perhaps to some extent deters similar disciplinary action against these members. This proposal would not create an incentive for capricious suits, for cost recovery would exist only in meritorious cases.

The availability of a damage remedy in some cases is of little help. The uncertainty of victory and obstacles to recovering from union treasuries make an attorney's compensation unlikely. The beneficence of a self-sacrificing attorney, or the right to file as a pauper with typewritten briefs, alleviates the problem only slightly. Perhaps more significant is that many cases involve factional fights involving groups of members. Professor Summers argues that the cost burden is not as great as might appear because the cost burden can be shared. Furthermore,

258. Section 501(b) grants the discretionary authority to allot "a reasonable part of the recovery . . . to pay the fees of counsel . . . and to compensate [a member] for any expenses necessarily paid or incurred by him in connection with the litigation." 73 Stat. 535 (1959), 29 U.S.C. § 501(b) (1964). Reasonable fees, then, are limited by the amount recovered.
259. This concept was stated long ago in Irwin v. Possehl, 143 Misc. 855, 858, 257 N.Y. Supp. 597, 600 (Sup. Ct. 1932): "If any member is deprived of [his] equal right[s], not only is an injustice done to that individual, but the entire class suffers."
many lawyers take cases seeking future clients or subsequent nonlabor work or, especially in election cases, hoping to become the union's counsel if the dissidents are victorious.\textsuperscript{261}

Of course, costs of suit and appeal can create serious difficulties even for a substantial organized group.\textsuperscript{262} Few individuals become plaintiffs if they are not backed up by a group which has raised money from its members:

Even then, unless the recovery of a large sum of money or the definite control of the union goes to the winner, a faction will hesitate to enter into litigation. It is a rare group of men that will undertake the many pressures and difficulties mentioned, merely to establish the principle of union democracy.\textsuperscript{263}

Indeed, the single individual is less likely to seriously consider suit.\textsuperscript{264} Add to this the unfamiliarity of attorneys with the law of internal union affairs, the lack of legislative history for an ambiguous statute, and tough pleading requirements,\textsuperscript{265} and it is doubtful that single individuals receive significant protection.

Assuredly, there are lawyers who accept internal union cases even though there is little chance of compensation. Presumably, however, many meritorious claims do not even reach this point. An individual might very well be cowed by the burden of challenging the union, an organization to which he may have strong ties. Furthermore, workers may be unfamiliar with the law and probably have had little, if any, contact with

\textsuperscript{261} See Summers, supra note 254, at 221.
\textsuperscript{262} See id. at 221 n.274. H.W. Benson, editor of Union Democracy in Action, described an insurgent group as living "on its own stubborn spirit. It collects dimes and dollars. A reform leader works all day and tries to be a Superman at night. Insurgents crank little second-hand mimeograph machines. No advice, no lawyers, no trained writers, no staff." Union Democracy in Action, No. 11, Jan. 1964, p. 3.
\textsuperscript{263} Strauss & Willner, Government Regulation of Local Union Democracy, 4 Lab. L.J. 519, 530 (1953).
\textsuperscript{264} Professor Summers states that individual cases go by default since many lawyers refuse to take cases unsupported by factional groups. See Summers, supra note 254, at 222.
\textsuperscript{265} In Scovile v. Watson, 338 F.2d 678 (7th Cir. 1964), a plaintiff complained that he was not permitted to raise a motion to reconsider the union's failure to arbitrate a discharge. The complaint was dismissed for failure to state that plaintiff's motion was in order and proper for consideration at that time. Since few meritorious claims find their way to district courts, the court's feeling that specificity is required to prevent "frivolous law suits initiated by dissident members" is dubious. In Yanity v. IAM, Civil No. 9440, W.D.N.Y., Dec. 31, 1962, allegations that members were not "permitted to speak without interruption" were held insufficient. Plaintiffs apparently must specifically allege that the proviso or reasonable rule limitation in § 101(a)(2) does not apply. But see George v. Bricklayer's Union, 255 F. Supp. 239 (E.D. Wis. 1966).
attorneys before. Thus, they hesitate to become involved in legal proceedings. Furthermore, members are cognizant of enormous risks, feeling that entrenched officers have legal and illegal ways of "taking care" of a troublesome member. Therefore, even alleviation of the cost burden would not remove all of the obstacles to suit.

VI. CONCLUSION

The sparse litigation under Title I does not necessarily indicate that the act has had little effect. Although many observers feel that the act has had a beneficial effect, evidence of such an effect is lacking. Observers have pointed out voluntary reforms of internal procedures undertaken by many unions. However, the evidence does not suggest that these reforms have benefited union members greatly. There is a trend toward more formalized union disciplinary procedures with explicit guarantees and statements of members' obligations to the unions. Although members' obligations and rights may now be clearly spelled out, certainly a desired result, clearer statements of obligations owed to the union may not significantly expand members' rights under union law.

Some observers feel that increased responsiveness to members' wishes will result in greater militancy, irresponsibility, and intransigence at the bargaining table and increased use of the grievance procedures. Some observers have noted a wave of

268. The unfamiliarity and hesitation of union members to involve themselves with the law can be traced to characteristics of working people in general. Their "norms include avoiding involvement with community authorities in general and with the law in particular." Lipset, supra note 253, at 27-28.
269. See, e.g., Aaron, The Union Members "Bill of Rights": First Two Years, 1 Industrial Relations 47, 71 (Feb. 1962).
270. Ibid.; Swankin, Union Disciplinary Powers and Procedures, 86 Monthly Labor Rev. 49 (Pt. 4 1963), states that of seventy unions holding conventions between the signing of the LMRDA and late 1961, fifty-five, with a membership of over nine million, amended one or more constitutional provisions relating to the discipline of officers and members. Many unions also amended election provisions, primarily related to "specific requirements of the Act." U.S. DEPT. OF LABOR, UNION CONSTITUTIONS AND THE ELECTION OF LOCAL UNION OFFICERS 8, 14-16 (1965).
271. See Young v. Hayes, 195 F. Supp. 911 (1961), where amendments deemed "necessary" by the international tended to create more centralized control.
272. See Aaron, The Labor Management Reporting and Disclosure
rebellion by locals against international officers, especially by rejecting negotiated settlements.273

Governmental protection of individual and political rights will not guarantee that the rights will be exercised, nor does it promise that the traditional apathy of union members to union affairs will be significantly affected. Fear is only one reason that members submit to official abuse of authority; another reason is the primary concern of members for material gains.274 The act does not alter this concern. The law attempts to tread an ill-defined line by preventing the destruction of opposition groups while also attempting to prevent disruptive splintering by recognizing institutional security interests. Using law to strengthen the day-to-day operation of democratic self-government is a difficult task. Legal commands cannot create members willing to insist on democratic practices and procedures, nor can they change apathy and indifference.275

The act does set a moral code, more explicit than the law of many states although not necessarily as broad in scope. The hope of most legislation, labor as well as nonlabor, is to set moral standards in areas previously unregulated by explicit moral guides.276 Hopefully, Title I has made officers more sensitive to individual rights as well as removed some deterrents to a member’s willingness to question or criticize union policies. By creating moral standards, the public and union members now have expectations about institutional behavior that may induce even greater responsibility on the part of union officials.

Act of 1959, 73 Harv. L. Rev. 851, 906 (1960); Lipset, supra note 253, at 33-34. Arbitrators have expressed the belief that more dubious and even frivolous grievances are being brought to arbitration by unions. Yet, from the standpoint of national policy, it is doubtful that oligarchic unions are preferable.

273. Cole, Current Trends in Collective Bargaining 2 (1960). The rebellion of airline mechanics against the IAM international officers in 1959, used as an example by Mr. Cole, has recently been repeated.


275. Professor Wellington in 1958 suggested that an expanded doctrine of fair representation was preferable to legislation of union democracy because principles of federalism suggested that regulation of union admission, discipline, and elections be left to the states and because federal legislation would not accomplish its object. Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1361-62 (1958).

276. See Lipset, supra note 253, at 35.