1992

Effective Democracy and Formal Rights: Retaliatory Removals of Union Officials Under the LMRDA

George Feldman

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol9/iss2/2
EFFECTIVE DEMOCRACY AND FORMAL RIGHTS: RETALIATORY REMOVALS OF UNION OFFICIALS UNDER THE LMRDA

George Feldman*

INTRODUCTION

This article is about union democracy. It argues that the removal from office of union officials in retaliation for their speaking or organizing against the policies of higher union leaders violates the Labor-Management Reporting and Disclosure Act of 1959 (the "LMRDA").

Emil Cehaich was a machinist for General Motors in Detroit. In 1975, when he had seven years of seniority, he was appointed by the union, the United Auto Workers, to be a benefits representative. As the collective bargaining agreement provided, Cehaich remained a GM employee and received his normal pay, but carried out his new duties during the work day. He helped retirees, beneficiaries and surviving spouses with pension and insurance problems, and handled the appeals of those whose claims were denied.

In 1979, a new collective bargaining agreement was negotiated with General Motors. The union brought elected and appointed officials who represented GM employees around the country, including Cehaich, to Dallas for a special meeting. The stated purpose of the meeting was to inform them about the tentative agreement before it was presented to the general membership for ratification. It is safe to assume that the union's national leadership wanted to convince these 4,000 "influential local union members" that the proposed new con-
tract was a good one, and to enlist their support in having it ratified.

In Dallas, Cehaich “became part of a dissident caucus which opposed the tentative agreement. He was among those dissidents who distributed a leaflet criticizing the agreement,” and warning the assembled local leaders that they would bear the brunt of the membership’s anger in the next elections.4 In response, the UAW leadership instructed GM to remove Cehaich as a benefits representative, which the company did.5

When Cehaich sued, claiming his removal from office violated his statutory right “to express any views, arguments, or opinions,”6 the District Court granted summary judgment against him,7 and the Court of Appeals affirmed. The court found that “Cehaich’s status as a member of the union remained unchanged after his dismissal from his position as a union officer,” and, therefore, he had failed to state a claim under the LMRDA.8

There is nothing unusual about this decision; there is probably no federal court that would have ruled otherwise.9 The union involved carefully protects the formal democratic rights of its members. It does not have a reputation for physically preventing opponents of the leadership from speaking at meetings, or of stuffing the ballot boxes. It is not gangster-ridden and does not have dissidents beaten up. It allows members to appeal many leadership decisions to an impartial “Public Review Board,” consisting of prominent outsiders whose reputations are above reproach.10

Nonetheless, the union’s action prevents the emergence of effective opposition and preserves the union as a single-party monopoly. The current law of retaliatory removals makes absolute loyalty to the leadership the price that must be paid for inclusion in the union’s political life. As a result, it blocks the development of effective union democracy and contradicts the goal of the LMRDA.

The primary objective of the Act was to ensure that “unions would be democratically governed and responsive to the will of their

4. Id.
5. Id. at 237.
8. Cehaich, 710 F.2d at 238.
9. It is possible that some courts would hold that the union may not remove non-policymaking appointed officials from office for expressing opposition and that Cehaich was a non-policymaker. See infra notes 446-448 and accompanying text.
memberships.” When Congress passed the original National Labor Relations Act (the “NLRA”), it decided that encouraging unionization was to be the basic labor policy of the United States. In passing the LMRDA, it dealt with the issue of deciding what type of unions that policy required. The LMRDA represents a Congressional decision that the national labor policy can best be effectuated by encouraging democratic unionism.

The rights at issue in a retaliatory removal are secured by Title I of the Act. However, the entire LMRDA deals with limiting the powers of union leaders, ensuring their accountability to their members and guaranteeing the members’ basic democratic rights. Title II of the Act, the reporting and disclosure provisions, requires the filing of detailed annual union financial reports with the Department of Labor. It also provides that members shall have access to that information and the records on which the reports are based. The availability of financial records of unions and their officers is a means of increasing the accountability of the union hierarchy and has been an important tool for union reform groups. Title III of the Act limits the reasons for which a national union leadership may place a local or other subordinate body into trusteeship. Consequently, it is more difficult for a national union leadership to establish a trusteeship for the purpose of squelching opposition locals.

13. The summary which follows does not include all the provisions of the LMRDA, nor does it describe the qualifications and special conditions included in some of the Act’s provisions.
15. Section 201(c) provides that a union “shall make available the information [in the required reports] . . . to all its members, and . . . shall be under a duty enforceable at the suit of any member . . . to permit such member for just cause to examine any books, records, and accounts necessary to verify such report.” 29 U.S.C. § 431(c) (1988).
16. See e.g., Sheet Metal Workers v. Lynn, 488 U.S. 347, 349 (1989) (describing rank and file group which used Department of Labor statistics in leaflets to demonstrate disparity in spending by their local officers compared to others). Convoy-Dispatch, the newspaper of Teamsters for a Democratic Union, regularly uses Title II-required information to publicize the multiple salaries of top Teamster officials.
18. Title III also provides procedures to eliminate the previous practice in some unions of preventing the development of alternative leaderships by maintaining locals in semi-perpetual trusteeships. See James, Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections, 13 HARV. L.REV. 247, 326 n.264 (1978) (examining the elections of the United Mine Workers from 1969 to 1973). The Act includes an eighteen month time limit after which a trusteeship will normally be terminated, and allows both private actions by members and actions instituted by the Secretary of Labor on the complaint of a member to terminate a trusteeship. LMRDA § 304(e), 29 U.S.C. § 464(c) (1988).
The trusteeship provisions are evidence of an interest in local autonomy for the purpose of encouraging opposition. Title IV mandates the periodic election of union officers, requires secret ballots and other procedural safeguards. It also sets the maximum terms of office, bars the use of union resources to promote a candidate and provides for enforcement through the Secretary of Labor acting on the complaint of any member. Other sections of the LMRDA forbid union discipline for exercising any rights under the Act and provide criminal penalties for using violence to interfere with their exercise.

When the bill that contained these provisions was introduced, many legislators "feared that the bill did not go far enough because it did not provide general protection to union members who spoke out against the union leadership." The resulting amendments became Title I of the LMRDA: the "Bill of Rights" of union members. Title I guarantees members equal rights to nominate candi-

19. In Lynn, the Supreme Court stated that:

The Committee Report . . . stressed that 'labor history and the hearings of the McClellan committee demonstrate that in some instances trusteeships have been used as a means of consolidating the power of corrupt union officers, plundering and dissipating the resources of local unions, and preventing the growth of competing political elements within the organization.' 488 U.S. at 356 n.8 (quoting S. REP. No. 187, 86th Cong., 1st Sess., 17 (1959))(emphasis added by the Court).

20. LMRDA §§ 401(a),(b), and (d); 29 U.S.C. §§ 481(a), (b), and (d)(1988).

21. The Act provides for the union to distribute campaign mailings at a candidate's own expense, allows candidates to inspect the membership list, and requires "[a]dequate safeguards to insure a fair election. . .including the right of any candidate to have an observer at the polls and at the counting of the ballots." LMRDA § 401(c), 29 U.S.C. § 481(e) (1988). The campaign mailing requirement, unlike the remainder of Title IV, provides a private cause of action.

22. LMRDA §§ 401(a),(b), and (d); 29 U.S.C. §§ 481(a), (b), and (d) (1988).


25. See LMRDA § 609, 29 U.S.C. § 529 (1988). See also infra note 135 and accompanying text. The section provides in pertinent part:

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.


28. The usual difficulty in ascertaining the "intent of Congress," except in the most general sense, is heightened here for two reasons. First, because the LMRDA Bill of Rights was first introduced as a series of amendments from the floor, there is little relevant legislative history. Second, it is clear that Congressional supporters of the LMRDA saw it as a way of
dates, vote, attend union meetings and participate in those meetings.\textsuperscript{29} It provides for freedom of speech and assembly.\textsuperscript{30} It requires a secret ballot election to raise dues\textsuperscript{31} and guarantees members the right to sue and institute actions before administrative agencies.\textsuperscript{32} It prohibits discipline of union members without due process.\textsuperscript{33} It invalidates any union constitutional or bylaw provision that conflicts with the LMRDA Bill of Rights.\textsuperscript{34} Title I also creates a private cause of action to remedy the infringement of the rights it protects.\textsuperscript{35}

The Supreme Court has referred to these difficulties and cited them as reasons to heed Professor Cox's admonition to interpret Title I flexibly, without too strict an emphasis on the language. But when it suits the Justices, they have laid extraordinary emphasis on the language without any apparent interest in the broader purposes of the statute. See infra note 138 and accompanying text.

\textbf{29.} LMRDA § 101(a)(1) provides:

\begin{quote}
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.
\end{quote}


\textbf{30.} LMRDA § 101(a)(2) provides:

\begin{quote}
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 reasonable rules pertaining to the conduct of meetings: \textit{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.
\end{quote}


\textbf{33.} LMRDA § 101(a)(5) provides:

\begin{quote}
No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization 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.
\end{quote}


\textbf{35.} LMRDA § 102 provides in relevant part:

\begin{quote}
Any person whose rights secured by the provisions of this subchapter [Title I of the
Union democracy is, therefore, required by law. But the appropriate scope of union democracy, for too many courts, has been based on a view that the union is like any business enterprise, with management having a right to run the enterprise however it wishes. This version of democracy allows no room for diversity of opinions inside the union's "management" or among its "agents." In keeping with this often unarticulated view, current law assumes that some LMRDA rights are formal and abstract things: that penalizing a low-level appointed union official for exercising her political rights does not "infringe" those rights; that forcing her to choose between her right to speak as a union member and keeping her job does not violate her free speech right. It assumes that the law should be indifferent to a major effect of compelling such officials to make this choice: perpetuating the permanent entrenchment of the incumbent leadership.

LMRDA have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. 29 U.S.C. § 412 (1988).

Title I also provides that all members are entitled to copies of collective bargaining agreements that affect them, LMRDA § 104, 29 U.S.C. § 414 (1988), and that unions must inform members of the provisions of the Bill of Rights, LMRDA § 105, 29 U.S.C. § 415 (1988).

In addition § 103 specifies that:

Nothing contained in [Title I] shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization. 29 U.S.C. § 413 (1988).

36. See Newman v. CWA Local 1101, 570 F.2d 439, 445 (2d Cir. 1978) [hereinafter Newman I]. The court held that:

Unless the management of a union, like that of any other going enterprise, could command a reasonable degree of loyalty and support from its representatives, it could not effectively function for very long. To obligate union leaders to tolerate open defiance of, or disagreement with, its plans by those responsible for carrying them out, would be to invite disaster for the union.

Id. (emphasis added). See also infra note 209 and accompanying text.

37. The LMRDA defines "officers" to include constitutional officers only; but I will use the term interchangeably with "officials" except when the more limited use is clear from the context.

The terms "officer" or "official" refer only to those who are members of the union, and thus, the discussion applies only peripherally to professional employees of the union, such as attorneys, accountants, and economists. These professional employees, while they provide resources that help incumbents maintain power, are not the potential leaders of an opposition. See infra note 365 and accompanying text. While union democracy requires the broadest possible interpretation of the rights of member-officials, democratic goals would probably best be served by barring the participation of non-member employees in any aspect of the union's political activity.


39. See Newman v. CWA Local 1101, 570 F.2d 439 (2d Cir. 1978).
These assumptions, manifested as legal doctrines, are not supported by the language or legislative history of the LMRDA. Furthermore, they are inconsistent with the doctrines that govern analogous areas of law. Most important, they function to defeat the overriding policy of the Act, the encouragement of democratic unions.40

The LMRDA requires a more democratic view, and it permits the view that unions should be widely participatory—the view that is required to revitalize American unions.41 The fact that American unions are in a serious decline, by any measurement, is not seriously disputed.42 This article is based on the belief that workers need powerful unions to advance their interests and that in order to be powerful in this way, unions must be democratic.43 The union democracy necessary to advance workers' interests in the America of the nineties goes beyond the formal rights now generally guaranteed by law.44

40. See supra note 11 and accompanying text (discussing the primary object of the LMRDA).
42. The causes of that decline, and its effect on the well-being of American workers, are issues of great controversy. There are several competing theories; see generally P. Weiler, Governing the Workplace: The Future of Labor and Employment Law (1990). One stresses that for reasons such as structural change in the economy, contemporary American workers no longer desire union membership as much as they did in the past. While many of these changes are extremely important, this is an ahistorical explanation that completely begs the question. See Book Review, 84 Mich. L. Rev. 1079 (1986). Second, the argument is strongly advanced by Prof. Weiler and others that a change in the legal climate has occurred and that employers have become increasingly willing to break the law in efforts to defeat unions. See Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769 (1983).

Again, while I believe this is true, and ought to be changed, it cannot seriously be argued that American employers are less willing to accept unions now than they were in the period that followed the passage of the Wagner Act and saw explosive union growth. Similarly, the change in governmental attitude is important, but the judiciary, at least, was surely no less hostile to unions in the thirties.

I believe that employer and, usually, government hostility to strong unions is to be assumed, and changes in economic structure, especially changes seeking cost advantages and labor savings most specifically, is a constant of the American economy. Unions have failed to respond to those changes, though they were able to respond to the greater changes of the thirties. See generally, K. Moody, An Injury to All (1988); I. Bernstein, Turbulent Years (1970).

I shall not say anything in this article about the ability of unions to change the economic situation with which they are confronted. But it should be understood that some degree of optimism about that ability is necessary for the argument of this article to make any difference.

44. The legal guarantee of internal union democracy is much more restricted when the collective bargaining relationship is involved. See Hyde, Democracy in Collective Bargaining, 93 Yale L.J. 793 (1984). Thus even some formal democratic rights, including perhaps the
and usually respected by most union leaderships. Instead, unions must be able to use their most important strengths, which they have largely squandered in the last decades. These strengths are the enthusiasm, solidarity, creativity, and endurance of their members, and of those who must be convinced to become members if unions are to regain their ability to improve the lives of working people. Unions that have not relied on these strengths have been increasingly unable to confront employers; they will continue to fail.

The kind of union democracy required involves the transformation of unions from bureaucratically hierarchical entities into organizations whose structure and philosophy encourage mass participation. This transformation requires creating an atmosphere that favors the vigorous expression of diverse views as a legitimate means of advancing the union. Such a philosophy of unionism, would re-

45. I do not intend to romanticize the working class; but my argument does assume that the great run of ordinary human beings, individually and collectively, achieve a good deal more, and are capable of still more, even under the most unfavorable circumstances than observers from above usually notice. See generally, E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1964); E. GENOVESE, ROLL, JORDAN, ROLL (1974); F. DOBBS, TEAMSTER REBELLION (1972).

46. The argument that unions are like an army at war in which disagreements threaten the unity necessary for victory, what Edgar James describes as the “united front” conception of the union, is the main justification advanced by union leaders for the lack of pluralism within unions.

[But] “autocracy may well defeat...strong, militant bargaining. Without more responsive mechanisms of government, union leadership is not likely to have the united membership necessary to back it in collective bargaining. The workers may feel antagonistic toward the leadership because they are not being consulted or because the leadership is not pursuing strongly supported contract demands.” James, supra note 18 at 250-51.

If the justification for lack of democracy is the union’s success at the bargaining table, then, however attractive the argument may have been during the post-war gains of the American labor movement, it simply will not wash today. See generally, K. MOODY, supra note 42.

47. It is possible that all organizations tend towards bureaucracy and hierarchy. R. MICHELS, POLITICAL PARTIES (1915). But see K. MOODY, supra note 42 at 28-29. But even if that is so, a tendency can be countered. And it is not necessarily crucial that the goal of a non-hierarchical mass participatory organization—a utopian goal, perhaps,—be achieved. Rather, the process by which members attempt to achieve that goal is itself the necessary countermeasure, creating a democratic and participatory ethos, or if one prefers, ideology.

48. There is a connection between the philosophy of democratic unionism I am describing, as compared to the bureaucratic unionism typical of American labor unions today, and the
ject the identification of the bureaucracy as the "union". It would refuse to accept the views of the leadership as the only legitimate position.

This is not to deny that the union leadership sometimes represents the union as an institution. This is especially true in collective bargaining and other contexts when the union is confronting the employer. Both the logic of the situation, and the structure of American labor law, based on exclusivity, require that the employer heed only a single union voice in these circumstances.\textsuperscript{40} The exclusivity of the bargaining relationship, however, does not require that union officials speak with one voice to one another and to the membership. The law now recognizes that the interest in union democracy protects an elected union official from removal in retaliation for opposing the union leadership.\textsuperscript{50} However, the distinction between elected and appointed officials is irrelevant to the union's institutional interest in presenting a united front to the employer. The statement of an elected vice-president of a local, denouncing the local president's bargaining program, is more likely to undermine the union's legitimate interest in maintaining itself as the exclusive bargaining representative than is the decision of an appointed benefits representative of that local to vote for the "wrong" candidate in his capacity as a delegate to the union's national convention.\textsuperscript{51} As the law now stands, the LMRDA would be interpreted to prevent the removal of the vice-president from office for his statement, while the benefits representative could summarily be fired. No legitimate union interest is served thereby.

The law should be interpreted to protect both the vice-president

split between the "social unionism" of the early CIO and the "business unionism" that was then, and has since been reinforced as, the dominant ideology. See K. Moody, supra note 42; D. La Botz, Rank and File Rebellion 118-125 (1990). The relationship is not simple; for example the most important force in the creation of the CIO, and for a decade perhaps the most militant American union, John L. Lewis' United Mineworkers, was run as an absolute dictatorship. But the subsequent history of the UMW may actually prove the point: militancy cannot depend on the presence of a militant leader. The lack of democracy in the UMW led to its long term inability to defend coal miners in a changing economy; it also led to massive corruption and violence to maintain the system. See James, supra note 18 at 327-28.

49. Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1988), provides that a union selected by the majority of employees in an appropriate bargaining unit "shall be the exclusive [representative] of all the employees in such unit for the purposes of collective bargaining. . ." See J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975).

50. See infra note 292 and accompanying text.

51. See Cehaich v. UAW, 710 F.2d 234 (6th Cir. 1983) (removing plaintiff from position as local union benefits representative for opposing proposed new collective bargaining agreement at leadership meeting called to discuss proposed CBA).
and the benefits representative from removal. This would further the Congressional mandate for democratic unionism, as well as the broad participatory version of democracy necessary to union revival. The first requirement of union democracy is the ability of the most active and committed union members to create, join, or support opposition groups without fear of reprisal. The law can help fulfill this requirement or it can raise barriers to its realization.

Almost a decade ago, Clyde Summers described American unions as one-party states. From that metaphor, Summers drew critical insights about the ways in which the LMRDA should be interpreted in order to further the goals of the law. "The function of the law," he wrote, "must be to loosen the grip of oligarchy so that those opposed to the incumbents can make their voices heard and the weight of their opposition felt." For example, the Department of Labor's interpretation of whether a particular union election violation "affected the outcome" of the election might be quite different if it were understood that a large anti-incumbent vote—though far short of the majority needed to win—has important effects. It "measures the level of discontent among the members" and may lead the incumbents—who, surrounded by a "sycophantic bureaucracy," often genuinely believe that dissatisfaction is limited to "a few screwball malcontents"—to change their policies in response. It can encourage a split in the top union leadership, and lead to a successful challenge in the next election by other elements of the union's hierarchy. The larger the anti-incumbent vote, the less isolated individual members of the opposition feel, and the more legitimate their opposition seems to the membership as a whole.

Summers' analysis explains why fulfilling the statute's goal necessitates interpreting the LMRDA in light of the structural and in-

---

52. I am not arguing for the creation of a union "civil service" system to replace patronage, or for the establishment of a "just cause" standard; see infra note 388 and accompanying text.
54. Id. at 99.
55. 29 U.S.C. § 482 (c) (1988). In order for a new election to be held, the Secretary of Labor has the burden of proving that a violation of Title IV has occurred, and that it "may have affected the outcome" of the election. 29 U.S.C. § 481 (1988).
58. Id.
59. Cf. Summers, supra note 53, at 106. "Although the incumbent oligarchy stays in power, it becomes responsive to the election returns. The greater the opposition vote, the greater the responsiveness." Id.
stitutional obstacles to union democracy. The most important structural barriers to union democracy are based on the inherent advantages of incumbency in controlling the methods of communication, financing political activity, maintaining stable organization, and establishing the legitimacy of support and the illegitimacy of opposition. The central mechanism by which the top leadership of a national union maintains control of these advantages is through control of the union staff and officials: full and part-time, organizers, clerical employees, administrators and educators. Depending upon the union and the type of position, they are sometimes appointed and sometimes elected. However, even elections usually occur with the approval or designation of the higher elected officials and, therefore, with the aid of the appointed staff. This body of union officials and employees runs safety committees in the workplace, researches the employer's finances, explains benefits, implements the union's political activities and organizes nonunion workplaces. Most important, it negotiates the contracts under which the members must work and controls the formal and informal mechanisms—including the grievance procedure—through which those contracts are enforced, reshaped, and recreated. For most union members, the people who negotiate and then administer the contract are the union.

The ability of the top union leadership to maintain the loyalty of this staff is based partly on shared views of union policy, on shared experiences and on the education and training that usually flow downward from the top. It is also based on the fear of reprisal: loyalty is a job requirement.

The LMRDA, particularly Title I, can be read to prohibit

---

60. Summers, supra note 53, at 96-98; see also R. Michels, supra note 47 (discussing the sociologist Seymour Martin Lipset who describes four sources of oligarchic power: the identification of opposition as disloyalty, control of the union bureaucracy and resources, domination of the channels of communication, and centralization of control). My description differs only in emphasis: while the ability of the top leadership to bestow positions that may be both lucrative and prestigious is obviously one of the sources of its power, I wish to stress that the machine that is thereby created is itself the means by which the other sources of the top leadership's power are managed and perpetuated. The leadership's monopoly on communications, like its ability to identify itself with the union and paint opposition as disloyalty, depends on its ability to control what views may be expressed by secondary union leaders. Similarly, the union's resources, the control of which gives the top leadership such an enormous advantage, are largely, although not entirely, human resources.

61. Summers, supra note 53, at 105; see also James, supra note 18, at 277.


63. And in certain contexts the National Labor Relations Act may also prohibit these reprisals. See Hartley, National Labor Relations Board Control of Union Discipline and the Myth of Nonintervention, 16 VT. L. REV. 11 (1991).

There are important differences, both practical and theoretical, between union discipline
To a growing extent this has been done. But the doctrines that many courts, including the Supreme Court, have developed in establishing these prohibitions have been based on an insufficient understanding of how unions work and what union democracy requires. The rulings in some cases include descriptions of situations that betray an extraordinary lack of sensitivity to reality. Courts have often treated these cases as a matter of balancing the individual rights of union officials against the institutional rights of the union. Typically, the institutional interest they are addressing is not that of the union at all, but that of the leadership. The two are not identical, neither in my view nor, I think it is clear, in the intent of the LMRDA.

The basic goal of the LMRDA and the imperative for strong unions — democratic unions — require not that the union's institutional and collective interest be outbalanced by the individual officer/member's job, but that the nature of that collective interest be properly understood. Current retaliatory removal doctrine rests on a sharp separation between the rights of members, protected by the LMRDA, and the unprotected status of holding union office. This separation is based on wrong assumptions: both unarticulated theoretical assumptions about the nature of rights and unthinking assumptions about how union politics actually work. It does not

cases under the NLRA and those brought under the LMRDA. The source of the protection is a different statute, and the particular right is that of an individual union member to engage in activity for "mutual aid or protection." NLRA § 7, 29 U.S.C. § 157 (1988). At least in principle, the NLRA concerns only those actions, by an employer or by a union, that affect the employment relationship. Finally, NLRA cases involve the relationship of an administrative agency, the NLRB, charged with administering that statute, and how it must (or may) take into account the policy of a different law, the LMRDA.

Board doctrine concerning union discipline in general and retaliatory removals in particular is incorrect, and fails to properly take into account the entire national labor policy of which the LMRDA is more than an incidental aspect. Nonetheless, because of the differences, it is more appropriate to discuss the issue of retaliatory discharges under the NLRA separately, and I will not discuss it here.

64. The system I am arguing against is not based on "patronage" in the sense of having to "know someone" in order to get a job. Indeed, unions often choose the most energetic and active members, even if they have no connections, to fill the low-level, usually unpaid, and often frustrating jobs that are the entry to the organization's political life. See infra note 329 and accompanying text. But the system does require that these active and militant members unquestioningly support not only the candidacies of the incumbents, but the policy of the union leadership on every issue that arises. Union democracy is stifled not by a "traditional" patronage system, based on established relationships, rewards, and largesse, but on a system based on a requirement of unanimity, of a solid leadership front ranged, not against the employer, but against the membership.

65. And in a somewhat different context, the National Labor Relations Board. See Hartley, supra note 63, at 40.
Retaliatory Removals strengthen democratic processes within unions by insuring that the will of the electorate is carried out. Instead, it helps assure that elections, at least beyond the local union level, will almost always present the membership with only a single candidate who has any realistic prospect of winning. The current law of retaliatory removals is a powerful tool to maintain the union leadership as a self-perpetuating single party monopoly. This article will describe how this law developed, why it impedes the development of democratic unions, and how the LMRDA should be interpreted in order to fulfill the intention and promise of the statute.

Part I of this article describes the development of the current doctrines relating to retaliatory removals under the LMRDA. In Finnegan v. Leu, the Supreme Court found no violation of the LMRDA when a newly elected local president fired the appointed business agents who had supported his opponent. The Court held that since the business agents remained members of the union who could still vote in union elections, attend union meetings and speak on union issues, the firings did not "infringe" their LMRDA-guaranteed rights to do these things. In addition, the Court held that the firing did not constitute "discipline" under the Act because that term was meant to refer only to limitations on membership rights.

The article then discusses three consequences of this formal view of rights by examining the case law that both anticipated Finnegan and followed it. First, when the separation of membership rights from officer rights was applied to elected officials, it made meaningless the members' equal rights to nominate and vote for candidates because a successful opposition candidate could be removed for speaking out against the policies of higher level union officials. Second, the removal of an official, whether elected or appointed, in retaliation for her joining with other members in political opposition to the leadership brought into question the members' right to speak and associate for political change in the union. The article discusses the courts' creation of a doctrine of exception in an attempt to mitigate...

66. The enormous resource advantages of an incumbent candidate become less important with a smaller unit. See James, supra note 18, at 265. Nonetheless, for reasons developed in this article, the ability of the top leadership to remove low-level appointed officials who express any divergence from the leadership's positions seriously hampers the emergence of effective opposition even at the local union level.
68. Id. at 440.
69. Id. at 438.
70. See infra notes 172-193 and accompanying text.
gate this result and explains the limitations of this approach.\footnote{71} Part I concludes by examining the \textit{Finnegan} approach to "discipline" and finds that the formal view of membership rights on which it is based makes the holding inapplicable in other contexts.\footnote{72}

Part II describes how the Supreme Court's decision in \textit{Sheet Metal Workers' International Association v. Lynn}\footnote{73} resolved the first of these contradictions by holding that the interest in union democracy requires that an \textit{elected} union official not be removed for exercising the free speech rights guaranteed to members by the LMRDA.\footnote{74} In \textit{Lynn} the Court limited the \textit{Finnegan} holding to appointed officials only but also applied an entirely different method of analyzing the issue.\footnote{75} \textit{Lynn} recast \textit{Finnegan} as a defense of union democracy. It was the vindication of the members' free choice, expressed in the election, that justified the removal of the staff appointed by the defeated candidate. But the logic of \textit{Lynn} does not support this sharp distinction between elected and appointed officials; nor does the underlying purpose of the LMRDA or that of federal labor policy.

First, this new dichotomy does not correspond to its stated rationale because, within the model of "democracy" that the Court has accepted, it is as pro-democratic under some circumstances to remove elected officials as it is to remove appointed union officials.

Second, Part II explains how prohibiting retaliatory removals is necessary because of the nature of the union.\footnote{76} Since it is a one-party state, union officials and staff play a central role in perpetuating the control of the incumbents. Even more important, lower-level union officials are vital to the creation of any realistic alternative to current leadership and policy. Fulfilling the goal of democratic unions requires encouraging and protecting the development of diverse views. It requires establishing that opposition is legitimate and that change is a realistic prospect. To establish that legitimacy, it is necessary that these diverse views come to be held by some of those who have proven themselves the most active and committed members, who often hold low-level appointive posts. Removing them from of-

\footnotetext{71}{See infra notes 194-247 and accompanying text.}
\footnotetext{72}{See infra notes 248-291 and accompanying text.}
\footnotetext{73}{488 U.S. 347 (1989).}
\footnotetext{74}{See infra notes 292-322 and accompanying text.}
\footnotetext{75}{The \textit{Finnegan} Court never explicitly said that its holding was limited to appointed officials. Although there is a good deal of language to indicate that this was in fact the case—language emphasized in \textit{Lynn}—all lower courts applied \textit{Finnegan} to elected officials. See infra note 105 and accompanying text.}
\footnotetext{76}{See infra notes 323-345 and accompanying text.}
Retaliatory Removals at the first hesitant expression of dissidence prevents opposition views from ever becoming identified with respected and proven secondary leaders. For the possibility of change to seem realistic, in the absence of organized opposition parties, these secondary leaders must be among the proponents of change. The creation of vigorous, sustainable democracy requires that union officials be permitted, except in the most unusual circumstances, to express their opinions, and organize support for those positions, even if the higher levels of the union hierarchy disagree.

Using the analogy of the Supreme Court's analysis of political patronage, Part II concludes by arguing that the rationale of *Finnegans*, even as limited to appointed officials, has been repudiated in the context of the political system on which Congress modeled the LMRDA. The political patronage cases repudiate both aspects of the analytical basis on which the current law of retaliatory removal of appointed union officials rests. They reject the formal and unreal logic which denies that severely punishing the exercise of a protected right may infringe that right as effectively as a direct prohibition. They also reject the rights/privilege basis of retaliatory removal jurisprudence: that, since there is no legal right to hold union office, the union may remove an official for any reason.

Part III develops a standard to determine the legality of retaliatory removals that is based on the statutory language and intent and argues that the *Lynn* decision implicitly requires that standard. The statutory guarantee of free speech and assembly itself contains limited exceptions under which the union may make reasonable rules that restrict those freedoms in order to protect its status as exclusive bargaining agent, and to protect itself as an institutional entity. These exceptions incorporate a distinction between the interest of the union and the partisan interests of its leadership. This article demonstrates that the legality of a union restriction does not depend on whether the member to whom it is applied holds a union position or not, nor on whether the position is elected or appointed. It concludes that the removal of an appointed union official in retaliation for exercising the political rights guaranteed by the LMRDA should be illegal except when the union can demonstrate that the removal falls within a narrow exception to protect the union leadership's ability to carry out its mandate.

---

77. *See infra* notes 346-383 and accompanying text.
78. *See infra* notes 384-413 and accompanying text.
79. *See infra* notes 414-454 and accompanying text.
The law of union democracy is full of rhetorical flourishes. The courts speak of rights and of democracy without attempting to understand the context in which those rights must be exercised or the institutional barriers to genuine democracy. If the union is a one-party state, one would have supposed that American courts would be sympathetic to intervening, to forcing union leaderships to adopt to the politics of competing voices, diversity, and pluralism. But the one-party state, abhorrent in Eastern Europe, may seem a less devi-

80. That Congress intended in passing the LMRDA to limit government intervention into internal union affairs to the minimum necessary to insure that the statute's goals were fulfilled is one of those rhetorical flourishes sprinkled throughout the cases. Congress felt that union self-government was necessary to a free society, and feared that government intrusion could lead to government control. As a bit of rhetoric, this contention is perfectly fine. See Hartley, supra note 63, at 66 (stating that NLRB nonintervention into internal union affairs is a shibboleth that cannot be discarded, but claim is a myth). But it simply does not help interpret the law about retaliatory removals. If the choice in remedying union corruption is between imposing a government trusteeship with direct control by federal officers, as against holding democratic elections whose legitimacy is assured by government supervision, then the policy of the LMRDA favoring democracy and limited intervention argues for elections and against a government takeover. But if the issue is whether a retaliatory discharge violates the law, the policy of minimal intervention adds nothing. The LMRDA is an elaborate set of safeguards and regulations. See supra note 13 and accompanying text. Clearly Congress thought this much intervention into union affairs was necessary. That Congress wanted to limit government intervention to only what was necessary is not controversial; the question is how much is that? (The argument for minimal intervention is in reality one of those contentions that, when it is raised to judges who do not like it, is answered by pointing out that it is properly addressed to Congress rather than the courts.)

Insofar as there are statements in the legislative history that support the view that Congress wished to limit intervention in internal union affairs, those statements generally predate the introduction of the Bill of Rights into the LMRDA. Indeed, as Michael Goldberg has pointed out, those statements were “put forward for the purpose of justifying the controversial omission from the bill. . .of a bill of rights.” Goldberg, Cleaning Labor’s House: Institutional Reform Litigation in the Labor Movement, 1989 DUKE L.J. 903, 938 (1989). In fact, as Paul Alan Levy has argued, “[t]he adoption on the floor [of the Bill of Rights] amounts to a repudiation” of such statements. Levy, Legal Responses to Rank-and-File Dissent: Restrictions on Union Officer Autonomy, 30 BUFF. L.REV. 663, 684 n.118 (1981).

The broader justification for governmental intervention, a justification that apparently convinced Congress, is well known. When [a] private organization begins to take on the importance and power of public governments in the lives of its members. . .[t]he loss of individual freedom within private associations creates a threat to the freedom-producing goals of pluralism itself, and establishes the basis of governmental intervention in order to protect private democratic rights in the name of pluralism. The irony of this intervention should not obfuscate its inevitability.

Atleson, supra note 28, at 403-4.

As for the attitude of union reformers towards government intervention, the healthiest view was best summed up by Ken Paff, National Organizer of Teamsters for a Democratic Union (TDU), in defending his organization's use of the labor laws: “We don't rely on the government or the law. We use the government and the laws, and we rely on the rank and file.” Quoted in D. LaBOTZ, supra note 48, at 326.
ant form to a court confronting it within a union because it so re-
sembles the business organizations with which courts are already fa-
miliar. The belief that command and hierarchy is the natural order of things, that those at the top are meant to decide and the passive majority to obey or get out, is another of the unexamined assumptions with which the law of union democracy is filled.

To explore these assumptions and their consequences, an exami-
nation of the development and current state of the law is first pres-
tented.

PART I: THE DEVELOPMENT OF THE LAW

A. The Key Cases: A Brief Chronology

This section briefly introduces, in chronological order, the major Supreme Court cases and a crucial Second Circuit case which have shaped the development of the law of retaliatory removals. The doctrinal developments are then analyzed more fully in the rest of this Part.

Judicial interpretation of Title I of the LMRDA, the statute's Bill of Rights, has been marked by formalism from its earliest days. In the Supreme Court's first interpretation of the LMRDA in *Calhoon v. Harvey,* the Court held that the equal right to nominate candidates, guaranteed by Title I and actionable under Section 102, could not be violated by eligibility restrictions so long as all members continued to have the same (highly limited) right to nominate. Instead it held that "whether the eligibility require-
ments. . .were reasonable and valid [under Title IV, which governs elections] is a question separate and distinct from whether the right to nominate on an equal basis given by §101(a)(1) [part of the Bill of Rights] was violated." Because the exclusive remedy provision of Title IV requires that challenges to elections be referred to the Department of Labor, *Calhoon* held that a violation of Title IV pro-

81. And against which the union is supposed to be defending the workers' interests.
82. 379 U.S. 134 (1964).
84. The relevant text of this section, 29 U.S.C. § 412, which creates a private cause of action for the infringement of any right secured by Title I, is set forth supra at note 35.
85. *Calhoon,* 379 U.S. at 139.
86. See 29 U.S.C. § 482 (1988) (providing that a union member may file a complaint with the Secretary of Labor alleging a violation of Title IV's election procedures. The Secretary must investigate the complaint, and if she finds probable cause of an unremedied violation, she must file suit against the union); see also 29 U.S.C. § 483 (1988) (providing in relevant part that "[t]he remedy provided by this subchapter for challenging an election al-
vides no jurisdiction for a private cause of action under Section 102.87 As pointed out by Justice Stewart in a concurrence joined by Justice Harlan:

[T]here are occasions when eligibility provisions can infringe upon the right to nominate. Had the [union] issued a regulation that only Jesse Calhoon [the incumbent] was eligible for office, no one could place great store on the right to self-nomination left to the rest of the membership. This Court long ago recognized the subtle ways by which election rights can be removed through discrimination at a less visible stage of the political process. . . . If Congress has told the courts to protect a union member from infringement of his equal right to nominate, the courts should do so whether such discrimination is sophisticated or simple-minded.88

While Calhoon is, in fact, irrelevant to the analysis of a retaliatory removal90 and it will not be discussed in the text that follows, its formalism shaped the reasoning of the most important early decision on retaliatory removals. In Schonfeld v. Penza,90 the Second Circuit held that although the retaliatory removal of an elected official did not violate the members’ equal rights to nominate and vote for candidates, the removal could violate Title I if it were “part of a purposeful and deliberate attempt. . . to suppress dissent within the union.”91 In that case, the court held that the removal of the elected head of the New York District Council of the Painters Union stated a cause of action under Title I, because “in the peculiar context of the history of union factionalism” that existed in the union, the removal could “impede or infringe upon the free speech and association rights of union members.”92

ready conducted shall be exclusive” referring to Title IV).

87. Calhoon, 379 U.S. at 139-40.
88. Id. at 143 (concurring opinion).
89. Neither the decision that eligibility requirements, if equally applied, can be challenged only under Title IV, which governs elections, nor the decision that a violation of Title IV cannot create jurisdiction under Title I, applies because no election is being challenged. See Drivers v. Crowley, 467 U.S. 526, 541 n.16 (1984) (stating that the exclusive remedy provision may not “bar postelection relief for Title I claims. . . that do not directly challenge the validity of an election already conducted”). By definition, the removed official is not suing to overturn eligibility requirements that prevented her from running; nor is she challenging the validity of the election. On the contrary, she is suing, in effect, to sustain the outcome of the election, and Title IV does not speak to this issue at all. In fact, in such a situation, it is a suit by the Secretary of Labor that the courts have no jurisdiction to entertain. See Kupau v. Yamamoto, 622 F.2d 449 (9th Cir. 1980).
90. 477 F.2d 899 (2d Cir. 1973).
91. Id. at 904.
92. Id. at 903. See supra note 30 and accompanying text (enumerating LMRDA § 101 (a)(2)).
The invention of the purposeful scheme exception was heavily influenced by the Schonfeld court's concern that "the mere appendage of free speech allegations to an election complaint" would enable a plaintiff to circumvent Calhoon.93

The competing values between Title I rights and Title IV procedural requirements are best reconciled, in our opinion, by limiting initial federal court intervention to cases where union action abridging both Title I and Title IV can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union.94

As the Schonfeld doctrine was applied in later cases, the courts ignored this original rationale for requiring that the retaliatory removal, in order to be actionable, be part of a plan to suppress dissent.95 In place of a limitation on Title I rights based on jurisdictional concerns, however formalistic and mistaken, the courts articulated limitations based on a formal conception of the substantive rights themselves.96 The removal of a union official for speaking against the leadership was not viewed as an "infringement" of the right to speak; only union actions that directly prevented a member from exercising the rights guaranteed by Title I were actionable.97

Finnegan v. Leu98 was both the culmination and ratification of this conception of rights. There, the Supreme Court held that Title I protected only "membership rights," not the status of holding union office.99 Retaliation for exercising membership rights—so long as the rights themselves remained intact—was not a prohibited "infringement."100 It also held that removing a union official for exercising Title I rights was not "discipline" within the meaning of section 609,

93. Schonfeld, 477 F.2d at 903.
94. Id. at 904. The Schonfeld court clearly overestimated the reach of Title IV. The union trial board's decision, after finding him guilty of formal charges, to deprive Schonfeld of eligibility to run for office cannot rationally be viewed as a "reasonable qualification[] uniformly imposed" on candidacy, which might bring it within the holding of Calhoun; it is obviously "discipline" within the meaning of LMRDA § 609, which although not part of Title I, is actionable under LMRDA § 102.
96. See id.
99. Id. at 442.
100. Id. at 441.
which prohibits union disciplinary action for exercising rights guaranteed by the LMRDA.\textsuperscript{101} The Court held that the prohibition applies only to those "retaliatory actions that affect a union member's rights or status as a member of the union."\textsuperscript{102}

After Finnegan, the lower courts were faced with two unresolved questions: whether a retaliatory removal that was part of a plan to suppress dissent remained actionable, and whether Finnegan applied to elected officials. As to the first, the courts generally continued to apply the Schonfeld exception, although the doctrine cannot be reconciled with the conception of rights to which these courts continued to adhere and on which Finnegan was based.\textsuperscript{103}

As to the second issue, some of the language in Finnegan implied that the holding was limited to the removal of appointed union officials.\textsuperscript{104} Despite this, as one Court of Appeals concluded, "most courts have either rejected an appointed/elected distinction under Finnegan or sharply limited it."\textsuperscript{105}

\begin{itemize}
\item \textsuperscript{101} Id. at 437.
\item \textsuperscript{102} Id. at 437 (emphasis in original).
\item \textsuperscript{103} See infra note 202 and accompanying text (discussing Schonfeld).
\item \textsuperscript{104} Justice Blackmun, joined by Justice Brennan, joined the majority "only on the understanding" that the holding was limited to "appointed union member-employees who will be instrumental in evolving the [elected leadership's] administrative policies." 456 U.S. at 442-43 (concurring opinion). The emphasis of this short concurrence, however, is on the question of appointed nonpolicy makers, rather than on the elected/appointed distinction.
\item \textsuperscript{105} Brett v. Hotel & Restaurant Employees Local 879, 828 F.2d 1409, 1414-15 (9th Cir. 1987). See, e.g., Adams-Lundy v. Ass'n of Professional Flight Attendants, 731 F.2d 1154 (5th Cir. 1984). In Adams-Lundy, a minority of the elected local executive board, through a parliamentary maneuver, removed the majority from office. The court found Finnegan controlling, and vacated the preliminary injunction that the District Court had granted. Although the issue was not before it, the court acknowledged that "implicit in our reasoning" was a failure to state a cognizable LMRDA claim since there was no "infringement" of the majority's Title I rights as members. Id. at 1160.
\end{itemize}

Other cases in which the membership rights/officer rights distinction was applied to elected officers include Johnson v. Kay, 860 F.2d 529 (2d Cir. 1988); Dolan v. Transp. Workers Union, 746 F.2d 733, 741 (11th Cir. 1984) (recognizing that removal of elected official poses a greater threat to democracy but applying Finnegan anyway, because "[n]either § 411(a)(2) nor LMRDA as a whole were intended to eliminate all threats to union democracy").

Several courts applied Finnegan in cases where they did not think it relevant to mention whether the removed official was elected or appointed. See e.g., Rutledge v. Aluminum Brick & Clay Workers, 737 F.2d 965 (11th Cir. 1984); Moore v. Carpenters Dist. Council, 714 F.2d 141 (6th Cir. 1983) (per curiam).

It should be pointed out that this trend was a reversal: before Finnegan, "most courts ... recognized that the protections of Title I extend at least to elected union officials." Levy, Legal Responses to Rank-and-File Dissent: Restrictions on Union Officer Autonomy, 30 Buff. L. Rev. 663, 686 (1981). Written before Finnegan and Lynn, this excellent article remains a valuable contribution to the literature. Its author has become the leading member of the union democracy bar.
Then in 1989, the Supreme Court decided without dissent in *Sheet Metal Workers' International Association v. Lynn*\(^{106}\) that the removal of an elected union official in retaliation for his political opposition to the union leadership violates the LMRDA. In holding that the overriding goal of the statute, union democracy, requires protecting an elected official’s speech, *Lynn* retrospectively called into question not only the results, but also the rationale of all previous retaliatory removal cases.

While *Lynn* expressly reaffirmed *Finnegan*’’s holding as applied to appointed union officials, the doctrinal analysis of *Finnegan* will show that the reasoning of *Lynn* directly contradicts the basis on which these cases rest. The formal conception of rights that is embodied in almost all pre-*Lynn* cases, including *Finnegan*, is at war with the retrospective rationale for *Finnegan* that *Lynn* articulated.

The necessity for rethinking the results of these cases is illustrated in part by the continued pernicious influence of the formal view of rights as exemplified in *Breininger v. Sheet Metal Workers*.\(^{107}\) *Breininger* was the first LMRDA case decided by the Supreme Court after *Lynn*. *Breininger* was not a retaliatory removal case; the plaintiff was a rank and file member who claimed that the union had discriminated against him by refusing to refer him to jobs from the union-administered hiring hall in retaliation for his support of opponents of the union leadership. The Supreme Court held that this action was not “discipline” within the meaning of the LMRDA. This illogical conclusion was necessary to avoid confronting the implications of limiting LMRDA rights to formalities in a context where those limits were unacceptable.

The sections that follow analyze these cases as well as other cases from the lower courts in detail. The several doctrinal issues involved are all present in *Finnegan*, which will be examined as a kind of apogee of the formal conception of rights. Each of the various doctrinal issues will be discussed separately after *Finnegan*, because although they are related, they have been developed independently. While the decisive, but incomplete, break from judicial formalism, *Lynn*, will be treated in detail only afterwards, these earlier cases must be measured against the reasoning of *Lynn*, and references to *Lynn* must necessarily appear throughout the earlier discussion.

---

B. Finnegans and Formalism: The Distinction Between the Rights of Membership and the Rights of Officers

Finnegan v. Leu,\(^{108}\) decided twenty-three years after the passage of the LMRDA, was the Supreme Court's first decision concerning retaliatory removals, and for seven years it remained the Court's final word on the subject.\(^{108}\) This case includes most of what is necessary to construct a coherent and pro-democracy theory of the LMRDA's protection of official rights. Some of the elements for such a theory appear in Finnegans as broad explanations of policy, some as footnotes reserving an issue or seeming to approve, in passing, of doctrines developed by the lower courts. Unfortunately, Finnegans also includes all that is necessary to construct a theory of the LMRDA as wholly unconcerned with the structural changes that are central to challenging autocratic and bureaucratic control of unions. More unfortunately still, it is this latter view of the statute that is reflected in the holding.\(^{110}\)

The petitioners in Finnegans were the former appointed business agents of Teamsters Local 20 who had campaigned for the reelection of the incumbent local president, who was defeated.\(^{110}\) The new president fired all the business agents because "he felt the agents were loyal to [the former president], not to him, and therefore would be...


\(^{109}\) Lynn was decided in 1989. 493 U.S. 67 (1989).

\(^{110}\) See Pope, Free Speech Rights of Union Officials Under the Labor-Management Reporting and Disclosure Act, 18 HARV. C.R.-C.L. L. REV. 525, 547 (1983) (suggesting that "in spite of its sweeping language, Finnegans leaves open far more than it settles. . . is not informed by a coherent vision of unionism. . . [and] can be interpreted favorably by proponents" of several competing visions of unionism). Professor Pope, writing soon after Finnegans was decided, was too optimistic in seeing in Finnegans support for what he terms "rank-and-file unionism." Professor Pope's argument, his description of the rank and file vision, which takes into account both the union's need for united action against the employer and the value of membership participation, does not attach sufficient significance to the one-party nature of unions. He therefore undervalues the importance of opposition and pluralism in the union, ascribing that view to what he calls "liberal unionism," which he describes as characterized by an emphasis both on democratic values and on cooperation with the employer, as contrasted with a conflict model of union/management relations. Similarly, he describes "business unionism" as emphasizing this conflict model, coupled with an emphasis on the union's administrative rather than democratic functions. See id. at 531-38. This typology ignores the relationship of the two axes (administration/democracy; cooperation/conflict). In the long run, undemocratic unions cannot successfully confront management and become indistinguishable from the "responsible union" model that emphasizes both cooperation and the union's hierarchically-based administrative role. Conversely, unions based on participatory democracy will tend towards a conflict model, unless conflict between workers and employers is based on misunderstanding or lack of trust rather than on a fundamental divergence of interests.

\(^{111}\) Finnegans, 456 U.S. at 431.
unable to follow and implement his policies and programs." The local's bylaws, the Court pointed out, gave the president the authority to "appoint, direct, and discharge" the business agents. The Court described the duties of a business agent as including:

- participation in the negotiating of collective-bargaining agreements, organizing of union members, and processing of grievances.
- In addition, the business agents, along with the president, other elected officers, and shop stewards, sit as members of the Stewards Council, the legislative assembly of the Union. Petitioners had come up through the union ranks and as business agents they were also members of Local 20. Discharge as business agents did not render petitioners ineligible to continue their union membership.

The fired business agents claimed that their discharges violated the LMRDA in two separate ways. First, they argued that the removals violated two sections of Title I, the "Bill of Rights." Section 101(a)(1) guarantees every union member equal rights to nominate candidates and to vote. Section 101(a)(2) guarantees freedom of speech and assembly. Both sections allow the union to have "reasonable rules" that may limit these rights. An "infringement" of any right secured by Title I creates a private cause of action under section 102.

The business agents also sued under section 609, which is not part of Title I. Section 609 prohibits "discipline" of "any member for exercising any right to which he is entitled" under the LMRDA; a violation of this section is also actionable under section 102.

---

112. Id. at 434.
113. Id.
114. Id. at 434. Chief Justice Burger apparently thought that the fact that the appointed business agents served on what the Court characterized as the local's "legislative assembly" underscored the need for the current president to be allowed to name his own choices to the positions. Id. The Court never wondered what sort of union "legislative assembly" it would be that included appointed members. Perhaps the Chief Justice was thinking of the House of Lords.
115. See supra note 29 (enumerating LMRDA § 101 (a)(1)).
116. See supra note 30 (enumerating LMRDA § 101 (a)(2)).
117. See supra notes 29 and 30.
118. See supra note 35 (enumerating LMRDA § 102).
119. LMRDA § 609, 29 U.S.C. § 529 (1988), is part of Title VI, the "Miscellaneous Provisions" subchapter of the LMRDA. The text of § 609 is set forth supra at note 25.
120. LMRDA § 102 "provides independent authority for a suit against a union based on an alleged violation of Title I of the Act." Finnegan, 456 U.S. at 439.

While the two provisions overlap, there are significant differences. Section 102 is meant to enforce substantive rights, but only if they are contained in Title I. Section 609 is meant only to prevent discipline for exercising substantive rights, but includes rights contained anywhere in the LMRDA.
The Court began its discussion of the infringement issue in Finnegan by noting that

[1]he amendments [that became Title I] placed emphasis on the rights of union members to freedom of expression without fear of sanctions by the union. . . . Such protection was necessary to further the Act's primary objective of ensuring that unions would be democratically governed and responsive to the will of their memberships.1

The Court thus recognized the relationship between the individual rights protected by Title I and the overall policy of the LMRDA. Congress felt that these individual political rights were among the means to ensure union democracy. But the logical conclusion of that recognition, that whether rights are infringed under Title I must be judged within the framework of the mandate for institutional democracy, at least partially eluded the Court.

Instead, the Court viewed the key issue as the distinction between those rights granted an individual as a member of a union, and the "non-right" to hold union office.122 Thus, if the union's action infringed the right to vote or to nominate candidates on an equal basis, or to attend union meetings and speak at them, then the action could be challenged under section 102. However, if the individual's "rights" to do these things remained formally unaffected, then that individual's "membership rights" guaranteed by the LMRDA had not been "infringed" and there is no cause of action under section 102. Since the fired business agents remained members in good standing of the local, the Court found no infringement of any right protected by Title I.123 The Court did not analyze the removal of the business agents as a restriction on Title I's guarantees of equal rights, speech, and assembly which could be justified only if the union's actions fell within the "reasonable rules" exceptions to those guarantees. Indeed, those exceptions were never mentioned.

Although Finnegan claims in its holding that its result is necessary to protect "the democratic process Congress sought to protect,"124 the Court's view of democracy and the democratic process is a formal and unrealistic one. Congress was not concerned with the

---

121. 456 U.S. at 435-36.
122. Id.
123. Id. at 439-42.
124. Id. at 441.
issue of union patronage in passing the LMRDA, according to the Court. "To the contrary, the Act’s overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." The Court sees the goal of eliminating patronage and the goal of democratic governance as conflicting. It says that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration’s responsiveness to the mandate of the union election." No doubt this poses a dilemma for some union employees; if they refuse to campaign for the incumbent they risk his displeasure, and by supporting him risk the displeasure of his successor. However, in enacting Title I of the Act, Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president’s freedom to choose his own staff. Rather [and here again, the Court indicates that it believes it is dealing with unrelated or even opposite phenomena] its concerns were with promoting union democracy, and protecting the rights of union members from arbitrary action by the union or its officers.

The Court’s conclusion in Finnegan is not without any basis in the literal language of the statute. It is possible to believe that imposing a penalty for the exercise of “rights secured by the provisions of this title” does not “infringe” those rights.

But what does such an interpretation say about the meaning of rights? In some contexts, the courts have rejected the constrained view of Title I rights as purely formal. Thus, the equal right to vote in a union referendum involves more than “a mere naked right to cast a ballot.” Surely, it means that the ballots will be counted

125. Id. (emphasis added).
126. Id.
127. Id. at 442 (emphasis in original).
128. LMRDA § 101(a)(1), 29 U.S.C. § 411 (a)(1) (1988), guarantees the equal right to vote in elections or referendums; a contract ratification vote is a form of referendum.

[A] union cannot immunize itself against charges of discrimination simply by affording each member the “mere naked right to cast a ballot;” the right each member has to vote must be “meaningful.” Accordingly, the courts have found that the “equal right to vote” was denied, notwithstanding universal suffrage, where union officials circulated inadequate or misleading information about matters to be voted upon; where union officials refused to provide opponents access to a membership mailing list; where ballots were submitted to members in unsuitable form; where irregularities occurred in counting ballots; and where union officials refused to im-
Presumably, it means that the membership can vote without excessive difficulty: the polls cannot be open during inconvenient hours or at inaccessible locations. Obviously, it means that the union leadership cannot use physical intimidation to prevent voting. However, it just as obviously means that if the union leadership breaks the arm of everyone voting wrong, but continues to allow them to vote, it would violate Title I. It would not be realistic to say that the threat of a beating doesn't infringe the member's right to vote, as long as the member has the formal right to show up at the meeting. Yet, it could be argued that the member merely had to face the difficult choice of voting or of having his arm broken.

Is there any way to distinguish this situation from that in Finnegan? It could be argued that the LMRDA recognizes a right to be free of violence, while there is no right to hold union office. But, what if the union only allowed voting to ratify a collective bargaining agreement on payment of a special assessment, such as $500? If this poll tax, properly implemented, were applied to all members, there would be no violation of equality and there is no Title I right to vote, except on an equal basis. However, it is highly unlikely that any court would allow such a restriction to stand.

These examples cannot be distinguished from Finnegan because of that case's emphasis on formal rights. The issue should not be whether the right guaranteed by Title I still exists despite the burden placed on it. The unreality of this reasoning derives from its divorce of the protected right from the context in which the right can actually be exercised. If placing serious penalties on the exercise of a
protected right is not seen as "infringing" it, then the right is in the literal sense only formal: it need have no substance.

The other claim of the business agents was that their firing constituted "discipline" for their support of the losing candidate, thus violating section 609, which makes it illegal for a union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of" the LMRDA. 135

If removing a member from an official position is discipline and the removal occurs because the member has spoken out against the union leadership, then section 609 would bar the removal. It would not matter whether the removed official's rights were also "infringed." Resolving the issue presented under section 609 in this way would have made unnecessary the development of the basic doctrine of retaliatory removals — that rights are not infringed by severely penalizing their exercise, so long as the formal ability to exercise them remains intact.

Instead, the Supreme Court decided that a retaliatory removal was not discipline. 136 That decision too was based on the distinction between "membership rights" and "officer rights:" "[T]he term 'discipline,' as used in section 609, refers only to retaliatory actions that affect a union member's rights or status as a member of the union." 137

The Court apparently did not feel this holding required much support:

Section 609 speaks in terms of disciplining "members"; and the three disciplinary sanctions specifically enumerated. . .are all punitive actions taken against union members as members. In contrast, discharge from union employment does not impinge upon the incidents of union membership and affects union members only to the extent that they happen also to be union employees. 138

This statement contains three related arguments, none of which are persuasive. The fact that the section speaks of disciplining "members" only restates the issue the Court is supposed to resolve. The plaintiffs were members, and their claim was that their dismissal constituted discipline. Second, while it is true that the section enumerates three forms of discipline (fines, suspensions, and expul-

137. Id. at 437 (emphasis in original).
138. Id. at 437-38 (footnote omitted).
sions), the fact that it adds "or otherwise discipline" was ignored.\textsuperscript{139} It subordinates the substance of punishment to its form and, notwithstanding the Court's denial of this implication in a subsequent discipline case, it invites a union "to circumvent [section 609] by developing novel forms of penalties different from fines, suspensions, or expulsions."\textsuperscript{140}

The final thought of the Court's quoted language is the section 609 version of the main holding of Finnegan: that the Bill of Rights' protections extend only to the formal, rather than the actual, ability to exercise those rights. Thus, a union decision to deny a dissident officer her right to vote in a union election would be actionable, but firing her is not, because it "does not impinge upon the incidents of union membership."\textsuperscript{141} In the context of discipline, this reasoning can lead to results that the Court itself would certainly find unacceptable. For example, the decision of a union disciplinary panel to formally punish members by suspending their right to work under any collective bargaining agreement to which the union was a party would obviously be discipline within the meaning of the LMRDA. However, so long as they could still attend union meetings, vote, and so on, it would "affect union members only to the extent that they happen also to be . . . employees" of the relevant employers.\textsuperscript{142} Results of this sort required the creation of other doctrines that did not depend on Finnegan.\textsuperscript{143}

The Court supported its holding on discipline with an additional argument, based on the legislative history, that seems more persuasive.\textsuperscript{144} A closer examination shows that the history does not support the Court's conclusion, and that the opposite interpretation more fully comports with the structure and intent of the LMRDA.

As the Court pointed out, the "procedural due process" provision of the Bill of Rights, section 101(a)(5), states that a member may not be "fined, suspended, expelled, or otherwise disciplined,"

\begin{itemize}
  \item \textsuperscript{139} LMRDA § 609, 29 U.S.C. § 529 (1988).
  \item \textsuperscript{140} Breininger v. Sheet Metal Workers, 493 U.S. \textemdash, \textemdash, 110 S. Ct. 424, 439 n.15 (1989). The Breininger Court was rejecting the suggestion that this interpretation of §§ 609 and 101(a)(5), an interpretation that Breininger shares with Finnegan, meant that any punishment other than fines, suspensions, and expulsions, would be exempt from those sections. \textit{Id}. As I will show, this denial is unconvincing. \textit{See infra} note 257 and accompanying text.
  \item \textsuperscript{141} \textit{See} Finnegan, 456 U.S. at 438.
  \item \textsuperscript{142} \textit{See id}.
  \item \textsuperscript{143} \textit{See infra} note 248 (discussing Breininger v. Sheet Metal Workers, 493 U.S. 67 (1989)). The example I have given would meet the definition of discipline in \textit{Breininger} but not in \textit{Finnegan}.
  \item \textsuperscript{144} \textit{Finnegan}, 456 U.S. at 438.
\end{itemize}
without specific procedural safeguards. Section 101(a)(5), although it uses the same phrase as section 609, is concerned only with the procedural regularity and fairness of union discipline. Unlike section 609, it does not bar discipline for prohibited reasons. The legislative history, generally almost nonexistent for the Bill of Rights, makes it clear that the safeguards of section 101(a)(5) were not intended to apply to the suspension from office of a union officer. The Court, adding its own emphasis, quoted the Conference Report:

[T]his "prohibition on suspension without observing certain safeguards applies only to suspension of membership in the union; it does not refer to suspension of a member's status as an officer of the union." This too is a persuasive indication that the virtually identical language in § 609 was likewise meant to refer only to punitive actions diminishing membership rights, and not termination of a member's status as an appointed union employee.

But this language refers only to the “suspension” of an officer as contrasted with a member. It can just as logically be read to mean that only suspensions and not permanent removal or other forms of discipline, would be exempt. The quoted report does not create any general distinction between officer rights and membership rights as the Court implies. It simply recognizes the difference in “suspension” in the two situations.

Even in isolation, the language of the Conference Report does not provide much support for the Court’s position. When one considers the context of the language and the general scheme of the LMRDA, the Court’s reliance on these words for attributing to Congress an intent to create a sharp cleavage between officer and membership rights is a wild extrapolation. The explanation for this single distinction in the legislative history that most courts had accepted is the need Congress saw for a union to remove from office immediately (and temporarily) an officer who was accused of financial misconduct. This concern of Congress is entirely addressed by this limited exception.

145. Id. See supra note 33 (enumerating LMRDA § 101 (a)(5)).
147. LMRDA § 101(a)(5) prohibits suspensions and expulsions without procedural safeguards. Yet the Conference Report limits the exemption of safeguards to the case of suspensions. The statement in the Conference Report is not part of any larger explanation of the purpose or scope of § 101(a)(5)—and it does not refer to § 609 at all.
148. See e.g., Grand Lodge, Machinists v. King, 335 F.2d 340, 342 (9th Cir.), cert. denied, 379 U.S. 920 (1964); Wood v. Dennis, 489 F.2d 849 (7th Cir. 1973) (en banc), cert. denied, 415 U.S. 960 (1974).
Even if the Court’s reading of the legislative history is accepted, it does not justify creating the fiction that a union official removed from office or a union employee fired from a job, is not being disciplined. The legislative history on which the Court relies makes reference to section 101(a)(5), not section 609.149

Several circuit courts had concluded that the meaning of “otherwise discipline” differed in the two sections, since Congress’ motive for excluding officer removal from the procedural safeguards of section 101(a)(5) did not apply to an action under section 609.150 Rejecting this position, the Supreme Court acknowledged “that the purposes of the two sections are different,” but found insufficient evidence in “either the language or legislative history of the Act” to justify reading the words “otherwise discipline” differently in the two sections.151

The Supreme Court thus adopted the position of then Judge Stevens who, concurring in Wood v. Dennis,152 had argued that the essentially identical language of section 609 and section 101(a)(5) had the same meaning. The Court did not however take up Stevens’ further observation in Wood that

[T]he risk of fiscal misconduct, which explains why the temporary suspension of a union officer is not regarded as discipline within the meaning of §101(a)(5), . . . does not require or justify a narrow interpretation of the word discipline in other situations, including permanent removal, in which the officer is plainly being punished. Why a person occupying an office of trust should be less entitled to fair procedures than other citizens is difficult to understand.153

If an officer is “plainly being punished,” it is unclear not only why she should not be entitled to the procedural protections of section 101(a)(5), but also why, assuming the punishment is occurring for exercising “any right . . . under the provisions of this Act,” it does not violate section 609.

Accepting that “otherwise discipline” has the same meaning in section 609 as it does in section 101(a)(5) has therefore led to a

149. See Finnegan, 456 U.S. 431, 438 n.9.
151. Finnegan, 456 U.S. at 438 n.9.
152. 489 F.2d 849, 857 (Stevens, J., concurring in result).
153. 489 F.2d at 858 n.4 (Stevens, J., concurring in result). The view that the permanent removal of an officer does not require the procedural protections of § 101(a)(5), combined with the membership rights/officer rights distinction, has also led to some counter-intuitive results. See Sullivan v. Laborers’ Int’l Union, 707 F.2d 347 (8th Cir. 1983).
narrowing of the meaning of section 609, lest procedural requirements, such as written notice of charges, be imposed in situations where they are inappropriate or impossible. But it could just as logically, as Stevens indicated, have led to the view that section 101(a)(5) requires procedural protections whenever a member was being punished, including by permanent removal from office, and that Section 609 prohibits such punishment, including by permanent removal, for exercising rights guaranteed members by any provision of the LMRDA. Under this view of the statute, the immediate temporary suspension, with no pre-removal hearing, of a union treasurer accused of robbing the till would violate neither section 101(a)(5), nor Section 609. The temporary removal could not be made permanent without according the officer the protections of section 101(a)(5). Further, the removal, temporary or permanent, of the officer for voting “wrong” at a union meeting would violate both sections.

In fact, this is the view that the Court, unknowingly, has effectively adopted in relation to elected officials. The Court’s decision in Lynn that the retaliatory removal of an elected official violates Title I means that a union wishing to remove such an official permanently would now be required to follow the disciplinary procedures described in its constitution and bylaws. The statute requires that these procedures would have to conform to section 101(a)(5) at a minimum. But, the suspension of such an official for suspected financial irregularities remains legal according to the Conference Report. That is, despite its interpretation of the Conference Report in Finnegan, the Court has effectively read the statute to require a disciplinary procedure for the permanent removal of elected officers, but not for their suspension. Thus, the Finnegan holding that permanent removal from office is not discipline is now only relevant to appointed officials. But the Conference Report lends no support to

154. See infra note 269 and accompanying text.
156. Lynn does not discuss the temporary removal issue.
157. Section 101(b) of the LMRDA provides that “[a]ny provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of [section 101, the Bill of Rights] shall be of no force or effect.” 29 U.S.C. § 411(b) (1988).
159. Finnegan, 456 U.S. at 436.
160. Although the Finnegan holding on discipline seems limited to appointed officials only (“We hold, therefore, that removal from appointive union employment is not within the scope of those union sanctions explicitly prohibited by §609.” 456 U.S. at 439), lower courts applied Finnegan to elected officials as well. See supra note 105 and accompanying text. Incidentally, it is impossible to take issue with the literal language of the holding; retaliatory remov-
that distinction. The Congressional intention to allow swift temporary removal to prevent continued looting of the union’s resources does not, in any sense, depend on whether the official is appointed or elected. Whether the Conference Report indicates that Congress intended only to exempt suspensions from the protections of section 101(a)(5) or to exempt permanent removals as well, the exemption must have been meant to apply to both appointed and elected union officials.

There are other indications in the LMRDA that Congress intended the permanent removal of officers to be accompanied by procedural safeguards. Section 401(h) of the Act, while it applies only to certain elected officers, requires that the union’s constitution and bylaws include an “adequate procedure” for removing such officers who are “guilty of serious misconduct”. It also implicitly provides that that procedure include the requirements that cause be shown and that the official receive notice and a hearing. The result of this hearing may be an important penalty, removal from office. Taken together, these are the hallmarks of a disciplinary procedure.

If the removal of an elected official is a form of discipline, it must be governed by section 609’s substantive bar on union discipline for exercising LMRDA rights, even if it were not governed by section 101(a)(5)’s procedural requirements. Why then does section 609 not apply to the removal of an appointed official? One explanation is that the statute, by its terms, requires the existence of an

161. Most local and national unions in fact restrict disbursement of funds to elected officials.

162. LMRDA § 401(h) provides:
If the Secretary of Labor, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act, that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot, conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of Title IV.


163. It applies to local and national constitutional officers, and delegates to a convention that elects national constitutional officers. In addition, the enforcement of Title IV is left to the Secretary of Labor, rather than to private actions. See 29 U.S.C. § 464(a) (1988).

164. The statute requires these safeguards only when the union itself does not have an “adequate procedure” for removal. See 29 U.S.C. § 481(h) (1988). The only reasonable reading of the statute—though not the only possible one—is that the union’s procedures must contain similar safeguards in order to be adequate; this is the interpretation of the Department of Labor. See 29 C.F.R. 417.2(b) (1991).
adequate removal procedure only as to elected officials. While that explains why the existence of section 401(h) does not itself prove that the permanent removal of an appointed official is a form of discipline within the meaning of section 609, it does not repair the hole in the Court's argument. Since the procedure required by section 401(h) meets any reasonable definition of "discipline," and incorporates minimum standards of due process, the Conference Report concerning temporary suspensions cannot mean, as the Court claims, that Congress intended that the permanent removal of officials should be unaccompanied by procedural safeguards and therefore was not "discipline." 

The Conference Report lends no support to the Court's view that the removal of an appointed official is not discipline. That holding, like the remainder of Finnegan, rests entirely on the view that the LMRDA protects only formal rights.

165. The purpose of § 401(h) indicates that the specification of "elected" officials does not support the creation of a distinction between elected and appointed officials. The law allows a union to choose not to impose discipline, and have no procedures by which discipline would be imposed against any members. This was not a fear of Congress. It was unlikely that unions would stop disciplining members for offenses such as strikebreaking; as the existence of §§ 101(a)(5) and 609 indicates, Congress was worried about too much discipline, not too little. Section 401(h) meets a different problem. Congress' concern was to ensure some means of removing even the top officials of a local union for misconduct on the complaint of union members.

The point made in the text does not require any softening of the distinction between §§ 609 and 101(a)(5) on the one hand and § 401(h) on the other. It only indicates that Congress, at least in this part of the LMRDA, did not view the permanent removal of officials as something that should be accomplished without procedural protections. If the Conference Report explicitly said otherwise concerning the protections provided by § 101(a)(5), then complex and convoluted explanations to reconcile the two views might be justified. When the most logical and simplest explanation of the Conference Report statement also happens to fit best with the overall statutory view on the necessity of due process protections, it would seem best to adopt that view. See 29 U.S.C. §§ 411(a)(5), 481(h), 529 (1988).

166. Section 401(h) does not require the particular safeguards of § 101(a)(5). It is still possible therefore that Congress did not intend any procedural protections for permanent removal of officials, except when elected local officials were removed on the initiative of the membership, when § 401(h) requires cause, notice, and a hearing, followed by a secret ballot vote. This interpretation requires believing that Congress thought that procedural safeguards were more necessary when the top union leadership faced charges from the rank and file rather than when low-level officials were being removed by their superiors.

The more likely explanation is also the simplest: Congress meant only to exempt temporary suspensions from the procedures required by 101(a)(5); see supra note 146 and accompanying text.

167. The Court's reasoning is also undercut by the existence in § 401(e) of language that provides that "every member in good standing shall be eligible to be a candidate and to hold office. . . and shall have the right to vote for or otherwise support the candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind. . . ." 29 U.S.C. § 481(e) (1988).

This section, like § 401(h), is part of Title IV of the Act, and its guarantee of holding
C. The Fruits of Formalism: Three Problems of Separating Membership Rights from Officer Rights

The separation of officer rights from membership rights that characterizes Finnegans resolution of both the “infringement” issue under sections 101(a)(1) and 101(a)(2) and the “discipline” issue under section 609 does not correspond to the reality of union politics. Because retaliatory removals are an important means of preventing the formation of effective union oppositions, the statutory goal of promoting democratic unionism requires protecting lower-level union officials. This interrelationship meant courts could be faithful to the doctrine only at the cost of ignoring reality.

Both before and after Finnegans, courts were faced with problems resulting from the officer/membership rights distinction that they found in the LMRDA and from the formal view of rights that they found in their own world view and which the officer/membership distinction manifested. Each application of these doctrines to elected officials contradicted rights that are clearly guaranteed by Title I: the equal nominating and voting rights of members guaranteed by section 101(a)(1). Each application to elected or appointed officials threatened (and in the case of appointed officials, still threatens) the members’ right to speak and associate for political change in the union, which is guaranteed by section 101(a)(2).

Finally, the interpretation of section 609 that, consistent with Finnegans main holding, exempts from the definition of “discipline” any union action that does not formally affect the penalized member’s status as a member, leads to unacceptable results when applied to contexts other than retaliatory removals. Each of these three areas

office without retaliation is therefore limited to certain elected union offices. See supra note 163. Nonetheless the absence of the “fine, suspend, expel, or otherwise discipline” language from this section provides further support for the view that the LMRDA was intended to prevent retaliatory removals—for such removal is surely a “penalty,” even if it is not “discipline.”

This language could also indicate that Congress was distinguishing between a “penalty” and “discipline;” it could have used this phrase in § 609. It seems more likely that this is loophole-plugging language, like the laundry list of prohibited uses in a copyright notice, or to use a familiar phrase from labor law: “interfere with, restrain, or coerce.”

The ban on “reprisal of any kind” (though the language could be read to mean “improper . . . reprisal of any kind”) indicates how broadly Congress wanted this provision to apply.

168. See infra note 331 and following text.
169. See supra note 29 and accompanying text.
170. Before Lynn, the courts typically treated retaliatory removals of elected and appointed officials identically. See supra note 105 and accompanying text.
171. See supra note 30 and accompanying text.
Retaliatory Removals will be discussed in turn.

1. The Contradiction between Candidacy and Election

The guarantees of Section 101(a)(1) include the equal right to nominate candidates and to vote. In addition, there is an implicit right to run for office, although recognition of this right is not necessary to this analysis. What happens to these rights when an elected official is retaliatorily removed?

In an important pre-Finnegan case, the Seventh Circuit, sitting en banc in Wood v. Dennis, rejected the member-plaintiffs' contention that their equal rights were violated by the removal of the official for whom they had voted. The court thought that accepting this theory would mean that no elected official could be removed in retaliation for political opposition. As a result, it held that removal from office was, by itself, insufficient to support a Title I claim by members. The court reasoned that the procedural protections of Section 101(a)(5) did not apply to the removal of officers and “summary removal is irreconcilable with the notion that members have an absolute right to their elected officials.” Therefore, the court declined “to extend the voting rights provisions of Section 101(a)(1) to subsequent procedures not directly affecting the exercise of the guaranteed rights.”

The court’s point that the membership does not have an “absolute right” to keep their elected officials is beside the point. It is unlikely that anyone has ever claimed otherwise. The fact that an

---

172. Title I was “specifically designed to protect the union member’s right to seek higher office within the union.” Hall v. Cole, 412 U.S. 1, 14 (1973). Although § 101(a)(1) speaks of the members’ equal right “to nominate candidates [and] to vote in elections,” and does not mention a right to run for office, most courts, even those that have interpreted Title I rights most narrowly, view the right to run for union offices on an equal basis as guaranteed by Title I. See e.g., Adams-Lundy v. Ass’n. of Professional Flight Attendants, 731 F.2d 1154, 1156 (5th Cir. 1984)(removed officers not denied membership rights because “still members in good standing, possessed of the right to . . . run for union office”); Newman v. Local 1101, Communication Workers of America (Newman I) 570 F.2d 439, 448 (2d Cir. 1978)(holding that plaintiff was “entitled to all the rights of union membership, including . . . candidacy for union office”); Sullivan v. Laborers’ International Union of North America, 707 F.2d 347, 350 (8th Cir. 1983) (holding that the right to run for office was protected by § 101).


174. See supra note 146 and accompanying text. As I pointed out there, and as Judge Stevens indicated in his concurrence in Wood, there is in fact no indication that “summary removal” is permissible—though summary temporary suspension is.

175. Wood, 489 F.2d at 857.

176. Id.

177. As section 401(h) of the LMRDA, 29 U.S.C. § 481(h) (1988), makes clear, the union is required to have “adequate means” in its constitution or bylaws to remove an elected officer for serious misconduct. See supra note 162 and accompanying text.
elected officer may legally be removed in some circumstances does not answer the question of whether the members' equal right to vote is violated when the removal is in retaliation for political opposition. By limiting the scope of Section 101(a)(1) to union actions that "directly" affect the equal right to vote, the Wood court ignored the effect of the removal on members' rights.\textsuperscript{178}

The Wood analysis permits the bizarre possibility that a union could repeatedly remove a winning candidate from office for expressing views opposed by the administration. Since there is no Title I right to hold a union office, these removals would not violate Section 101(a)(1), so long as the union allowed the members to nominate the removed official to run for the office again. The candidate would have a right to criticize the administration vigorously, harshly, and unfairly.\textsuperscript{179} But if she were elected, even if she were elected precisely because the membership agreed with her criticisms, she could then be punished (though, of course this would not constitute "discipline") by removal from office. It is not clear what value there is in having a legal right to nominate and vote for a candidate, but no legal right to have that candidate, if elected, serve in office. The courts were saying, in effect, that Congress had created a legal right to run for office, but no legal right to win.\textsuperscript{180}

This absurd result did not exist only in theory, as two frequently cited cases illustrate. In Dolan \textit{v.} Transport Workers Union,\textsuperscript{181} decided shortly after Finnegan, the Eleventh Circuit struggled with the question of whether Finnegan applied to elected officials and found that it did under certain circumstances.\textsuperscript{182} Since only the speech of

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{178}]. Wood found broad protection under \S 609 and very narrow protection under \S 101, the opposite of the law today. See \textit{supra} note 136 and accompanying text. The choices the Seventh Circuit made are not self-evidently less faithful to the language of the statute then the law as the Supreme Court developed it.
\item[	extsuperscript{179}]. Even libelous attacks against union leaders are protected against intra-union retaliation by the LMRDA, though they remain actionable under common law. See \textit{Salzhandler v. Caputo}, 316 F.2d 445 (2d Cir. 1963).
\item[	extsuperscript{180}]. It is hard to imagine a court actually saying that Congress intended to confer an illusory right. An alternative understanding is that Congress never contemplated the contradiction I have described. If so, according to most doctrines of statutory analysis, the courts ought to have decided what result was most consistent with Congress' intent as to the issues it did consider. There are two ways to frame the issue: First, did Congress mean to protect "officers' rights" whenever that was necessary to protect members' rights? That was the approach by which the courts created the \textit{Schonfeld} doctrine. See \textit{infra} note 194 and accompanying text.
Alternatively, the issue may be conceived more broadly: did Congress intend to protect "officers' rights" whenever that was necessary to advance the goal of union democracy? That is the general approach adopted in Lynn. See \textit{infra} note 304 and accompanying text.
\item[	extsuperscript{181}]. 746 F.2d 733 (11th Cir. 1984).
\item[	extsuperscript{182}]. \textit{Dolan}, 746 F.2d at 742.
\end{enumerate}
\end{footnotesize}
members is protected, the court found that the "critical issue here is whether the speech . . . constituted only membership speech or has been transformed into 'officer speech,'" to which Title I does not apply.\(^{183}\) Finding that the speech in this case was "officer speech," the court held that the removal form office was legal.\(^{184}\) However, barring a removed officer from then running for office did violate Section 101(a)(2): "Union leadership cannot by dint of authority prevent a dissenting member from attempting to regain office. At least under the circumstances of this case, such action constitutes an

\(^{183}\) Id. at 742. The court acknowledged that "[a]ll speech by a member is, in a sense, membership speech."

But when a member assumes a union office, the office can imbue the member's speech with additional significance. [The speech can advance or interfere with the duties of the office.] If the speech does either, it is no longer membership speech but has been transformed into "officer speech." In addition, officers with broad policymaking or policy enforcing powers may be considered to be "speaking for the union" on most any issue relevant to union policy. If the court determines that an officer could reasonably be perceived as speaking for the union, or if her speech affects performance of her specific duties, the protections of § 411(a)(2) for membership speech do not apply.

Id. But see Lynn v. Sheet Metal Workers Int'l Assoc., 804 F.2d 1472, 1479 n.5 (9th Cir. 1986) (rejecting "the Eleventh Circuit's approach, for any speech could arguably 'advance,' 'interfere,' or 'affect' an officer's performance of her duties: Just as 'all speech by a member is, in a sense, membership speech . . . ,' so all speech by an officer could be 'officer' speech.'"), aff'd, 488 U.S. 347 (1989).

Judge Anthony Kennedy, dissenting from the Ninth Circuit's retaliatory discharge holding, also rejected Dolan's analysis, but came to the opposite conclusion:

The nature of the speech prompting the removal is essentially irrelevant. . . . [R]emoval of union officials, whether elected or appointed, does not sufficiently impair the integrity of union democracy to contravene membership rights protected by the LMRDA unless . . . the dismissal was part of 'a purposeful and deliberate attempt to suppress dissent.'"

804 F.2d at 1486 (Kennedy, J., concurring and dissenting) (quoting Schonfeld v. Penza, 477 F.2d 899, 904 (2d Cir. 1973).

The panel majority also noted that

even if we were to adopt the remaining prong of the Eleventh Circuit's analysis, whether the officer 'could reasonably be perceived as speaking for the union,' it would not apply here, because Lynn's remarks occurred at an internal union meeting, while Dolan's statements were made to others outside the union.

Lynn, 805 F.2d at 1479 n.5.

In this respect, the Ninth Circuit majority perhaps took too charitable a view of Dolan. Surely, speaking as a union policymaker to union members on relevant issues could be taken, at least in some circumstances by some reasonable members, as words cloaked by the authority of the position.

It seems that Dolan would allow the union to restrict the speech of elected officers whenever the speech either advances or interferes with union policy, or if it concerns an issue in any way relevant to union policy. Speech entirely irrelevant to any issue the members care about would presumably be protected.

\(^{184}\) Dolan, 746 F.2d at 742-43.
unreasonable regulation of member speech.\textsuperscript{185} The court did not discuss what would happen if the removed officer succeeded in regaining her office, but continued to voice opposition to the union leadership.\textsuperscript{186} If the denial violated the official's own right to speech, then the holding means that punishing member speech by denying candidacy rights is unacceptable, while punishing the same speech by removal from office is legitimate. The court is saying that there is a protected right to run for office, but no right to win.\textsuperscript{187}

In a leading pre-\textit{Finnegan} case that involved an elected shop steward who was removed from office for advocating a more militant bargaining strategy, the Second Circuit reversed the District Court's granting of a preliminary injunction and allowed the union to remove him.\textsuperscript{188} In pointing out that the steward, Dave Newman, had not had his membership rights infringed, the court stated that after his "decertification" as a steward:\textsuperscript{189}

[H]e was entitled to all the rights of union membership, including full participation in union meetings, \textit{candidacy for union office}, and the right to speak out in opposition to the management [of the union—i.e. the administration], to write and distribute any publication... and to nominate and vote for others to replace the union officers with whom he disagreed.\textsuperscript{190}

\textsuperscript{185.} \textit{Id.} at 743.

\textsuperscript{186.} A parallel contradiction emerges in improper discipline cases. \textit{See} Sullivan v. Laborers' Int'l Union, 707 F.2d 347 (8th Cir. 1983) (holding that although \textit{Finnegan} allows elected official's removal from office without procedural protections of \textsection{} 101(a)(5), barring him from running to regain office does require those protections). \textit{See also} Schonfeld v. Penza, 477 F.2d 899, 904 (2d Cir. 1973) (holding that removal from union office does not violate the official's rights, but making him ineligible to run requires compliance with \textsection{} 101(a)(5)).

\textsuperscript{187.} Another reading is that the court had difficulty separating the "equal rights" guarantee of \textsection{} 101(a)(1) from the substantive speech and assembly rights of \textsection{} 101(a)(2), and that it really meant that the candidacy bar violated the equal rights provision under either of two theories. Candidacy itself may be a Title I protected right derived by necessary implication from the equal right to nominate and vote. I believe this is a correct view of those guarantees. \textit{See supra} note 172 (discussing a union member's right to run for office). Alternatively, the court may have meant that the denial of the removed official's candidacy deprived the members' of their right to nominate and vote. Under either view the right would then derive from \textsection{}101(a)(1), but would not change the point I am making. The court would still necessarily be holding that preventing a member from running for office is illegal in circumstances where removing her from office is legal.

\textsuperscript{188.} \textit{Newman I}, 570 F.2d 439 (2d Cir. 1978). At the time of the events discussed in \textit{Newman I}, I was a shop steward in Local 1101, and worked closely with Dave Newman, the lead plaintiff in the case. However, I was not involved in the legal proceedings.

\textsuperscript{189.} "Certification" meant that the union informed the employer that the individual was a steward and authorized to initiate and administer grievances, represent other employees when they requested the presence of a steward, etc.

\textsuperscript{190.} \textit{Newman I}, 570 F.2d at 448 (emphasis added).
The court also pointed out that Newman had been previously decertified as a job steward, allegedly because of his criticisms of the local’s leadership. He had been chosen as a steward again by the membership but denied certification, then again elected steward (receiving, said the court, the highest vote of seven candidates at his jobsite), and “after a six-week delay he was this time certified by the Local’s management.”191 The decertification now before the Court of Appeals occurred about a year later.192 The court drew from this record the conclusion that there was no infringement of Newman’s rights under the LMRDA.193

The judges apparently never wondered about the value of Newman’s right to be a candidate for union office, nor of his right (and the right of his co-plaintiffs, who included members who had voted for him) to “nominate and vote for others to replace the union officers with whom [they] disagreed” if the newly elected officer — either Newman or someone who agreed with Newman — would have to stop criticizing the union leadership as soon as he entered office. Presumably, the disgruntled members could change this only if they managed to elect a majority of the union’s governing body at

191. Id.
192. Id.
193. The court’s analysis is remarkable:
[T]he significant fact is that despite a prior decertification as a job steward and the union leadership’s prior refusal to certify him after election to that office, Newman continued to exercise his free speech rights as a union member, conducting vigorous campaigns for greater democratization in opposition to Local 1101’s incumbent leadership. In view of this unique record, in which identical conduct by the defendants has not deterred Newman or any other union members from exercising their rights under LMRDA, we do not believe that judicial intervention is necessary or justified.

Id. at 448-49.

It is not clear how the court knew that no other member had been deterred from speaking in favor of “greater democratization in opposition to Local 1101’s leadership.” Id. It seems possible that any shop steward who wanted to remain a steward might have felt that silence was appropriate. Perhaps the court simply meant that the record failed to show that anyone had been deterred. Of course, the nature of such deterrence is that affected members are unlikely to complain about it. The exceptions, like Dave Newman, who continue to oppose the leadership, risk having their courage cited as proof that they were not deterred. See Tucker v. Bieber, 900 F.2d 973, 978 (6th Cir. 1990) (noting that the plaintiff’s contention that his removal from full-time appointed position while candidate for UAW Regional Director chilled membership rights appears “completely baseless” since “vigorous campaign still occurred”).

The real reason for the Local’s efforts to remove Newman as a steward was an unwillingness to have him become a chief steward, a post chosen “by and from” the stewards’ body at each major job location. See Newman I, 570 F.2d at 446. In contrast to the hundreds of stewards in Local 1101, there were less than a hundred chief stewards, and their political influence was considerable. Id. at 446 n.5. Newman was chosen chief steward several times by his fellow stewards.
one time. Then, they too would have the right to silence the supporters of the previous administration who remained in office.

2. The Right to Dissent and the Schonfeld Doctrine

Section 101(a)(2) is a substantive guarantee of speech and assembly. The removal of an official for speaking out to the members on union policy or for associating with other members in an attempt to change union policies or leadership can be interpreted as infringing those members' rights to speak and assemble for such purposes. It both "chills" their willingness to speak out and also "deprive[s] the membership of [the removed official's] leadership, knowledge and advice at a critical time" in the political life of the union.

This was the reasoning of Lynn, in which the Supreme Court barred the retaliatory removal of all elected officials as part of a recognition of the connection between officer and membership rights. Earlier cases in the lower courts did not go so far. These cases, both before and after Finnegan, usually held that punishing an official for speaking did not "infringe" his Title I rights and his removal from office did not violate the members' equal right to vote. Nonethe-

194. See supra note 30 (enumerating LMRDA § 101 (a)(2)).
195. See Lynn, 488 U.S. at 354-55.
196. Id. at 355. The Court made this point as part of its contrasting the effect of the removal of an elected official as compared to an appointee. This particular part of the argument, it seems plain, does not support that distinction. See infra note 403 and accompanying text.
197. Lyn, 488 U.S. at 355.
198. This view was reinforced by the dicta in Calhoon v. Harvey, 379 U.S. 134, 139 (1964), which seemed to imply that a union action that treats all members equally undemocratically cannot infringe the equal rights guarantee of section 101(a)(1). See supra note 83 and accompanying text. That view has been undercut in subsequent cases. See supra note 128 and accompanying text.

Insofar as Calhoon might conceivably apply, it would do so in precisely the opposite way than the courts have thought. While the suit by a union official challenging her removal for disloyalty should not be affected by Calhoon, a suit challenging her disqualification from running for that office might be. Normally such a disqualification is viewed as a direct infringement of a Title I right, and the courts have correctly so held. See supra note 185 and accompanying text.

However, if the union constitution or bylaws provided that no official removed for disloyalty could be eligible to run, that—at least literally—would present the issue of a uniformly imposed candidacy qualification which, under Calhoon, cannot support jurisdiction under § 102.

In that situation, only the Secretary of Labor could challenge the union rule. See Calhoon, 379 U.S. at 134. LMRDA § 401(e), 29 U.S.C. § 481(e) requires that the qualification not only be uniformly imposed, but also that it be "reasonable." See 29 U.S.C. § 481(e)(1988). I believe the only possible meaning of "reasonable" in this context is the same as the standard by which I argue the retaliatory removal of a union official must be judged
less, the lower courts developed a doctrine that held that a retaliatory removal might still infringe the members’ Title I rights.

_Schonfeld v. Penza_,199 the landmark second circuit case, written almost a decade before _Finnegan_, noted that the retaliatory discharge of a union official infringes the members’ rights when it is “part of a purposeful and deliberate attempt . . . to suppress dissent within the union.”200 The case was, in a strong or a weak form, widely followed. In _Finnegan_, the Supreme Court recognized the doctrine as a possible exception to its holding.201 The lower courts held that the existence of a purposeful plan to suppress dissent mattered because then, as the plaintiffs in _Schonfeld_ alleged, the removal “constitutes a form of intimidation of the membership and their duly elected officers and amounts to reprisal for efforts by Schonfeld and others to advocate and implement changes in union structure and procedure.”202

Within the already prevailing formal view of Title I rights, a view that would later culminate in _Finnegan_, the _Schonfeld_ doctrine was a way for courts to escape the consequences of their formalism in situations where it seemed plainly necessary, according to the particular court’s own view of union democracy. There are situations, and _Schonfeld_ itself was such a case, where it is almost impossible

---

199. 477 F.2d 899 (2d Cir. 1973).
200. Id. at 904.
201. “[W]hatever limits Title I places on a union’s authority to utilize dismissal from union office as ‘part of a purposeful and deliberate attempt . . . to suppress dissent within the union,’ cf. _Schonfeld v. Penza_, it does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own.” _Finnegan_, 456 U.S. at 441 (citation omitted).

The viability of _Schonfeld_ was reinforced in _Lynn_, which made it unnecessary for elected officials, while leaving unresolved its applicability to appointed officials:

_We_ reject [the] contention that a union official must establish that his firing was part of a systematic effort to stifle dissent within the union in order to state a claim under § 102. Although in _Finnegan_ we noted that a § 102 claim might arise if a union official were dismissed as “part of a purposeful and deliberate attempt . . . to suppress dissent within the union,” we did not find that this constituted the only situation giving rise to a § 102 claim. We merely stated that we did not have such a case before us, and that we expressed no view as to its proper resolution. _Lynn_, 488 U.S. at 355 n.7 (citations omitted, emphasis in original).

202. 477 F.2d at 903.
for a court to maintain that the union's action in removing an official does not infringe the membership's right to speak and assemble freely.\textsuperscript{203}

But as a method of avoiding the consequences of the division of membership from officer rights, the \textit{Schonfeld} exception is doctrinally incompatible with the formal view that requires it. Within that formal model, if the members are still free to speak and attend meetings, then they have not — any more than the removed official himself — had their Title I rights infringed. The fact that the union hierarchy removed Schonfeld to inhibit other union members from speaking, or to remove the leader of the opposition from a position of influence, visibility, and prestige, and thereby make the opposition's chances of success more remote, should not change this analysis.\textsuperscript{204}

\textit{Schonfeld} thus implicitly recognized that the formal right to speak, vote and attend meetings is not sufficient to satisfy the requirements of Title I. The doctrine was necessary because the purpose of the LMRDA is not simply to allow members to cast votes in elections that are uncontested, or might as well be, or to speak on union policy only in circumstances where their speech can have no effect. A union leadership rarely needs or attempts to "suppress dissent" in the sense of preventing members from exercising these formal rights, unless the exercise of these rights threatens to have an effect or is so perceived by the leadership. In a few unions, including the most corrupt, where the hierarchy has little political skill and rules by physical intimidation, any sign of dissent, even an isolated opposition statement at a membership meeting, may be viewed as threatening.\textsuperscript{205} Most unions, however, tolerate opposing views ex-

\textsuperscript{203} \textit{Schonfeld v. Penza} was one of many cases involving the corrupt, tyrannical, and ineffective leadership of Painters District Council 9 and the efforts of reformers, led by Frank Schonfeld, to reclaim their union. See e.g. Robins v. Rarback, 325 F.2d 929 (2d Cir. 1963); Salzhandler v. Caputo 316 F.2d 445 (2d Cir. 1963); Schonfeld v. Raftery, 271 F. Supp. 128 (S.D.N.Y.), aff'd. 381 F.2d 446 (2d. Cir. 1967); Schonfeld v. Raftery, 335 F. Supp. 846 (S.D.N.Y. 1971). The old regime's record of violence, intimidation, and flouting of the law, while not unique, was too much for the courts to ignore.

The litigation was of course only one aspect of the struggle to restore democracy to the union. The tenacity and bravery of Schonfeld himself contributed immeasurably to that cause.

\textsuperscript{204} See Schonfeld, 477 F.2d at 899-904. One might say that in order to accommodate the \textit{Schonfeld} exception, courts have presided over a transformation: the earthly bread and wine of officer rights are transubstantiated by the miracle of the purposeful scheme into the body and blood of membership rights.

\textsuperscript{205} In 1976, when the only delegate of the fledgling Teamsters for a Democratic Union at the national Teamsters convention, Pete Camarata, attempted to propose a constitutional amendment to limit the salary of the general president, he was prevented from speaking and later beaten up in public. D. La Botz, \textit{supra} note 48, at 72. See also James, \textit{supra} note 18, at 328 (stating that the first delegate to address 1964 Mineworkers convention was beaten so
pressed by individual members, especially when those members are isolated and marginal to the union's political life. The expression of opposition by a secondary leader of the union, whether elected or appointed, is different. A retaliatory removal is motivated less by an attempt to discourage the exercise of formal rights than by a desire to prevent the dissident views, either on policy or leadership, from gaining a wider audience. Retaliatory removals prevent dissident views from being seen as a legitimate alternative within the union and ultimately, from succeeding in changing the policy or the leadership. The whole point of retaliatory removals, in other words, is to suppress dissent within the union.

The Schonfeld doctrine is flexible: it allows a court to find, or not to find, an attempt to suppress dissent depending on the egregiousness of the union leadership's conduct. It also permits a court to consider the overall character of the union in question. However, this flexibility results from the inability of courts to articulate coherent standards to apply the doctrine. Such standards would require transcending the artificial division of officer and membership rights and viewing Title I rights as part of the means to insure politically open unions that value diversity. The existence of a purposeful attempt only matters if the cramped view of speech and assembly is rejected in favor of this broader vision. The Schonfeld doctrine is coherent only if it is understood as asking whether, in a particular situation, the exercise of formal rights of membership is sufficient to satisfy the LMRDA.

The flexibility of the doctrine also allows inappropriate considerations to determine the outcome of cases. A union with an unsavory reputation is more likely to be found to be engaging in an attempt to suppress dissent than a union that seems "responsible." Perhaps, in some sense, this is justified. However, responsibility may mean not only the absence of organized crime, but also that the union's attitude towards employers, collective bargaining, and strikes comports with the court's social vision. Thus, as is typical of rank and file dissidents, Dave Newman criticized the leadership of his local and international for their lack of militancy, as well as their lack of de-

---

206. Compare the Second Circuit's attitude towards Schonfeld's removal from the notoriously crime-ridden Painters Union with its handling of Newman I, which involved the "clean" CWA.
The court of appeals in *Newman I* recited a history that could plainly have brought the case within the *Schonfeld* doctrine, but declined to apply it. Instead, it reversed the preliminary injunction against Newman's decertification. Nonetheless, despite its evident hostility to Newman's claims, when on remand the District Judge found that the decertification was part of a deliberate plan to suppress dissent, the Court of Appeals, in *Newman II*, affirmed.

Democratization of the union and a more militant stance towards the employers are typically the twin demands of opposition movements. See, e.g., James, supra note 18, at 328-29 (discussing the origins of Miners for Democracy); D. La Botz supra note 48 (discussing the Teamsters for a Democratic Union).

Most union members who become reformers do so when they come to feel that their attempts to fight the employer over money, working conditions, job security, safety, etc.—the issues that prompted them to become active—are being frustrated rather than aided by the union leadership. Their attempts to change the policies of that leadership, or the identity of the leaders, then force them to confront, and attempt to change, the lack of democratic means to do so. For many oppositionists, the demand for union democracy, which might never have arisen if the autocratic leadership had “delivered the goods,” becomes an important value in itself: the inability to deliver the goods and the undemocratic nature of the union are seen as inevitably linked.

The leadership’s “calm and dispassionate approach” (which was trying to obtain concessions by “peaceful” means) is contrasted with Newman’s belief that the entire national union should be prepared to reject an inadequate contract offer (presumably by non-peaceful means—or worse yet, a strike).

In *Newman II* the court gave three reasons for the reversal of the grant of the preliminary injunction in *Newman I*. Id. at 835. This problem was cured by the district court’s finding that “despite Newman’s opposition to policies of the Local’s management, he had faithfully and effectively performed his duties as a job steward.” Id. at 836.

But in *Newman I*, the court had said that:
In a case that illustrates the usefulness and flexibility, as well as the limitations of the Schonfeld doctrine, the Second Circuit considered the issue of whether the doctrine survived Finnegan in Cotter v. Owens. Finding the doctrine still viable, the court of appeals reversed the district court's refusal to consider the plaintiff's Schonfeld argument. Both Frank Schonfeld and Dave Newman had been elected. In Cotter, the court now applied Schonfeld to the case of an appointed official. The case exemplifies why protecting only elected officials from retaliatory removals does not adequately safeguard the ability of union members to achieve democratic control of their unions. For that reason, it is worth examining the facts of the case, and what the Second Circuit made of those facts, in some detail.

The inability or unwillingness of Newman to explain the Local's program and policy to employees in a manner designed to enlist their cooperative understanding of it, much less himself to implement that policy, is obvious. As a vigorous opponent of that policy he favored eradication, rather than promotion or even objective criticism, of the policy. Under the circumstances he could not be expected to explain it fairly to the membership. In short, his political interests were incompatible with some of his principal duties as a steward.

570 F.2d at 447-48.

In other words, the District Judge, on remand, found as fact what the Court of Appeals had said could not be true.

The second reason for the remand, explained by the court in Newman II, was the fact that there had been "no showing in the record that the purpose or effect of decertifying Newman as a job steward was to discourage his free speech rights as a member or those of others as members." 597 F.2d at 835. In fact, as the court admitted in Newman I, the District Court had found "that other plaintiffs . . . were likely to succeed in showing that the decertification of Newman had 'chilled their speech in violation of'" §§ 101(a)(2) and 609. 570 F.2d at 444. It was not the absence of record evidence that had forced the reversal of the preliminary injunction. What the court actually said in Newman I was that "[T]he record is equally clear that neither the purpose nor the effect. . .was to discourage his exercise of his free speech rights as a member." Id. at 448. Again, on remand the District Court found the opposite.

Finally, the Newman II court stressed that on remand the District Court had found that Newman had not disrupted a meeting with the local president, which was the reason the local had advanced for the decertification. 597 F.2d at 836. But in Newman I, the court had explicitly declined to consider this controverted fact as relevant by stating that: "even if Newman's version is accepted, it is clear his removal was justified." 570 F.2d at 447.

The flexibility of the Schonfeld doctrine, and the risks inherent in that flexibility, are apparent. It is hard to escape the conclusion that a determined District Judge (Whitman Knapp) simply ignored the prejudices of the Court of Appeals, and that the Court of Appeals gave in. (The two appellate panels had only one member in common, Judge Mansfield—but he was the author of both opinions.)

In addition, the importance and implications of the case may have been better appreciated by the Newman II panel because of the amicus brief submitted on behalf of several reform groups from other unions, including Teamsters for a Democratic Union.

211. 753 F.2d 223 (2d Cir. 1985).

212. Id. at 229. The court found the question a close one, but decided that Finnegan's explicit "not unfavorable reference to Schonfeld" meant that the doctrine had not been extinguished. Id. at 229-30.

213. See id. at 228-230.
detail.

Michael Cotter, a nuclear power plant mechanic and long-time shop steward, was removed from the local's Nuclear Safety Committee after he helped found "Fight Back." This was an opposition group whose newsletter criticized high officer salaries, the failure to regularly convene the committee and to obtain better exposure-level and safety rules. In rejecting the argument that Cotter might be exempt from the Finnegan holding under a "nonpolicymaker" exception, the court emphasized that "the subject of nuclear safety, particularly at Indian Point [Nuclear Power Station], is obviously of vital concern." This was a key issue "in a long-standing, bitter fight between rival factions in the Local." The safety committee "participated in the development, if not the implementation of union policy, identified priorities for training and safety procedures, and met with management. . .and with members of the Nuclear Regulatory Commission." The committee had been created by the Business Manager of the Local and "the Local has a legitimate interest in insuring that it reflects the policies of the present leadership. The Local argues that it should not be forced to give these dissidents a 'bully pulpit,' and indeed, it is not unimaginable that the Committee could become such a forum.”

Concluding that Cotter could not avail himself of a nonpolicymaking exception, assuming it existed, the court nonetheless remanded the case, because there was a genuine issue of material fact as to whether the removal “was not merely an isolated act of retaliation for political disloyalty,” but instead, fell within the Schonfeld exception. The court held that they could "conceive of rare situations where the retaliatory firing of policymakers might be part of a series of oppressive acts by the union leadership that directly threaten the

214. Cotter had twenty-six years of seniority when the case was decided; he was a shop steward for “most of” the previous twenty-four years. 753 F.2d at 224.
216. The nonpolicymaking employee issue is discussed below. See infra note 446 and accompanying text.
217. Cotter, 753 F.2d at 228. “It was important enough,” the court noted, “for Cotter to successfully claim that Con Edison fired him for pressing the subject too aggressively.” Id. at 225. Cotter had been fired, but had been reinstated when the Department of Labor found that the firing was in retaliation for his complaints about nuclear safety violations by Con Edison; he later won a state wrongful discharge action. Id.
218. Id. at 226.
219. Id. at 228.
220. Id.
221. Id. at 230.
The court then recommended that the case, on remand, be consolidated with two other pending cases. One challenged "the removal of three members of Fight Back as elected shop stewards." In the other, a District Judge had already twice enjoined the Local, once from processing its own by-laws amendments without those of Fight Back, and, two months later, from "interfering with the right of plaintiffs to present their proposed amendments to the By-Laws . . . to the membership" and "from causing or participating in disruptions" of the Local's membership meetings so as to prevent the members from considering the proposed amendments.

In fact, the court noted, litigation between factions in the local had been continuing for fifteen years. If the difference between a retaliatory removal that falls within the Schonfeld doctrine and one that does not is simply that the plaintiff must show the removal "was not merely an isolated act of retaliation for political disloyalty," then the record recited by the Court of Appeals demonstrates that Cotter has obviously met his burden. If he must prove that the purpose or effect of the many acts was to suppress dissent, then, except in the unlikely event that the union leaders admit that this was their aim, he needs to show that their actions do indeed have the effect of suppressing dissent.

But what would constitute proof of such an effect? Evidence that dissidents were regularly removed from union positions would prove nothing: each of the removals would be allowed under Finneghan. Even if the removal was one of many actions by the leadership,

---

222. Id. at 229.
223. Id. at 229-30.
224. Id. at 223 (quoting Fight Back Comm. v. Gallagher, 115 L.R.R.M. (BNA) 2685 (S.D.N.Y. Nov. 17 1983) (citation omitted)).
225. Id. at 229.
226. Id. at 230.
227. The usual phrasing of the Schonfeld doctrine, involving a "purposeful" and "deliberate" attempt to suppress dissent, would seem to indicate that the union hierarchy's subjective motivation is the central issue. The courts that have applied the doctrine have not emphasized this factor, often referring to the "purpose and effect" of the leadership's actions as if they were the same thing. This is just as well; there is nothing in the LMRDA to indicate that the infringement of rights is justified by either good faith or inadvertence. See generally Local 3489 Steelworkers v. Usery, 429 U.S. 305 (1977) (meeting attendance rule that has the effect of disqualifying over 96% of union members from running for office violates Title IV).
228. The Cotter court, citing Newman I as its authority, says that on remand Cotter would be required to show by "clear and convincing proof" that he came under the Schonfeld doctrine. 753 F.2d at 229. Why this higher standard should be imposed is never explained.
some of which violated the LMRDA, that should not affect the legality of the removal.\textsuperscript{229} Affidavits from members that they are afraid to speak out might indicate that the removal chilled the members' Title I rights.\textsuperscript{230} However, since the court believes that forcing a union member to choose between speaking out and holding union office is legitimate, any "chilling" of a member who refrains from speech out of fear of this consequence would also be legitimate.

The \textit{Cotter} court cannot explain how some retaliatory removals, (those "rare situations" and "unusual circumstance[s]" of which it says it can conceive,) can "directly threaten the freedom of members to speak out"\textsuperscript{231} because, if "speaking out" is understood in the way \textit{Finnegan} has defined it, then retaliatory removals do not threaten that fundamentally empty right. The LMRDA is concerned with more than "speaking out". Its goal is to ensure that unions are democratically governed.\textsuperscript{232} The rights guaranteed by Title I, especially the speech and assembly rights, are meant to advance that wider goal.\textsuperscript{233} The only logical justification for the \textit{Schonfeld} doctrine is that retaliatory removals are almost always part of an attempt to

\begin{itemize}
\item \textsuperscript{229} In \textit{Johnson v. Kay}, 860 F.2d 529, 537 (2d Cir. 1988) the court distinguished "random acts of individuals directed solely at Johnson as union President," which would not invoke the \textit{Schonfeld} doctrine, from "organized attempts by the defendants to prevent union members sympathetic to Plaintiff from expressing their views." The court pointed out that:

\begin{itemize}
\item [in] addition to relating . . . instances of physical intimidation directed at [the elected local president] and her supporters, the complaint describes a series of actions by the defendants designed to monopolize communication and power within the union, and to take physical control of the union building . . . . Moreover, the nature, intensity and extent of the defendants' scheme, including [physical threats], and the attempts to block her normal channels of communication with other members during the period before the vote on the proposed constitutional amendments, the planned disruption of . . . meetings designed to frustrate union members from supporting Johnson, and the seizure of the union building, would strongly tend to chill union members who desired to exercise their rights in a fashion disapproved by the [rival] faction.
\end{itemize}

\textit{Id.} at 537.

If there really are physical attempts to prevent union members from expressing their political views, there is no need to invoke the \textit{Schonfeld} doctrine. If it is these actions, directed at members' rights, that state a claim under § 102, with the removal of the officer also being actionable only because it was a part of the whole plan to suppress dissent, then the doctrine should not apply to \textit{Newman II}, or \textit{Cotter}, where neither the members nor the removed official had these rights directly eliminated.

\item \textsuperscript{230} This is assuming that the court does not apply the Catch-22 logic of \textit{Newman I}, which held that the very fact that members are willing to challenge the leadership by continuing to support the removed official demonstrates that the removal has not chilled their rights. \textit{See Newman I}, 570 F.2d at 448-49.

\item \textsuperscript{231} \textit{Cotter}, 753 F.2d at 229.

\item \textsuperscript{232} \textit{See id.} at 226.

\item \textsuperscript{233} \textit{See id.}
\end{itemize}
prevent the members, not simply from speaking and assembling, but from effectively challenging the incumbent’s control of union policy and positions.

Cotter was removed precisely because his committee membership was important, a key workplace issue was involved, and Fight Back could potentially use his position to legitimize their views. And it is precisely for these reasons that removing Cotter would hinder the ability of dissidents to change union policies and replace the current leadership. Effects such as these constitute the suppression of effective dissent.

The Cotter court cannot explain what actions violate the Title I rights of the members under Schonfeld because it hasn’t any idea of the role that lower-level officials play in creating and leading alternatives to incumbent leaderships. It does not understand the need for diverse opinions within the union leadership in order to allow membership involvement. Most important, its view of democracy does not value that diversity.

Cotter says that the safety committee should “reflect” the policies of the present leadership. The union has a legitimate interest in ensuring that the safety committee’s official statements and actions do not contradict those of the elected leadership. But the court has confused this limited legitimate union interest with the entirely separate interest of the leadership to maintain power. There is no indication that Cotter did anything contrary to this limited interest of the union. He was removed because the rank and file group with which he was associated criticized the union leadership over the crucial safety issue, not because either he or the committee was accused of any improper actions.

The union—as distinct from its leadership—has no legitimate interest in hindering the dissemination of those views. The union, not the present administration, has no legitimate interest in preventing an opposition group from deriving information on vital issues by serving on union committees. The union has no interest in refusing to accept input in formulating safety policy from political opponents of the leadership. The union, in sum, has no interest in making it easier for union officials to stay in power and more difficult for an opposition to succeed.

Removing Cotter, removing Schonfeld, and removing Newman, serves those interests well. However, the law should not help incumbent union leadership maintain a monopoly on communication. It

234. Id. at 228.
should not fear that the opposition acquire a "bully pulpit." The law should not assist union leaders to require, as a condition of participation in the union's political life, that each voice reflect a monolithic agreement on every issue.

_Cotter_, by allowing the possibility that the removal of an appointed member of a union committee may violate the LMRDA, illustrates the usefulness of the _Schonfeld_ doctrine. In contrast, the court's inability to articulate any standard for when a removal falls within the doctrine, its unwillingness to distinguish the interests of the union from that of the leadership, and its failure to acknowledge, or perhaps to understand, that the LMRDA requires meaningful democracy outside the formal bounds of _Finnegan_, all demonstrate the limitations of the doctrine.

The application of the _Schonfeld_ doctrine also varied greatly between circuits. For example, the Fifth Circuit in _Adams-Lundy v. Association of Professional Flight Attendants_235 discussed _Schonfeld_ extensively and recognized the validity of the doctrine. Some of the court's language implies a broad view of union democracy:

> Sometimes, however, one group or faction within a union may become so entrenched and despotic that the democratic character of the union is threatened. When that happens, and when the dominant group strives to stifle dissent and efforts at reform within the union, the rights of union members to belong to an open democratic labor organization are infringed. As these are the core interests protected by the LMRDA, the Act does provide a remedy in such a case, even if the particular repressive action challenged is the removal from office of a political opponent of the dominant clique—an action not ordinarily comprehended by the terms of §102.236

But this language is deceptive. The court is merely allowing for the possibility of a _Schonfeld_ exception for elected officials; and it turns out that its view of what threatens "the democratic character of the union" is a circumscribed one. The plaintiffs' allegations were held insufficient to support their likelihood of success under _Schonfeld_.237 This was despite the fact that the plaintiffs were the majority of the elected local executive board, who had been suspended from office by the minority faction, in a vote in which the members of the majority were prevented from participating because they had

---

235. 731 F.2d 1154 (5th Cir. 1984).
236. _Id._ at 1158 (emphasis added).
237. _Id._ at 1156.
a personal interest in the outcome.\textsuperscript{238}

The court held that the preliminary injunction granted below had to be vacated because the plaintiffs had failed to make a \textit{prima facie} case that:

their suspension from office was part of a scheme to subvert the union's basic democratic structure or otherwise directly implicated rights of members. . . .[T]here is no claim or proof that the defendants are attempting to dismantle the union's electoral system nor that members opposing that faction are in any fashion suppressed or threatened with reprisals. In other words, the injury done to the plaintiffs was done to them in their status as officers, not in their status as individual members.\textsuperscript{239}

To the Court of Appeals, the union's "basic democratic structure" had not been subverted and its electoral machinery remained intact; it was just that the results of the elections could be reversed. The members' right "to belong to an open democratic labor organization" has not been infringed; it has only been redefined.

In contrast, in a series of cases decided between \textit{Finnegan} and \textit{Lynn}, the Ninth Circuit was more willing to find a purposeful scheme.\textsuperscript{240} Indeed, in its disposition of \textit{Lynn},\textsuperscript{241} the case that the Supreme Court later affirmed on an even broader basis, the Ninth Circuit seemed to say that the very fact that a removed official was elected was enough to invoke \textit{Schonfeld}.\textsuperscript{242} The court also reserved

\textsuperscript{238} \textit{Id.} at 1156. Although the suspended members were a majority, the local president was part of the minority. While the record is not clear, presumably the parliamentary ruling that prevented the majority from voting on its own suspension from office was made by the president and required a supermajority to overrule.

\textsuperscript{239} \textit{Id.} at 1159 (emphasis added).

\textsuperscript{240} Before \textit{Finnegan}, the Ninth Circuit had held that the retaliatory removal of an appointed official violated § 609 as well as Title I, without requiring evidence of a plan to suppress dissent. \textit{See} Cooke v. Orange Belt Dist. Council of Painters, 529 F.2d 815 (9th Cir. 1976); Grand Lodge Int'l Ass'n of Machinists v. King, 335 F.2d 340 (9th Cir. 1964); (holding that retaliatory reassignment to less desirable location is actionable).

\textsuperscript{241} The Ninth Circuit also apparently did not require that the existence of the plan be proven by "clear and convincing evidence," unlike the Second Circuit. \textit{See} Cotter, 753 F.2d at 229.

At least in one case, a panel of the Ninth Circuit found that \textit{Finnegan} had extinguished the \textit{Schonfeld} doctrine. In \textit{Bloom v. General Truck Drivers Local 952}, 783 F.2d 1356 (9th Cir. 1986), in an inexplicable misreading of \textit{Finnegan}, the court quoted the Supreme Court's language that clearly left open the possibility of the \textit{Schonfeld} exception, and held that it referred only to the possibility of a cause of action by nonpolicy and nonconfidential employees. The Supreme Court was, beyond any doubt, leaving this open as an \textit{additional} possibility, apart from the \textit{Schonfeld} doctrine. \textit{Compare Finnegan}, 456 U.S. at 440-41 and n.11 with \textit{Bloom}, 783 F.2d at 1359 n.3.

\textsuperscript{242} \textit{Lynn v. Sheet Metal Workers Int'l Assoc.}, 804 F. 2d 1472 (9th Cir. 1986), \textit{aff'd}, 488 U.S. 347 (1989).

\textsuperscript{244} Certainly this was the characterization of Judge Anthony Kennedy, who dissented,
the issue of the possible application of *Schonfeld* to the removal of an appointed official in a way that implied that, at least sometimes, it did apply.243

In *Brett v. Hotel & Restaurant Employees Local 879*,244 the court supported the *Lynn* rationale in saying that "at a minimum an elected official has a cause of action when he or she suffers a retaliatory removal which occurred as a purposeful and deliberate attempt to suppress dissent within the union."245 The usual phrasing of the *Schonfeld* exception requires that the discharge be "part of" the purposeful attempt to suppress dissent, which implies (though does not require) that a series of acts occur apart from the retaliatory removal. The Ninth Circuit's formulation is a subtle change; it indicates that the removal itself may constitute the attempt to suppress dissent, and would be illegal if that were its purpose. This is particularly interesting because the facts of *Brett* did not require it: the case included allegations of a long history of repressive activities.246 The fact that the court holds that "at a minimum" a cause of action exists in a *Schonfeld* situation, indicates a broader view on retaliatory dismissals. "It appears to us that the LMRDA goal of union democracy will be much better served if the membership's elected representatives may speak out on issues relating to their office with-

arguing that "the mere fact that Lynn was an elected officer is not sufficient to bring this case within that exception." 804 F.2d at 1486 (concurring and dissenting opinion).

But in *Brett v. Hotel & Restaurant Employees Local 879*, 828 F.2d 1409, 1416 n.11 (9th Cir. 1987) a different panel of the Ninth Circuit characterized the Court of Appeals' *Lynn* holding more cautiously:

We do not hold an elected official always has a cause of action. Instead, we merely follow *Lynn* to hold that at a minimum an elected official has a cause of action when he or she suffers a retaliatory removal which occurred as a purposeful and deliberate attempt to suppress dissent within the union.

828 F.2d at 1416 n.11 (citation omitted).

243. *Lynn*, 804 F.2d at 1478, n.4 (stating "We do not address the question of when removal from appointive office, in an attempt to suppress dissent, violates section 102. See *Finnegan*, 456 U.S. at 440-41." (emphasis added)).

244. 828 F.2d 1409 (9th Cir. 1987).

245. *Id.* at 1416 n.11.

246. *Id.* at 1412. Brett claimed that:

[H]er removal was part of a three-year effort by officials of Local 879 to purge Kay Rollison and her supporters from positions in Union leadership. Rollison, in her attempts to protest union activities, run for union office, and stay in office once elected, had been met with a series of illegal obstructions carried out by the Local and the International.

*Id.* (citations omitted).

It is possible that the court simply adopted the similar language in the Court of Appeals' disposition of *Lynn*, where all the acts alleged were directed against Lynn himself. *See supra* note 241 and accompanying text.
out fear of reprisal from elected officials higher up."

With that statement, the Ninth Circuit recognized that Schonfeld, even stretched to its limit, was insufficient to satisfy the statute's intent. The Schonfeld doctrine is irreconcilable with Finnegan because no removal can violate "membership rights" in the way that Finnegan conceived of them. The courts that applied Schonfeld were implicitly, sometimes unconsciously and frequently reluctantly, transcending the formal conception of rights, but they were constrained by the Supreme Court's delineation.

3. Discipline and the "Incidents of Union Membership"

Finnegan held that the removal of a union official is not "discipline" under section 609 because that term "refers only to retaliatory actions that affect a union member's rights or status as a member of the union." This resolution does not provide a framework by which the question of what constitutes union discipline can be decided in other situations; the reasoning of Finnegan is inapplicable outside the context of retaliatory removals without creating unacceptable results. In Breininger v. Sheet Metal Workers, decided seven years after Finnegan, and less than a year after Lynn, the Supreme Court was forced to invent a second limitation on the statutory meaning of discipline to avoid the consequences of applying Finnegan's separation of membership from officer rights. The resulting analysis, albeit unintentionally, further weakens Finnegan.

In Breininger, the plaintiff, a rank and file member, claimed that the union failed to dispatch him from its hiring hall in retaliation for his dissident activities. In rejecting this claim, the Sixth Circuit had relied on the major holding of Finnegan: that the rights

247. Brett, 828 F.2d at 1415 n.10. In addition to the Fifth Circuit's narrow view of what effect was necessary to show a purposeful plan, and the Ninth Circuit's more expansive interpretation, some courts seemed uncertain whether the key issue was the union official's motivation or the effect of their actions. For example, when a secretarial employee who was a union member was fired after a union election, she claimed she was not discharged "for conflicting loyalties but merely to make an 'example' of what happens to members supportive of dissidents, thus infringing her rights as a union member." Hodge v. Drivers Local 695, 707 F.2d 961, 964 (7th Cir. 1983). The court dealt with this argument by finding that the evidence showed that the union was motivated by a desire to have a loyal staff, rather than a general desire to punish enemies, but did not consider the effect of the action. Neither the parties nor the court, however, seemed to have explicitly considered the Schonfeld doctrine.

248. 456 U.S. at 437 (emphasis in original).
250. Id. at 91.
251. Id at 71-72.
guaranteed by Title I were only rights of “members.” The Sixth Circuit applied this reasoning to Breininger’s section 609 claim, which depended on his having been disciplined for “exercising any right to which he is entitled” by the LMRDA. As the Supreme Court characterized the decision below:

The Court of Appeals reasoned that because “[h]iring hall referrals . . . are available to nonmembers as well as to members,” and the hiring hall was not an exclusive source of employment for sheet metal workers, petitioner did not suffer discrimination on the basis of rights he held by virtue of his membership in the union.

The Court did not adopt the reasoning of the Court of Appeals. Nor did it accept the argument of the petitioner that “Congress could not have intended to prohibit a union from expelling a member of the rank-and-file from a members-only hall for his political opposition to the union leadership, but to permit the leadership to impose the same sanction if the hiring hall included a few token non-members as well.”

Instead, the Court declared that it:

[N]eed not decide the precise import of the language and reasoning of Finnegan . . . because we find that by using the phrase “otherwise discipline,” Congress did not intend to include all acts that deterred the exercise of rights protected under the LMRDA, but rather meant instead to denote only punishment authorized by the union as a collective entity to enforce its rules . . . . The term refers only to actions “undertaken under color of the union’s right to control the member’s conduct in order to protect the interests of the union or its membership.”

The Court gave three reasons for its view. It explained first that the enumerated forms of discipline in the statute (fines, expulsions, and suspensions) “imply some sort of established disciplinary process rather than ad hoc retaliation by individual union officers.” In a footnote the Court hastened to deny any implication that ‘discipline’ may be defined solely by the type of punishment involved,” and acknowledged that it would be “discipline” if the

252. Id. at 90.
253. Id.
254. Id. (citation omitted) (quoting 849 F.2d 997, 999 (6th Cir. 1988)).
255. Id. Justice Stevens, joined by Justice Scalia, did adopt the Solicitor General’s argument, who joined the petitioner as amicus curiae.
256. Id. at 91 (quoting Miller v. Holden, 535 F.2d 912, 915 (5th Cir. 1976)).
257. The Court seems always to give three reasons, even if there are only two.
union imposed a suspension of hiring hall referrals as a "sentence" to "punish a violation of union rules." If this is so, then the distinction between "discipline" barred by section 609 and those "acts that deterred the exercise of rights protected under the LMRDA" but which Congress did not intend to prohibit, is simply the existence of formal proceedings. The Court, in the same footnote, denies this as well, in a passage which seems to vitiate what the Court has just said:

Contrary to the dissent's suggestion . . . we do not hold that discipline can result only from "formal" proceedings, as opposed to "informal" or "summary" ones. We note only that Congress' reference to punishments typically imposed by the union as an entity through established procedures indicates that Congress meant "discipline" to signify penalties applied by the union in its official capacity rather than ad hoc retaliation by individual union officers.

If this statement means the individual action of a vindictive union official may not be charged to the union, then it is only a recognition that the LMRDA is meant to promote and protect union democracy, and not simply provide a federal cause of action for private disputes. But such a recognition would entail an analysis of each claim in its factual setting. The plaintiff in Breininger was not alleging this sort of private dispute. He was claiming that the union hierarchy was discriminating against him, though without formal announcement, because of activities protected by Title I of the LMRDA. It is hard to believe that Congress could have meant to so severely limit the union leadership's right to formally discipline members, both by the substantive bar of section 609 and the procedural requirements of section 101(a)(5), but simultaneously was willing to allow punishment without any limitations so long as the union did it informally and secretly. Nor does the "expansive lan-

259. Id. at 92 n.15.
260. See id.
261. Id.
262. Id. at 98-99. The dissent noted:
At this pleading stage, petitioner's allegations must be accepted as true and his complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be consistent with the allegations." Petitioner alleges "that in failing to refer him for employment... the defendant, acting by and through its present business manager, David Williams, and its present business agent, Michael Duffy, 'have otherwise disciplined' plaintiff." The union's abuse of the hiring hall system is further said to have "been part of widespread, improper discipline for political opposition."

Id. (Stevens, J., concurring in part and dissenting in part) (citations omitted).
guage”264 of both sections 101(a)(5) and 609 support the Court’s view. The safeguards of the first section are required whenever discipline is imposed by the “organization or by any officer thereof.”265 Even more telling, section 609 prohibits discipline for improper reasons by “any labor organization, or any officer, agent, shop steward, or other representative of a labor organization.”266 If Congress had been concerned with discipline only in the narrow sense to which the Court has limited it, the emphasized words would be unnecessary.267 As Justice Stevens, dissenting from this aspect of Breininger, put it: “It is inconceivable that a statute written so broadly would not include such sanctions within its compass.”268

An echo of Finnegan appears in the Breininger Court’s second reason for excluding the union’s acts from the meaning of “discipline”. The Court reasoned that Congress could not have intended

267. Nor is it credible that Congress meant to exclude economic retaliation by unions from the definition of discipline. The Court’s evidence for this is that an early Senate version of the statute included criminal penalties both for improper discipline and for using force or violence or . . . economic reprisal. . . . [T]he fact that even in an earlier bill improper discipline by a labor organization was listed separately from economic coercion by any person shows that the Senate believed that the two were distinct and that it did not intend to include the type of unauthorized “economic reprisals” suffered by petitioner in the instant case in its definition of “discipline.” Breininger, 493 U.S. at 93-94.

There are a number of things wrong with this reasoning. First, of course, this draft did not pass; perhaps it did mean exactly what the Court thinks it meant and that is the reason it was rejected. I have no evidence whatsoever for this; the Court has none to indicate that the rejected draft reflected Congress’ intentions.

Second, the legislative history that does exist indicates that the Court’s interpretation is exactly the opposite of Congress’. The second part of the provision, but now limited to “force or violence” and not mentioning “economic coercion,” became § 610 of the LMRDA, 29 U.S.C. § 530, and like its predecessor, it is an exclusively criminal provision. The removal of the reference to economic coercion was explained by Rep. Griffin, introducing the draft that did pass: “[W]e believe the quoted language is too vague for criminal enforcement and further that the activity proscribed is covered and should be prohibited under the phrase ‘or otherwise discipline’ in Section 609 where civil remedies are available for enforcement.” 105 Cong. Rts. 14,346 (July 27, 1959) (emphasis added). I am indebted to Prof. Summers for bringing this legislative history to my attention.

In addition, as Justice Stevens pointed out, the earlier provision was “addressed to attempts to interfere with rights protected by the substantive provisions of Title I and not to the arbitrary imposition of discipline at which the procedural provisions were aimed.” Breininger, 493 U.S. at 96, n.4 (concurring in part and dissenting in part).

Finally, it should be obvious that even if Congress thought that not all forms of economic coercion were forms of discipline, it does not then follow that Congress thought that no form of economic coercion was discipline. A fine is both; uniformly requiring kickbacks of all members who wish to be referred to a job is not discipline.

268. 493 U.S. at 98, (Stevens J., concurring in part and dissenting in part).
that the formalized procedure set forth in section 101(a)(5) occur each time before the union hiring hall failed to refer a member for a job.\textsuperscript{269} If this failure to dispatch is “discipline” within the meaning of section 609, and if “discipline” means the same in sections 609 and 101(a)(5), then such a formal procedure might seem to be required.

The simplest answer to this problem is that it is a problem created by the forms of legal reasoning imposed by courts, and not one created by Congress or that would come up in the real world. It is perfectly rational—even if it violates some sense of symmetry—to believe that a union’s refusal to refer a member from the hiring hall, in retaliation for political views, constitutes “discipline” under both sections, but that the failure to provide the formal procedures normally required is not an independent violation of the law because those procedures are impossible under the circumstances.

But even this explanation is in fact unnecessary. The Court’s reasoning in \textit{Breininger} is simply a non-sequitur: The union has done something which, because of its summary nature, precludes the application of the procedures of section 101(a)(5). Therefore, what the union did could not have been discipline.\textsuperscript{270} It makes more sense to analyze the events in a different way. The union has punished a member in a manner—by failing to dispatch him from a hiring hall—that can never be appropriate legal discipline.\textsuperscript{271} The union is not entitled to punish a member in this way under any circumstances. The source of this prohibition is not the LMRDA but the National Labor Relations Act.\textsuperscript{272} This is true even if the member

\textsuperscript{269} Id. at 93.

\textsuperscript{270} Cf. Hudson v. Palmer, 469 U.S. 517 (1984) (stating that although no pre-deprivation process could reasonably take place, failure to provide post-deprivation remedy would constitute deprivation “without due process of law” under the Fourteenth Amendment).

\textsuperscript{271} Neither the employer nor the union may affect the employment relationship based on internal union activities since these activities are protected by § 7 of the NLRA, 29 U.S.C. § 157 (1988); see Radio Officers’ Union v. NLRB, 347 U.S. 17 (1954); \textit{In re Nu-Car Carriers}, 88 N.L.R.B. 75 (1950) (employer); National Maritime Union v NLRB, 423 F.2d 625 (2d Cir. 1970) (union). The only exception to this involves discipline for the non-payment of dues or equivalent fees, when such payment is required by the collective bargaining agreement, as the proviso to § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1988) specifies. But in that case, the procedural requirements of § 101(a)(5) also do not apply, see supra note 33 and accompanying text (enumerating LMRDA § 101(a)(5)).

Specifically, union administered hiring halls are legal only if they treat union members and non-members in a nondiscriminatory manner. Local 357, Teamsters v. NLRB, 365 U.S. 667 (1961); see \textit{GORMAN, BASIC TEXT ON LABOR LAW} 664-70 (1976).


\textsuperscript{273} \textit{See Hoisting and Portable Engineers Local 4, 189 N.L.R.B. 366 (1971), enforced}
has received full due process, and it is true even if the union would be entirely justified in imposing some other form of discipline.\textsuperscript{274} It is hard to believe that, if in addition to imposing an illegal punishment, the union has done so for reasons barred by the LMRDA, that does not constitute an independent and actionable violation of law. The fact that the union's failure to provide proper procedures would be excusable if the union's action had otherwise been proper should not affect the fact that this form of punishment is prohibited, nor that the reason for the punishment is also prohibited.\textsuperscript{276} The issue of procedural regularity is thus irrelevant in this situation: compliance with section 101(a)(5) can never justify the union's refusal to refer the member from the hiring hall when it is a form of punishment; compliance with section 101(a)(5) is never required when the union's refusal to refer is not punishment.\textsuperscript{278} Similarly, a union official temporarily removed, assertedly because of financial malfeasance, would not have a claim against the union for failure to provide the pre-discipline hearing required by section 101(a)(5). But that should not affect her ability to claim that the asserted reasons for the removal are false, and that the union has violated section 609.

The third reason cited by the Court in \textit{Breininger} for its narrow view of the meaning of "discipline" is a peculiarly selective version of the legislative history of the statute, that points out how earlier

\textsuperscript{274} In a sense, then, the Court is right in saying that a refusal to dispatch a member from a hiring hall is not "discipline," if discipline is understood as encompassing only those punishments that, for proper cause, and with proper procedures, a union is entitled to impose.

In fact, this is not what the Court means, since it notes that "[e]ven respondent acknowledges that a suspension of job referrals through the hiring hall could qualify as 'discipline' if it were imposed as a sentence on an individual by a union in order to punish a violation of union rules." \textit{Breininger}, 493 U.S. at 92 n.15. I agree with the view that such action would be discipline within the meaning of both §§ 609 and 101(a)(5), but I can think of no circumstance in which the union would be legally entitled to impose this punishment, except for the nonpayment of dues, when § 101(a)(5) does not apply. See supra note 271 and accompanying text. \textit{But see} Carpenters Local 1913 (Fixtures Unlimited) 189 N.L.R.B. 521 (1971), \textit{enf'd mem.}, 464 F.2d 1395 (9th Cir. 1972) (finding such discipline is not unfair labor practice).

\textsuperscript{275} The Court necessarily recognizes this: the fact that the failure to provide procedural safeguards was excusable does not affect the claim that the failure to dispatch violated the union's duty of fair representation to Breininger, nor that it might violate §§ 101(a)(1) and 101(a)(2), see \textit{infra} notes 290-291 and accompanying text. Nor is the inapplicability of § 101(a)(5) relevant to deciding whether the failure to dispatch constitutes an unfair labor practice under the NLRA, see \textit{infra} notes 290-291 and accompanying text. But see supra note 151 and accompanying text.

\textsuperscript{276} For example, when a union refuses to dispatch a member (or non-member) because she has lower seniority in the geographic area than others.
drafts—drafts that were never passed by Congress—contained language that, like Section 101(a)(5), seem to contemplate that "discipline" would involve formal procedures.\textsuperscript{277} Insofar as this history has any relevance at all, it merely serves to reinforce the first two arguments the Court makes, arguments whose implications the Court itself found it necessary to limit, and thereby make unintelligible.\textsuperscript{278}

The way the Court handled the Section 609 issue in \textit{Breininger} is puzzling at first. It could have said, as Justice Stevens did in dissent, that "[a]s a matter of plain language 'discipline' constitutes 'punishment by one in authority . . . with a view to correction or training.'\textsuperscript{279} Union discipline is thus punishment imposed by the union or its officers 'to control the member's conduct in order to protect the interests of the union or its membership.'\textsuperscript{280} This definition would continue to exclude private vindictive acts by union leaders from regulation by the LMRDA. But it would change the focus of the inquiry from the procedures that were followed or from the form that the discipline took, to whether it was done by the union leadership in order to punish a member for exercising protected rights. That is, such a definition would require the courts to do exactly what the statute seems to say they should do.

Instead, the Court adopted a definition of discipline that will prevent plaintiffs in \textit{Breininger}'s position from claiming a violation of section 609.\textsuperscript{281} While that result is unfortunate, and indicates the Court's inconsistency in treating claims under the LMRDA in the context of the statute's purpose, the holding also undermines \textit{Finne-}

\textsuperscript{277} \textit{Breininger}, 493 U.S. at 92-93.

\textsuperscript{278} See \textit{supra} notes 259-261 and accompanying text, discussing footnote 15 in \textit{Breininger}, where the Court denied that it is holding that "discipline can result only from 'formal proceedings, as opposed to 'informal' or 'summary' ones." 493 U.S. at 92 n. 15.

\textsuperscript{279} \textit{Breininger}, 493 U.S. at 97 (Stevens, J., concurring in part and dissenting in part) (quoting \textit{WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY} 644 (1976)). Justice Stevens also cited two other standard dictionaries for this meaning.

\textsuperscript{280} \textit{Breininger}, 493 U.S. at 97 (Stevens, J., concurring in part and dissenting in part) (quoting Miller v. Holden, 535 F.2d 912, 915 (5th Cir. 1976)).

\textsuperscript{281} See \textit{Breininger}, 493 U.S. at 70-71. But they will still be able to claim that the union's retaliatory failure to dispatch from a hiring hall violated the union's duty of fair representation. This was the main issue decided in \textit{Breininger}. The Court held that Breininger's allegation stated such a claim, and that the claim was not within the primary jurisdiction of the NLRB.

In addition, the Court left open the possibility that the union's action could infringe a member's rights to equal treatment and to free speech and assembly guaranteed by § 101(a)(1) and (a)(2). Breininger had failed to allege that the union's refusal to refer him from the hiring hall violated the substantive protections of Title I and was therefore actionable under § 102 independently of § 609. Despite attempts to raise this issue before the Supreme Court, the Court declined to consider it but expressly left open the possibility of future claims. \textit{Breininger}, 493 U.S. at 94 n. 18.
gan's view of section 609's meaning in the case of retaliatory removals. In a retaliatory removal, whether the procedures followed are formal or not, the action is almost invariably "authorized by the union as a collective entity to enforce its rules," and "undertaken under color of the union's right to control the members' conduct in order to protect the interest of the union or its membership."282 In those situations, Breininger's definition of discipline is met; nor would there be any difficulty in according the official a hearing before her permanent removal. Finnegan's refusal to apply section 609 to retaliatory removals is then left with a single, thin, justification: the exemption of temporary removals from the procedural protections of section 101(a)(5).283

Yet, accepting Justice Stevens' view would have had even more devastating consequences for the Finnegan analysis. If the Court had held that the treatment of Breininger was indeed "punishment authorized by the union as a collective entity to enforce its rules,"284 it would then have been forced to reach the issue that it had declined to consider: "the precise import of the language and reasoning of Finnegan."285 The issue would then be whether the punishment imposed on Breininger affected his "rights or status as a member of the union."286 If it did, the union's action would constitute discipline under the Finnegan definition. The Section 609 holding of Finnegan would still stand, albeit only on the flimsy support of the single reference in the Conference Report concerning suspensions from office. The main holding of Finnegan, however, would be left with no rationale. Finnegan rested on the proposition that a removed union official has not had her Title I rights infringed because, although she may have been punished (though not "disciplined") for exercising those rights, she can continue to exercise them fully. The union's action did not prevent Breininger, any more than the Finnegan plaintiffs, from speaking, attending union meetings, or voting.

If Finnegan is right, and cannot convincingly be distinguished, then Justice Stevens' position in Breininger must be wrong. Justice Stevens resolved this problem by distinguishing Finnegan, which he had joined, on the grounds that the right to be referred from a union hiring hall was a "membership" right, protected by the LMRDA,
while the right to hold union office was not.

It is clear that since the hiring hall in Breininger was available on a non-discriminatory basis to non-members of the union, the right to use the hall was not a membership right in precisely the same (unreal) sense that the right to hold union office is not a membership right. Just as union membership does not give anyone the right to hold union office, neither does it give any member the right to be dispatched from the hall. That latter right comes from the collective bargaining agreement, the authority for which in turn derives from the exclusivity provision of the NLRA, and legally cannot depend on union membership status. In neither situation is the "privilege" or "right" that is at issue (the choice of term determines the outcome) an attribute of union membership. In both situations, the penalized person, if a union member, can continue to attend meetings, speak on union issues, and vote for candidates. The member simply has to pay a price for exercising these rights.

Because this conclusion is so obviously absurd in situations such as a hiring hall, it is admirable that Justice Stevens refused to accept it. But he could not, without undercutting the rationale of Finnegan, identify the punishing of Breininger's protected speech and assembly, without more, as an infringement of those rights. Instead, he was forced to define Breininger's right to be dispatched from the hiring hall as itself a substantive right protected by the equality guarantee of Title I.

287. This was the holding of the Court of Appeals in Breininger, 849 F.2d 997 (6th Cir. 1988).

288. Section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1988) provides that the union chosen by a majority of employees in an appropriate bargaining unit "shall be the exclusive representative" of all unit employees.

289. Justice Stevens accepted the argument of the Solicitor General's amicus brief in Breininger: "Finnegan's conclusion that the Act did not protect the positions and perquisites enjoyed only by union leaders was surely not intended to narrow the class of benefits, enjoyed by the rank-and-file, that cannot be withdrawn in retaliation for the exercise of protected rights." 493 U.S. at 101, (Stevens, J., concurring in part and dissenting in part) (quoting brief of the United States as amicus curiae).

In fact, since eligibility for most appointed union offices is limited to union members, while the right to be dispatched from a hiring hall is not, the "positions and perquisites enjoyed only by union leaders" comes closer to being an attribute of membership than does the right to be dispatched. In neither case is membership a sufficient condition to exercise the "right;" in the case of being dispatched, it is not even a necessary condition.

290. The discriminatory treatment of Breininger should, I believe, be viewed as violating the guarantees of equal rights of § 101(a)(1) and of speech and assembly of § 101(a)(2), an issue upon which the Court did not pass, since it was not raised below, see supra, note 281. But the formalistic view of Finnegan could be applied to this case as well: if the right to be dispatched is not itself a Title I right, then members in Breininger's position have not had their equal rights to exercise those rights "infringed". One hopes that the courts will, even if unable
The majority, protecting Finnegan's formal definition of Title I rights, but unwilling to join the Court of Appeals in applying that definition to a situation where its unreality was so apparent, chose to create a new limitation on the meaning of "discipline" that defies common sense. 291

PART II: LYNN AND THE NEW DICHOTOMY

The formal view of rights was undercut by the Supreme Court's decision in Sheet Metal Workers International Association v. Lynn, 292 which held that the retaliatory dismissal of an elected union official violates the LMRDA. But the three problems caused by formalism and the resulting officer/member distinction have only partially been solved.

Edward Lynn was an elected business representative of Local 75 of the Sheet Metal Workers. 293 In the year following his election, "Lynn and other members became increasingly critical of expenditures by the Local's officers and organized a dissident group, which successfully campaigned to defeat proposals to raise the Local's dues." 294 The local officers, including Lynn, then appealed to the International to take whatever action was necessary, including the imposition of a trusteeship, to deal with the local's finances. 295 The International union appointed a trustee, who soon came to the conclusion that a dues increase was necessary. 296 Lynn refused to

291. I do not mean to imply that the Justices plotted to protect the Finnegan holding. It is possible, certainly, that the formal view of rights that animated Finnegan also, and independently, led to the resolution of Breininger. But the Court's treatment of the overall issue in Breininger, whether the punitive failure to dispatch is illegal, implies a willingness to find a solution so long as it did not require reconsidering Finnegan. The Court did not leave Breininger without a remedy: it reversed the Court of Appeals, and held that he had stated a claim that the union had breached its duty of fair representation; it also left open the possibility of a § 101(a)(2) or § 101(a)(1) claim. See supra, note 281.


293. Id.


295. Id.

296. Id.
support the increase without a commitment to reduce expenditures, spoke against it at the special meeting called to vote on the proposal, and the proposal was again defeated. In response, the trustee removed Lynn as business representative. The Supreme Court held that the removal violated Title I.

Lynn did not concern union discipline, and so Finnegan's restricted view of the meaning of section 609 remains unaffected. Lynn does overrule decisions holding that even elected officials are subject to retaliatory removal, which separated the right to be a candidate from the right to win. But these decisions have not become simply historical curiosities; they manifest more than the inability of the lower federal courts to anticipate the later twists of Supreme Court doctrinal analysis. Rather, they indicate an insensitivity, indeed a numbness, to the whole point of the LMRDA. It remains remarkable that courts could have failed to understand the implications of holdings like Newman and Dolan. Nor was this failure unique. Every court that faced the issue in the years between Finnegan and Lynn thought Finnegan had some application to elected officials and most thought it applied fully. Even those that viewed the distinction between elected and appointed officials as significant limited their holdings. None said, as the Supreme Court

297. Section 101(a)(3), 29 U.S.C. § 411(a)(3) (1988), requires a secret ballot vote of the members to raise local union dues. The Court found that "this critical Title I right does not vanish with the imposition of a trusteeship." Lynn, 488 U.S. at 358.

298. The union also brought internal charges against Lynn, fining him $2,500, and allegedly refused to dispatch him to employers, and refused to handle his grievance. Lynn, 804 F.2d at 1472. These issues were not before the Supreme Court.

299. Breininger was decided after Lynn. On the other hand, the recognition that retaliatory removals violate § 609's prohibition on discipline or that they violate § 102's prohibition on "infringement" of Title I rights would make unnecessary the resolution of the other issue. Since Lynn concerned only the infringement issue, the remainder of this article will argue that the holding of Lynn should be extended to appointed officials, and will not deal with the § 609 problem.

300. Newman I was a pre-Finnegan case, but continued to be cited as precedent. See, e.g., Kudla v. NLRB, 821 F.2d 95, 101 (2d Cir. 1987). At least one court read Finnegan as settling a circuit split in favor of the Newman I holding. See Local 314 v. National Post Office Mail Handlers, 572 F.Supp 133 (E.D. Mo. 1983).

301. See supra text accompanying notes 181-187.

302. See supra note 105. Finnegan itself never discussed whether the holding applied to elected officials, though much of the language seems to be confined to appointed positions. The concurrence viewed the holding as limited to "appointed union member-employees who will be instrumental in evolving the president's administrative policies," citing the Court's cases limiting political patronage under the First Amendment. Finnegan, 456 U.S. at 442-43 (Blackmun, J., joined by Brennan, J., concurring).

303. See, e.g., Kapau v. Yamamoto, 455 F. Supp. 1084, 1090 (D.Haw. 1978), aff'd, 622 F.2d 449 (9th Cir. 1980), (stating that "[p]laintiffs' right to nominate candidates and to vote in elections would be meaningless if, after having nominated and voted for a successful candi-
said in *Lynn*, that removing an elected official for exercising rights guaranteed to members by Title I violates the LMRDA, even without any showing that the removal was “part of a systematic effort to stifle dissent within the union.”

*Lynn*’s rejection of the need for a “purposeful plan” is a recognition that the development of a doctrine of exception to the membership rights/officer rights dichotomy was only partially successful in protecting “the rights of union members to belong to an open democratic labor organization . . . [which are] the core interests protected by the LMRDA.” The dissonance between *Schonfeld*’s recognition that the removal of a union official could violate the members’ right to political dissent and *Finnegan*’s narrow and formal description of that right could never be reconciled.

*Lynn* is a wholesale rejection of that description, a rewriting of *Finnegan* that abandons its basic premises, and recasts it as a defense of democratic governance. The logical result of the institutional and structural perspective by which the Court analyzes the LMRDA in *Lynn*, however, is not a reaffirmation of *Finnegan*’s conclusions, though limited to appointed officials and for new reasons. If *Lynn*’s approach to union democracy were combined with a realistic understanding of the role of appointed officials in creating the conditions in which democracy can flourish, *Finnegan* would be, not the rule, but a minor exception necessary to advance democracy in a few

date, they are nevertheless deprived of his services as an elected officer due to defendants’ concerted actions to subvert the results of a valid election.”).

The court is careful to link the infringement to the union’s “concerted actions to subvert . . . an election” and “a calculated and deliberate effort by the defendants to unlawfully deprive the plaintiffs of some of their Title I rights. . . .” *Id.*

Thus, although the court’s analysis certainly implies that the right to nominate and vote would be “meaningless” without the right to serve in office, it is the “concerted” and “deliberate” attempt by the union to undo a valid election that gives rise to the cause of action under § 102. *Kapau* is thus a *Schonfeld* case, albeit a Ninth Circuit version of *Schonfeld*.

In *Miller v. Holden*, 535 F.2d 912, 917 (5th Cir. 1976), the court said that “if *Sewell*’s recognition that a member retains his statutory rights despite his dual capacity as a member and a union official or employee is to have meaning, § 412 must provide a remedy for retaliation against a member’s exercise of free speech even if he is not punished in his capacity as a member,” (footnote omitted, citing *Sewell* v. Grand Lodge IAM, 445 F.2d 545, 550 (5th Cir. 1971)), But the Fifth Circuit retrospectively rewrote *Miller* as a *Schonfeld* issue in *Adams-Lundy v. Assn. of Professional Flight Attendents*, 731 F.2d 1154, 1158 (5th Cir. 1984).

The Ninth Circuit’s decision in *Lynn*, although worded as requiring a “purposeful plan to suppress dissent,” does in fact recognize that “[a]llowing the removal of an elected official for exercising his free speech rights would in effect nullify a member’s right to vote for a candidate whose views he supports.” 804 F.2d at 1479, n.7.

305. *Adams-Lundy*, 731 F.2d at 1158.
unusual circumstances. The Court began its analysis by drastically recharacterizing 

_Finnegan_. Justice Marshall, writing for all but one participating justice, began by quoting 

_Finnegan_ on “the basic objective of the LMRDA: ‘ensuring that unions [are] democratically governed and responsive to the will of their memberships.’”

“We considered this basic objective in 

_Finnegan_,” continued the Court and

[w]e held that the business agents could not establish a violation of § 102 because their claims were inconsistent with the LMRDA’s “overriding objective” of democratic union governance. Permitting a victorious candidate to appoint his own staff did not frustrate that objective; rather, it ensured a union’s “responsiveness to the mandate of the union election.” We thus concluded that the LMRDA did not “restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own.” In rejecting the business agents’ claim, we did not consider whether the retaliatory removal of an elected official violates the LMRDA. . . .

The distinction between membership rights and officer rights, the cornerstone of _Finnegan_’s reasoning, which every court since _Finnegan_ had viewed as central, is not mentioned. Instead, the Court says the plaintiffs’ claims were rejected because they were inconsistent with union democracy. The formalism of the distinction is

---

306. This argument was advanced by the plaintiff in _Franza v. IBT Local 671_, 869 F.2d 41, 45 (2d Cir. 1989). See infra notes 444-446 and accompanying text (discussing the “_Finnegan_ exception” argument).

307. 488 U.S. at ___, 109 S. Ct. at 641. Justice White concurred in the result; Justice Kennedy did not participate. He had sat on the Ninth Circuit panel below, and had dissented on the retaliatory removal issue, rejecting the importance of the elected/appointed distinction and taking a narrow view of the applicability of the _Schonfeld_ doctrine:

[T]he mere fact that Lynn was an elected officer is not sufficient to bring this case within that exception. At least absent allegations that his suspension was part of a scheme to subvert the union’s basic democratic structure,. . . ., the injury suffered by Lynn is primarily connected with his status as an officer, not a union member, and does not support a claim under the LMRDA.

804 F. 2d 1472, 1486 (9th Cir. 1986) (concurring in part and dissenting in part) (citations omitted).

308. 488 U.S. at ___, 109 S. Ct. at 643 (quoting _Finnegan_, 456 U.S. at 436)(alteration made by Lynn Court).

309. 488 U.S. at ___, 109 S. Ct. at 643.

310. _Id_. at ___, 109 S. Ct. at 644 (citations to _Finnegan_ omitted).

311. _Id_. at ___, 109 S. Ct. at 643. To bolster this emphasis, the business agents, whose job included “participation in the negotiating of collective-bargaining agreements, organizing of union members, and processing of grievances [and] sit[t]ing as members of the Stewards Council, the legislative assembly of the Union,” _Finnegan_, 456 U.S. at 434, are now only the
given short shrift. It is true, admits the Court, that like the business agents in Finnegan, Lynn was never prevented from exercising his Title I rights. But, "[t]his argument is unpersuasive," because "the business agents' Title I rights had been interfered with, albeit indirectly, because the agents had been forced to choose between their rights and their jobs" and Lynn, too, "paid a price for the exercise of his membership rights."

Given that in both cases the removed officials' Title I rights had been interfered with, the decisive question is whether such interference creates a cause of action. And this "must be judged by reference to the LMRDA's basic objective: 'to ensure that unions [are] democratically governed and responsive to the will of the union membership as expressed in open, periodic elections.'"

The Court thus rejected the idea that penalizing the exercise of rights is immaterial as long as the rights can still formally be exercised. There is no way to distinguish between the situation faced by the Finnegan plaintiffs and that faced by Lynn on the basis of the officer rights/membership rights dichotomy. Instead, the distinction is based on whether the removal advances union democracy. And, said the Court, the removal of an elected official does not advance this basic LMRDA goal:

The consequences of the removal of an elected official are much different. To begin with, when an elected official...is removed from his post, the union members are denied the representative of their choice...Lynn's removal deprived the membership of his leadership, knowledge and advice at a critical time for the Local.

In judging the effect of a retaliatory removal within the framework of the statute's mandate to advance union democracy, the Court has effectively created an irrebuttable presumption that the retaliatory removal of an elected official is contrary to this goal. Because of the special role of elections, this view is justified. But the portion of Finnegan that remains, that the removal of an appointed official for exercising Title I rights does advance democracy is, con-
trary to Lynn's rewriting of Finnegan, almost always unjustified. The membership rights/officer rights dichotomy that Lynn overturns was wholly inimical to the institutional perspective of the LMRDA. However, the new dichotomy that Lynn created, between elected and appointed officials, does not serve the goals of the statute either.

There are three reasons for this. First, the doctrinal dichotomy between elected and appointed officials does not correspond to the rationale offered to explain why it furthers union democracy; in doctrinal terms it is underinclusive. Beyond doctrine, it completely fails to take into account the role of appointed union officials in creating a viable opposition; in the real world of union politics it is vastly overinclusive. Finally, it cannot be reconciled with the analysis that the Court has adopted in a closely analogous area, that of political patronage. Each of these will be discussed in turn.

A. The New Dichotomy Does Not Correspond to its Rationale

The appointed/elected distinction that Lynn has created does not correspond to the rationale that the Court has advanced to justify it. Given the model of democracy that the Court has accepted, if the result in Finnegan is pro-democratic, then the removal of elected officials can also be pro-democratic, and this is most true in situations such as presented in Lynn. The reasoning of Finnegan, as described in Lynn, directly contradicts the Lynn holding.

On the logic of Finnegan it would be proper to remove from office an official elected by a small constituency, for example a local president, whose otherwise protected speech or actions displease (or display "disloyalty" to) an official whose mandate is far wider (for example, the International President). This becomes apparent if the situation of the Teamsters local in Finnegan is applied to a national union arena. Suppose a newly elected national president found his positions criticized by the long-time president of an important local, who had supported the defeated national incumbent. Suppose the victorious challenger had run on a pledge to enter into joint cooperative programs with management, which the local president opposed. Unless the law recognizes the institutional value of diverse and competing voices in the leadership of the union, the fact that a relatively small group of members had elected the local president should be outweighed by the desire of the democratically elected national president to have local officers who will carry out his policies—policies which a majority of the whole membership can be presumed to favor. (After all, a substantial number—though a minority—of the local members voted for the defeated incumbent who had appointed
the fired business agents in *Finnegan*; that fact played no role in the Court's analysis.

*Lynn* itself could have been interpreted this way. The national president of the union, chosen to represent the entire Sheet Metal Workers' membership, removed a business representative from office in a single local that was financially endangered. The removal was motivated by the business representative's open opposition to the union's policy that was meant to put the local on a sound financial footing. The national president's mandate, we can presume, reflected a desire of a majority of the *entire* membership that his policies, including his financial policies, be implemented.

A court that identifies "the union" with the highest level of bureaucracy involved could, faithful to the analysis of *Finnegan*, even as rewritten by *Lynn*, decide in both examples that the national president's removal of the local official was a vindication of the democratic process Congress meant to protect. That result would strengthen the one-party state even more.

Fortunately, *Lynn*, by its express terms, almost completely forecloses such a result, but that is because the holding in *Lynn* implicitly requires a model of democracy that values diversity and pluralism, rather than the centralized model of democracy implicit in *Finnegan*. The *Lynn* Court's characterization, in dicta, of the ability of an elected union leader to remove appointed staff at will as pro-democratic is made without considering what structures a democratic system would require. It is possible to have a political system in which a distinction between the ability to remove elected and appointed officials is reasonable. American political life until recently presented a model in which patronage dismissals were acceptable for lower level appointed officials but would not have been allowed for elected officials. However, the American political system, on which the LMRDA was modeled, suggests that the distinction between elected and appointed officials derives its significance from the struc-

316. The trustee, rather than the international president removed *Lynn*, but the trustee was clearly the agent of the president. See 488 U.S. at ___, 109 S. Ct. at 642. In any event, the direct removal of *Lynn* without the imposition of a trusteeship would have been, if anything, less likely to have been accepted by the Court.

317. The Court expressly rejected the need to establish that the retaliatory removal of an elected official was part of a *Schonfeld* scheme. *Lynn*, 488 U.S. at ___, n.7, 109 S.Ct. at 645, n.7. I can think of no way of distinguishing the *Lynn* holding from any future case, except perhaps the extremely thin argument that the particular speech for which *Lynn* was removed involved a vote on a dues increase, a subject specifically covered by Title I. I cannot imagine a court that reads *Lynn* accepting such a distinction.

318. *See infra* text accompanying notes 346-383.
tural distribution of power. The multiplicity of elected offices in civil society, based first on the division of executive from legislative powers, on functional distinctions (school board, mayor), on geographical differences (school district, county commission), on levels of government (county attorney, state attorney general) and on federalism (which includes elements of the other distinctions), does not simply reflect a desire for local autonomy or regionalism; this structure is based in part on a belief that the dispersion of power promotes diverse views among the holders of power and therefore serves as a check on the growth of power.

While unions have always had elected local officials, and most have intermediate bodies such as regions or districts, these geographically-based distinctions are usually the only diffusion of power. There is no division between union executive and legislative powers, and effectively no independent judicial function.

If this centralized model is a form of democracy (the imperial democracy of a Napoleon III, perhaps, or the “shareholder democracy” of the modern public corporation), it can only be because the electorate as a whole has delegated its powers to the victorious candidate to do with as he sees fit; the model does not include representation of those sections of the electorate who have lost the (single) general election. Within this centralized model, the ability to remove

319. And in many cases from the power delegated to an elected judiciary as well.
320. Title III of the LMRDA, which limits both the reasons for which, and the procedure by which, a subordinate union body may be placed in trusteeship is evidence that the statute is concerned to some degree with protecting local autonomy. But that general concern nonetheless allows a union to create as centralized a structure as it chooses, in sharp contrast to the elaborate dispersion of power in the political arena.
321. Some unions provide for the representation of industry groupings, for example, aerospace workers in the United Auto Workers and airline workers in the Teamsters. But this is usually done by the appointment of an elected national union official to head an industry “division” or “council;” in most cases such a division only groups already existing locals. Similarly, when industrial unions such as the UAW provide for the representation of skilled workers, who are incorporated within plant-wide locals, this is not accomplished by allowing the skilled workers separately to elect top union leaders.
322. As Professor Summers has written:

[O]ligarchic control leads to and is reinforced by centralization of control. The incumbent officers seek to enlarge their functions, often in the name of increasing efficiency and strengthening the union to enable it to deal more effectively and rationally with employers. The effect is to increase the bureaucracy, which feeds on its own hunger . . . . Centralization is at the expense of subordinate units which lose their autonomy of finance and function. Leaders of subordinate units lose their independent power bases and their ability to challenge the central administration. The bureaucratic structure becomes monolithic, leaving little room for multiple centers of independent political power.

Summers, supra note 53 at 98.
lower level elected officials who represent only a part of the constituency of the higher official advances democracy in the same way as the ability to remove appointees; it is not possible to distinguish the claim that removing the Finnegan plaintiffs is pro-democracy from the claim that removing Lynn for opposing the dues increase is pro-democracy.

As the next sections of this article demonstrate, the ability of an elected official to remove appointees could be pro-democratic in the sense that the Court presumably means only if there are competing, stable, opposition groups whose power is, in the long term, approximately equal to that of the incumbent party.

B. Real Democracy Requires Effective Opposition: the Role of Lower-Level Officials

The second reason for rejecting the notion that Finnegan advances union democracy is that, even as to appointed officials, the Finnegan situation is the rare exception in the real world of union politics. In the great majority of situations, the authority of an elected official to remove an appointed official in retaliation for her speech does not protect democracy, it preserves the one-party state.

There are several related aspects to this point. Victories by non-incumbents (unless they are the chosen successors of incumbents) are rare and the need to insure that the staff carries out the political program of the newly elected officials can be met in more limited ways that comport with the language and intention of the LMRDA. Most important, because of the role of appointed officials in many unions, the Finnegan rule is a major inhibition to the development of opposition groups with a substantial possibility of success.

The situation that Lynn and Finnegan purport to describe, where the authority of a newly elected official to remove the appointees of the old administration is necessary in order to carry out the mandate of the electorate, is unusual first of all simply because victories by dissident candidates are unusual. Even if the Finnegan rule helped advance democracy in those unusual cases, it would not be worth retaining if the primary effect of the doctrine is to prevent those cases from arising more often. It is in large part because of the decisive importance of the union's appointed staff in creating an electoral machine that, at the national union level, the defeat of incumbents by an outside candidate is so rare.323

323. See James, supra note 18 at 263-283. By “outside” candidate, I include anyone who was not chosen by the incumbent leadership, not merely someone who has held no prev-
Even without Finnegan, the fear that the mandate of a newly elected officer may be obstructed by holdover appointees is generally unfounded. If obstruction means continuing to express views contrary to those of the elected officials, then the law indeed should normally protect the official against retaliation. The union will in fact be stronger. But if obstructing the political program of the elected leadership means refusing to handle grievances with which the official disagrees, or not attending meetings, the law should not prevent the removal of any official, appointed or elected.325

Finnegan is thus rarely needed to allow a newly elected official to fire the old appointees; but it is an ever present threat to fire the incumbent’s own appointees should they fail to support him on every issue with sufficient enthusiasm.

This brings us to a more fundamental explanation of why Finnegan does not generally advance democracy: the role of appointed officials in union politics. It is not merely that they are faced with a dilemma: if they support a candidate, and she loses, they will be fired.326 It is that they are under tremendous pressure not to remain neutral, even if they wanted to. They will be fired, not only for supporting the loser, but for failing to support the winner, and even for

---

324. The recent, extraordinary victory of the Ron Carey/TDU slate in the Teamsters is the exception that proves the rule. The circumstances of the election were unprecedented. The Teamster leadership agreed to a membership-wide vote as part of an agreement with federal prosecutors to drop a RICO suit; the election was held under the close supervision of officials appointed by the federal court, which severely hampered the bureaucracy's ability to use its advantage in resources and probably eliminated its ability to miscount the vote itself. In addition, the existence of an established and stable national group such as TDU, which deserves much of the credit for Carey's victory, is, unfortunately, still a rarity in the union movement. The argument of this article is that retaliatory discharges makes the creation and growth of such groups much more difficult, not impossible.

325. See infra note 414 and accompanying text.

326. As Finnegan acknowledged, 456 U.S. at 442.
failing to support the winner with enough energy. Almost inevitably, this means that they will be forced to support the incumbent, and this is truer the higher up the elected position. The result is the creation of a powerful machine committed to keeping the incumbents in office and giving them an extraordinary advantage against any opposition. The logical exception to this proposition is itself telling. A business agent, or international representative, may feel free—indeed may feel compelled—to oppose a local incumbent when a higher level of the bureaucracy supports the opposition. Thus, local presidents who oppose the policies of their international presidents, or of their regional directors, may indeed find themselves with a staff that obstructs their political program. And typically, Finnegan will not help them at all—because the staff jobs involved will be controlled at the higher level.

Nor is the threat of removal confined to electoral politics or election periods. The union leadership can remove any appointed official who raises any doubt on any union policy: any criticism of a proposed collective bargaining agreement, even if confined to a meeting of the leadership; any doubt expressed about the union’s political strategy, or its attitude towards organizing; anything that implies that other views are legitimate. The Finnegan rule furthers the total identification of the leadership as the union, and it is effective.

The threat of being fired is clearly a restriction of the right to speak or vote, often far more so than the threat of being shoved around or having one’s tires slashed. This is most true when the official position is a full-time job, usually higher paid, more interesting, with far more control, than the regular job that the official has left. Often the fired union official can return to that job, but not always.

---

327. See Hodge v. Drivers Local 695, 707 F.2d 961 (7th Cir. 1983), where the plaintiff attempted to distinguish Finnegan on the grounds that she had been fired not for open support of the leadership’s opponents but for her neutrality. The court held that this was irrelevant since the leadership could choose whatever staff it considered loyal.

328. This was the situation in which Ed Sadlowski found himself when he was elected (after election rigging to keep him out) to the Directorship of the largest District in the Steelworkers union. See James, supra note 18 at 344.

329. It also assures that a union leader will have difficulty finding out what the members are actually thinking, even if he wants to. The phenomenon of the isolated autocrat, from corporate executives to Stalin, is well known. See Summers, supra note 53 at 106.

330. The retaliatory removal may for example cause the loss of superseniority. See, e.g., Brett v. Hotel and Restaurant Employees Local 879, 828 F.2d 1409, 1412 (9th Cir. 1987). Long term full-time union officials may no longer be entitled to leave from their original employer; some may have had their old job eliminated, or their original employer may have gone out of business.
Even when the official position is unpaid or barely paid as is the case with most shop stewards, the loss of these positions involves a penalty. Sometimes the perquisites of such union jobs are substantial—though often those benefits may not be obvious to the outsider. Anyone who has ever worked on an assembly line understands the value of spending a day or two a month showing safety films, or raising money for the Torch Drive, or even sitting grievances.

The loss of these sorts of benefits is a penalty that the individual union official suffers. But there is a far greater penalty—a penalty to the union and to the possibility of democracy. Lower-level union positions are the place, usually the only place, where potential leaders of an opposition can develop political skills, become known to, and come to know, larger numbers of members, and create networks among themselves than can become an alternative leadership. It is often in lower level union positions that active and concerned members, anxious to be involved in the union, become opponents of the leadership, as they experience frustration with the bureaucracy’s methods and results. Union members who are most dissatisfied with their wages or working conditions, and are most willing to attempt to change these, are more likely to attend union meetings, to walk picket lines during strikes, to be willing to participate in rallies, hand out union leaflets, staff telephone banks. Their lack of apathy, their militancy, is viewed initially by the leadership in all but the most corrupt unions as exactly what the union needs. They are the people most likely to be appointed to low-level union positions, or sometimes elected either informally or formally by small work groups. In those positions, these militants, far more than other members, are confronted by the policies of the higher officials of the local, or of the national union. Often, these policies come to be seen as part of the problem, as a barrier to fighting the employer, or even as a source of support for the leadership.

---

331. See, e.g., Newman v. Local 1101, CWA (Newman 1), 570 F.2d 439, 448 (2d Cir. 1978) (removed steward received $20 for each of four union meetings per year to cover expenses).
332. See, e.g., Cotter v. Owens, 753 F.2d 223 (2d Cir. 1985).
333. See, e.g., Cehaich v. UAW, 710 F.2d 234 (6th Cir. 1983) (benefits representative received regular pay from employer).
334. See, e.g., D. La Botz, supra note 48 at 144-46.
335. See, e.g., D. La Botz, supra note 48 at 63-4. This is the main reason why preventing retaliatory removals matters even without requiring non-partisan hiring initially.
337. See, e.g., D. La Botz, supra note 48 at 70-71.
actual support for the employer. For some, the frustration of feeling that “the union” is an indifferent or even hostile force results in dropping out, in a return to “apathy.” But for others, it leads to a determination, perhaps beginning over a single issue, to change the union. Becoming an opponent of the union leadership is thus usually a process, and the process often takes place while occupying low-level, often appointed, union positions. It is precisely for that reason that union hierarchies want to control these positions.

Penalizing union officials for speaking and voting thus not only “chills” their willingness to exercise those rights; it severely hinders—often prevents—the formation of an alternative body of political leaders. It preserves the one-party state by making loyalty to the party the only means to be heard, because disloyalty is punished by the loss of legitimacy, and by confinement to a marginal role in the political life of the union.

Allowing the retaliatory removal of appointed officials thus weakens democracy in two important ways. It allows the incumbents to create a powerful political machine, with financial, organizational, and time resources that opponents will be unable to match. And it prevents some of the most likely participants, if not leaders, of an opposition movement from developing in that direction, thereby—in many cases—preventing the formation of any opposition at all.

Are there not, nonetheless, situations where the rule of Finnegan does advance the primary goal of the democraticization of unions, where abolishing it could lead to a kind of “tenure” in an appointed post? The argument that barring retaliatory removals would create a sort of civil service is a red herring. As will be discussed more fully, the LMRDA itself creates a standard by which removals of union officials may be measured; that standard is grounded on a distinction between the legitimate interests of the union and that of the leadership. In those rare cases where the political agreement of an official with the leadership serves a legitimate interest of the institution as a whole, then such agreement may be required. In a situation where the union can show that the retaliatory removal is necessary to advance democracy, a “Finnegan exception” would be justified.

The example that seems to require this is the post of business agent in some unions, especially the Teamsters, that is both ex-

338. See infra note 391 and accompanying text.
339. See infra notes 444-446 and accompanying text (discussing “Finnegan exception” doctrine).
tremely powerful and locally appointed. Finnegan himself was one of these. It is understandable that a successful insurgent candidate would feel a need to remove his opponent’s loyalists from control of such crucial positions. The solution to this problem that is not only consistent with the statute but with the political goals of these victorious dissidents, is that these jobs should be elected, not appointed.

340. The Teamsters Union, contrary to popular perceptions, is in some ways far less centralized than other major American unions, though, of course, this relative decentralization has not coincided with democracy. While the Teamster constitution provides the General President with almost unlimited powers, since the days of Jimmy Hoffa no Teamster president has been able—or perhaps even wanted—to create a single powerful central authority. Instead, the various regional powers in the IBT, sometimes reflecting the backing of rival criminal organizations, have functioned more on the model of powerful feudal barons, some (like the Dukes of Burgundy), achieving as great power as the kings to whom they owed nominal allegiance. It was the inability of the Teamster bureaucracy to function as a united political machine that was one of the causes of the stunning victory of Ron Carey and his TDU-backed slate in December, 1991.

341. Professor Pope has suggested that a newly-elected administration should be exempt from a general restriction on removing certain officials, such as business agents. See Pope, supra note 110. While there is much to recommend viewing this situation as an example of the rare case where a retaliatory removal advances democracy, there are also many problems. When the leadership of an international union uses all its resources to prevent the reelection of an incumbent local dissident, the newly installed local president, loyal to the international, would then be able to fire the holdover appointees, and help insure that the dissidents never win again. See supra note 110 and accompanying text.

The career of Harold Leu, the local president whose firing of the holdover business agents in Finnegan was approved by the Supreme Court as a vindication of the mandate of the electorate, presents another cautionary example. He went on to become the head of the Ohio Conference of Teamsters (Jackie Presser’s old bailiwick), and was the candidate for International Secretary-Treasurer on the slate endorsed by the incumbent Teamster leadership.

It is difficult to articulate a convincing interpretation of the statute that would allow distinguishing situations where a newly-elected administration’s ability to remove holdover appointees encourages opposition and pluralism in the union as a whole from those where it would serve the opposite purpose.

Given the fact that one of the major problems with the appointees of entrenched leaders in unions like the Teamsters is that these appointees tend not to do very much to earn their pay (that is, that these jobs tend to become sinecures for loyalists and sometimes for the administration’s “muscle”), a simple requirement by the new administration that these holdovers do their job will end by justifying the removal of many of them. This is equally true at the national level; perhaps the first task of Ron Carey’s “transition team” might be to ask each national Teamster functionary what his job is supposed to be. One may presume that while most (though probably not all) could answer that question, the relationship of the daily functioning of many of them to their supposed job description would be sufficiently distant as to justify discharge even under a “just cause” standard.

342. The demand for elected business agents and stewards has probably been the single reform that Teamsters for a Democratic Union has fought for the longest and most consistently. See D. Laboltz, supra note 48 at 79 (First TDU national campaign was for democratic local bylaws; “[a]t the top of the list of bylaw reforms was the right to elect union stewards and business agents.”) The Teamster leadership’s response to the TDU campaign was to have the union constitution amended to prohibit locals that had not yet done so from amending their bylaws to provide for these posts to be elected. See Teamster Constitution, art. XXII, § 8.
Keeping these powerful patronage positions as they are only leads to the perception that the newly elected outsiders—like the old guard they have replaced—are more interested in patronage and privileges than in changing the union. And this perception can become reality—reformers who want to use antidemocratic means to advance democracy end by recreating the system they meant to abolish. Finnegan as it stands today is not a neutral rule that sometimes helps union dissidents who win control of a local. It rarely applies to them and even when it does, these dissidents—if they are serious about reforming the union—should use other means.\footnote{Fin-}

The problem of retaliatory removals cannot be solved by eliminating appointed positions, however; some union positions, including membership on various committees, are not suited for formal elections. These posts are often staffed by volunteers because, despite the advantages of occasional variation in work, they are not sought after. Often, serving on the local safety committee is viewed as asking for aggravation: disgruntled members blame the committee for problems which only the union leadership, rather than the committee, can act on. And in many jobs, showing oneself as a active union member brings undesired attention—more careful supervision and tighter standards—from management.\footnote{344}

If these offices are not widely sought, why would a union leader ever try to remove someone who was doing an adequate job? And why would a safety committee member try to resist being removed?\footnote{345} Because, while these sorts of jobs are not desirable in the

\footnote{(1986). I thank Michael Goldberg for pointing this out to me.}
\footnote{343. The LMRDA of course does not require that these positions become elective; I will discuss whether appointed business agents like the Finnegan plaintiffs ought to fall within a “Finnegan exception” below.}
\footnote{In determining whether removal of appointed staff advances democracy in a particular case, it should be relevant that the new appointees are to serve only on an interim basis until elections for those posts can be held. For example, when the Miners for Democracy succeeded in defeating the long-entrenched leaders of the United Mineworkers, they dismissed executive board members who had been appointed from districts in trusteeship, and appointed a new board of interim officers who immediately voted to mandate “elections in all districts where appointed officers had been dismissed.” James, supra note 18 at 353. Similarly, it might be justified for the newly elected national Teamster leadership to remove appointees as part of a process of making their posts elective.}
\footnote{344. Special treatment on the basis of union activity is of course illegal. It is also almost universal. Sometimes, when a union is powerful, or perhaps when the employer feels comfortable with the arrangement at which he has arrived with the union, holding a union position can lead to more favorable treatment in regard to such things as tardiness or the length of breaks. Lower level union officials who criticize the union’s lack of militancy are rarely the beneficiaries of this kind of favorable discrimination.}
\footnote{345. The danger that an appointed official will somehow use the excuse of free speech to hold on to a job from which she should be removed because she is not performing satisfacto-}
Retaliatory Removals

For the personal advantages they bestow, and while they may bring the foreman's unwanted careful checking of production figures and time-cards, they are indeed a training ground for future leadership. It is precisely when a low-level official begins to realize his potential disagreement with the regime that appointed him, that the regime sees a need to remove him. It is precisely as an oppositionist begins to create himself that the regime senses the possibility of his creating an opposition. For the small title of member of the safety committee creates legitimacy and—equally important, and perhaps as an aspect of legitimacy—the perceived possibility, perhaps only the thin possibility, that opposition is not completely futile. It is at that moment that the regime cannot tolerate him.

The benefits to union democracy of allowing emerging union leaders, oppositionists in the process of developing, to continue in these appointed posts, despite disagreements with the union hierarchy, must be weighed against the small risk that in rare instances an appointed official will succeed in keeping a post from which she deserves to be removed. Nurturing the process of creating diverse voices within the union, even if it is only occasionally manifested, is surely worth the price.

C. The Analogy of the Political Patronage Cases

The third reason for rejecting the appointed/election distinction and the survival of Finnegan's formal view of rights is the discordance between that view and analogous areas of the law.

In the past fifteen years, the Supreme Court has decided three political patronage cases, Elrod v. Burns,\(^{346}\) Branti v. Finkel,\(^{347}\) and Rutan v. Republican Party,\(^{348}\) that strongly undercut Finnegan's mechanical interpretation of the LMRDA. In considering the action of a governmental body in dismissing\(^ {349}\) and in hiring, promoting, and transferring\(^ {350}\) public employees based on their political activities or affiliation, these cases reject both the foundations of the Court's retaliatory removal jurisprudence. They reject the "illegal conditions" aspect of Finnegan: the formal and unreal logic that ref-

---

\(^{346}\) 427 U.S. 347 (1976) (plurality opinion).
\(^{347}\) 445 U.S. 507 (1980).
\(^{349}\) Elrod, 427 U.S. at 347; Branti, 445 U.S. at 507.
\(^{350}\) Rutan, ___ U.S. at ___, 110 S. Ct. 2729.
uses to see that punishing the exercise of a protected right is often as effective a means of preventing the exercise of that right as a direct prohibition. And they also reject the rights/privilege strand of Finnegan: the view that, since there is no legal right to hold union office, the union may remove an official for any reason. The reasoning of these cases removes the doctrinal underpinnings of Finnegan.

The Court rejected out of hand the argument that because public employees can continue to exercise their First Amendment rights, adverse employment decisions based on exercising those rights were not unconstitutional:

This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.351

And, while the retaliatory removal cases say that Congress did not want to create a system of tenure for union employees, the Court has more recently said that while “[t]he First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge,” it “prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees’ freedom to believe and associate.”352 The Court has

351. Id. at ____, 110 S. Ct. at 2736 (footnote omitted); compare with Bloom v. General Truck Drivers, 783 F.2d 1356, 1359 (9th Cir. 1986) (holding that “[a]n indirect burden on membership rights, such as a forced choice between expressing one’s opinion and losing one’s job, is insufficient to state a LMRDA claim.”).

352. Rutan at ____, 110 S. Ct. at 2737-38; see also id. at ____, 110 S. Ct. at 2740 (Stevens, J., concurring) (quoting Illinois State Employees Union v. Lewis, 473 F.2d 561, 567-68, (7th Cir. 1972) (Stevens, J.)):

[R]ecognition of plaintiff’s claims will not give every public employee civil service tenure and will not require the state to follow any set procedure or to assume the burden of explaining or proving the grounds for every termination. It is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration. It is true, of course, that a prima facie case may impose a burden of explanation on the State. But the burden of proof will remain with the plaintiff employee and we must assume that the trier of fact will be able to differentiate between those discharges which are politically motivated and those which are not.

Id.
said that the lack of legal entitlement to a job transfer or promotion is "beside the point."\textsuperscript{353} Penalizing the exercise of constitutional rights, especially freedom of speech, is unconstitutional.\textsuperscript{354} Thus, even if Congress had meant to create a sharp distinction between protected membership rights and unprotected officer rights, it is impossible to reconcile the political patronage cases with allowing the removal of a union official for exercising rights that Congress indisputably did intend to protect. Although the Constitution does not give anyone the right to have a government job, it does require the government not to penalize constitutionally protected activity. In precisely the same way, the LMRDA which does not give any union member the right to union employment, forbids the union from penalizing activity protected by the statute. Just as the Court has recognized that attaching an "unconstitutional condition" to receiving or maintaining government employment is itself unconstitutional, the Court should recognize that attaching an "illegal condition" to holding union office is itself illegal.

1. The Appropriateness of the Analogy

The analogy of the political patronage cases to the retaliatory removal decisions is a powerful one. This power does not derive solely from the fact that every argument that the Court has accepted as determinative in the patronage cases applies with equal or greater force to retaliatory removals; and moreover that every argument accepted by the Court in \textit{Finnegan} applies equally to the political arena—and has been rejected. The power derives from the conscious decision of Congress to model Title I of the LMRDA on the Bill of Rights, and specifically to model section 101(a)(2) on the First Amendment. That decision reflects something more than the obvious political attractiveness of the concept.\textsuperscript{355} It also recognizes the rela-

\textsuperscript{353} \textit{Rutan}, ___ U.S. at ___, 110 S. Ct. at 2736.

\textsuperscript{354} The Court has used the identical passage three times to stress this point: [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, \textit{there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.} For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. \textit{Rutan}, ___ U.S. at ___, 110 S. Ct. at 2736 (quoting \textit{Perry v. Sindermann}, 408 U.S. 593, 597 (1972)) (emphasis added). The same language is quoted in \textit{Elrod}, 427 U.S. at 360-61 (plurality opinion) and in \textit{Branti}, 445 U.S. at 514-15.

\textsuperscript{355} The argument that Title I would merely give members within their unions the rights enjoyed by all Americans in society surely made it more difficult to vote against passage.
tionship between political democracy and the protection of speech and assembly. Because the commitment to political democracy of the Constitution and of the LMRDA are analogous, the methods by which the democratic process is to be protected are also analogous.356

However, there are differences between the proper way to analyze limitations placed on the government by the Constitution and limitations placed on a union by the LMRDA. The language of the Constitution is different from that of the statute, and they do not operate in equivalent spheres. In addition, the special role of the Constitution as the ultimate source of law, combined with the special role of the judiciary in interpreting it, have led to the evolution of doctrines of judicial interpretation which may not apply to a statute. When these three interrelated differences are examined, however, they are either irrelevant to the applicability of the patronage cases in the interpretation of the LMRDA, or actually strengthen the argument that Finnegan cannot be reconciled with them.

One possible distinction involves examining the purpose of the LMRDA provisions and of the First Amendment. The political pa-

\[\text{356. That is why the political patronage cases are more useful in analyzing the retaliatory removal cases than are cases decided under various anti-discrimination laws, even though those cases also uniformly reject the rights/privilege distinction.}\]

\[\text{It is a truism that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988 and Supp. 1992), and similar anti-discrimination laws prohibit adverse employment decisions based on race, gender, and other proscribed categories even if the employee has no entitlement to being hired or promoted. The NLRA itself, in § 8(a)(3) prohibits discrimination by an employer to "encourage or discourage membership in any labor organization," 29 U.S.C. § 158(a)(3) (1988).}\]

\[\text{There is also a societal goal in anti-discrimination laws such as Title VII. They do not exist simply to protect individual rights. Nonetheless, there is a distinction between such anti-discrimination laws and laws that are aimed at the political process itself.}\]

\[\text{Similarly, all of § 8(a) is meant to protect the exercise of the rights guaranteed by § 7, 29 U.S.C. § 157 (1988), which are clearly intended to protect a collective process. Nonetheless, the analogy of the discrimination prohibition of § 8(a)(3) to the prohibitions of §§ 101(a)(1) and 101(a)(2) of the LMRDA is not as clearcut as is the analogy of the political patronage cases. This is because the commitment to political democracy in the union and in society is analogous. Unfortunately, there is no such commitment to industrial democracy in the NLRA, or at least no such commitment has been recognized for many decades.}\]

\[\text{The cases that recognize the government's right to restrict the political rights of public employees deal with another side of the problem. See, e.g., C.S.C. v. Letter Carriers, 413 U.S. 548 (1973). They are a different method of limiting the distortion of the political process through patronage. This method is inappropriate for low-level union officials, because it would remove a major source of potential oppositional activity. It is, however, quite an appropriate model in dealing with professional employees of unions. See infra note 365 and accompanying text.}\]
tronage cases are based, at least in part, on an individual rights perspective. It is the burden on the individual's exercise of her First Amendment rights that is the "unconstitutional condition:" "The cost of the practice of patronage is the restraint it places on freedoms of belief and association."\(^{357}\) Indeed, it is the arguments proffered in defense of the patronage system that emphasize an institutional perspective. Patronage is said to advance the two-party system and therefore the democratic political process.\(^{358}\) These arguments were rejected by the Court.

The basis of the argument in the union context is different. The institutional interest in union democracy requires severe restrictions on retaliatory discharges. This argument does not depend on the individual rights of union officials.\(^{359}\)

A closer look at the patronage cases shows that the Court recognized that removing the burden on individual rights is closely connected to allowing the political process to function democratically:

> It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. Conditioning public employment on partisan support prevents support of competing political interests... As government employment... becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.\(^{360}\)

The Court acknowledged the existence of other factors in the political arena that tend to counteract the importance of pa-

---

357. *Elrod*, 427 U.S. at 355 (plurality opinion).

358. "[P]atronage stabilizes political parties and prevents excessive political fragmentation..." *Rutan*, 110 S. Ct. at 2752. "[E]liminating patronage will significantly undermine party discipline; and... as party discipline wanes, so will the strength of the two-party system." *Id.* at 2754 (Scalia, J., dissenting). *See also Elrod*, 427 U.S. at 382-87 (Powell, J., dissenting); *Branti*, 445 U.S. at 527-532 (Powell, J., dissenting).

359. The fact that removal from union jobs penalizes officials is relevant to my analysis because the fear of losing the advantages of the office motivates officials to work for the incumbents. It is not relevant to the other anti-democratic effect of retaliatory removals: removing potential leaders and members of an opposition from positions that confer visibility, legitimacy, and training. In neither case is the penalty on the removed official the wrong that must be corrected.

tronage. First, "the proliferation of merit systems" means that far fewer voters than in the past owe their jobs to patronage. In addition, the Court listed "[n]ew methods of political financing, the greater necessity of expertise in public employment, growing issue orientation in the elective process, and new incentives for political campaigners." These countervailing factors were not enough to remedy the patronage system's distortion of the political process; and they are far weaker in the context of union politics, when they exist at all.

"Growing issue orientation" can be seen as counteracting the effects of patronage only if it means that voters are willing to desert the candidate of their traditional party to support the candidate of another party with whom they are in programmatic or single-issue agreement. This presumes the existence of on-going rival parties.

The "greater necessity of expertise" is not relevant to the sorts of union positions that have been discussed here. Rather, it chiefly affects unions in hiring professional employees such as economists, accountants, and attorneys, who are typically not members of the union and, while the resources they provide inevitably strengthen the incumbents, play a secondary role either in preventing or advancing political democracy in the union.

Finally, the "new methods of political financing" that may offset the importance of patronage in public employment do not exist in unions, where the importance of the union staff has increased. The staff has always been the primary source of campaign contributions, as well as donations of personal time. "Flower funds," ("office funds"

---

361. Id. at 354, n.8.
362. Id. at 366.
363. Id. at 354 n.8 (plurality opinion).
364. I am not sure what the Court means by "new incentives for political campaigners," unless it is a reference to the development of professional campaign consultants. If so, it has little relevance within unions.
365. The areas where these employees are most important is in their financial support and the "donating" of their professional services to the incumbents—support that the increased need for expertise does not affect as long as these are considered good jobs and there are more professionals who want them than there are jobs available. These professional employees may then be expected to act loyally—including by financial support—whether or not they were initially hired because of their loyalty or connections. The argument that the LMRDA should prohibit most retaliatory discharges does not apply to such employees. In my view, such employees should be barred from all union political activity, including donating services or financial contributions to any union candidate or faction.
366. "For incumbents, the largest single source [of campaign financing] is the paid staff." United Steelworkers of America v. Sadlowski, 457 U.S. 102, 129 n.4 (White, J., dissenting). In addition, incumbents can run a campaign with far less money than their opposition because of their control of the union newspaper, their easy access to membership names,
Insofar as anything has changed, it is that in the past fifteen years, for the first time, some unions have introduced rules that realistically bar any alternative source of funds. In addition, the Labor Department’s interpretation of the LMRDA’s ban on accepting “employer” funds is not limited to employers who have any bargaining relationship, present or foreseeable, with the union. This makes the union staff an even more crucial source of funds. Rank and file members, who are the only other alternative, typically will contribute only small amounts. This makes the ability to know and to reach as many people as possible, for example in the course of one’s job as a business agent, even more important.

Justice Scalia, dissenting in Rutan, viewed patronage as institutionally valuable. He argued that by holding out the hope of reaching addresses and phone numbers, and the free legal services they obtain. Id. In the 1977 Steelworkers election that Sadlowski lost, the administration-backed winner received about 90% of his funds from the union’s staff. James, supra, note 18 at 349. In addition to the factors mentioned by Justice White, incumbents need less money than insurgents because they often receive in-kind contributions from vendors, such as the union’s public relations firm. Id.

367. An extreme example is presented by Tony Boyle, former president of the United Mineworkers, who was subsequently convicted of murdering his opponent, Jock Yablonski.

Of the 198 non-clerical employees on the union’s staff with incomes over $10,000, only nine failed to contribute and two of those were Yablonski and his brother. The relative uniformity of contributions by job category, the sequence of receipts, and the timing and amount of two subsequent salary increases all belied Boyle’s attempt to characterize the contributions as voluntary.

James, supra note 18 at 331-32.


369. 29 C.F.R. § 452.78(b) (1991) (interpreting § 401(g) of the LMRDA, 29 U.S.C. § 481(g) (1988)). This can mean that the local bar owner, assuming he employs a bartender, cannot contribute twenty dollars to the candidacy of one of his regular customers. Basically, a broad interpretation of this provision eliminates almost anyone who might have enough money to contribute. See Marshall v. Teamsters Local 20, 611 F.2d 645 (6th Cir. 1979).

370. Sadlowski, 457 U.S. at 128-29 (White, J., dissenting, summarizing position of Clyde Summers).

371. As for civil service systems, which the Court mentions as one of the developments that has reduced the importance of patronage in the public arena, they do not exist in unions. However, union clerical employees, as opposed to union staffs, are themselves often unionized, and this provides a measure of protection. But these jobs concern patronage in the sense of having to know someone in order to get hired; this is not a major impediment to the creation of an opposition. Like union professional employees, who are also sometimes unionized, these positions are not usually held by members of the union in question, and the LMRDA protections do not apply to them.

ward "if not this year, than the next," a patronage system encourages loyalty to the "outs" as well as to the incumbents, thus strengthening the two-party system. The arguments favoring patronage assume the existence of a stable two-party system: "The patronage system does not, of course, merely foster political parties in general; it fosters the two-party system in particular." The Elrod plurality had questioned the need for patronage in preserving a healthy party system: "Patronage can result in the entrenchment of one or a few parties to the exclusion of others . . . [It] is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government." One need not decide whether the Court or the dissenters are correct to understand that neither argument supports a patronage system when there is no stable opposition party that is likely to survive an electoral loss.

Individual First Amendment rights of belief, speech, and association are closely related to protecting a democratic political process, and whatever other purposes the First Amendment may have, the protection of the political process is central. Even in a two-party system, the Court has held, the possible benefits of a patronage system are outweighed not merely by the burden on the individual's First Amendment rights, but also by the effect on the political process that burden creates.

The protections of Title I of the LMRDA were modeled after those of the First Amendment precisely because, just as the personal rights guaranteed by the Constitution are central—"indispensable"—to a democratic political process in society, so too the rights guaranteed to union members by Title I are

373. Id. at —, 110 S. Ct. at 2753 (dissenting opinion).
374. Id. at —, 110 S. Ct. at 2754.
375. Id.
376. Elrod, 427 U.S. at 369-70 (plurality opinion).
377. "Although Justice Scalia's defense of patronage turns on the benefits of fostering the two-party system . . . [i]n each of the examples that he cites—"the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines and the Daly Machines"—patronage practices were used solely to protect the power of an entrenched majority." Rutan at —, 110 S. Ct. at 2744, n.4 (Stevens, J., concurring) (citation omitted, quoting id. at —, 110 S. Ct. at 2747 (Scalia, J., dissenting)).
378. Elrod, 427 U.S. at 372-73 (plurality opinion).
379. Sadlowski, 457 U.S. at 111.
380. "[T]he system of government the First Amendment was intended to protect [is] a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern." Elrod, 427 U.S. at 372 (plurality opinion).
necessary to establish a democratic political process in the union. Because the union is a one-party state in which low-level officials play a central role in maintaining the leadership's control over the instruments of power, and because those officials are usually crucial in creating and maintaining any serious possibility of opposition, the protection of their associational rights is necessary for union democracy. It is true that, while the sheer numbers of patronage employees in government may itself pose a danger to the political process, this is a relatively slight concern in unions. But the centrality of lower union officials, both to the creation of a machine that entrenches incumbents and to the possibility of creating an effective opposition, makes the threat of retaliatory removals a far greater factor in distorting the political process.

It is this mirroring of the connection between the Constitution's protection of individual rights and political democracy that makes the political patronage cases especially relevant to the issue of retaliatory discharge.

**PART III: THE STATUTE-BASED STANDARD**

**A. "Reasonable Rules" and Legitimate Purposes**

However attractive the comparison between the political patronage cases and the retaliatory removal cases, there remains an important difference between the way the judiciary must examine governmental actions attacked as unconstitutional and union actions attacked as violating the LMRDA. This difference may seem great enough to render the comparison irrelevant, or even to favor the use of incompatible analyses. Such a conclusion derives from a superficial application of the distinctions in the appropriate "level of scrutiny" in constitutional interpretation to adjudications under the LMRDA. A more careful consideration of this question, however, reinforces the applicability of the substantive analysis of the political patronage cases to the retaliatory removal area and points to the de-

---

381. The close interrelationship of these two strands inside unions intensifies the severity of the violation by creating an ever descending cycle. The inability to create and sustain a democratic union itself prevents the protection of the rights of speech and assembly: the entrenchment of the union hierarchy is the result.

382. Though in many unions, the typical membership meeting, when no contract is being negotiated, is attended by so few members that holders of official positions make up a fairly high proportion of the meeting. See Steelworkers v. Usery, 429 U.S. 305, 308 n.4 (1977) (noting that the average attendance in Steelworkers local of 660 members was 47).

383. Though the influence of the union staff simply because of its numbers is not negligible. The Steelworkers president controlled over 1,500 full-time positions in the late nineteen-seventies. Sadlowski, 457 U.S. at 128 (White, J., dissenting).
velopment of a standard, based on the statute, by which the legality of retaliatory removals should be judged.

The political patronage cases involved the action of a governmental body in dismissing, and in hiring, promoting, and transferring public employees based on their political activities or affiliation. These employment practices thus collided directly with the First Amendment's guarantees of free speech and association, with the collision occurring over political association in the most narrow sense: "the core of those activities protected by the First Amendment." The constitutionality of these practices therefore depended on whether they served a compelling state interest and were as narrowly drawn as possible to do so.

The provisions of the LMRDA guaranteeing free speech and association and equal rights to union members both include language that makes it clear that "reasonable" rather than "compelling" exceptions are permissible. For that reason, the Supreme Court has held that although it was modeled on the Bill of Rights of the Constitution, the LMRDA Bill of Rights does not simply incorporate First Amendment doctrine. Insofar as the Court has held that in passing the LMRDA, Congress did not intend to make it as difficult for a union to limit its member's speech or assembly as the Constitution makes it for Congress or the states to limit the speech or assembly of citizens, the result is sound. A union need not demonstrate

---

384. Elrod, 427 U.S. at 356 (plurality opinion).
385. Even if it were correct that "less-than-strict scrutiny is appropriate when the government takes measures to ensure the proper functioning of its internal operations, such a rule has no relevance to the restrictions on freedom of association and speech at issue" in political patronage. Rutan, ___ U.S. at ___, 110 S. Ct. at 2735, n.4.
386. See supra notes 29 and 30 (enumerating §§ 101(a)(1) and 101(a)(2)).
387. Sadlowski, 457 U.S. at 108-11. There is however evidence in the legislative history that Title I was intended to give to union members precisely the same substantive rights that American citizens have under the Constitution. On introducing the Bill of Rights, Sen. McClellan, whose committee hearings were the main impetus to the passage of the LMRDA, said: "We should give union members their inherent constitutional rights, and we should make those rights apply to union membership as well as to other affairs in life." (April 4, 1959). In a similar vein, Rep. Landrum, after whom the LMRDA is named, said: "[N]o American living today, whether he is a member of a union or not, is without the rights contained in this so-called bill of rights, because they are substantially contained in the Bill of Rights of the Federal Constitution. The only argument is that we may be applying them in a field that is completely new." 105 Cong. Rec. 15,711 (1959).
388. Although Professor Summers has argued that:

that the challenged restriction is the best way it can achieve an end that it must accomplish. \textsuperscript{389}

But this does not change the fact that the rights guaranteed by Sections 101(a)(1) and 101(a)(2) are central to the scheme that Congress created in the same way that political speech and association are central to the scheme of the First Amendment. \textsuperscript{390} Nor does

---

\textsuperscript{389} While it is correct to reject a requirement that the union justify a rule by showing that it is narrowly tailored to meet a compelling union interest, this should not be confused with the rejection of "strict scrutiny" in the constitutional context. The LMRDA imposes something different than a constitutional "rational relationship" test. First, there is no logical reason for adopting such a test. Since the constitutional doctrine does not apply, the rejection of half of what that doctrine presents as an either/or choice is not based on the Constitution, and does not leave one with the single alternative of adopting the other half of the choice.

Second, the LMRDA speaks of "reasonable" rules which, as in state constitutional law, seems to describe a "fit" between the rule and its justification that, while not as restrictive as a requirement that it be "narrowly tailored," nonetheless requires more than a rational relationship. \textit{Compare} Williamson v. Lee Optical Inc., 348 U.S. 483 (1955) (explaining that as long as a law is rationally correcting an evil, it is constitutional; it need not be logically consistent with its aims in each and every respect.) \textit{with} F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (explaining that state classifications may not be arbitrary; they must have a fair and substantial relation to the aim of the legislation in order to be sustained under the Equal Protection clause of the Fourteenth Amendment).

More important, the LMRDA restricts not only the "fit" between the means and the end, but also the permissible subject matter. In this sense, the reasonable rules exceptions incorporate the constitutional distinction between restrictions touching on fundamental rights and those that do not.

In \textit{Sadlowski}, the Court clearly rejected the application of "strict scrutiny" under § 101(a)(2). 457 U.S. at 111. But the proffered justification for the union rule in \textit{Sadlowski} was one that the Court viewed as among the goals of the LMRDA, limiting the interference of outsiders in the union. \textit{Id.} at 112. The Court then analyzed the union rule under the proviso to § 101(a)(2), and found it reasonably related to that justification. \textit{Id.} at 115-16. While the result in \textit{Sadlowski} is completely contrary to the reality of union politics, the method the Court used does not contradict the argument of this article.

\textsuperscript{390} Part of the reason for the application of a rational relationship test in the constitutional context is that the legislature is a coequal branch of the government. The separation of powers and, in the case of state legislatures whose enactments are challenged in the federal courts, concepts of federalism counsel deference to the legislative decisions. There is a presumption of constitutionality unless there is some reason to apply strict scrutiny.

It could be argued that the desire to avoid government interference in internal union affairs except to the extent necessary to assure fidelity to the labor laws requires similar deference to the decisions of the union.

This argument does not add much. I am advocating judicial interference only to that extent as well. In any case, such deference simply does not apply when, as here, the challenged restriction touches on what are in this context fundamental rights. Instead, this should trigger the LMRDA equivalent of strict scrutiny.

I say the "equivalent" because I obviously do not mean that the rule need be other than reasonable. The rejection of constitutional strict scrutiny in \textit{Sadlowski} was a rejection of a "narrowly tailored" test, and it occurred in a situation where the challenged rule was only a
the fact that "reasonable" rules restricting speech, assembly, and equal voting rights are permissible answer the question of what rules are reasonable. The fact that the rule need only be "reasonable" cannot be separated from the issue of "reasonable to do what?"

The LMRDA allows reasonable restrictions in a specific context, the protection of democratic processes in the union. The language of the exceptions does not answer every question that may be raised, but neither is it so vague or open-ended as to be meaningless.

The proviso of Section 101(a)(2) allows a union 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." This "reasonable rules" exception to the protection of speech and assembly provides substantive meaning in four ways. First, the proviso to Section 101(a)(2) limits to two categories rules restricting speech or assembly that can be reasonable.

Second, it incorporates a distinction between the interests of the union as an institution, to protect which reasonable restrictions are permissible, and the interests of the leadership. Third, permissible restrictions apply to membership rights; no distinction between the restrictions that may be applied to members and those that may be partial interference with one aspect of the political rights implied by the statute: the ability to contribute financially to a campaign. In a retaliatory removal, the core right to speak and assemble is itself implicated. A union restriction that does not implicate the rights guaranteed by §§ 101(a)(1) and 101(a)(2) should be treated with great deference by courts. See infra, note 399; Boilermakers v. Hardeman, 401 U.S. 233 (1971) (holding that courts may not judge basis of union discipline). But a union rule that penalizes the exercise of rights that are, in the context of union politics, both "fundamental" personal rights as well as an indispensable assurance of political democracy, clearly justifies judicial intervention.

391. Cf. Dept. of Agric. v. Moreno, 413 U.S. 528 (1973) (holding that a federal food assistance program available for households containing only related people did not constitute a rational effort to deal with state concerns); Zobel v. Williams, 457 U.S. 55 (1982) (holding that Alaska's residency requirement in distributing benefits is not rationally related to a valid state interest and thus violates the Equal Protection Clause of the Fourteenth Amendment).

392. The proviso to § 101(a)(2) reads:

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.


393. The body of § 101(a)(2) also includes a narrow qualification that relates to only one type of speech: "Every member. . . .shall have the right . . . .to express at meetings of the labor organization his views, upon candidates . . . .or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings. . . . " 29 U.S.C. § 411(a)(2) (1988). See supra, note 30 (restating full text). The free speech provision thus does not permit a member to speak at meetings whenever he wants, about whatever he wants; the union may conduct orderly meetings.
applied to officers is either necessary or justified. If a rule is reasona-
ble within the meaning of the statute, its violation may be penalized
without disobeying the statute. If it is not reasonable, no one may be
penalized for violating it. Finally, it necessarily follows that the rea-
sonableness of a rule cannot depend on whether the official to whom
it is applied is elected or appointed.

The proviso of Section 101(a)(2) does not simply allow any
“reasonable rules;” it limits the sorts of rules that can be deemed
reasonable. First, a union may adopt reasonable rules “as to the re-
sponsibility of every member toward the organization as an institu-
tion.” Second, it may limit conduct “that would interfere with its
performance of its legal or contractual obligations.” These two ex-
ceptions are meant to ensure that the rights of speech and assembly
not be used to “unduly harass and obstruct legitimate unionism.” The
union may thus reasonably restrict those rights when they con-
ict with its position as exclusive bargaining agent: when its ability
to carry out its legal and contractual obligations is endangered.

The union may also protect itself as an institution against em-
ployers or rival unions. Unlike the First Amendment, the LMRDA
permits the union to defend itself as an entity without any showing
that the speech in question poses a “clear and present danger,” or
indeed, any actual danger, to the union. But the “institutional re-
sponsibility” exception also effectively codifies the requirement that
it be the union’s interest, and not that of any particular leadership
group within the union, that is being defended. Just as the political
patronage cases rest on a distinction between governmental and par-

---


The Bill of Rights was introduced as an amendment on the floor of the Senate by Sen.
McClenan, whose committee’s investigation into union corruption was the impetus for the
“Labor Reform Act” that became the LMRDA. The McClennan amendment was narrowly
passed by the Senate, but then the Senate “by an unusual legislative maneuver substituted . . .
a modified version sponsored by Senator Kuchel . . . and others. This then became the basis of
the Title I enacted into law.” The LABOR REFORM LAW at 402 (BNA) (1959). The proviso to
the speech and assembly provision first appeared in the Kuchel substitute. Steelworkers v.

The precursor to the proviso first appears in the bill reported by the House Labor Com-
mittee, but as part of § 101(a)(5); it was explicit authority to discipline a member who failed
in “loyal observance. . .of his responsibility toward the labor organization as an institution
and toward the labor movement as a whole” as well as conduct interfering with the union’s
legal or contractual obligations. House Labor Committee Report accompanying HR 8342, re-
printed in THE LABOR LAW REFORM, supra, at 298 (emphasis added). The emphasized words
probably were meant to insure that the union could continue to discipline members who, for
example, failed to honor another union’s picket line.
tisan interests in light of the First Amendment's protections, so too does the LMRDA incorporate an analogous distinction in limiting permissible restrictions of its speech and assembly rights.

No rule that penalizes the exercise of those rights—in other words, no rule that directly contravenes the policy of the law which allows the rule in the first place—can be "reasonable" simply because it helps the leadership either to stay in power or to prevent competing views from being heard. A rule that penalizes a union member for exercising her rights under the LMRDA can only be reasonable in the context of the Act if it advances union democracy, or advances some other goal recognized by the LMRDA.

A rule is not reasonable because it seems to a court to serve the "larger" goals of "labor stability" or peaceful resolution of conflicts. The degree to which these general goals of national labor policy ought to be allowed to restrict membership rights is recognized in the LMRDA itself. Thus it is legitimate for a union to restrict speech in order to prevent a breach of its legal or contractual obligations, but that should not allow restrictions on advocacy of more militant collective bargaining postures. This limitation on speech should be confined to protecting the union's position as exclusive bargaining agent. Courts that allow views of what constitutes socially responsible unionism to color their understanding of the scope of membership rights are not unusual. But the LMRDA represents

396. See Elrod, 427 U.S. at 362 (plurality opinion). "[C]are must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice." Id. See also Branti v. Finkel, 445 U.S. 512, 517 n.12.

397. Thus the Steelworkers' restriction on outside financing of election campaigns was held a reasonable rule, despite its partial restriction on § 101(a)(2) rights, because it advanced the union's interest in preventing nonmembers from exerting influence on union policies. Steelworkers v. Sadlowski, 457 U.S. 102, 115 (1982). The Court held that this was "a legitimate purpose that Congress meant to protect," emphasizing the expressed concern of Senators, including Senator McClenann, who introduced the Bill of Rights on the Senate floor, of allowing unions to remove outside influences that had "infiltrated". Id. at 116. (Though, as the Court acknowledged, Senator McClenann was referring primarily to organized crime.) That is to say, like the interest in democratic unions, the interest in limiting the influence of nonmembers is one of the "interests of the union as an institution" recognized by the LMRDA.

398. The narrow scope of this exception is further indicated by the fact that Congress limited it to union rules that relate to a member's "refraining from conduct that would interfere" with the performance of the union's "legal or contractual obligations."

399. See supra notes 209-210 (discussing Newman I). See also NLRB v. Boilermakers, 581 F.2d 473, 474 (5th Cir. 1978) (denying enforcement of General American Transportation Corp., 227 N.L.R.B. 1695 (1977)). In Boilermakers, the court refused to enforce the NLRB's finding of a § 8(b)(1)(A) violation for removing a steward who filed unfair labor practice charges against the employer on his own behalf without using the grievance procedure. The court said that because the union policy to which the member . . . refused to adhere [using the grievance procedure] reflected a legitimate union interest in harmony with our national
Congress' decision that the labor policy of the United States can best be effectuated by encouraging democratic unions.\textsuperscript{400}

A rule that has the effect of penalizing a member for exercising rights protected by the LMRDA clearly harms democracy, and should be presumed invalid under the Act.\textsuperscript{401} A union official who is able to show that her removal was in retaliation for exercising her membership rights under Sections 101(a)(1) or 101(a)(2) should be reinstated unless the union can demonstrate that the removal furthers the goals of the LMRDA, principally democratic governance.

B. Applying the Statutory Standard to Retaliatory Removals

1. The Implicit Meaning of Lynn

In Finnegan, the Supreme Court held that the retaliatory removal of an appointed official did not violate the LMRDA without

\begin{quote}
\textit{In that case, the court's infatuation with the national labor policy favoring private dispute resolution conflicted with the NLRB's insistence on unimpeded access to Board processes. But, in general, the Board suffers from the same problem. See Hartley, supra note 63 at 43-44 (noting that the NLRB prevents unions that act "irresponsibly" from disciplining members for not conforming, and defines union's use of legal economic weapons of which the Board disapproves as irresponsible).}
\end{quote}

\textsuperscript{400} Congress passed the LMRDA while fully aware of its relationship to basic federal labor laws. The act that is partially codified as the LMRDA also included important amendments to the NLRA.

It is perhaps ironic, though I believe consistent, to couple arguments for increased judicial protection in the internal affairs of unions with warnings against judicial activism. Asking courts to be faithful to the mandate of Congress is not inconsistency and there is nothing odd about recognizing that if given discretion in some areas by Congress, courts will sometimes exercise that discretion in areas that Congress had not intended. My reading of the LMRDA is that Congress intended courts to protect the free speech of union members, and to decide which union rules restricting speech were reasonable. However, Congress did not intend the courts to decide "reasonableness" in light of the judges' own principles of political economy. Congress wanted reasonableness to be decided in light of the policies of the labor laws as expressed in the LMRDA. It should be recalled that the constrained view of rights and of union democracy against which I am arguing is that of the judiciary, including the Supreme Court, and, so far as we can tell, not that of Congress. There is nothing inconsistent about asking the courts to balance what Congress has told them to balance, but to respect the balances that Congress has struck itself.

\textsuperscript{401} A deferential standard is not appropriate because the interference with speech and assembly in the union context is in most cases interference with the political process that allows us to identify the rule with the decision of the majority and thus justify deference in the first place. To pursue the constitutional analogy, a rule that penalizes a union member for the exercise of rights guaranteed by Title I of the LMRDA implicates two of the rationales that would trigger strict scrutiny under the Due Process clause: it interferes with what are, in this context, "fundamental rights," and it thereby prevents the political process from operating democratically. \textit{See} U.S. v. Carolene Products, 304 U.S. 144 (1938).
attempting to analyze the union’s action under the “reasonable rules” exceptions of the statute; it never even mentioned them. In Lynn, the Court found the removal of an elected official violated Title I, and again did not discuss the “reasonable rules” exceptions. Yet Lynn makes sense only if it is seen as an application of this statute-based standard of membership rights to actions taken against officials. Indeed, the reasoning of the case is consistent only if it is carried beyond its holding, and seen as applying to appointed as well as elected officials.

In a footnote, the Lynn Court points out that “[t]here is no suggestion that Lynn’s speech in opposition to the dues increase [for which he was removed] contravened any obligation properly imposed upon him as an elected business agent of the Local.” 402 If the Court’s footnote is read simply to mean that there was no such obligation because the union’s constitution or bylaws did not provide for one, then the rule that Lynn creates will be swallowed by this exception. The only reading that is consistent with the holding in Lynn is that for an obligation to be “proper” requires not only that it has been adopted properly, (according to the procedures that the constitution and bylaws provide), but that it must be substantively proper; it must be a reasonable rule within the meaning of Sections 101(a)(1) and 101(a)(2). This interpretation is reinforced by the location of the footnote. The Court’s reference is to the effect on members of removing an elected official:

Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him. Seeing Lynn removed from his post just five days after he led the fight to defeat yet another dues increase proposal, [here the Court places the footnote,] other members of the Local may well have concluded that one challenged the union’s hierarchy, if at all, at one’s peril. 403

How would the membership be less chilled by seeing Lynn removed if they knew the union constitution had required him to support the dues increase? Indeed, how would the membership be less chilled if Lynn had been appointed rather than elected? While in that case their right to vote would not have been affected, certainly the conclusion that “one challenged the union’s hierarchy, if at all, at one’s peril” would have equal power. 404

403. Id. at ____, 109 S. Ct. at 645 (citation omitted).
404. In Franza v. Local 671, International Brotherhood of Teamsters, 869 F.2d 41, 48
The effect on the membership, the infringement of their right to speak, associate, and vote to change the leadership and policies of the union, can vary with the adoption of a union rule imposing an obligation on Lynn only if the propriety of that obligation is to be determined by reference to the standards guaranteeing those rights. In other words, rules that limit an official's ability to speak, just as those that limit a member's right, cannot be reasonable within the meaning of Title I unless justified by a "countervailing interest rooted in union democracy that suffices to override [the] protection" of the statute.

The Court returned to this issue in the context of the imposition of a trusteeship. There is, says the Court, "nothing in the International's constitution to suggest that the nature of Lynn's office changed once the trusteeship was imposed, so that Lynn was obligated to support [the trustee's] position." Again, is the Court only saying that the union's constitution could have such a provision, but did not? The Court hints at an answer a moment later, in another footnote: "We do not address a situation where an international's constitution provides that, when a trusteeship is imposed, elected officials are required to support the trustee's policies and thus may occupy a status similar to the appointed officials in Finnegan. Cf. § 101(b)." Section 101(b), to which the Court refers, says that "[a]ny provision of [a union's constitution or bylaws] which is inconsistent with the provisions of [the Bill of Rights] shall be of no force or effect." It is unjustified, of course, to read the Court's reservation of an issue not presented as resolving that issue. The Court's reference to Section 101(b) does not mean that any such union rule would violate the LMRDA. But it must mean that the proper measure of the validity of such a rule is its conformity to the rights guaranteed by Title I. That is, the validity of a union rule that man-
dates the proper conduct of elected officers depends on whether it violates standards, set forth in Title I, that supposedly guarantee only rights of membership. Thus Lynn thus overrides the membership/officer right distinction as applied to elected officials.

In fact, as the Court had pointed out earlier, the union's constitution did contain language that indicates that the officials of a Local under trusteeship effectively occupied the same status as of the appointed officials in Finnegan. The constitution allowed the trustee to remove them at his discretion. The conclusion to be drawn from this is that even when an official occupies the equivalent of an "at will" position, she still may not be removed in retaliation for exercising Title I rights. This reasoning applies with full force to appointed officials as well. The Lynn analysis thus removes the logical basis of the Finnegan holding. The attempt to recast Finnegan as a defense of union democracy succeeds only by eliminating the membership/officer rights distinction on which Finnegan is based.

While these observations were not the focus of the Court's attention in Lynn, their logic is nonetheless central to the case. There are only three ways to read the holding of Lynn. The Court could have meant that no elected official could ever be removed for any reason. That is clearly not what the Court intended; it is at odds not only with the Lynn dicta, but also with the explicit command of the statute. Second, the Court might have meant that an elected union official may not be removed from office for protected speech unless the union has had the forethought to so provide in its constitution or bylaws, in which case it is legal. If that is the meaning of Lynn, the effect of the case is trivial. It will last only long enough to allow union constitutions and bylaws to be amended. The third possibil-

410. Id.
411. Id. at ___, 109 S. Ct. 642. “The general president . . . deleg[ed] to the trustee . . . the authority ‘to supervise and direct’ the affairs of the Local, ‘including, but not limited to the authority to suspend local union . . . officers, business managers, or business representatives.’ Art. 3, § 2(c), Constitution and Ritual of the Sheet Metal Workers' International Association.’ Id. (omission in quotation by the Court). It is clear that the trustee was given the authority to "suspend" local officers for the duration of the trusteeship.

Strictly speaking, the Court is correct in saying that the union's constitution did not require elected officials to support a trustee's policies. But it allowed their removal whether or not they supported the trustee's policy.

412. See supra note 162 (discussing LMRDA § 401(h), 29 U.S.C. § 481(h)(1988), which requires a union to provide in its "constitution and bylaws . . . an adequate procedure for the removal of an elected officer guilty of serious misconduct.

413. There would also be an odd dissonance created. In Boilermakers v. Hardeman, 401 U.S. 233 (1971), the Court held that § 101(a)(5) did not require that the specific act for which a member was disciplined be listed in the union's constitution or bylaws, so long as the

http://scholarlycommons.law.hofstra.edu/hlelj/vol9/iss2/2/94
ity, and the only one that comports with everything else the Court says, is that the proper measure of any rule imposing a penalty on the exercise of rights guaranteed by Section 101(a)(2) is conformity with the “reasonable rules” exceptions contained in the section itself.

C. Protecting the Union While Advancing Democracy

While the “reasonable rules” provision refers to both members and officers, there can be situations where a rule is reasonable as applied to officers but not as applied to members. The statutory language provides a framework to analyze these situations; undertaking this analysis further illustrates that the LMRDA requires that its protections be applied equally to elected or appointed officials. The application of this standard furthers the goal of democratic unionism while preserving the union’s right to defend its legitimate interests that are recognized by the statute.

I. “Legal and Contractual Obligations”

This category allows rules related to conduct that interferes with the union’s performance of legal or contractual obligations. Certainly, such conduct may include speech, as in the First Amendment context. Thus, a union could properly impose a rule that disciplined a member for leading a wildcat strike, even if that leadership was expressed verbally.\footnote{414}

But a collective bargaining agreement may place an affirmative obligation on union officials to end wildcats.\footnote{415} A member who engaged in a wildcat would thus risk her own wages and job, while an officer who participated, or even who simply failed to attempt to end the wildcat would, in addition, subject the union to legal liability. In this situation, it would not violate Title I for the union, in keeping with its right to have reasonable rules to prevent interference with its legal or contractual obligations, to provide for the removal of an officer who failed to attempt to stop a wildcat, while not imposing any member was clearly notified of the content of the charges against her. If, in contrast, a retaliatory removal is permissible only when an official has violated specifically enumerated obligations, the removal would require a greater degree of procedural protection in this respect than would formal discipline.

\footnote{414} I do not believe that a member who urged the membership at a union meeting to call a strike that would be illegal or in breach of contract could properly be disciplined by the union. But a member who walked around the plant urging others to follow her out of the workplace in a strike that was illegal or in breach of contract would not be protected by § 101(a)(2) from union discipline. Whether a union should penalize a member for these sorts of actions is a different issue.

\footnote{415} The wisdom of a union agreeing to such a provision is not at issue here.
such requirement on other members.416

To say that such a rule would be permissible as to officers is simply to recognize that the terms of the statute allow such a distinction when the "legal or contractual obligations" differ between members and officers. It is finally no different from recognizing that a shop steward who repeatedly misses scheduled grievance meetings, thereby causing the grievances to be forfeited, is failing in a responsibility that a member does not have. A union rule that allowed removal of a steward under these circumstances would not be subject to challenge because it distinguished between officers and members.

What would prevent a union from setting forth in its constitution or bylaws, as part of the responsibilities of the particular office, such things as publicly supporting the collective bargaining strategy of the top union officials,417 or supporting their reelection by requiring financial contributions to their campaign funds and personal campaigning for them?418

This issue returns us to the Lynn Court's discussion of a "properly imposed" obligation.418 Once the officer/member distinction is eliminated, it can be seen that the statute itself provides a narrow definition of what sorts of obligations are properly imposed under this exception and what sorts of "job requirements" the union may introduce. The union has a legal obligation to represent the employ-

416. Similarly, the NLRB treats misconduct by a union agent differently than misconduct by a member or union supporter in deciding whether such misconduct warrants setting aside a union victory in a representation election. See, e.g., Milchem Inc., 170 N.L.R.B. 362 (1961). A union that removed an official for such misconduct would not violate the LMRDA even if it did not discipline ordinary members for the same actions.

417. See Newman I, 570 F.2d 439, discussed supra notes 209-210, where the court relied heavily on this sort of reasoning by finding in the CWA steward's manual a job requirement of representing the position of the leadership to the members. The court treated the steward's manual essentially as if it was an employee's manual produced by company management. The reason for this treatment, if not the justification, is clear. Throughout Newman I, the court's view of unions as hierarchical enterprises exactly equivalent to any other business is evident. See supra note 36. The fact that labor unions are structured differently from businesses, operate under different laws, and,—most important—have a fundamentally different purpose, is completely ignored.

418. See supra notes 366-367 and accompanying text. So-called "flower funds" to which union officials and staffs "voluntarily" contribute to aid in the political goals of the union administration are not uncommon.

While § 401(g) of the LMRDA, 29 U.S.C. § 481(g)(1988), prohibits the use of union resources to promote particular candidates, at least in elections governed by Title IV, see supra note 163 (explaining which elections are so governed), the statute has been interpreted to permit "incidental" campaigning by union staff. See 29 C.F.R. § 452.76 (1991). In addition, staff may campaign on their own time. It is of course very difficult to determine which particular hours an official is working, and which time is his own.

419. 488 U.S. at ——, 109 S. Ct. at 639 n.6; see supra notes 402-403 and accompanying text.
Retaliatory Removals for whom it is the exclusive bargaining agent. A rule that allows the removal of a shop steward for failing to file grievances is within the scope of the union’s right to make rules to prevent members from acting in derogation of that obligation. In many cases where the union attempts to remove an official for incompetence or nonfeasance, the union has a legal obligation to prevent that nonfeasance. There is of course no legal or contractual obligation to support an incumbent.

The elimination of the artificial division between officer rights and membership rights allows distinguishing most situations where the LMRDA ought to prevent officer removal from those where removal of an officer is proper, for example for stealing from the union treasury. If a removed officer could also properly be banned from running for reelection—that is, if his “membership rights” (in the narrow sense that even the most reluctant courts have recognized them) could be limited without violating the LMRDA, then the removal itself does not violate the Act. The same is true of appointed officials. If an appointee could be removed and properly be prevented from running for office, (or if he could properly be expelled or suspended from the union), then the removal from office, whether or not accompanied by additional penalties, would not be illegal.

Thus, under this exception, a member and an official, elected or appointed, must be treated identically for voicing opposition to the policies of the union leadership, except when the legal or contractual obligations of the speaker differ because of their status.

420. See Vaca v. Sipes, 386 U.S. 171 (1967). While mere negligence on the part of a steward would not constitute a breach of the union’s duty of fair representation, there need not be a perfect fit between the legal requirement and the union rule meant to prevent that requirement from being breached. Id. See supra note 389.

421. This would not prevent a union disciplinary body, in a proper removal, from removing an elected official, but choosing not to limit his membership rights. That is, a situation apparently similar to the one I have criticized earlier would be created. See supra notes text accompany notes 181-193 (discussing Dolan and Newman I). But the similarity is a superficial one. The removed officer could run to regain his office, and if he repeated the conduct that caused his removal, he could be removed again. But the conduct itself would never have been protected by the LMRDA, whether the individual was then only a member, a candidate, or an elected official. In contrast, in cases like Newman I and Dolan, it was conceded that the acts committed by the removed officials could not have subjected them to any penalty if they had been members but not officials or employees of the union, and that even as officials or employees, their acts subjected them only to penalties that (according to the courts) did not affect their rights as members.

422. Even then, it is only conduct, including conduct manifested in speech, that may be punished.
2. "Responsibility to the Union as an Institution"

The other category is more ambiguous, since its language does not refer to familiar legal classifications. The members' responsibility to the union as an institution is a concomitant of majority rule. The union is a collective institution that must balance competing needs and, often use the bargaining power of its strongest members to advance the interests of its weakest. The members depend on mutual commitments, and the union must have the ability to protect those commitments. The statutory right to defend the union as an institution recognizes that unions are not simply discussion groups; one of their chief purposes is to strengthen the economic power of workers by maintaining the unity of the collective. Thus, the "institutional responsibility" exception allows the union to adopt a rule disciplining a member for advocating the elimination of the union, or persuading members to join a different union—even when the disciplined activity is pure speech. It also allows unions to discipline members for working during a strike, violating a properly imposed boycott of an employer, or violating production norms.

While different contractual or legal obligations of members and officers, justifying different treatment, are relatively easy to ascertain, the distinction is not always as clear under the institutional responsibility exception. However, the clear cases—where the union removes officials simply because they no longer support the leadership as fully as the leadership wants—are hardly unusual. The knowledge that removal will swiftly follow an act of disloyalty or even an inadequate display of zeal in support of the incumbents and

423. Ultimately, it is impossible to separate one's view of what constitutes appropriate responsibility to the institution from one's view of the nature of that institution. The sort of loyalty owed to the union depends on what one believes a union should be. The appropriate scope of that responsibility, for too many courts, has been narrowed by the view that union "management" has a right to run its "business" however it wishes. The LMRDA requires a much more democratic view.

428. Whether any discipline other than suspension or expulsion from the union would violate § 8(b)(1)(A) of the NLRA is a separate issue. See Local 125, International Molders and Allied Workers Union (Blackhawk Tanning Co.), 178 N.L.R.B. 208 (1969), enf’d 442 F.2d 92 (7th Cir. 1971); Tri-Rivers Marine Eng’rs Union, 189 N.L.R.B. 838 (1971).
their policies, freezes the secondary leadership of the union into a machine to preserve the political status quo. The adoption of an interpretation of the LMRDA that restricts removal of union members to reasons permitted by the statute would, by itself, weaken the leadership's ability to prevent the formation of alternative leadership groups in the union.

Under the institutional responsibility exception as under the contractual and legal obligations exception, many difficult problems are resolved by understanding that an official can be removed whenever she can also be disciplined as a member. A business agent who fails to perform picket duty is an example of this. It would be legal to remove her for this failure, even though there is no legal or contractual obligation to picket, if it is permissible to bar her from running for the office, and if the union could also discipline a member for failure to picket. Discipline for advocating adherence to a different union, for working during a strike, and for violating production norms similarly concern the members' institutional responsibility.

Could a union remove from office a business agent who fails to attend union meetings, contrary to a properly adopted rule, when no such rule applies to members? Again, removal would be legal if other discipline, affecting "membership rights," would also be proper. This response is not question begging. Under current law, a court would have to decide the reasonableness of such a rule at the suit of an official who was "disciplined" for violating it. The same inquiry should apply if, instead of being "disciplined," the official were removed from office.432 The statutory right to defend the union as an institution does not require any distinction between the political rights of officers and members, though it sometimes involves a recognition of their different positions. In the great majority of cases where those positions differ sufficiently to warrant differential treatment, as in this example, the political activity of the official is not the cause of the removal.433

Situations in which an official's responsibility to the institution may differ so greatly from that of a member as to justify removal

432. My own view is that the union would generally be justified in applying such an attendance rule to its officials, including elected officials.

433. One could argue that a refusal to picket, or to attend union meetings, is political expression; surely a wide range of expressive activity is recognized as "speech" under the First Amendment. See Texas v. Johnson, 491 U.S. 397 (1989). Assuming that the removal is not pretextual in the narrow sense (for example, if the rule were only enforced against business agents who oppose the administration), it seems to me that a more limited understanding of speech and association adequately protects the statutory interest in union democracy, without risking the weakening of the union's right to defend its institutional integrity.
from office for what would normally be protected speech are extremely uncommon. The analysis I am proposing must be able to accommodate them in order to serve as a general standard. By considering the hard cases, one can test whether barring almost all retaliatory removals conforms with the scheme of the LMRDA.

While it is easy to see a principled distinction between a union rule that requires a shop steward to process grievances in a timely manner, and a rule that requires the shop steward to support the candidacy of an incumbent union president, rules that require support, not of the leadership as individuals but of the leadership's policies, present more difficult problems. Is a rule requiring shop stewards to publicly support a strike, once it has been properly called, a reasonable rule to defend the union as an institution? Or a rule that requires the steward to support a contract ratification if the bargaining committee so recommends? What about a safety committee chairperson who voices complaints about a particular department, when the union leadership believes such complaints will hinder the improvement of safety conditions in the plant as a whole?

A strike is perhaps the most difficult moment in the life of a union and its members; it is then that mutual dependence is greatest, and when the union's ability to act unitedly is most necessary. A union official who publicly calls on members to return to work while the strike continues is surely failing in her responsibility to the union as an institution. This is true even though the members, including the official, have a legal right to return to work. But, it seems clear that a union official who, rather than calling on members to cross the picket line, instead urges the members to vote to end a strike, has not violated this institutional responsibility—any more than has an official who urges the members to vote to continue a strike against the leadership's advice.

This is not an example of differing standards of member and officer institutional responsibility. It should be equally legal for a union to discipline a member who calls on others to return to work while a strike continued; it would be equally illegal to discipline a member for urging the membership to vote to end the strike.

434. I believe this rule would be justified either by the "legal or contractual obligation" exception, or the "institutional responsibility" exception.
436. See Winery, Distillery and Allied Workers Union, 296 N.L.R.B. No. 72 (Sept. 13, 1989). It is possible that only penalties such as suspension or expulsion from the union, rather than fines, would be legal under the NLRA under these circumstances. See supra note 428.
When an official urges rejection of a contract that the leadership has recommended, the same principle obviously applies. However, the two cases are not the same. An official may have a responsibility, that members do not have, to explain the leadership's position on the contract, as on other issue. When a business agent or steward, whose job includes communication between the leadership and the members, fails to so communicate, it is legitimate for the union to remove him. That is not the same as a responsibility to sell the contract to the membership; it is not a requirement "to explain the . . . [union's] program and policy to . . . [members] in a manner designed to enlist their cooperative understanding of it."\(^4\)

While the distinction between being removed from office for failure to inform members about union policy and being removed for opposing union policy may sometimes lead to factual disputes, the difference is a great one.\(^4\) In fact, such a failure to inform is no different then if the official failed to inform members of an upcoming membership meeting, or the location of the contract ratification vote.\(^4\) These cases, then, are not retaliatory discharges, but examples of "nonfeasance." The problem is not that there will be difficulties of proof, that the courts will in this area, uniquely, be unable to distinguish between permissible and prohibited motivations. Rather, the danger to date has been too great a willingness to accept as a failure


439. These disputes are not different from those that courts are forced to resolve every day. Even in retaliatory removals, it should be easier to determine whether the official was removed for her views than to decide whether her removal was part of a deliberate and purposeful attempt to suppress dissent under *Schonfeld*, see supra text accompanying note 200, an inquiry that is regularly undertaken today.

Thus, in many retaliatory removal cases, courts must already follow the procedure described by Justice Stevens in *Rutan*, see supra note 352. Such a standard would not add to the difficulties of proof, but would make a substantive change: far fewer retaliatory removals would be permissible.

The distinction is well illustrated by *Newman I*. See supra text accompanying notes 209-210. There, the court found in the CWA steward's manual a job requirement of representing the position of the leadership to the members. Newman argued that he had always explained the leadership's position to the members, but had also strongly criticized it. The court of appeals believed that "[t]he inability or unwillingness of Newman to explain the Local's program and policy to employees *in a manner designed to enlist their cooperative understanding of it*, much less himself to implement that policy, is obvious." *Newman I*, 570 F.2d at 447-48 (emphasis added). The court did not require simply that a steward keep the membership informed of union policy; it believed that lower-level officials could be removed not only for expressing disagreements with the leadership's policy, but even for failing to attempt to convince members that that policy was correct.

440. There should be no difference if the official, rather than being incompetent, has a political purpose for failing to inform the members, for example, because he wishes them to boycott the meeting or vote. However, an official, under this scheme, would have a right to inform members of the vote and urge them to boycott it.
to do one's job any opposition to the union leadership's positions.441

The most difficult problems occur when the union's legitimate interest in acting in a unified way when confronting the employer may intersect the members', and officials', right to attempt to change union policy. The examples of contract ratification votes and strike continuation are aspects of this problem, but each has been presented as a situation where the speech in question was directed at convincing members how to vote. This makes the answer relatively straightforward: the union leadership should not be allowed, because they won the last election, to effectively control each subsequent vote.442

There are situations, however, where an ongoing union policy, not subject to a formal vote, is challenged by lower-level officials who have some degree of responsibility concerning that policy. An example of this is the chair of a safety committee who wishes to raise safety issues concerning a particular department. The local leadership believes that there are higher priorities, and that raising these issues will jeopardize their strategy to improve safety in the workplace as a whole. If the safety committee chair insists on raising the issues she thinks important in official meetings with management, she can be removed.443 This is true despite the fact that the union

441. In Sewell v. Grand Lodge IAM, 445 F.2d 545 (5th Cir. 1971), the court sustained the firing of an international representative for “insubordination.” The top union leadership had decided that the union's constitution should be changed, and the representative had opposed the change in discussions with groups of members, though not in official meetings.

If one accepts the view of unions as simply business organizations like any others, albeit organizations that must occasionally submit to membership votes, then the representative was surely being “insubordinate.”

However, although the court justifies the removal by citing the union's interest in protecting its ability to bargain against a “monolithic front of large commercial corporations,” id. at 552, the union's legitimate interest in maintaining unity against the employer was simply not implicated. This is clear when one considers the content of the proposed change in the international constitution against which the removed official argued. The constitution required that any amendments made to it at the convention be subsequently submitted to the membership for ratification. The leadership sought to eliminate this membership vote.

Every one of the hundreds of IAM full-time staffers, the people who handled all higher-level grievances for the locals, was required to work to get this change implemented. The penalty for exercising the LMRDA right of dissent in this most central of the law's concerns, the membership's right to vote on the basic governing structure of the union, was removal.

442. The NLRB also distinguishes “between those rules that restrict a member's right to advocate a change in union policy through democratic means and those that limit a member's ability to advocate disobedience of a current policy.” Hartley, supra note 63 at 49.

443. See NLRB v. Local 212, UAW, 690 F.2d 82 (6th Cir. 1982). The court found that the union violated NLRA § 8(b)(1)(A) by removing the chair of the Fair Employment Practices Committee after he filed an unfair labor practice charge against the union. Id. at 84. The court distinguished this from removal of an official who filed an ULP against an employer “in derogation of the grievance procedure in the collective bargaining agreement” because the
could not appropriately discipline her in any other way, and could not discipline a member who raised these issues.\(^{444}\)

This is an example of an official position where political agreement with the leadership, on some issues, is a legitimate requirement of holding the position. It is an example of the rare situation that Finnegan and Lynn treat as the norm: where the ability of the elected leaders to remove an official who disagrees with them advances union democracy. This situation, which might be termed, if the statute were correctly interpreted, the "Finnegan exception,"\(^{445}\) should be understood narrowly.

The issue is not, as the retaliatory discharge cases imply, whether the official is a "policymaker,"\(^{446}\) especially when that term is understood in the broadest possible sense to include "implementation" of policy\(^{447}\) or simply anything dealing with an important subject.\(^{448}\) Rather, the proper analysis is whether "party affiliation is an

---

\(^{444}\) Section 9(a) of the NLRA provides that, despite exclusivity, individual employees or groups of employees may present grievances to management. 29 U.S.C. § 159(a) (1988). However, attempts to negotiate with management, without the union, are not protected. See Emporium Capwell Co. v. Western Addition Community Org'n, 420 U.S. 50, 61-65 (1975).

\(^{445}\) In Franzu v. Local 671, International Brotherhood of Teamsters, 869 F.2d 41, 45 (2d Cir. 1989), the plaintiff contended that "Title I was designed generally to preclude retaliatory discharge for the exercise of protected rights, suggesting that Finnegan is itself an exception necessary to promote union democracy." \(\text{Id.}\) The court rejected this argument; the court was wrong.

\(^{446}\) Some courts have rejected the possibility of a nonpolicymaker exception left open by Finnegan. See Local 671, 869 F.2d at 48 (stating that the "test is not whether the employee is or is not in a policymaking position, rather the question is whether membership rights were directly infringed by action taken with respect to a union member's employment status.").

\(^{447}\) See Rutledge v. Aluminum Brick & Clay Workers, 737 F.2d 965, 967 (11th Cir. 1984) (stating that "Finnegan applies to union employees who are instrumental in implementing union policy as well as those officials who formulate policy"); Witmeyer v. BRAC, 779 F.2d 206, 208 (4th Cir. 1985) (policymaking includes "implementing" as well as actually formulating policy).

\(^{448}\) See, e.g., Cotter v. Owens, 753 F.2d 223 (2d Cir. 1985), discussed supra, in text accompanying notes 211-25. The court rejected the application of a nonpolicymaker exception because "perhaps most significant, the subject of nuclear safety, particularly at Indian Point, is obviously of vital concern," and was the key issue between a dissident group and the local leadership. \(\text{Id.}\) at 228. Whether or not the removed safety committee member was a policymaker, there was no indication that he had been removed because he had acted on the committee in some way contrary to the leadership's policy. The leadership argued, and the court accepted as justification, that he was removed because his position on the committee might give the dissident group a "bully pulpit." \(\text{Id.}\) His removal, as far as the evidence indicated, was not necessitated by the right of the leadership to control official safety policy, but by the leadership's desire to prevent dissemination of criticisms of that policy.

Similarly, in Genco v. UAW, No. C88-0397, 1989 U.S. Dist. LEXIS 10178, at *1, 133 LRRM 2053 (N.D. Ohio Aug. 21, 1989) the court allowed the removal of the plaintiff from
appropriate requirement for the effective performance of the . . . office involved." Only when it is, and when an office holder's disagreement actually jeopardizes the accomplishment of the union policy, does the retaliatory removal advance democracy.

Thus, the safety committee chair who opposes safety policy may be preventing elected leaders from vindicating the will of the electorate—but a safety committee chair who opposes the union's foreign policy, or the reelection of the national officers, or even the local officers who appointed her, should not be removable. Maintaining his job as Safety Instructor at a General Motors plant. The collective bargaining agreement provided that this full-time position would be filled by an hourly worker, selected by UAW officers. The employer required only that the instructor be capable of performing the job. The plaintiff supported a losing candidate against the incumbent Shop Chairman, who immediately told GM to remove the plaintiff from the program. The plaintiff argued that he was not a policymaker since he followed a fixed lesson plan. *Id.* at *6. The court rejected this argument:

A union employee entrusted with carrying out important union policy . . . who was responsible for communicating information central to the safety and health program set out by GM and the UAW in their collective bargaining agreement, occupies a trusted position with the union and must be compatible with the union leadership to serve effectively. Once the union leadership's trust in [him] was lost, he became subject to removal from his appointed position as a union employee.

*Id.* at *6-*7 (citation omitted). (It is not at all clear that the plaintiff was in fact a "union employee," but the court did not address this issue).

It is likely that under the Constitution the Supreme Court would not require a showing that a particular office holder had acted in a way that interfered with the elected officials' ability to carry out their program, but would allow the categorical exemption from the rule of *Branti* and *Rutan* of those officials with the power to interfere, whether or not that power had been exercised. Both the governor's press secretary, and (probably) the state Education Commissioner could be dismissed because of their (private) political disagreement with the governor.

In the case of the LMRDA, such a categorical exemption should be even narrower, effectively limited to "confidential" positions, such as the national president's administrative assistants.

This distinction is required by the one-party nature of unions. Party affiliation is rarely "an appropriate requirement for . . . effective performance" when there is no competing political party. In a two-party system, an elected official's ability to differentiate her policies from that of the opposition, an ability partly dependent on her political compatibility with high-level appointed officials, serves to clarify the electorate's choices.

Whatever the depth of the differences between Democratic and Republican administrations, the existence of two competing sets of office-holders, even if they are nothing more than that, furthers at least some sense that entrenchment in office is undesirable, that opposition is not treason, that the government and the party are not the same thing.

In a one-party system, requiring political agreement means further merging the identities of the union and the "party," denying the value of diversity, and creating a *nomenklatura* that prevents the emergence of opposition.

In *Cehaich v. UAW*, 710 F.2d 234, 239 (6th Cir. 1983), the court rejected the possible nonpolicymaker status of a benefits representative. The court held that securing benefits is "[o]ne of the most sensitive functions performed by a union . . . [requiring] the adoption
the ability of the elected officials to enforce absolute uniformity on all issues is not vindicating the election results: it is a means of entrenching the election results forever.

In this situation, the ability of the safety committee chair to speak out on all matters other than safety should not be compromised. And even as to safety, the safety committee chair has a responsibility to work for the democratically decided policy of the union, not to agree with it. Disagreement over safety policy, raised at a union meeting by the appointed official who is most responsible for it, is conducive to democratically deciding the union’s position on plant safety. It is certainly possible that the employer will become aware that there are disagreements within the union leadership on safety policy. It is even conceivable that this awareness may weaken the union in some cases. However, the employer is as likely to be aware of disagreements within the membership expressed at the same meeting, and no one proposes that the LMRDA not protect that expression. More important, as an empirical matter, such disagreements will typically strengthen the union’s bargaining position by making it clear to the employer that the leadership’s position is more moderate than the alternative, that the leadership is being pushed by—rather than dragging—the rank and file.462

And finally, even if disagreements weaken the union on a particular issue in the short term, the price—for advocates of unionism—is worth it.453 It is a necessary part of the participatory democracy that

of union strategy in terms of the representation of union claimants, the union’s interpretation of benefit provisions under the contract, and the formulation of a union position on various types of benefits.” Id. at 239. The court further held that “[an] appointee [is invested] with the trust of the membership. When that trust is lost, not only will the appointee be subject to removal; but the elected official has placed his office in jeopardy also.” Id.

But the fact that handling benefits is an important job, or even that it is a “policymaking” job, is not relevant. The plaintiff’s removal had nothing to do with the way he administered benefits, or, so far as the record shows, even any private disagreement on benefit strategy or priorities. His removal was motivated by his opposition to a collective bargaining proposal, expressed at a meeting, a thousand miles from his local, called to discuss the proposal. The court simply accepted the right of the leadership to demand absolute loyalty on every issue as the price of being included in the union’s political life.

452. Members do not typically attack the leadership because it is asking too much, or because it wants to deal with all problems at once while they wish to take a longer term approach. Edgar James makes the same point and also points out that “[T]he more conservative supporters of the LMRDA . . . [who] favored stronger and more detailed election provisions, because they equated non-elite control with bargaining docility, and thought that the rank-and-file would exercise a moderating influence” on collective bargaining, “flatly misunderstood” the impact of making unions more democratic. James, supra, note 18 at 260.

453. I am skeptical that the union’s position would ever be weakened. As Edgar James has perceptively noted, “[r]ank and file ratification, for example, rarely undercut union negotiators, but acts as a check on their own militance and ability to articulate member objectives.
unions need. It does not accord with the notion that courts sometimes have of democracy (and here the analogy of the political arena is harmful)—an occasional vote to choose leaders who are then free to do what they like. But insofar as that view is shared by union leaders, and union members, it is one of the causes of the decline of American unions.

CONCLUSION

The interpretation of the LMRDA that best advances the goal of democratic unionism requires that no union official, elected or appointed, may be removed from office for exercising rights guaranteed by Title I, unless the union can show that the removal is necessary to democracy.

This is not a proposal for a "just cause" standard in union employment. The union may remove an appointed official without demonstrating cause. But the union cannot remove an official for prohibited reasons.\textsuperscript{464} I believe this is the most faithful reading of the LMRDA, the reading that best advances the goal of democratic unionism, and the reading that will help create the kind of democracy that, whether their leaders know it or not, unions need in order to survive.

Unions will not regain their vitality if they emulate the way business operates. They will not succeed unless they understand that the battles they need to fight require not a hierarchical structure of command, but a "new model army," a cooperative enterprise of men

\textsuperscript{454} If the removed official is able to make a \textit{prima facie} showing that the removal was in retaliation for exercising speech and assembly rights, the union would be required to justify the removal, either by showing there was some other reason, or that the removal was necessary under the narrow "Finnegan exception."

There is a subtle, but important, difference between weakening an officer's position and weakening the union's bargaining strength." James, \textit{supra} note 18 at 251, n.13.

The administrative burden on the union would not be great. A union could remove an appointed official whom it felt was incompetent without worrying about having to document that incompetence except when the official was able to demonstrate to a court's satisfaction that the removal was in retaliation for political opposition. A union that claimed the official was removed for legitimate reasons, but that it had failed to document those reasons until after the official had manifested political opposition to the leadership, might indeed be forced to reinstate an official who was in fact incompetent. This is not a great injustice: if a union finds that ineffective performance merits removal only when it is accompanied by political opposition, the opposition—not ineffectiveness—was the cause of the removal. Every union official who has ever handled a claim under §8(a)(3) of the NLRA where the employer has fired someone in retaliation for union activity, rather than the asserted tardiness or poor work record, should be sympathetic to this method of analysis. See NLRB v. Wright Line, 251 N.L.R.B. 1083 (1980), \textit{enf'd}, 662 F.2d 899 (1st Cir. 1981); NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).
and women whose belief in their union is unshakable because they have created it, and continue to recreate it.